

Employee participation and voice in companies: A legal perspective

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SUMMARY

Key concepts: Employee participation, voice, industrial democracy, economic democracy, corporate law, labour law, corporate governance, corporate social responsibility, fairness, collective bargaining, workplace forums, strikes, matters of mutual interest, disputes, stakeholders, shareholders, empowerment, consultation, joint decision-making, information, co-determination, social justice, managerial prerogative

Recently, South African company law underwent a dramatic overhaul through the introduction of the *Companies Act 71* of 2008. Central to company law is the promotion of corporate governance: companies no longer are accountable to their shareholders only but to society at large. Leaders should direct company strategy and operations with a view to achieving the triple bottom-line (economic, social and environmental performance) and, thus, should manage the business in a sustainable manner. An important question in company law today: *In whose interest should the company be managed?*

Corporate governance needs to address the entire span of responsibilities to all stakeholders of the company, such as customers, employees, shareholders, suppliers and the community at large. The *Companies Act* aims to balance the rights and obligations of shareholders and directors within companies and encourages the efficient and responsible management of companies. The promotion of human rights is central in the application of company law: it is extremely important given the significant role of enterprises within the social and economic life of the nation.

The interests of various stakeholder groups in the context of the corporation as a “social institution” should be enhanced and protected. Because corporations are a part of society and the community they are required to be socially responsible and to be more accountable to all stakeholders in the company. Although directors act in the best interests of shareholders, collectively, they must also consider the interests of other stakeholders. Sustainable relationships with all the relevant stakeholders are important. The

advancement of social justice is important to corporations in that they should take into account the *Constitution*, labour and company law legislation in dealing with social justice issues.

Employees have become important stakeholders in companies and their needs should be taken into account in a bigger corporate governance and social responsibility framework. Consideration of the role of employees in corporations entails notice that the *Constitution* grants every person a fundamental right to fair labour practices.

Social as well as political change became evident after South Africa's re-entry into the world in the 1990s. Change to socio-economic conditions in a developing country is also evident. These changes have a major influence on South African labour law. Like company law, labour law, to a large extent, is codified. Like company law, no precise definition of labour law exists. From the various definitions, labour law covers both the individual and collective labour law and various role-players are involved. These role-players include trade unions, employers/companies, employees, and the state. The various relationships between these parties, ultimately, are what guides a certain outcome if there is a power play between them.

In 1995 the South African labour market was transformed by the introduction of the *Labour Relations Act* 66 of 1995. The LRA remains the primary piece of labour legislation that governs labour law in South Africa. The notion of industrial democracy and the transformation of the workplace are central issues in South African labour law. The constitutional change that have taken place in South Africa, by which the protection of human rights and the democratisation of the workplace are advanced contributed to these developments. Before the enactment of the LRA, employee participation and voice were much-debated topics, locally and internationally. In considering employee participation, it is essential to take due cognisance of both the labour and company law principles that are pertinent: the need for workers to have a voice in the workplace and for employers to manage their corporations.

Employee participation and voice should be evident at different levels: from information-sharing to consultation to joint decision-making. Corporations should enhance systems and processes that facilitate employee participation and voice in decisions that affect employees.

The primary research question under investigation is: *What role should (and could) employees play in corporate decision-making in South Africa?* The main inquiry of the thesis, therefore, is to explore the issue of granting a voice to employees in companies, in particular, the role of employees in the decision-making processes of companies.

The thesis explores various options, including supervisory co-determination as well as social co-determination, in order to find solutions that will facilitate the achievement of employee participation and voice in companies in South Africa.

OPSOMMING

Titel: Werknemerdeelname en -stem in maatskappye: 'n Regsperspektief

Sleutelkonsepte: Werknemerdeelname, stem, industriële demokrasie, ekonomiese demokrasie, maatskappyereg, arbeidsreg, korporatiewe bestuur, korporatiewe sosiale verantwoordelikheid, billikheid, kollektiewe bedinging, werkplekforums, stakings, aangeleenthede van wedersydse belang, geskille, belanghebbendes, aandeelhouders, bemagtiging, konsultasie, gesamentlike besluitneming, inligting, mede-vasstelling, sosiale geregtigheid, bestuurs-prerogatief

Die Suid-Afrikaanse maatskappyereg het onlangs 'n dramatiese opknapping met die bekendstelling van die *Maatskappywet* 71 van 2008 ondergaan. Die bevordering van korporatiewe bestuur staan sentraal tot die maatskappyereg: maatskappye is nie meer net aan hul aandeelhouders verantwoordbaar nie maar moet ook die groter gemeenskap in ag neem. Leiers moet maatskappystrategieë- en bedrywighede bestuur met die oog op die bevordering van die drievoudige doelstellings (ekonomiese, sosiale en omgewing) en moet ook die besigheid op 'n volhoubare wyse bestuur. 'n Belangrike vraag in maatskappyereg vandag is: *In wie se belang moet die maatskappy bestuur word?*

Korporatiewe bestuur moet die volle spektrum van verantwoordelikhede teenoor belanghebbendes van die maatskappy soos kliënte, werknemers, aandeelhouders, verskaffers en die gemeenskap in die algemeen aanspreek. Die *Maatskappywet* het ten doel om die regte en verpligtinge van aandeelhouders en direkteure in maatskappye te balanseer, en die wet moedig ook die doeltreffende en verantwoordelike bestuur van maatskappye aan. Die bevordering van menseregte is sentraal in die toepassing van die maatskappyereg: dit is uiters belangrik in die lig van die belangrike rol van ondernemings binne die sosiale en ekonomiese lewe van die volk.

Die belange van die verskillende belangegroepe in die konteks van die maatskappy as 'n "sosiale instelling" moet verbeter en beskerm word. Omdat maatskappye deel van 'n samelewing en 'n gemeenskap uitmaak, word daar van hulle verwag om sosiaal verantwoordelik te wees en meer verantwoordbaar teenoor alle belanghebbendes in die maatskappy te wees. Hoewel direkteure in die beste belang van aandeelhouders as 'n groep optree, moet die belange van ander belanghebbendes ook in ag geneem word. Volhoubare verhoudings met al die betrokke rolspelers is belangrik. Die bevordering van sosiale geregtigheid is belangrik en behels dat maatskappye kennis moet neem van die *Grondwet* sowel as arbeids- en maatskappyereg wanneer hulle met sosiale geregtigheidskwessies te doen kry.

Werknemers het belangrike belanghebbendes van maatskappye geword en hul behoeftes moet in ag geneem moet word binne 'n groter korporatiewe bestuur- en sosiale verantwoordelikhedsraamwerk. Die oorweging van die rol van werknemers in maatskappye behels dat kennis geneem word van die feit dat die *Grondwet* aan elke persoon 'n fundamentele reg op billike arbeidspraktyke verleen.

Sosiale sowel as politieke verandering was duidelik ná Suid-Afrika se her-toetrede in die 1990's tot die internasionale arena. Veranderinge in sosio-ekonomiese omstandighede in 'n ontwikkelende land is ook duidelik. Hierdie veranderinge het 'n groot invloed op die Suid-Afrikaanse arbeidsreg gehad. Nes maatskappyereg is arbeidsreg tot 'n groot mate gekodifiseer. Net soos maatskappyereg, bestaan daar nie 'n presiese definisie van arbeidsreg nie. Dit blyk duidelik uit die verskillende definisies van arbeidsreg dat beide die individuele en kollektiewe arbeidsreg by die konsep ingesluit word en dat verskeie rolspelers betrokke is. Hierdie rolspelers sluit vakbonde, werkgewers/maatskappye, werknemers, en die staat in. Dit is uiteindelik die verskillende verhoudings tussen hierdie partye wat tot 'n spesifieke uitkoms sal lei indien daar 'n magspel tussen hulle is.

Die Suid-Afrikaanse arbeidsmark is in 1995 getransformeer deur die bekendstelling van die *Wet op Arbeidsverhoudinge* 66 van 1995. Die WAV bly die primêre arbeidswetgewing wat

arbeidsverhoudinge in Suid-Afrika reguleer. Industriële demokrasie en die transformasie van die werkplek is sentrale kwessies in die Suid-Afrikaanse arbeidsreg. Waar die beskerming van menseregte en die demokratisering van die werkplek bevorder is, is dit aan die grondwetlike veranderinge wat in Suid-Afrika plaasgevind het, te danke. Werknemerdeelname en -stem was voor die inwerkingtreding van die WAV plaaslik sowel as internasionaal 'n veelbesproke onderwerp. Dit is dus noodsaaklik wanneer werknemerdeelname oorweeg word dat 'n aantal aspekte in ag geneem moet word, naamlik die tersaaklike arbeids- en maatskappyereg beginsels, die behoefte van werkers om 'n stem in die werkplek te hê en dat werkgewers hul maatskappye moet bestuur.

Werknemerdeelname en -stem behoort duidelik te wees op verskillende vlakke: vanaf openbaarmaking van inligting tot konsultasie tot gesamentlike besluitneming. Maatskappye moet stelsels en prosesse wat werknemerdeelname en -stem fasiliteer rakende besluite wat werknemers kan beïnvloed, versterk.

Die primêre navorsingsvraag wat ondersoek moet word, is: *Watter rol moet (en kan) werknemers speel in korporatiewe besluitneming in Suid-Afrika?* Die belangrikste ondersoek van die proefskrif, is die kwessie van die verlening van 'n stem aan werknemers in maatskappye; en meer spesifiek, die rol van werknemers in die besluitnemingprosesse van maatskappye.

Hierdie tesis ondersoek verskeie opsies, insluitend toesighoudende mede-vasstelling sowel as sosiale mede-vasstelling ten einde oplossings te vind wat die fasilitering van werknemerdeelname en -stem in Suid-Afrikaanse maatskappye bevorder.

LIST OF ABBREVIATIONS AND ACRONYMS

Ac Man Rev	Academy of Management Review
Afr J Bus Ethics	African Journal of Business Ethics
Afr Soc Rev	African Sociological Review
AG	Aktiengesellschaft
AktG	Aktiengesetz
Ank Bar Rev	Ankara Bar Review
Am J Comp L	American Journal of Comparative Law
BBBEEAct	Broad-Based Black Economic Empowerment Act
BCEA	Basic Conditions of Employment Act
BEE	Black Economic Empowerment
BetrVG	Betriebsverfassungsgesetz
BLLR	Butterworths Labour Law Reports
BC L Rev	Boston College Law Review
BJIR	British Journal of Industrial Relations
Bus Ethics Quart	Business Ethics Quarterly
Bus Law Int'l	Business Law International
CCMA	Commission for Conciliation Mediation and Arbitration
CJLJ	Canadian Journal of Law and Jurisprudence
CEO	Chief Executive Officer
CLL	Contemporary Labour Law
COIDA	Compensation for Occupational Injuries and Diseases Act
Comp Lab L & Pol'y J	Comparative Labour Law and Policy Journal
COSATU	Congress of South African Trade Unions
CSR	Corporate Social Responsibility
Deak L Rev	Deakin Law Review
DrittelbG	Drittelbeteiligungsgesetz
Duke LJ	Duke Law Journal
EC	European Community

ECJ	European Court of Justice
EEA	Employment Equity Act
EEC	European Economic Community
EJIL	European Journal of International Law
ELLJ	European Labour Law Journal
E L Rev	European Law Review
EU	European Union
EWC	European Works Council Directive
ESG	Environmental Social Governance
FLC	Federal Labour Court
FDI	Foreign Direct Investment
FSU	Finnish Seaman's Union
George Wash L Rev	George Washington Law Review
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
Hastings Bus LJ	Hastings Business Law Journal
Harv L Rev	Harvard Law Review
HRM	Human Resource Management
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILO	International Labour Organisation
ILJ	Industrial Law Journal
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies
Int J Hum Res Man	International Journal of Human Resource Management
Int'l Lab Rev	International Labour Review
IR	Industrial Relations
IRJ	Industrial Relations Journal
Int Rev Law and Econ	International Review of Law and Economics

JBE	Journal of Behavioural Economics
JBL	Juta's Business Law
J Bus Ethics	Journal of Business Ethics
JEBO	Journal of Economic Behavior & Organization
JEFS	Journal of Economic and Financial Sciences
JFE	Journal of Financial Economics
J Ind Psych	Journal of Industrial Psychology
JICLT	Journal of International Commercial Law and Technology
LDD	Law Democracy and Development
LRA	Labour Relations Act
Ltd	Limited
MitbestG	Mitbestimmungsgesetz
MqJBL	Macquarie Journal of Business Law
MOI	Memorandum of Incorporation
Montan-MitbestG	Montan-Mitbestimmungsgesetz
MULR	Melbourne University Law Review
NC Int'l Law Journal	North Carolina Journal of International Law and Commercial Regulation
NEDLAC	National Economic Development and Labour Council
NOI	Notice of Incorporation
OB	Organisational Behaviour
OECD	Organisation for Economic Cooperation and Development
OHSA	Occupational Health and Safety Act
Ot Man Grad Rev	Otago Management Graduate Review
PAIA	Promotion to Access to Information Act
PDA	Protected Disclosures Act
PER	Potchefstroomse Elektroniese Regsblad (<i>Potchefstroom Electronic Law Journal</i>)
Pty (Ltd)	Proprietary Limited

RDP	Reconstruction and Development Programme
SALJ	South African Law Journal
SA J of Bus Man	South African Journal of Business Management
SA J of Hum Res Man	South African Journal of Human Resource Management
SA Lab Bull	South African Labour Bulletin
SA Merc LJ	South African Mercantile Law Journal
SCE	European Cooperative Society
Scot J Pol Econ	Scottish Journal of Political Economy
SDA	Skills Development Act
SE	Societas Europaea
SEBG	SE-Beteiligungsgesetz
SEEG	Gesetz zur Einführung der Europäischen Gesellschaft
SRI	Socially Responsible Investing
Stell LR	Stellenbosch Law Review
TFEU	Treaty on the Functioning of the European Union
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (<i>Journal of Contemporary Roman-Dutch-Law</i>)
TSAR	Tydskrif vir die Suid-Afrikaanse Reg (<i>Journal of South African Law</i>)
UIA	Unemployment Insurance Act
UK	United Kingdom
UNSRSG	United Nations Special Representative to the Secretary General
USA	United States of America
Waikato L Rev	Waikato Law Review
Wis Int'l LJ	Wisconsin International Law Journal

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CHAPTER 1 – INTRODUCTION

1.1 Overview

Corporations¹ are dominant economic institutions: they govern our lives; and “determine what we eat, what we watch, what we wear, where we work, and what we do”.² Their culture, iconography and ideology surround us: they dictate to governments, their supposed overseers, as well as exercise control over society at large.³ Corporations govern in the manner of states.⁴ Furthermore, they are wealth-creators: a universal truth. Work plays a central part in the well-being of individuals.⁵ Millions of people depend for their livelihood on the income they receive from corporations in the form of wages (salaries): in most instances they are their only source of income. The dependency on wages transforms society into a body of “wage earners”. The reality of their dominance brings with it responsibilities: a primary responsibility of those in charge of the governance of the firm, the economy and the state is to organise work in such a way as to promote the well-being of labour.⁶ Labour, as a component of society, through the trade unions, should play an

¹ The concepts “company” and “corporation” are used interchangeably and the same meaning should be attached to them. A company is defined in The *Companies Act* 71 of 2008 (The *Companies Act*). The *Companies Act* became operational on 1 May 2011. A company is defined in s 1 of the *Companies Act* as: “a juristic person incorporated in terms of this Act, a domesticated company, a juristic person that, immediately before the effective date-

- (a) was registered in terms of the-
- (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or
- (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;
- (b) was in existence and recognised as an ‘existing company’ in terms of the Companies Act, 1973 (Act No. 61 of 1973); or
- (c) was registered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act”.

² Bakan *The Corporation* 5.

³ Bakan *The Corporation* 5.

⁴ Gumpinger 2011 *Appeal* 101.

⁵ Lower *Employee Participation* 151.

⁶ Lower *Employee Participation* 151.

important and active role in decision-making that “vitally concerns its interests”.⁷ Trade unions not only have a duty to collaborate with other social institutions, which include representatives of management and capital, but they have responsibilities when it comes to the production of wealth.⁸ Their duties are not limited to the distribution of wealth but extend to its production. Therefore, it is important for society as a whole, not only for corporations and their shareholders, that wealth creation takes place on a continuous basis, and in a sustainable manner. It is argued that sustainable development⁹ and participatory democracy¹⁰ are inextricably connected and that trade unions play a key role in the democratic process.¹¹ The role of trade unions can be summarised as follows:

Beyond their functions of defending and vindicating, unions have the duty of acting as representatives working for ‘the proper arrangement of economic life’ and of educating the social consciences of workers so that they will feel that they have an active role, according to their proper capacities and aptitudes, in the whole task of economic and social development and in the attainment of the universal common good.¹²

Modern corporate law has progressed significantly. Globalisation has had an impact on how corporations conduct themselves when they do business. In South Africa there was a need to rejuvenate the corporate law landscape to keep up with trends locally, as well as internationally. More ever, the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) has a fundamental impact on law in general: it states

[t]he Republic of South Africa is a sovereign, democratic state founded on values such as human dignity, the achievement of equality and the advancement of human rights and freedoms as well as non-racialism, non sexism and the supremacy of the constitution and the rule of law.¹³

⁷ Lower *Employee Participation* 151.

⁸ Lower *Employee Participation* 151.

⁹ Sustainability and sustainable development will be discussed in chapters 2 and 3 below.

¹⁰ Participatory democracy will be discussed in chapters 2-7 below.

¹¹ Kester *Trade Unions* 3.

¹² Lower *Employee Participation* 151 where he quotes from *The Compendium of the Social Doctrine of the Church*.

¹³ S 1 of the *Constitution*. Values such as human dignity, the achievement of equality and the advancement of human rights are discussed chapters 2-6 below.

In *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa*¹⁴ it was pointed out that

the Constitution is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to the constitutional control.

It is clear that corporations should subscribe to the principles of the *Constitution* and, as legal persons, are afforded, for example, rights such as dignity and privacy.¹⁵ Companies must now apply a triple bottom-line approach:¹⁶ taking due cognisance not only of the economic aspects but also the social and environmental aspects in their decision-making.¹⁷ These changes are evident from recent developments in company law which will be addressed below.

Recently, South African company law underwent a dramatic overhaul with the introduction of the *Companies Act* of 2008. Central to company law is the promotion of corporate governance. Developments in corporate governance jurisprudence have taken place not only in South Africa but worldwide, in countries such as (but not limited to) the United States, the United Kingdom and Australia. The *Companies Act* 61 of 1973 was repealed by the 2008 Act: the 1973 Act did not deal adequately with matters of corporate governance. Developments in corporate governance jurisprudence in South Africa are reflected in the reports of *King I* in 1994¹⁸ and *King II* in 2002,¹⁹ as well, because of changes in international governance trends and the need to reform South African company law, *King*

¹⁴ *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

¹⁵ See for example s 8, 9 and 14 of the *Constitution*. It is also trite law that a corporation can sue on the grounds of defamation where its reputation, good name or *fama* was infringed (see for example *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) as well as *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 1 SA 945 (A); *Post and Telecommunications Corporation v Modus Publications (Pty) Ltd* 1998 3 SA 1114 (ZS); *Treatment Action Campaign v Rath* 2007 4 SA 563 (C) as well as *Media 24 Ltd v SA Taxi Securitisation* 2011 5 SA 329 (SCA)). See also in this regard Neethling and Potgieter 2012 *THRHR* 304-312.

¹⁶ The triple bottom-line approach will be discussed in chapters 2 and 3 below.

¹⁷ *King Report on Corporate Governance for South Africa* in 2009 para 9 (Institute of Directors *King Report III* (available from Institute of Directors www.iod.com)).

¹⁸ Institute of Directors *King Report I*.

¹⁹ Institute of Directors *King Report II*.

III saw the light. These developments paved the way for the eagerly anticipated *Companies Act*: the product of the Department of Trade and Industry's (the DTI) policy paper²⁰ which envisaged the development of a "clear, facilitating, predictable and constantly enforced governing law". The 1973 Act neglected corporate governance matters, so *King I* and its successor, *King II*, dealt with them exclusively as voluntary codes.²¹ The 2008 Act

not only sets out how a company acquires legal personality and raises funds, but incorporates issues of corporate governance for the first time since the limited liability company was introduced in South Africa by the *Joint Stock Companies Limited Liability Act* 23 of 1861 in the Cape.²²

Before we look at what is covered under corporate law and corporate law principles it is important to explore exactly what corporate governance entails.

The basic legal characteristics of the business corporation must be identified in order to determine what are the functions of corporate law. These characteristics are: "legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership"²³ and the corporation must "respond - in ways we will explore - to the economic exigencies of the large modern business enterprise".²⁴ From the above it is clear that two important functions of corporate law can be identified: the principal function of corporate law is to provide business enterprises with a legal form/structure that possesses the five core characteristics/attributes; the second function reduces the on-going costs of organising business in the corporate form.²⁵ The latter outcome is achieved by facilitating coordination between the participants in the corporate enterprise and by reducing the scope for value-reducing forms of opportunism among the

²⁰ *South African Company Law for the 21st Century – Guidelines for Corporate Law Reform* (Government Gazette 26493 of 23 June 2004).

²¹ King 2010 *Acta Juridica* 446.

²² King 2010 *Acta Juridica* 446.

²³ Armour, Hansmann and Kraakman 2009 <http://www.law.harvard.edu>.

²⁴ Armour, Hansmann and Kraakman 2009 <http://www.law.harvard.edu>.

²⁵ Armour, Hansmann and Kraakman 2009 <http://www.law.harvard.edu>.

different constituencies,²⁶ such as conflicts between managers and shareholders, conflicts among shareholders, and conflicts between shareholders and the corporation's other constituencies, including creditors and employees. These generic conflicts are usually characterised by economists as "agency problems".²⁷

Good governance is essential to the business of corporations. Good governance²⁸ is "essentially about effective leadership": the "ethical values of responsibility,²⁹ accountability,³⁰ fairness³¹ and transparency"³² are foundations for such leadership, as well as "moral duties that find expression in the concept of Ubuntu".³³ Corporate scandals and abuses in companies such as Enron, Worldcom, Bhopal and Exxon Valdez have given rise to public distrust, fear and anxiety, and resulted in the demand that companies be held responsible for their actions (also with regard to their employees).³⁴ This development reaffirms the view that corporations should be good corporate citizens: corporate citizenship "flows from the fact that the company is a person and should operate in a

²⁶ Armour, Hansmann and Kraakman 2009 <http://www.law.harvard.edu>.

²⁷ Armour, Hansmann and Kraakman 2009 <http://www.law.harvard.edu>.

²⁸ Institute of Directors *King Report III* 10.

²⁹ Responsibility entails that the board "should assume responsibility for the assets and actions of the company and be willing to take corrective actions to keep the company on a strategic path, that is ethical and sustainable" (Institute of Directors *King Report III* 21).

³⁰ Accountability entails that the board "should justify its decisions and actions to shareholders and other stakeholders" (Institute of Directors *King Report III* 21).

³¹ Fairness entails that the board "should ensure that it gives fair consideration to the legitimate interests and expectations of all stakeholders of the company" (Institute of Directors *King Report III* 21).

³² Transparency entails that the board "should disclose information in a manner that enables stakeholders to make an informed analysis of the company's performance, and sustainability" (Institute of Directors *King Report III* 21).

³³ Institute of Directors *King Report III* 10. Ubuntu can be defined as "that condition which goes beyond mere friendship and proceeds to a willing and unselfish cooperation between individuals in society, with due regard for the feelings of others and not taking into account incidental social differences. Ubuntu exhibits the following discernible components: (i) individual-centered- (a) internal, namely human dignity, steadfastness; (b) external, namely compassion, honesty, humaneness, respectfulness; (ii) community-centred, namely adhering to familial obligations, charitableness, cooperation, group solidarity, social consciousness" (De Kock and Labuschagne 1996 *THRHR* 120). See also Institute of Directors *King Report III* 60 where Ubuntu is defined as follows: "A concept which is captured in the expression 'uMuntu ngumuntu ngabantu', 'I am because you are; you are because we are'. Ubuntu means humaneness and the philosophy of ubuntu includes mutual support and respect, interdependence, unity, collective work and responsibility".

³⁴ Armour, Hansmann and Kraakman 2009 <http://www.law.harvard.edu>.

sustainable manner”.³⁵ It is clear that companies no longer are accountable merely to their shareholders, but also to society at large.³⁶ Leaders, for example, should direct company strategy and operations with a view to achieving the triple bottom-line (economic, social and environmental performance) mentioned earlier and, thus, should also manage the business in a sustainable manner.³⁷ Sustainability³⁸ considerations “are rooted in the South African Constitution which is the basic social contract that South Africans have entered into”.³⁹ Responsibilities are imposed by the *Constitution* on juristic persons and individuals in society for the realisation of the most fundamental rights.⁴⁰ Thus, it is clear that companies need to act in a responsible manner and need to take due cognisance of important corporate governance standards and principles.

Corporate governance is a broad concept and there is no generally accepted definition. Corporate governance has been defined as:

the collection of law and practices, grounded in fiduciary duties and their application, that regulates the conduct of those in control of the corporation, and the means through which a variety of countries provide legal basis for corporations while preserving, to some extent, authority to control abuses of these business organizations.⁴¹

Employees play an important role within such a corporate governance framework: they can have a direct influence by voicing their concerns regarding inappropriate or illegal conduct.

³⁵ Institute of Directors *King Report III* 11.

³⁶ Gumpinger 2011 *Appeal* 101-102.

³⁷ Institute of Directors *King Report III* para 8. The triple-bottom line as well as sustainability issues will be discussed in chapters 2 and 3 below.

³⁸ Sustainability of a company means “conducting operations in a manner that meets existing needs without compromising the ability of future generations to meet their needs. It means having regard to the impact that the business operations have on the economic life of the community in which it operates. Sustainability includes environmental, social and governance issues” (Institute of Directors *King Report III* 60).

³⁹ Institute of Directors *King Report III* para 8

⁴⁰ Institute of Directors *King Report III* para 8.

⁴¹ Aka 2007 *NC Int'l Law Journal* 238.

Thus, they control how companies report on issues or make issues public, and they also influence decision-making.⁴²

It is a long-established principle in company law that a company has a separate legal personality:⁴³ it exists separately from those who manage it and its shareholders.⁴⁴

The “separateness” of a company is affirmed by section 19(b) of the *Companies Act* of 2008 which states that from the date and time that the incorporation of a company is registered,

⁴² The role of employees in corporate decision-making and corporate governance issues will be discussed in chapters 2-7 below.

⁴³ In *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C) the court confirmed the instances when the “separateness” of a company can be disregarded and the “corporate veil” be pierced. The court stated that “[i]n the sphere of companies, the directors and members of a company ordinarily enjoy extensive protection against personal liability. However, such protection is not absolute, as the court has the power – in certain exceptional circumstances – to ‘pierce’ or ‘lift’ or ‘pull aside’ ‘the corporate veil’ and to hold the directors personally liable for the debts of the company” (para 19). See also *Shipping Corporation of India Ltd v Evdomon Corporation* 1994 1 SA 550 (A) where the court required proof of “an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs” before the corporate veil will be pierced (556e-f), as well as *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A) where the court confirmed misuse “to perpetuate fraud, or for a dishonest or improper purpose” will justify the piercing of the corporate veil. See also *Botha v Van Niekerk* 1983 3 SA 513 (W) as well as *Manong & Associates v City of Cape Town* 2009 1 SA 644 (EqC) and *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd* 2012 2 All SA 9 (SCA) for more examples of where the corporate veil can be pierced. S 20(9) of the *Companies Act* incorporated the common-law principles of piercing the corporate veil to some extent and provides that the court can declare “on, an application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity” that “the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration”. The court may make any further order the court considers appropriate to give effect to a declaration. S 22 of the *Companies Act* also provides that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. This will also result in the personal liability of the directors of the company.

⁴⁴ *Salomon v Salomon and Co Ltd* 1897 AC 22 (HL). See also *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 550-551 where the court confirmed that a registered company is a legal persona distinct from the members who compose it and that separateness is not merely an artificial technical thing but a matter of substance as property vested in the company cannot be regarded as being vested in all or any of its members.

the company has all of the legal powers and capacity of an individual, except to the extent that (i) a juristic person is incapable of exercising any such power, or having any such capacity; or (ii) the company's Memorandum of Incorporation provides otherwise.

An important question in company law is: *In whose interest the company should be managed?*⁴⁵ One view is that a company can best be described as "a series of contracts concluded by self-interested economic actors".⁴⁶ These actors include equity investors (shareholders), managers, *employees*⁴⁷ and creditors. When these contracts are taken together they make up the structure of the company and when these contracts are evaluated, the contracts with the shareholders "hold sway" and the company ultimately operates to serve their interests.⁴⁸ According to this view, it is clear that the shareholders expect the company to be profitable and that the company's directors and managers are tasked, primarily, with the duty of creating a corporate governance structure "which ensures that the company conducts its business so as to maximise the returns of these investors".⁴⁹ A different view maintains that a corporation "cannot be reduced to the sum of a series of contracts" because it is vital to take into account a wide range of stakeholders whose interests may overlap or be in conflict with each other.⁵⁰ The board and management of corporations strike a balance between the interests of various stakeholders in their application of corporate governance principles.⁵¹ It is necessary for any corporation to determine which groups will be regarded as "stakeholders"; however, many definitions exist of the concept "stakeholder":

The meanings of 'stake' and 'holder' are important within stakeholder thinking. Simply stated, the word 'stake' means a right to do something in response to any act or attachment. Since 'rights' are generally attached with liabilities, this word also denotes the liabilities a person possesses for enjoying a particular right. Hence, a stake could be a legal share of something. It could be, for instance, a financial involvement with something. From the organizational stakeholder perspective, Carroll identifies three sources of stakes: ownership at one extreme,

⁴⁵ My emphasis. This question and answers thereto will be discussed again in chapters 2 and 3 below.

⁴⁶ Davis and Le Roux 2012 *Acta Juridica* 307.

⁴⁷ My emphasis.

⁴⁸ Davis and Le Roux 2012 *Acta Juridica* 307.

⁴⁹ Davis and Le Roux 2012 *Acta Juridica* 307.

⁵⁰ Davis and Le Roux 2012 *Acta Juridica* 307.

⁵¹ Rossouw 2008 *Afr J Bus Ethics* 29.

interest in between, and legal and moral rights at the other extreme. The word 'holder' is comparatively easy to understand. It denotes a person or entity that faces some consequences or need to do something because of an act or to meet a certain need.⁵²

According to one commentator, stakeholders include "any group or individual who can affect or is affected by the achievement of the organization's objectives";⁵³ another states that it "can encompass a wide range of interests: it refers to any individual or group on which the activities of the company have an impact".⁵⁴ Whether a narrow or broad definition of the notion "stakeholders" is applied, the importance of stakeholders cannot be over-emphasised. It can be said that corporate governance addresses the entire span of responsibilities to stakeholders of the company, such as customers, *employees*, shareholders, suppliers and the community at large.⁵⁵ Both internal as well as external stakeholders are important to organisations: multiple agreements are entered into between internal stakeholders, such as employees, managers and owners and the corporation, as well as between the corporation and external stakeholders, such as customers, suppliers and competitors.⁵⁶ Additional stakeholders that are important include government and local communities. The importance of the latter group of stakeholders lies in the fact that they set out the legal and formal rules within which corporations must operate. When corporate governance, "*is focused on the interests of shareholders only*",⁵⁷ internal as well as external corporate governance is regarded as being shareholder orientated.⁵⁸ Because of the separation of ownership and control, the shareholder model, increasingly, has become associated with agency theory, which holds that "managers are the agents of shareholders (or owners) and in their capacity as agents are obligated to act in the best financial interest of the shareholders of the corporation".⁵⁹ It is argued that this view, however, is

⁵² Rahim *MqJBL* 2011 306.

⁵³ Freeman *Strategic Management* 46.

⁵⁴ Mallin *Corporate Governance* 49.

⁵⁵ Hurst 2004 <http://www.scu.edu> 6. See also Clarkson 1995 *Ac Man Rev* 106.

⁵⁶ Freeman and Reed 1990 *JBE* 337.

⁵⁷ My emphasis.

⁵⁸ Rossouw 2008 *Afr J Bus Ethics* 29.

⁵⁹ Rossouw 2008 *Afr J Bus Ethics* 29.

narrow and out-dated because *shareholders are no longer the only primary stakeholders*⁶⁰ of a corporation. A corporation must take all stakeholders into consideration, even constituents such as pressure groups or non-government organisations that are “public interest bodies that espouse social goals relevant to the activities of the company”.⁶¹

1.2 Contemporary framework

South Africa is a young constitutional democracy with important consequences that permeate every discipline of the law. In the context of this research the first aspect to take note of relates to the very nature of how companies function. The *Companies Act* in its purpose provision, *inter alia*, is committed to promoting compliance with the Bill of Rights in the application of company law.⁶² In addition it aims to promote the development of the South African economy by “encouraging transparency and high standards of corporate governance”.⁶³ These goals are extremely important given the significant role of enterprises within the social and economic life of the nation.⁶⁴ Furthermore, the *Companies Act* aims to balance the “rights and obligations of shareholders and directors”⁶⁵ within companies and it encourages the efficient and responsible management of companies.⁶⁶ It is pointed out that these goals:

accord with the traditional function of company law: the facilitation of profit maximisation and risk taking in an environment that provides statutory protection for outside contracting parties and shareholders.⁶⁷

⁶⁰ My emphasis.

⁶¹ See Du Plessis, Hargovan and Bagaric *Principles* 24 where they refer to the most inclusive definition of stakeholders. Stakeholders are accordingly defined as “those groups or individuals that: (a) can be reasonably be expected to be significantly affected by the organisation’s activities, products and/or service; or (b) whose actions can reasonably be expected to affect the ability of the organization to successfully implement its strategies and achieve its objectives”.

⁶² S 7(a) of the *Companies Act*.

⁶³ S 7(b)(iii) of the *Companies Act*.

⁶⁴ S 7(b)(iii) of the *Companies Act*.

⁶⁵ S 7(i) of the *Companies Act*.

⁶⁶ S 7(j) of the *Companies Act*.

⁶⁷ Katzew 2011 *SALJ* 690.

It can be said that the *Companies Act* goes further than the traditional function of company law in that it “crosses the corporate Rubicon”⁶⁸ by extending the company’s obligations beyond the parameters of traditional South African company law and expressly recognises the significant societal role of enterprises. The *Companies Act* acknowledges an existing principle: it makes provision for the fact that companies must reaffirm the concept of the company as a means of achieving economic and social benefits and enhance the welfare of South Africa as a partner in the global economy.⁶⁹ But it is clear that “in the structure of a company now is the implicit demand that it respect, protect and fulfil human rights to the extent that these rights are applicable to it”.⁷⁰ The applicability of the Bill of Rights to corporations goes beyond imposing obligations on them: it changes the very nature of how corporations (must) now function.⁷¹

The second aspect to take note of is that the success, legal observance and value of a company are no longer measured only having regard to its financial statements. The interests of various stakeholder groups in the context of the corporation as a “social institution” should also be enhanced and protected.⁷² Corporate governance from the stakeholder perspective entails a system where a balance is achieved between the interests of the various stakeholders of the corporation.⁷³ Balancing⁷⁴ is a complicated bargaining process involving all the stakeholders in the corporation⁷⁵ and it is therefore

⁶⁸ Katzew 2011 *SALJ* 691. The author refers to Mervin King’s comment made at a workshop at the University of Witwatersrand on 8 March 2010.

⁶⁹ S 7(d) of the *Companies Act*.

⁷⁰ Bilchitz 2008 *SALJ* 777.

⁷¹ Bilchitz 2008 *SALJ* 777.

⁷² Rossouw 2008 *Afr J Bus Ethics* 29.

⁷³ Rossouw 2008 *Afr J Bus Ethics* 29.

⁷⁴ If this process is successful trust can be created between the company and all its internal and external stakeholders. This is also true in organisations other than companies. Because communication is important, companies (and other organisations) should stimulate dialogue with all the stakeholders to enable them to enhance or restore confidence with stakeholders, remove tension between the company (organisation) and stakeholders or relieve pressure. This can be achieved by means of formal processes such as annual general meetings and cooperation with trade union representatives. The role of informal processes, such as direct contact, websites, press releases or advertising, should also be considered (Rossouw 2008 *Afr J Bus Ethics* 29).

⁷⁵ Stiglitz 1999 *Challenge* 44.

important that bargaining must be successfully completed. It has occasionally been submitted that the corporation is not a social institution but rather a private institution where the corporation is the private property of the shareholders (owners) and thus the business, legally and ethically, can be conducted only in the best interests of the owners.⁷⁶ It is held the view is narrow and, in context of modern developments, out-dated. It is important in this context to take note of the role that employees⁷⁷ play in corporations: first, as stakeholders, they cannot be ignored and second, as the creators of the company's wealth or worth, they constitute a core constituency in the organisation. Employees are important role-players in contributing not merely in a labour capacity to the organisation for which they work, but also by being a necessity/prerequisite to the company's existence and prosperity, in addition to being a stakeholder.⁷⁸ If employees, for example, decide to embark on strike action for long periods of time it impacts negatively on the future of the company:⁷⁹ the corporation might have to close its doors due to unproductivity that makes it unprofitable, or lead to job losses even though the company might not close down. Sustainability of the business is a corporate law notion which will fall squarely within the sphere of duties of directors of the company, but it is also an important (implied) duty that can be extended to employees.⁸⁰ We can say that "a company cannot be considered a success if the total social value it creates is less than the social costs it throws off"⁸¹ and if "the interests of society as a whole are what matters, then one cannot look just at the profit a company (or an industry or economy) makes in order to know if it is successful".⁸²

⁷⁶ Friedman *The New York Times Magazine* (September 13 1970) as discussed in Gumpinger 2011 *Appeal* 103.

⁷⁷ For purposes of labour protection as well as the rights granted in terms of company law it is important to note that the definition of an employee is central to the discussion. It is important to distinguish an employee from others. Labour legislation has expanded the definition of "employee" beyond the common law definition of someone who places his or her labour potential under the control of another person in exchange for remuneration, in order to extend protection to as many persons as possible. See chapter 2 below for a detailed discussion on labour law protection and employees.

⁷⁸ Employees as important role-players in companies will be discussed in chapters 2-7 below.

⁷⁹ Strike action will be discussed in chapters 2, 4, 5 and 6 below.

⁸⁰ The duties of directors as well as sustainability will be discussed in chapter 3 below.

⁸¹ Greenfield 2005 *Hastings Bus LJ* 90.

⁸² Greenfield 2005 *Hastings Bus LJ* 90.

The cost side of the equation is an important issue to consider. Although both “social value” and “social cost” are elastic terms and it is difficult to attach a precise definition to them, benefits and costs can be defined broadly in order to put things into perspective.⁸³

Benefits, on the one hand, include:

not only profit to the shareholders but also workers’ earnings, the stability of a company brings to communities in which it does business, the quality and importance of the company’s products or services, and more.⁸⁴

Costs, on the other hand, include:

pollution, over-use of scarce resources, harmful effects of the company’s products or services, mistreatment of employees, and even more abstract externalities such as the company’s reinforcement of harmful stereotypes.⁸⁵

It is important that directors should ensure that contracts which they have entered into, for example, with employees or creditors, are based upon “terms and obligations that minimise costs, particularly agency costs”⁸⁶ because a corporation should be profitable and ultimately provide some return on investment for the shareholders. However, the social value of a company must be assessed on more than its financial statements. The value of employees in the company, as well as the contribution to the society, in general, which enables the company to operate in it, play a role in the overall success of a company.

1.3 The role of employees in corporations

When considering the role of employees in corporations it must be noted that the *Constitution* grants every person a fundamental right to fair labour practices.⁸⁷ Social, as

⁸³ Greenfield 2005 *Hastings Bus LJ* 90.

⁸⁴ Greenfield 2005 *Hastings Bus LJ* 90.

⁸⁵ Greenfield 2005 *Hastings Bus LJ* 90.

⁸⁶ Davis and Le Roux 2012 *Acta Juridica* 307.

⁸⁷ S 23(1)(a) of the *Constitution*.

well as political changes, were notable in South Africa after 1990: changes in socio-economic conditions within a developing country were also evident. These changes had a major influence on the South African labour law dispensation. Like company law, labour law, to a large extent, is codified. Like company law, no precise definition of labour law exists.⁸⁸ Labour law has always suffered from “a degree of definitional ambiguity”:⁸⁹ as is evident from the definitions highlighted below. When we look at the concept “labour law”, it is important to consider the following:

The discipline of *labour law* is defined in part by its-subject matter, in part by an intellectual tradition.⁹⁰ Its immediate subject-matter consists of the rules which govern the employment relationship. However, a broader perspective would see labour law as the normative framework for the existence and operation of all the institutions of the labour market: the business enterprise, trade unions, employers’ associations and, in its capacity as regulator and as employer, the state. The starting point for analysis is the existence of the employment relationship as a distinct economic and legal category. Labour law stems from the idea of the ‘subordination of the individual worker to the capitalist enterprise’; it is above all the law of *dependent labour*, and hence is specific to those categories of economic relationship which in some way involve the exchange of *personal service or services* for remuneration. Labour law is concerned with how these relationships are continued, a role shared by the common law and social legislation but also by extra-legal sources such as collective bargaining and workplace custom and practice. Its scope accordingly extends from the individual to the collective, from the contract of employment to relations between institutions of organised labour and capital, and to the conduct and resolution of conflicts between them.⁹¹

Labour law, in general terms, has been defined as

the totality of rules in an objective sense that regulate legal relationships between employers and employees, the latter rendering services under the authority of the former, at the collective as well as the individual level, between employers mutually, employees mutually, as well as between employers, employees and the state.⁹²

⁸⁸ See chapter 2 below for a detailed discussion on the different worlds of labour and company law.

⁸⁹ Arthurs 2013 *Comp Lab L & Pol’y* J 585.

⁹⁰ This intellectual tradition “sees labour law as a unified discipline which has outgrown its diverse origins in the law of obligations and in the regulatory intervention of the state” and as “a subject with its own doctrinal unity and structure, it spans the divides between common law and legislation and between private law and public law” (Deakin and Morris *Labour law* 1).

⁹¹ Deakin and Morris *Labour law* 1.

⁹² Van Jaarsveld, Fourie and Olivier *Principles and Practice* para 51.

It has also been said that labour and employment law:⁹³

are the collection of regulatory techniques and values that are properly applied to any market that, if left unregulated, will reach socially suboptimum outcomes because economic actors are individuated and cannot overcome collective action problems. Labour and employment law can reach socially beneficial outcomes in such markets through some combination of the following techniques. Individual actors can be permitted to form organizations and be protected against retaliation for doing so. These organizations may be monitored or regulated in the interest of the public or of their principals. These organizations may conclude binding agreements. The agreements may be enforced through special institutions outside the general run of contract. Minimum contractual terms may be socially specified. Institutions of dispute resolution may be socially provided or encouraged, such as labour courts, arbitration, or mediation. Ground rules for economic conflict may be enacted.

From the above, labour law covers both individual and collective labour law and various role-players are involved. Some of the role-players include trade unions, employers/companies, employees, and the state.⁹⁴ The various relationships between these parties, ultimately, are what results in a certain outcome if there is a contest between them. It must be noted that the "law governing labour relations is one of the centrally important branches of the law - the legal basis on which the very large majority of people earn their living".⁹⁵

The law makes "only a modest contribution to the standard of living of the population", in that a person who, for example, wants to qualify as a lawyer will have to master the principles first.⁹⁶ It is true that labour law can be regarded (as are other aspects of the law) as "a technique for social power"⁹⁷ as it is concerned with issues such as insubordination where one party is under the command and obedience of another who makes rules and decisions. Social power thus entails the "power to make policy, to make rules and to make decisions, and to ensure that these are obeyed".⁹⁸ Labour law is

⁹³ Hyde 2006 <http://ssrn.com/abstract=896381>.

⁹⁴ The role of these role-players will be discussed in chapters 2-7 below.

⁹⁵ Davies and Freedland *Kahn-Freund* 14.

⁹⁶ Davies and Freedland *Kahn-Freund* 14.

⁹⁷ Davies and Freedland *Kahn-Freund* 14.

⁹⁸ Davies and Freedland *Kahn-Freund* 14.

concerned with such issues⁹⁹ and it is possible to regulate the power to command and the duty to obey in that an “element of co-ordination can be infused into the employment relationship”.¹⁰⁰

Co-ordination and subordination are regarded “as matters of degree, but however strong the element of co-ordination, a residuum of command power will and must remain”.¹⁰¹ To illustrate this claim on a practical level it can be said that the “when” and the “where” of work, on principle, must still be decided by management, “but the law may restrict managerial power as to the time of the work” and thus creates a mechanism for enforcement to protect the worker who relies on it.¹⁰²

In 1995 the South African labour market was transformed with the introduction of the *Labour Relations Act* (LRA).¹⁰³ The LRA remains the primary piece of labour legislation that governs labour law in South Africa. It marked “a major change in South Africa’s statutory industrial relations system” and, following “the transition to political democracy, the LRA encapsulated the new government’s aims to reconstruct and democratise the economy and society as applied in the labour relations arena”.¹⁰⁴ Other pieces of important labour legislation are the *Basic Conditions of Employment Act*¹⁰⁵ and the *Employment Equity Act*.¹⁰⁶ The notion of industrial democracy¹⁰⁷ and the transformation of the workplace are central issues in South African labour law. The constitutional change that took place in South Africa advanced the protection of human rights and democratisation of the workplace.

⁹⁹ The functions of labour law will be discussed in detail in chapter 2 below.

¹⁰⁰ Davies and Freedland *Kahn-Freund* 18.

¹⁰¹ Davies and Freedland *Kahn-Freund* 18.

¹⁰² Davies and Freedland *Kahn-Freund* 18. The managerial prerogative will be discussed in chapters 2 and 4 below.

¹⁰³ 66 of 1995 (the LRA).

¹⁰⁴ Du Toit *et al Labour Relations Law* (2006) 5 and Du Toit *et al Labour Relations Law* (2015) 5.

¹⁰⁵ 75 of 1997 (BCEA).

¹⁰⁶ 55 of 1998 (EEA).

¹⁰⁷ Industrial democracy will be discussed in chapters 2, 4, 5 and 6 below.

In the past labour legislation in South Africa was based on racial categorisation and discrimination and trade unions reflected the racial divide.¹⁰⁸ Parallel legislation was introduced for white and black workers and black workers,¹⁰⁹ initially, were not allowed to join trade unions.¹¹⁰ It is evident that the process of becoming a true “democracy” was not confined to the political arena, but is relevant in the context of the workplace where trade unions (and employees) pushed for employees to be involved in the decision-making process. The importance of industrial democracy¹¹¹ is highlighted as follows:

[W]e must have democracy in industry as well as in government; ... democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and ... workers in our great ... industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.¹¹²

Trade unions in South Africa, prior to 1994, demanded greater democracy in the workplace; some employers had taken the initiative to involve employees in decision-making.¹¹³ A trade union has been defined as nothing other than “an association of employees whose principal purpose is to regulate relations between employees and employers, including employer’s organisations”.¹¹⁴ Rights, such as the freedom of association, as well as the rights to organise and to strike, are afforded to employees and recognised by both the *Constitution*¹¹⁵ and the LRA.¹¹⁶ Other rights, such as the freedom of trade, occupation and profession, are provided for by the *Constitution*.¹¹⁷ The

¹⁰⁸ Manamela 2002 *SA Merc LJ* 729.

¹⁰⁹ Legislation included the *Labour Relations Act* 28 of 1956 and the *Black Labour Relations Regulations Act* 48 of 1953.

¹¹⁰ Manamela 2002 *SA Merc LJ* 729.

¹¹¹ See chapter 2 and 4 for a discussion on industrial democracy.

¹¹² Senator Robert Wagner, Radio Speech (Apr. 12, 1937), in *Supreme Court Findings Hailed by Wagner as Most Significant Since Marshall*, N.Y. Times, Apr. 13, 1937, 20 as quoted by Craver 1997 *George Wash L Rev* 135.

¹¹³ Du Toit 1993 *Stell LR* 325.

¹¹⁴ S 213 of the LRA. An employer’s organisation is defined as “any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions” (s 213 of the LRA).

¹¹⁵ S 23(2), (3) and 4 of the *Constitution*.

¹¹⁶ S 4, 5 of the LRA as well as Chapter IV of the LRA. These rights will be discussed in detail in chapters 2 and 4 below.

¹¹⁷ S 22 of the *Constitution*.

constitutional right of “[e]very trade union, employer’s organisation and employer” to “engage in collective bargaining” is also provided for.¹¹⁸

The primary objectives of the LRA, *inter alia*, include the following:

to provide a framework within which employees and their trade unions, employers and employer’s organisations can (i) collectively bargain to determine wages, terms and conditions of employment, and other matters of mutual interest; and (ii) formulate industrial policy¹¹⁹ and ... to promote orderly collective bargaining [and] ... collective bargaining at sectoral level.¹²⁰

Before the enactment of the LRA, employee (worker) participation and voice was a much-debated topic, locally as well as internationally. Presently, the debate continues.

The purposes of the LRA are “to advance economic development, social justice, labour peace and the democratisation of the workplace” and among the primary objects of the LRA is to promote employee participation in decision-making in the workplace¹²¹ and the effective resolution of labour disputes.¹²²

The *Labour Relations Act* 28 of 1956 made no significant provision for employee participation.¹²³ The era is characterised by the following:

¹¹⁸ S 23(5) of the *Constitution*.

¹¹⁹ S 1(c)(i)-(ii) of the LRA.

¹²⁰ S 1(d)(i)-(ii) of the LRA. The long title of the LRA also includes as one of its purposes the promotion and facilitation of collective bargaining at the workplace and sectoral level.

¹²¹ S 1(d)(iii) of the LRA. The *Explanatory Memorandum* on the original draft of the LRA explained the inclusion of this principle as follows: “South Africa’s re-entry into international markets and the imperatives of a more open international economy demand that we produce value-added products and improve productivity levels. To achieve this, a major restructuring process is required. Studies of how other countries have responded to restructuring warn that our system of adversarial industrial relations, designed in the 1920s, is not suited to this massive task ... If we are to have any hope of successfully restructuring our industries and economy, then management and labour must find new ways of dealing with each other” (Du Toit *et al Labour Relations Law* (2006) 43).

¹²² S 1(d)(iv) of the LRA.

¹²³ Du Toit *et al Labour Relations Law* (2006) 21.

Collective bargaining over distributive issues and job security, seen by many as the embodiment of adversarialism, was the primary form of employee involvement in the exercise of managerial prerogative by employers. The system was characterised by low levels of trust between labour and management, disempowered and uncommitted employees, and workplaces illprepared to face the challenges of technological innovation.¹²⁴

The need existed for a model of statutory-supported employee participation which would give employees a greater say in organisations. It was evident from international experience that there are benefits for employees as well as employers stemming from such a system, in that increased access to information and participation in decisions could “empower workers and democratise workplace relations, while employers would gain from improved industrial relations and more efficient and flexible workplaces”.¹²⁵ A strong argument was made in South Africa that some form of co-operative decision-making on the shop floor should be introduced. However –

[t]he question was whether existing collective bargaining structures could double as participatory forums or whether a separate structure with a different agenda should be created for the purpose.¹²⁶

A new mechanism introduced in the 1995-LRA to provide workers with a voice in the workplace is the so-called workplace forum. Workplace forums¹²⁷ draw upon the model of the German *works council system* and were enacted to “introduce a form of participatory workplace governance” and to create a system of participatory decision-making in addition to, or alongside, (adversarial) collective bargaining.¹²⁸

It is evident from the *Companies Act* that employees are granted a greater voice by means of employee participation.¹²⁹ Employee participation, as indicated earlier, was supposed to

¹²⁴ Du Toit *et al Labour Relations Law* (2006) 21-22.

¹²⁵ Du Toit *et al Labour Relations Law* (2006) 22.

¹²⁶ Du Toit *et al Labour Relations Law* (2006) 22.

¹²⁷ See s 78-94 of the LRA. Workplace forums are provided for in chapter V of the LRA. Workplace forums will be discussed in chapter 6 below.

¹²⁸ Davis and Le Roux 2012 *Acta Juridica* 318.

¹²⁹ Employee participation will be discussed in chapters 2-7 below.

be regulated (at least from the labour side) in the form of workplace forums which were designed “to keep distributive bargaining and co-operative relations apart”¹³⁰ so as to allow collective bargaining to develop. The “purpose was not to undermine collective bargaining but to supplement it” because it would relieve collective bargaining of the functions for which it is not well suited.¹³¹ With regard to the justification for employee participation Du Toit *et al* points to the following:

The previous Act had made no provision for employee participation in any form. ... International experience, on the other hand, showed that statutory employee participation could hold benefits for employees as well as employers. Increased access to information and participation in decisions could empower workers and democratise workplace relations, while employers would gain from improved industrial relations and more efficient and flexible workplaces.

A strong argument therefore existed for legislation to introduce some form of co-operative decision-making on the shopfloor. The question was whether existing collective bargaining structures could double as participatory forums or whether a separate structure with a different agenda should be created for the purpose.¹³²

It is submitted that employee participation is much wider than the establishment and functioning of workplace forums and the process of collective bargaining.¹³³ It could also be realised by means of compulsory conciliation, information-sharing and other normative and procedural entitlements.

A key component of employee participation is ownership and control of the firm.¹³⁴ A nexus exists between the company and employees and may be understood as proprietary in the same way as the nexus between the company and shareholders.¹³⁵ The proprietary entitlement of shareholders of a company arises from their investment of capital in the

¹³⁰ Manamela 2002 *SA Merc LJ* 729.

¹³¹ Du Toit *et al Labour Relations Law* (2006) 341.

¹³² Du Toit *et al Labour Relations Law* (2006) 21-22.

¹³³ Collective bargaining will be discussed in chapters 2 and 5 below.

¹³⁴ Ownership and control will be discussed in chapter 3 below.

¹³⁵ Njoya 2012 *Comp Lab L & Pol'y J* 474.

company, whereas that of the employees arises from their contribution of labour inputs that, in return, provide value to the company.¹³⁶

Employee participation can thus be described as:

a philosophy or style of organisational management which recognises both the need and the right of employees, individually or collectively, to be involved with management in areas of the organisation's decision-making beyond that normally covered by collective bargaining.¹³⁷

From an industrial relations viewpoint, employee participation "may be seen as a form of democratisation to the extent that it makes inroads into management prerogative".¹³⁸ However, it is important to remember that the law "gives the employer the right to manage the enterprise",¹³⁹ although this prerogative is not unfettered.

It is essential when considering employee participation to take due cognisance of both the labour and company law principles that may be pertinent, as well as the need for workers to have a voice in the workplace and for employers to manage corporations. It is also important to note that before the enactment of the *Companies Act*, company law, to a large extent, was unconcerned with employees: the reason was in support of the principle that directors owe their duty to the company.¹⁴⁰ Labour law and company law over centuries have been considered and applied as separate fields of the law. However, this is not a true reflection of the contemporary state of affairs. Each field of law directly and indirectly impacts on the other and, although they are separate disciplines, they are

¹³⁶ Njoya 2012 *Comp Lab L & Pol'y J* 474. Employee inputs and interests in context of corporate law will be discussed chapter 3 below.

¹³⁷ Salamon *Industrial Relations* (1987) 296, (1992) 341.

¹³⁸ Salamon *Industrial Relations* (1992) 326. The terms "employer prerogative" and "managerial prerogative" are used as synonyms. See the discussion by Strydom 1999 *SA Merc LJ* (part 1) 44-48 for reasons as to why these terms are used as synonyms.

¹³⁹ Brassey *et al New Labour Law* 74.

¹⁴⁰ The question to whom do directors owe their duty to will be discussed in chapters 2 and 3 below.

relevant to each other: there is some overlap as far as subject matter and the stated goals of each area of the law are concerned.¹⁴¹

1.4 Research problem and modus operandi

South African organisations (including companies), generally, are undecided about the extent to which employees should be allowed to participate in organisational, corporate and managerial decisions.¹⁴²

The primary research question that needs investigation is: *What role should (and could) employees play in corporate decision-making in South Africa?* The main inquiry of the thesis, therefore, is to explore the issue of granting a voice to employees in companies; in particular, the role of employees in the decision-making of companies.

The research question will be answered by looking at how decision-making is promoted if the organisation is a company. A distinction is made between government institutions, other entities and companies. The reason for this is, although employees work for these organisations, not all employers are companies.

In this research the following issues will be addressed:

- (1) different forms of employee participation;¹⁴³
- (2) different levels of participation;¹⁴⁴
- (3) the appropriate parties and matters for participation;¹⁴⁵
- (4) the nature of participation (for example disclosure of information, consultation, decision-making);¹⁴⁶

¹⁴¹ The overlap between labour law and corporate law will be discussed in chapters 2 and 3 below.

¹⁴² Valoyi, Lessing and Schepers 2000 *J Ind Psych* 33.

¹⁴³ See chapters 3-7 below.

¹⁴⁴ See chapters 3-7 below.

¹⁴⁵ See chapters 3-7 below.

¹⁴⁶ See chapters 3-7 below.

- (5) the status of participation (for example in consultation with, after consultation with, joint-decision-making);¹⁴⁷ and
- (6) appropriate regulation of participation (for example compulsory or voluntary nature).¹⁴⁸

The secondary research questions that flow from the primary research question are:

- (1) To what extent can trade unions provide effective participation for employees in decision-making?
- (2) To what extent can workplace forums provide effective participation for employees in decision-making?
- (3) To what extent is the two-tier board structure entrenched in German and European law a viable option in South Africa?
- (4) Which empowerment initiatives offer employees the best result in terms of a viable decision-making structure?

1.5 Research methodology and chapter divisions

An objective in this study is to explore how labour and company law can be approached in an integrated manner with regard to the issue at hand. Although labour law and company law are mostly researched and considered separate parts of the law in academic sources, an integrated approach will be followed in the thesis. This approach looks beyond the traditional borders of labour law and company law in order to analyse, evaluate and recommend the most beneficial legal regulation of worker-participation in South Africa.

An exploratory study is conducted to source the literature used in the analysis. Local legal principles, as well as comparative literature, are used to compare the South African system with other jurisdictions and to identify shortcomings or gaps in the current system. In the

¹⁴⁷ See chapters 3-7 below.

¹⁴⁸ See chapters 3-7 below.

event of a gap being identified improvements will be considered and recommended. Labour, as well as corporate law, to a large extent, are influenced by developments on economic, political and social levels. Thus a comparative approach will be useful to address these developments and to test different theories. The role of employees with regard to participation (and the possible development of a viable structure for participation) will be explored with reference to other national systems, such as the German one, and within the supranational European Union system.¹⁴⁹ Having regard to our constitutional framework concerning international law obligations, the relevant instruments of the International Labour Organisation will also be canvassed.

It is recognised that some may view the fact that South Africa is a developing country as a limitation/constraint when making a comparison with developed countries. Specific attention will be given to universal and principled issues: to include an evaluation of the institution of collective bargaining, employee (worker) participation and voice via work councils, worker directors and different types of board structures. The study will look at direct, as well as indirect, forms of participation when it comes to employee participation in decision-making in order to suggest a proposed model for employee participation and voice in South-African workplaces. Recommendations regarding legislative amendments and/or other measures to improve employee participation will be included.

The research will look at management and control functions and the obligations of directors in order to illustrate the principle of in whose best interest a company is managed. The functions/obligations will be discussed only to illustrate the difference

¹⁴⁹ The interaction with and role of other stakeholders in a company, especially employees, is a topical issue and was always a topical issue. British lawmakers (attempted before 1980) the incorporation of rights of employees (as stakeholders) into the (then) company law. Although South African company law has its foundations in English law as the 1973-Act was based on principles of English law, English law is not chosen for comparative purposes. Limited employee participation in Britain, is evident (starting with the Bullock Report and culminating in the present s 172 of the British *Companies Act* 2006). The German and EU systems were chosen as comprehensive employee participation rights are evident not only in company law structures but also in labour law. The German system created the primary vehicle for employee participation by granting workers with voice and participation rights on the supervisory board. References are, however, made to the British Companies Act in chapters 2 and 3.

between the one and two-tier board structures as well as the extent to which employees participate in such boards. This limitation also applies to the fiduciary obligations and the duty of care and skill.

The remaining chapters are presented as follow: the next chapter sets out labour and company law perspectives and theories on employee participation. It is followed by an analysis and discussion of the responsibilities of companies towards employees in chapter three. Chapter four proposes different forms and frameworks of employee participation; chapter five provides an analysis of the collective bargaining framework in South Africa; chapter six investigates the viability of workplace forums as an alternative means for employee participation and voice; chapter seven analyses different jurisdictions, such as those in Germany and the European Union. Finally, chapter eight proposes a model for employee participation, and contains conclusions, observations and recommendations.

The thesis incorporates the law up to 1 January 2015.

CHAPTER 2 – THE DIFFERENT WORLDS OF LABOUR AND COMPANY LAW: TRUTH OR MYTH?

2.1 General

The shareholder-stakeholder debate took central stage as early as in the 1930s in the United States of America with different viewpoints discernible in the commentaries of Dodd and Berle. The issue at the heart of the debate was whether corporate law should address the interests of other stakeholders or whether shareholder primacy and the maximisation of their wealth should be the only issue.¹⁵⁰ Multiple theories and models on the nature of the company and corporate governance stem from the different schools of thought. The shareholder-stakeholder issue is still often debated in South Africa and cannot be viewed as settled. Developments in corporate governance jurisprudence in South Africa to include stakeholders other than shareholders are evident from the publication of the various *King reports*¹⁵¹ which paved the way for the highly anticipated *Companies Act*.¹⁵²

The development of corporate law and corporate governance jurisprudence has led to the recognition of the role of multiple stakeholders of a company with only one shareholder, but the full recognition of employees as stakeholders in a company is still a matter of debate in South Africa. In 1980 British law was changed to require that directors have regard "to the interests of the company's employees in general, as well as the interests of its members".¹⁵³

¹⁵⁰ Berle 1932 *Harv Law Rev* 1365-1372 and Dodd 1931-1932 *Harv Law Rev* 1145-1163 for the respective viewpoints on the shareholder-stakeholder debate.

¹⁵¹ The King Report on Corporate Governance 1994 (Institute of Directors *King Report I*), King Report on Corporate Governance for South Africa in 2002 (Institute of Directors *King Report II*) and King Report on Corporate Governance for South Africa in 2009 (Institute of Directors *King Report III*) (available from Institute of Directors www.iod.com).

¹⁵² See chapter 1 above for an introduction to the *Companies Act* 71 of 2008.

¹⁵³ Wedderburn 1993 *ILJ* (UK) 527.

Unfortunately, South African labour or company law, as yet, do not provide clarity as to the extent of the involvement and the level of participation of employees in corporate decision-making. Although labour law provides for the extensive protection of employees, the protection is limited, especially when it comes to employee participation in corporate decision-making. A relevant question (from a corporate law perspective) is should corporate law allow labour law to make inroads into with regards to employee participation? This question is especially relevant when due cognisance is taken of the level of employee participation in corporate decision-making, as well as the function of labour law and the theories and models of companies.¹⁵⁴

The purpose of this chapter is to investigate if, and how, contemporary South-African corporate law permits the interests of employees to be taken into account, and to provide an overview of the different functions and/or models that apply in both labour and corporate law.

The topic is a multi-dimensional one. However, the chapter will not investigate in detail the various provisions in the *Companies Act* with regard to how employees are accommodated and if they are accommodated differently from other stakeholders. Also, it will not look in detail at the duties of directors and how, or if, these duties have been changed by the introduction of the *Companies Act*. Finally, the chapter will not consider the different board structures and the possibilities for the participation of employees in these structures and, also will not address the issue of workplace forums and the collective bargaining framework in detail.¹⁵⁵

¹⁵⁴ See chapter 3 below for a detailed discussion on corporate law and employees.

¹⁵⁵ These matters are addressed in chapters 3-7 below.

2.2 Overlap between corporate and labour law

Even though developments in the coordination of labour and company law have taken place (in South Africa as elsewhere) they are still regarded as two distinct and separate worlds of legal thought, political reality,¹⁵⁶ fields of legal scholarship and regulatory policy.¹⁵⁷ Company law regulates the actions of companies in the market¹⁵⁸ and usually excludes labour law and employees.¹⁵⁹ Abram Chayes has observed that the concept of "corporation" not only has economic dimensions but also political, legal and social ramifications which extend beyond it:¹⁶⁰ however, these dimensions as "appropriate academic disciplines remain largely unconcerned" with each other.¹⁶¹

Some authors point out that corporate law, primarily, is about shareholders, the board of directors and the relationships between them, and, occasionally, it concerns itself with other creditors and bondholders.¹⁶² Corporate law courses only on rare occasions pause to consider the relationship between the corporation and worker because the "justification for insulating the concerns of workers from the attention of corporate law is that such concerns are the subject of other areas of the law, most prominently labour law and employment law".¹⁶³

The following is evident:

We infer from the teaching of both corporate governance theoreticians and legal scholars that debates on the regulation and conception of corporate governance within the framework of 'stakeholder-oriented vs. shareholder-oriented perspectives' or 'legal incorporation in company law and labour law vs. incorporation in company law or labour law' dichotomies

¹⁵⁶ Zumbansen 2006 *Ind J Global Legal Studies* 272.

¹⁵⁷ Mitchell, O'Donnell and Ramsay 2005 *Wis Int'l LJ* 417.

¹⁵⁸ Smit 2006 *TSAR* 152.

¹⁵⁹ Zumbansen 2006 *Ind J Global Legal Studies* 276.

¹⁶⁰ Zumbansen 2006 *Ind J Global Legal Studies* 277.

¹⁶¹ Zumbansen 2006 *Ind J Global Legal Studies* 277.

¹⁶² Greenfield 1998 *BC L Rev* 283.

¹⁶³ Greenfield 1998 *BC L Rev* 283.

mask a conflict concerning more fundamental representations of the world as they question the division of the world into an economic and a social sphere.¹⁶⁴

Smit's¹⁶⁵ discussion highlights important synergies that exist between the fields of labour and company law, as well as their different objectives, in order to address the issues of flexibility:

It appears that any labour market reforms will have to take account of developments and trends in economic and social spheres as well. In this regard it is argued that there are still old unresolved problems relating to the role and place of employees in company law that must first be reconsidered before the issue of greater flexibility can seriously be entertained.

There are some cross-cutting issues concerning company and labour law as far as the issue of flexibility and workers' aspirations are concerned. Many prescriptions relating to the organisation of a workplace and rights and duties and employment contracts have an impact on the prerogative of management. It should also be noted that there are generally limitations to the scope and effect of legal provisions and, accordingly, employee protection derived there-from. ...

Company law regulates the actions of companies in the market. Unfortunately, very little attention is bestowed on the interests of employees in company law, either nationally or internationally. As far as insolvency law is concerned, the position is not much different. There would thus seem to be a vacuum in research in this field, since it certainly cannot be argued that employees are not closely connected to the companies they work for and on which their livelihoods depend. Employees deserve to have more attention paid to their often precarious position. It should be evident that labour can only do so much and that other branches of the law, including company law, must address some of the new challenges facing markets.¹⁶⁶

Glynn¹⁶⁷ (in his discussion of the American position) adds that corporate law, in simplified terms, usually purports to serve two kinds of functions. First, it establishes the legal form of the firm and it also provides whether its attributes can be waived or not: these attributes include its legal personality, equity ownership structure, decisional structure, and limited liability.¹⁶⁸ Second, corporate law, potentially, addresses three sets of "value-reducing forms of opportunism" or agency problems: first, a conflict exists between

¹⁶⁴ Cochon 2011 <http://etui.org/research/publications>.

¹⁶⁵ Smit 2006 *TSAR* 152-153.

¹⁶⁶ Smit 2006 *TSAR* 152-153.

¹⁶⁷ Glynn 2009 *IJLLIR* 3-14.

¹⁶⁸ Glynn 2009 *IJLLIR* 6.

manager and shareholder interest; second, there is a conflict between the interests of controlling and non-controlling shareholders or shareholder groups interests; and third, there is a conflict between the interests of shareholders and of other stakeholders who may be viewed as outside the firm, including employees, creditors, customers, and society as a whole.¹⁶⁹

Although the view above is accurate, scholars and lawyers in labour law have expressed an interest in the field of company law and *vice versa*. Thus, it is clear that both corporate law and labour law provide certain fundamental starting points for analysis: each of which shapes the regulatory scope of the other. Corporate law, for example, bestows legal personality¹⁷⁰ on business entities and allows such entities to enter into bilateral employment contracts with workers.¹⁷¹ Labour law, at the same time, describes the corporation's actions in establishing, conducting, and terminating such employment relationships. Generally speaking, the "separation" entails that the concerns and problems associated with corporate governance are regarded as separate from those problems associated with employment regulation.¹⁷² It is evident that corporate and labour law affect each other, especially with regard to corporate governance and labour management, in that "labour law structures and limits what management can do in its relations with employees".¹⁷³ Glynn¹⁷⁴ points out that the interests of other constituencies are, like employees, relegated to the margins in corporate-law doctrine. Especially if we consider how narrowly these concepts are reflected in the language used in corporate and employment law: evident from how firm "ownership" interests are described, as well as from how the view of what constitutes corporate "internal affairs" is limited. There is a tendency to characterise employment law as concerning the relationships between a firm and its employees, not as between employees and other stakeholders in the firm (for

¹⁶⁹ Glynn 2009 *IJCLIR* 6.

¹⁷⁰ See *Salomon v Salomon and Co Ltd* 1897 AC 22 (HL) discussed in chapter 1 regarding separate legal personality.

¹⁷¹ Mitchell, O'Donnell and Ramsay 2005 *Wis Int'l LJ* 417.

¹⁷² Mitchell, O'Donnell and Ramsay 2005 *Wis Int'l LJ* 417.

¹⁷³ Mitchell, O'Donnell and Ramsay 2005 *Wis Int'l LJ* 475.

¹⁷⁴ Glynn 2009 *IJCLIR* 6.

example, managers and shareholders).¹⁷⁵ When it comes to employee participation in corporate decision-making cognisance should be taken of both labour and company law principles. In other words, a multi-disciplinary approach is preferable when researching the role, status and rights and obligations of employees in the corporation; thus, it can be said that "while labour law and corporate governance could once have been thought of as discrete areas for analysis, it is clear that is no longer the case" as the relationship between them "has become both complex and paradoxical".¹⁷⁶

2.3 The different "worlds" of company and labour law

2.3.1 The functions of labour law

Labour law is a concept that is difficult to define: no comprehensive or generally accepted definition exists. The notion of "labour law" thus needs explanation.¹⁷⁷ *What is labour law for?*, is a question with both a past and a future.¹⁷⁸ In some contexts it is understood to refer merely to collective labour relations, in others it covers both individual and collective labour law. The terminological difference "is not only of semantic interest", but also indicates different approaches to labour law.¹⁷⁹ Labour law differs from other legal fields because, often, it is

promulgated through 'non-legal' (ie political, social, and cultural) processes, expressed in the form of 'non-legal' (ie non-state) norms and administered through 'non-legal' processes (ie those not normally employed by conventional courts).¹⁸⁰

In its actual function in the workplace, labour law does not challenge the "hegemonic claims of state law and legal institutions", but it provides alternative approaches to law

¹⁷⁵ Glynn 2009 *IJCLIR* 6.

¹⁷⁶ Deakin "Workers, Finance and Democracy" 79.

¹⁷⁷ Davidov and Langille *Labour Law* 70.

¹⁷⁸ Davidov and Langille *Labour Law* 1.

¹⁷⁹ Davidov and Langille *Labour Law* 70.

¹⁸⁰ Davidov and Langille *Labour Law* 36-37.

such as legal pluralism, reflexive law, and critical theory.¹⁸¹ Seen from this perspective, labour law is neither "non-law nor a mutant form of law but law incarnate", and constitutes an experiment in social ordering that reveals the true nature of the legal system in general.¹⁸²

The principal purpose of labour law, however, "is to regulate, to support and to restrain the power of management and the power of organised labour".¹⁸³ This argument is based on the viewpoint that labour law acts as a countervailing force: counteracting the inequality of bargaining power that can be found in the employer-employee relationship.¹⁸⁴ In their original meanings the words "management" and "labour" do not refer to persons but activities,¹⁸⁵ which included the following: planning and regulating production, distributing and co-ordinating capital and labour on the one hand, and producing and distributing on the other.¹⁸⁶ Today, though, "management" and "labour" are abstractions and are used to denote, not the activities, but the people who use them. "Management" may be a private employer, company, firm, association of employers or an association of associations, public corporation, local authority or the state (government).¹⁸⁷ The word "management" can be used to identify the person or body who has the power to define policy and to make rules and decisions, and can be a production or factory manager, or the foreman of an assembly line, or the head of department, or the board of directors.¹⁸⁸ These persons command their subordinates through the instructions they give as managers. "Labour", on the other hand, denotes the trade unions with which management negotiates, the shop stewards, and the subordinates who are members of trade unions.¹⁸⁹ A trade union is "an association of employees created principally to protect and advance the interests of its members (workers), through collective action, and to regulate reactions

¹⁸¹ Davidov and Langille *Labour Law* 36-37.

¹⁸² Davidov and Langille *Labour Law* 36-37.

¹⁸³ Kahn-Freund *Labour* 8; Davies and Freedland *Kahn-Freund* 15.

¹⁸⁴ Kahn-Freund *Labour* 8.

¹⁸⁵ Davies and Freedland *Kahn-Freund* 15.

¹⁸⁶ Davies and Freedland *Kahn-Freund* 15.

¹⁸⁷ Davies and Freedland *Kahn-Freund* 15.

¹⁸⁸ Davies and Freedland *Kahn-Freund* 15.

¹⁸⁹ Davies and Freedland *Kahn-Freund* 15-16.

between employees and employers".¹⁹⁰ The primary function of these unions is to negotiate collective agreements on behalf of the members with employers. These negotiations cover issues such as wages and work conditions, such as working hours, safety at work and benefits.

In order to trace the distribution of managerial power, society is tasked with a difficult assignment. The task is not easier if the means of production are publicly owned rather than privately owned.¹⁹¹ It is also difficult to determine on the side of labour where power lies.¹⁹² It is important to look at the function(s) of labour law to see whether the widely formulated purpose is (still) met or not. It must be noted that concepts, such as employer and employee, and the boundaries they signify have a purpose and it is "our task to understand and define this purpose, indeed the *goal*, and thus the very idea, of labour law – and to develop the best *means* (conceptual boundaries and other legal techniques) to achieve it".¹⁹³ Langille,¹⁹⁴ a Canadian scholar, notes that the objective of labour law is "justice" in employment and productive working relations which will not otherwise be obtained if workers in the labour market are "at a bargaining power disadvantage in that contracting process".¹⁹⁵ Labour law responds to the basic problem in two ways: first, it secures justice by rewriting the substantive deal (mostly by statute) between workers and employers through providing labour standards and, thus, providing for maximum hours, vacations, minimum wages, health and safety regulations, and so on.¹⁹⁶ The second is "responding to the perceived problem ... not via the creation of substantive entitlements,

¹⁹⁰ Barker and Holtzhausen *South African Labour Glossary* 153. S 213 of the *Labour Relations Act* 66 of 1995 (LRA) define a trade union as follows: "A trade union is nothing other than an association of employees whose principal purpose is to regulate relations between employees and employers, including employers' organisations".

¹⁹¹ Davies and Freedland *Kahn-Freund* 17.

¹⁹² Davies and Freedland *Kahn-Freund* 17.

¹⁹³ Davidov and Langille *Boundaries* 10.

¹⁹⁴ Langille 2005 *EJIL* 428-429.

¹⁹⁵ Langille 2005 *EJIL* 428-429.

¹⁹⁶ Langille 2005 *EJIL* 428-429.

but rather by way of procedural protection":¹⁹⁷ thus protecting rights to a fair bargaining process.¹⁹⁸

There are two main philosophical positions concerning the function of labour law: the market and protective views.¹⁹⁹ The market view is based upon the principle that government intervention plays a role in the attainment of prosperity and economic growth, but excessive government intervention leads to economic decline if market forces are not left to attain economic growth and prosperity. Thus, the function of labour law is not to interfere in market forces but to assist them to ensure economic growth and the well-being of employees and employers.²⁰⁰ When a successful partnership exists between employers and employees they not only have a mutual understanding of one another's needs but they also have the shared goal of developing a winning business.²⁰¹ In terms of the protective view, an imbalance of power places the employee at a disadvantage when it comes to bargaining power and resources and, due to this imbalance, the function of labour law is to protect employees and assist them in redressing the imbalance.²⁰² Thus, the overriding concern of labour law is the protection of employment and employees.²⁰³ Labour law seeks to ensure the protection of employees, but also contributes to organising the production of goods or services in firms: in spelling out the rules that govern the master-servant relationship in terms of the individual employment contract, it is also concerned with the centre of power and is governed by labour relations.²⁰⁴

In addressing the principle "labour is not a commodity" labour law faces a paradox: it regulates employment relationships for two principal purposes, namely, "to ensure that they function successfully as market transactions, and, at the same time, to protect

¹⁹⁷ Langille 2005 *EJIL* 428-429.

¹⁹⁸ Langille 2005 *EJIL* 428-429.

¹⁹⁹ Creighton and Stewart *Labour Law* 2-3.

²⁰⁰ Creighton and Stewart *Labour Law* 5-6.

²⁰¹ Wedderburn 2002 *ILJ* (UK) 99, where he refers to *The Partnership at Work Fund: Open for Applications* (DTI 2002 Application Form).

²⁰² Creighton and Stewart *Labour Law* 2-3.

²⁰³ Zumbansen 2006 *Ind J Global Legal Studies* 277.

²⁰⁴ Morin 2005 *Int'l Lab Rev* 7.

workers against the economic logic of the commodification of labour".²⁰⁵ "Labour is not a commodity"²⁰⁶ is a widely recognised international labour principle as proclaimed by the International Labour Organisation (ILO). Despite radical, socialist and traditional economists endorsing this principle, it presents a paradox because it "asserts as the truth what seems to be false".²⁰⁷ In this regard, Collins²⁰⁸ states:

Employers buy labour rather like other commodities. The owner of a factory purchases the premises, raw materials, machinery, and labour, and combines these factors of production to produce goods. A business does not own the worker in the same way as it owns the plant, machinery, and raw materials. As a separate legal person, the worker is free to take a job or not, subject of course to what Marx called 'the dull compulsion of economic necessity'. Without that freedom, workers would be slaves. Yet the employer certainly buys or hires the worker's labour for a period of time or for a piece of work to be completed. Workers sell their labour power - their time, effort, and skill - in return for a wage. As with other market transactions dealing with commodities, the legal expression of this relation between an employer and employee is a type of contract. The contract of employment, like other contracts, confers legally enforceable rights and obligations. It seems that labour is in fact regarded much like a commodity in a market society and its laws.

Here labour may still be regarded as a "commodity", but it does not necessarily have to be the case. The "wage-work bargain" is an unequal one. For the business the position is as explained above, but for the worker the unequal nature of the bargain affects his status and livelihood. The inequality exists because the employer can accumulate material and human resources, whereas the individual employee mostly has very little bargaining

²⁰⁵ Collins *Employment Law* 3.

²⁰⁶ O'Higgins 1997 *ILJ* (UK) 230 is of the view that three meanings can be attached to the principle "labour is not a commodity": "As used by Ingram, it meant that pricing of labour could not be left solely to the operation of the labour market. The level of wages had to be such as to provide a reasonable standard of living for a worker and his or her family. The phrase, however, has other meanings, as in *Nokes v Doncaster Collieries*. It also means that a worker cannot be transferred from one employer to another without the worker's consent. In the history of the ILO it has been given a third significant meaning and explains why the ILO has dedicated so much effort to the outlawing of fee-charging employment agencies. It has also been used in the ILO as a justification for an ILO Convention outlawing illegal manpower trafficking in migrant labour" (O'Higgins 1997 *ILJ* (UK) 230). See also Langille 1998 *ILJ* 1011, where he points out that the "answer which 'old' labour gave to the proponents of market ordering was 'labour is not a commodity'" and that the "answer which 'new' labour law must give in a globalized economy is that it also follows that 'labour law is not a commodity'".

²⁰⁷ Collins *Employment Law* 3.

²⁰⁸ Collins *Employment Law* 3.

power.²⁰⁹ In essence labour law is about power-relations: first it is concerned with the relations between the employer on the one hand and trade unions on the other, and second, it is concerned with the decision-making power of the employer in the enterprise, which is met by the employees' countervailing power.²¹⁰ The main goal of labour, it appears, "always has been to compensate [for] the inequality of the bargaining power".²¹¹ The language of a "contract" between an employer and an employee is often used, although the individual relationship between an employer and an employee is based not on contractual equality (or proportionality) of bargaining power, but on subordination.²¹² The contract of employment tends to "re-establish" (and not destroy) the status between an employer and an employee as it specifies the rights of the worker and the obligations of the employer, while the rights of the employer and the obligations of the worker remain at least in principle "open", "diffuse" or "status-like".²¹³ Four insights (analysed by Sinzheimer and which are relevant in the South African context) have become the driving force for labour law regulation.

These insights are summarised as follows:

First, the object of transaction in an employment relationship is not a commodity but the human being as such. Or as, later on, the Philadelphia Declaration of the International Labour Organization (ILO) listed as its first because it makes perfectly clear that the labour market is not a market as any other, and therefore cannot follow the same rules as other markets do. Second, personal dependency is the basic problem of labour law. Third, human dignity may be endangered by the employment relationship and, therefore, one of the main goals of labour law is the fight for human dignity. This already at a very early stage expresses the goal of the ILO's present decent work agenda. It should be stressed that the three above-mentioned factors – labour not being a commodity, personal dependency as a characteristic feature of the employment relationship, and the endangering of human dignity – are closely linked to each other. They are the three core aspects of the same phenomenon. And they explain why the employment contract is not just a contract among others: it establishes a relationship *sui generis*. Fourth, Sinzheimer stressed that labour law cannot be perceived as merely law for the employment relationship but has to cover all the needs and risks which have to be met in an employee's life, including the law on creation of job

²⁰⁹ Collins *Employment Law* 3.

²¹⁰ Collins *Employment Law* 4.

²¹¹ Davidov and Langille *Labour Law* 71.

²¹² Wedderburn 1993 *ILJ* (UK) 523.

²¹³ Wedderburn 1993 *ILJ* (UK) 523.

opportunities. In other words: Sinzheimer understood social security law in its broadest sense as also being an inseparable part of labour law.²¹⁴

In *Naptosa v Minister of Education, Western Cape*²¹⁵ the court observed that labour law is fundamentally an important as well as extremely sensitive subject, which is based upon a political and economic compromise between organised labour and the employers of labour. These parties are very powerful socio-economic forces which makes the balance between the two forces a delicate one. The court noted – in the words of McIntyre J - when it comes to their experience with labour relations, as a general rule, that courts are not the best arbiters of the disputes which arise from time to time... . Judges do not always have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems.²¹⁶ The court then observed the following:

The words of McIntyre J²¹⁷ (reported at (1987) 38 DLR (4th) 161 at 232) are peculiarly apt in the case of judicial interference with matters which in labour law are regarded as matters of mutual interest; but they are also true, I think, where a court is, in a highly regulated environment, asked to fashion a remedy which the legislature has not seen fit to provide.²¹⁸

²¹⁴ Davidov and Langille *Labour Law* 71. Langille 2005 *EJIL* 429 points out that: "The ethic of substantive labour law is strict paternalism and the results are standards imposed upon the parties whether they like it or not. The ethic of procedural labour law is freedom of contract and self-determination – what people call industrial democracy – and its results are basic rights which, it is believed, lead to better, but self-determined, outcomes. These are two different approaches to securing the overarching goal of justice in employment relations. Taken together, they and the contractual approach they respond to, as joined by the narrative just outlined, are labour law - i.e., what makes labour law, labour law, and not family law, or tax law, or anything else for that matter".

²¹⁵ *Naptosa v Minister of Education, Western Cape* 2001 *ILJ* 889 (C) 897.

²¹⁶ *Naptosa v Minister of Education, Western Cape* 2001 *ILJ* 889 (C) 897.

²¹⁷ McIntyre J in *Re Public Service Employee Relations Act*, expressed the following view: "Labour law ... is a fundamentally important as well as extremely sensitive subject. It is based upon a political and economic compromise between organised labour – a very powerful socio-economic force – on the one hand, and the employers of labour – an equally powerful socio-economic force – on the other. The balance between the two forces is delicate ... Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time ... Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems".

²¹⁸ *Naptosa v Minister of Education, Western Cape* 2001 *ILJ* 889 (C) 897.

2.3.2 Perspectives on South African labour law

2.3.2.1 Who is an employee?

For purposes of labour protection as well as the rights granted in terms of company law it is important to note that the definition of an employee is central to the discussion. In order to extend protection to as many persons as possible labour legislation has expanded the definition of "employee" beyond the common law definition of someone who places his or her labour potential under the control of another person.

In terms of section 213 of the LRA, an employee is defined as:

(a) any person, excluding an independent contractor, who works for any person or for the State and who receives, or is entitled to receive, any remuneration;

(b) any other person who in any manner assists in carrying on or conducting the business of the employer.

The definitions of "employee" in the LRA, as well as the *Basic Conditions of Employment Act* 75 of 1997 (BCEA); the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993; (COIDA), the *Unemployment Insurance Act* 63 of 2001 (UIA); and the *Skills Development Act* 97 of 1998 (SDA) expressly exclude an independent contractor from the definition of "employee". South African law has always distinguished between employees and independent contractors: an important distinction because the legal rights of each category vary considerably.

Generally, employees are protected by labour law, whereas independent contractors are not.

A contract of mandate, which involves an independent contractor,²¹⁹ for example, is specifically excluded from doctrines such as that of vicarious liability.²²⁰ In 2002 the LRA²²¹ and the BCEA²²² were amended to include the rebuttable presumption of employment in order to assist persons who claim to be employees rather than independent contractors. These factors are:

- (i) the manner in which the person works is subject to the control or direction of another person;
- (ii) the person's hours of work are subject to the control or direction of another person;
- (iii) in the case of a person who works for an organisation, the person forms part of that organisation;
- (iv) the person has worked for that person for an average of at least 40 hours per month over the last three months;
- (v) the person is economically dependent on the other person for whom he or she works or renders services;

²¹⁹ See *Kylie v CCMA* 2010 7 BLLR 705 (LAC): the court determined that an employment relationship existed between a sex worker and her employer, even if the contract of employment was void for reasons of illegality. In *Ndikumdavyi v Valkenberg Hospital* 2012 8 BLLR 795 (LC) the applicant was a Burundian refugee, trained and qualified in South Africa. The court in *Ndikumdavyi* found it necessary to indicate that it is necessary to distinguish that matter from *Kylie*, in that the court in *Kylie* was concerned with the rendering of illegal services in what the law regards as a criminal activity whereas in the latter matter the applicant was unable to continue the rendering of legal services because a permanent appointment was prohibited by statute (para 24). See also Smit and Botha 2011 TSAR 815-829, where they discuss whether or not members of parliament are employees and employers for purposes of the *Protected Disclosures Act* 26 of 2000 (PDA).

²²⁰ See *Langley Fox Building Partnership (Pty) Ltd v De Valance* 1991 1 SA 1 (A) 8; *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A), the court listed factors that are indicative of an employment relationship; as well as *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 17 (SCA) 23. *Niselow v Liberty Life Association of Africa Ltd* 1998 ILJ 752 (SCA) dealt with the definition of "employee" in terms of the *Labour Relations Act* 28 of 1956. The court in the *Niselow* case held (753I) that an employee at common law undertakes to render a personal service to an employer. The court further held that regardless of the second part of the definition ("... any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer") it did not bring the individual in that case within the scope of the definition. The court based this decision on distinguishing a contract of work and a contract of service. Consequently, the appellant in that case, who was an agent contracted to canvass insurance business for the respondent, was carrying on and conducting his own business rather than assisting in the carrying on or conducting of the business of the respondent. In the labour appeal court the court noted, however, that the supreme court of appeal "did not have the benefit of argument on the second part of the definition of 'employee'". See also Smit and Botha 2011 TSAR 815-829 in this regard.

²²¹ S 200A of the LRA.

²²² S 83A of the BCEA.

- (vi) the person is provided with tools of trade or work equipment by the other person; or
- (vii) the person works for or renders service to only one person.

However, what Acting Judge Van Niekerk stated in this regard in *Discovery Health Limited v CCMA* should be noted:²²³

The protection against unfair labour practices established by s 23(1) of the Constitution is *not dependent on a contract of employment*. Protection extends potentially to other contracts, relationships and arrangements in terms of [which] a person performs work or provides personal services to another. The line between performing work 'akin to employment' and the provision of services as part of a business is a matter regulated by the definition of 'employee' in s 213 of the LRA. (own emphasis)

2.3.2.2 *The libertarian and social justice perspective*

The purpose of the LRA is expressly set out in the Act, namely, to advance economic development, social justice, labour peace and the democratisation of the workplace through the promotion of: (i) orderly collective bargaining,²²⁴ (ii) collective bargaining at sectoral level, (iii) employee participation in decision-making in the workplace and (iv) the effective resolution of labour disputes.²²⁵ It is submitted, the function of South African labour law is firstly to protect and promote the interests of employees in order to address the imbalance between them and employers. Before the enactment of the *Interim Constitution of the Republic of South Africa* 200 of 1993 and the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) there was a serious debate regarding whether labour rights should or should not be provided for in the Bill of Rights in the *Constitution*. In this regard Olivier²²⁶ points out:

²²³ *Discovery Health Limited v CCMA* 2008 ILJ 1480 (LC) 1494 para 41.

²²⁴ See chapter 5 below for a detailed discussion on collective bargaining.

²²⁵ S 1 of the LRA.

²²⁶ Olivier 1993 *TSAR* 657.

It is sometimes argued that labour rights are so-called second generation or socio-economic rights and that they place a duty upon the state to act in a positive manner. They have to be contrasted with rights that protect an individual against undue interference by the state. For this reason, it is said, labour rights should not be contained in a bill of rights, since the courts cannot enforce them without intruding upon the terrain of the legislature and/or the executive branch of government. The truth, however, is that some labour rights, such as the right to associate freely and the right to strike, do not essentially differ from other classical human rights and may be enforced in like manner.

As noted earlier in discussing the market view of labour law, the government, or the state, is an important role player involved in labour relations. The concept of "state corporatism" in the context of labour law becomes relevant: it represents "the growth of formalised links between the state and autonomous economic groups", such as labour and capital, ranging from consultation to more formal negotiation initiatives over economic outcomes.²²⁷ The state plays an interventionist role in economic management, on the one hand, by limiting the autonomy of collective parties and, on the other, by granting access to government policy-making to representative institutions of labour and capital.²²⁸ Government "takes measures to protect the individual employee against possible abuses by the employer through protective labour legislation" and "may also try to develop rules to regulate to a certain extent the power relations between capital and labour with a view to protecting society as a whole".²²⁹ There are two broad perspectives on the extent to which the state should intervene in the labour market:²³⁰ the libertarian and social justice perspectives.

2.3.2.2.1 The libertarian perspective

The libertarian, or free-market model, regards the contract of employment and the accompanying "individual bargain, which it represents as the only legitimate mechanism to regulate the employment relationship".²³¹ Proponents of this view treat labour legislation "with the disdain normally reserved for an alien plant species, an unwelcome intruder

²²⁷ Deakin and Morris *Labour Law* 27.

²²⁸ Deakin and Morris *Labour Law* 27.

²²⁹ Blanpain 1974 *ILJ* (UK) 5-6.

²³⁰ Van Niekerk and Smit (eds) *Law@work* 6.

²³¹ Van Niekerk and Smit (eds) *Law@work* 6-7.

invading the indigenous landscape of the common law and imposing unwarranted regulation on the freedom to contract on equal terms in the marketplace".²³² It is argued that statutory regulation in the labour market is inconsistent with what is referred to as a "right to work under any conditions":²³³ that laws intended for the protection of employees have the unintended consequence of protecting the employed at the expense of the unemployed, and thus legitimate protection for employees is afforded by the "effective and adequate common law and the resultant sellers' market in which employers will be required to compete for labour by offering ever-improving" terms and conditions of employment.²³⁴ The proponents of this view argue that when labour legislation is abolished it is beneficial for employees and the broader society. A case for deregulation has been put in South Africa too, where it has been argued that the individual contract of employment, as opposed to any form of collective agreement, is the best means to ensure the greatest possible degree of flexibility and competitiveness.²³⁵

It is not clear that the denial or violation of core labour standards will result in a comparative advantage; rather research indicates that poor labour conditions "often signal low productivity or are one element of a package of national characteristics that discourage foreign direct investment (FDI) inflows or inhibit export performance".²³⁶ Labour economics aside, a number of external limitations on the nature and extent of any deregulation of the South African labour market are present. First, as a member of the ILO, South Africa has ratified all of the ILO's core conventions and, thus, incurs international law obligations to uphold the rights to freedom of association, to promote collective bargaining, to ensure equality at work, and to eliminate forced labour and child labour. The labour law reforms that were introduced in 1995 ensured that South Africa met these obligations. The *Declaration on Fundamental Principles and Rights at Work*, 1998 obliges member states

²³² Van Niekerk and Smit (eds) *Law@work* 6-7.

²³³ Van Niekerk and Smit (eds) *Law@work* 6-7.

²³⁴ Van Niekerk and Smit (eds) *Law@work* 7.

²³⁵ Van Niekerk and Smit (eds) *Law@work* 7.

²³⁶ Van Niekerk and Smit (eds) *Law@work* 8.

(including South Africa) to observe the principles that underlie these conventions.²³⁷ Second, the *Constitution* recognises core labour rights: the Preamble describes the aim of the *Constitution* to be to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".²³⁸

In *Minister of Finance v Van Heerden*²³⁹ the court in this regard stated:

Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.

In particular, the *Constitution* provides for the right to fair labour practices as a fundamental right: by implication "social justice is a necessary precondition for creating a durable economy and society, and places obvious limitations on the policy choices open to those who seek to regulate the labour market".²⁴⁰ Labour market policy cannot be only a matter of economics because the *Constitution* needs to be taken into account when choices are made and the limitation of constitutional rights is considered.²⁴¹ A social justice obligation is also provided for in the LRA and the BCEA.

²³⁷ In terms of the ILO *Declaration on Fundamental Principles and Rights at Work*, 1998 the members have a constitutional obligation to promote and realise four "core" or fundamental rights. These rights are freedom of association and free collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination. These rights must be promoted even though the relevant conventions were not ratified by member states. South Africa, however, ratified all the conventions relating to these four "core" rights. These conventions include *Freedom of Association and the Right to Organise Convention* (1948) (No 87); *Right to Organise and Collective Bargaining Convention* (1949) (No 98); *Forced Labour Convention* (1930) (No 29); *Abolition of Forced Labour Convention* (1957) (No 105); *Minimum Age Convention* (1973) (No 138); *Worst Forms of Child Labour Convention* (1999) (No 184); *Equal Remuneration Convention* (1951) (No 100); and *Discrimination (Employment And Occupation) Convention* (1958) (No 111). Van Niekerk and Smit (eds) *Law@work* 8.

²³⁸ S 1 of the *Constitution*. See for example *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 1, where it was stated that: "[t]he people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble of the Constitution records this commitment".

²³⁹ *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) para 25.

²⁴⁰ Van Niekerk and Smit (eds) *Law@work* 9.

²⁴¹ Van Niekerk and Smit (eds) *Law@work* 9.

2.3.2.2.2 A social justice perspective

According to the social justice perspective, trade unions are regarded as primary vehicles through which social justice is achieved.²⁴² This notion is based upon Sir Otto Kahn-Freund's conception of labour law, elaborated in the 1950s and 60s as a means of counteracting the inequality of bargaining power between employers and employees (see the discussion above). According to Kahn-Freund, an equilibrium in labour relations can be best achieved and maintained through voluntary collective bargaining. The law plays only a secondary role as "it regulates, supports and constrains the power of management and organised labour".²⁴³ The interests of parties and their respective power drive the process of bargaining and the outcomes of the process. A more recent social justice perspective not only would "acknowledge collective bargaining as an important means to define and enforce protection for workers",²⁴⁴ but also "recognise rights as a complementary and perhaps more significant medium to promote social justice in the workplace".²⁴⁵ The *Constitution* (as noted above), as well as the enabling legislation such as the LRA, BCEA and *Employment Equity Act* (EEA),²⁴⁶ play an important role not only in the protection of the right to fair labour practices but also with regard to rights to freedom of association, freedom of expression, privacy and equality. Statutory rights, their nature and scope, and how they are implemented and enforced are important in the protection of workers' rights, but are not absolute and often need to be balanced against the competing rights of employers and third parties.²⁴⁷ Dispute resolution institutions, such as the Commission for Conciliation, Mediation and Arbitration (CCMA) and labour courts (as well as other courts), play a fundamental role as labour rights are enforced, assessed, and, if necessary, balanced with other competing rights.²⁴⁸ The acknowledgement of human rights, including fundamental labour rights, is an important corporate responsibility in South Africa, as well

²⁴² Van Niekerk and Smit (eds) *Law@work* 9.

²⁴³ See Davies and Freedland *Kahn-Freund* 15 as well as Van Niekerk and Smit (eds) *Law@work* 9.

²⁴⁴ Van Niekerk and Smit (eds) *Law@work* 10.

²⁴⁵ Van Niekerk and Smit (eds) *Law@work* 10.

²⁴⁶ *Employment Equity Act* 55 of 1998.

²⁴⁷ Van Niekerk and Smit (eds) *Law@work* 10.

²⁴⁸ Van Niekerk and Smit (eds) *Law@work* 10.

as for multi-national companies generally. Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights; "especially in host countries that have little in the way of labour market regulation, or where to attract investment or for want of resources, minimum labour standards are not enforced".²⁴⁹ These developments may serve to promote collective bargaining (to the extent that basic labour rights include the rights to organise and to bargain collectively), especially in those environments where the legislative environment remains hostile.²⁵⁰

It can be said that labour law originated from the focus on employment relations in order to regulate the conditions of tangible labour and to extend protection to workers' physical bodies. It evolved to protect "employment" and to organise workers collectively within the enterprise (which is the economic locus of decision-making) to the point where workers' interests are taken into account and workers have input into decision-making.²⁵¹

It is submitted that regardless of the view taken of the true function of labour law, the right of employees to participate in decisions affecting them and/or the enterprise today, is included under the purpose and function of labour laws.

2.3.2.3 *The employer (managerial) prerogative*

The theory of the normative field of law proposes that "the law comprises of a multitude of – often conflicting - legal norms, and therefore forms all but a consistent and hierarchical legal 'system'".²⁵² Within the multitude of legal norms a number of basic normative patterns can be distinguished which reflect social as well as moral concepts that are central to human relations and society at large.²⁵³ In the normative field of labour law "the market functional pattern (a composite pattern representing normative conceptions central to the

²⁴⁹ Van Niekerk and Smit (eds) *Law@work* 10.

²⁵⁰ Van Niekerk and Smit (eds) *Law@work* 10. See discussion in chapter 3 below.

²⁵¹ Morin 2005 *Int'l Lab Rev* 11.

²⁵² Rönmar 2004 *Int J Hum Resource Man* 455.

²⁵³ Rönmar 2004 *Int J Hum Resource Man* 455.

functioning of the market economy) can be divided into two different normative patterns, *the managerial prerogative and freedom of contract*".²⁵⁴

The managerial prerogative has its foundation in the right to property and the proprietor's right of disposition. It is contrasted with protection of the established position, "manifest as *employment protection*, [secures] the continued employment of those already employed (that is those who have already established a position in the company and in the labour market)".²⁵⁵

The managerial prerogative:²⁵⁶

signifies the power of the employer to regulate the issues pertaining to the organization and function of the undertaking aiming to attain its goals, and more precisely, to determine the kind, the place, the manner, and the time of labour provision by the worker specifying in this way his labour performance.²⁵⁷

In *BTR Dunlop Ltd v National Union of Metalworkers (2)*²⁵⁸ the court stated: "the right to trade includes the right to manage that business, often referred to as the managerial prerogative".²⁵⁹ The decision-making power of employers (and thus corporations who are employers) is upheld in the free market economy by four notions:

- (i) the right to property, which enables the owner to dispose of his property as he wishes in order to obtain benefit from it;
- (ii) freedom of commerce and industry, where every citizen obtains the freedom to engage in commerce, profession, craft or industry;
- (iii) freedom of association, which enables an individual to combine his resources in a trade or industry with that of others and form a corporation in order to share profits; and

²⁵⁴ Rönömar 2004 *Int J Hum Resource Man* 455.

²⁵⁵ Rönömar 2004 *Int J Hum Resource Man* 455. Original emphasis.

²⁵⁶ The managerial prerogative is discussed again in chapter 4 and below to show how it impacts on employee voice and participation in decision-making.

²⁵⁷ Papadimitriou 2009 *Comp Lab L & Pol'y J* 273.

²⁵⁸ *BTR Dunlop Ltd v National Union of Metalworkers (2)* 1989 10 *ILJ* 701 (IC).

²⁵⁹ *BTR Dunlop Ltd v National Union of Metalworkers (2)* 1989 10 *ILJ* 701 (IC) 705C.

- (iv) obtaining power over people, where a worker has the freedom to enter into an individual labour contract with an employer he selected and where the employer obtains the power to command the employee to obey.²⁶⁰

In terms of these notions the power to manage the enterprise belongs to the employer. In this context of the managerial prerogative:

[t]he law gives the employer the right to manage the enterprise. He can tell the employees what they must and must not do, and he can say what will happen to them if they disobey. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him. ... But, even given these constraints, he still has a wide managerial discretion. He can decide which production line the employees should work on; whether they should take their tea break at ten or ten fifteen; when they may go on leave; and countless other matters besides. He can also decide what will happen to the employees if they do not work properly, if they go to tea early and so on. In short, it is he who within the limits referred to, lays down the norms and standards of the enterprise. This – at least as far as the law is concerned – is what 'managerial prerogative' entails, no more and no less.²⁶¹

The term "prerogative" refers to the right to make decisions regarding the aims of the organisation as well as the ways in which the organisation will achieve these aims.²⁶²

These decisions can be divided into two broad categories:

The first relates to decisions about the human resources utilised by the organisation. Typically, but not necessarily, organisations will make use of employees to achieve their aims. Decisions will have to be taken as to the number and types of employees needed, their terms and conditions of employment, the termination of their employment, where and when and how they do their work, and the supervision of their work.

The other category of decisions can be described as decisions of an 'economic' or 'business' nature. These include decisions relating to the acquisition and/use of physical assets needed by the organisation and decisions regarding the aims of the organisation, the products it produces or the services it provides.²⁶³

²⁶⁰ Blanpain 1974 *ILJ* (UK) 6.

²⁶¹ Brassey *et al* *New Labour Law* 74.

²⁶² Strydom 1999 *SA Merc LJ* (part 1) 42.

²⁶³ Strydom 1999 *SA Merc LJ* (part 1) 42.

The managerial prerogative is regarded seen as being of special importance when dealing with decisions about the human resources utilised by the organisation, because it is linked to the employer's ability to control the activities of employees in the workplace.²⁶⁴

2.3.2.4 Principles of fairness

The *Constitution* (as pointed out earlier), provides that everyone has a right to fair labour practice.²⁶⁵ The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town*²⁶⁶ held:

Our Constitution is unique in constitutionalizing the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is not capable of precise definition. This problem is compounded by the tension between the interests of the workers and the interest of employers that is inherent in labour relations. Indeed what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.²⁶⁷

This fundamental right extends not only to employees but also to employers. With reference to fairness, the Constitutional Court (in *National Education Health & Allied Workers Union v University of Cape Town*)²⁶⁸ further:

Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organizations as the case may be, the Constitution says so explicitly. If the rights in s 23(1) were to be guaranteed to workers only, the Constitution should have said so. The basic flaw in the applicant's submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must apply either to all employers or none. It should make no difference whether they are natural or juristic persons.

²⁶⁴ Strydom 1999 *SA Merc LJ* (part 1) 42.

²⁶⁵ S 23(1)(a) of the *Constitution*.

²⁶⁶ *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 *ILJ* 95 (CC).

²⁶⁷ *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 *ILJ* 95 (CC) para 33.

²⁶⁸ *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 *ILJ* 95 (CC) para 39.

It is clear that "fairness" is an underlying principle that is to be applied in labour law. The LRA, for example, provides for the protection of employees against unfair labour practices and unfair dismissal.

Section 186(2) of the LRA contains a definition of an unfair labour practice;²⁶⁹ section 186(1) contains the definition of dismissal. Section 188(1) of the LRA provides that if a dismissal is not automatically unfair, it is unfair if the employer fails to prove substantive fairness (that the reason for dismissal is a fair reason related to the employee's conduct or capacity, or based on the employer's operational requirements) and procedural fairness (that the dismissal was effected in accordance with a fair procedure). Section 187 of the LRA provides the category of "automatically unfair dismissals". The section lists a number of reasons for dismissal, if established, that mean that the dismissal of the employee is unfair simply by virtue of the reason for the dismissal. In terms of section 187 it is not open to the employer to justify its decision to dismiss the employee (with limited exceptions relating to the inherent requirements of a job and the employee reaching the agreed or normal retirement age).

²⁶⁹ In *National Entitled Workers' Union v CCMA* 2003 24 ILJ 2335 (LC) 2339 the court explained that the concept "unfair labour practice" recognises the rightful place of equity and fairness in the workplace and in particular that what is lawful may be unfair. The court refers to Poolman *Principles of Unfair Labour Practice* 11 in which he summarises the strength and nature of the concept. He says: "The concept 'unfair labour practice' is an expression of the consciousness of modern society of the value of the rights, welfare, security and dignity of the individual and groups of individuals in labour practices. The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms. The law cannot anticipate the boundaries of fairness or unfairness of labour practices. The complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance. Labour practices draw their strength from the inherent flexibility of the concept 'fair'. This flexibility provides means of giving effect to the demands of modern industrial society for the development of an equitable, systematized body of labour law. The flexibility of 'fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid" (Poolman *Principles of Unfair Labour Practice* 11).

2.3.2.5 Collective bargaining

A central theme of the LRA is that “collectivism”²⁷⁰ rather than “individualism” is promoted. It is maintained that collective action is an attribute of democracy.²⁷¹ Collective rights, such as the right to organise, the right to strike and collective bargaining, are in addition to the fundamental status provided for by the *Constitution*²⁷² and underwritten by the LRA. The inequality in bargaining power in the employment relationship, coupled with the incomplete nature of the employment contract,²⁷³ leads to the inability of employees to take part in decisions that directly affect their lives. This claim is evident in that “employees are commonly subjected to control of their employers/managers over different aspects of their working lives”.²⁷⁴ In this view the employment relationship is characterised by democratic deficits.²⁷⁵ If employees are not allowed to associate and act collectively the unequal bargaining position between the employer and employees remains:²⁷⁶ employees, and trade unions, will be entitled to collective rights and formal equality only if these rights are guaranteed.²⁷⁷ In *Minister of Finance v Van Heerden*²⁷⁸ the court, with regard to the achievement of substantive equality, declared

For good reason, the achievement of equality preoccupies our constitutional thinking. ... the commitment of the Preamble is to restore and protect the equal worth of everyone, to heal the divisions of the past and to establish a caring and socially just society. In explicit terms, the Constitution commits our society to 'improve the quality of life of all citizens and free the potential of each person'. ... it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality – a duty which binds the judiciary too. ...

²⁷⁰ Collective bargaining as a form of adversarial bargaining is discussed in detail in chapter 4 and 5 below.

²⁷¹ Davidov 2004 *IJCLIR* 84.

²⁷² See s 23(2)-(5) of the *Constitution*.

²⁷³ Kaufman *Theoretical Perspectives* 55 points out that not all terms and conditions and performance requirements can be anticipated and set down in writing “*ex ante*” when an employee starts work and an employment contract is entered into. The employment relationship thus requires ongoing “administration, negotiation and adjustment while the incomplete nature of the employment contract opens the door for conflict, misunderstanding, and opportunistic behaviour as the employer and employee seek to exploit contractual gaps and holes to their advantage”.

²⁷⁴ Davidov 2004 *IJCLIR* 84.

²⁷⁵ Davidov 2004 *IJCLIR* 84.

²⁷⁶ Olivier 1993 *TSAR* 658.

²⁷⁷ Olivier 1993 *TSAR* 659.

²⁷⁸ *Minister of Finance v Van Heerden* 2004 12 BCLR 1181 (CC) paras 23-24 and 31.

The achievement of equality goes to the bedrock of our constitutional architecture. ... Thus the achievement of equality is not only a guaranteed and justifiable right in our Bill of Rights, but also a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance.

In addition, Welch has argued:

Promoting justice and dignity in the workplace should be perceived to be as important to the individual as promoting justice and dignity in society generally through protecting freedom of worship and freedom of expression and should thus stand at the core of fundamental human rights. Moreover, given the economic and social and even political power of employers, rights at work have an inherent collectivist dimension. Thus the ability of workers to organize collectively in a trade union should be seen as a fundamental freedom within a human rights framework.²⁷⁹

Collective bargaining plays a key role in social legislation, (but not in corporate law).²⁸⁰ In a general sense "collective bargaining" refers to the process of negotiation between an employer or groups of employers and trade union(s) with the intention of creating collective agreements. Collective bargaining is the principal means (in South Africa) by which trade unions seek to improve the working conditions of their members.²⁸¹ The collective agreements which trade unions enter into with employers it has been argued embody both fairness and efficiency and "help create a climate of good industrial relations which, in turn, leads to an increase in productivity and a reduction in staff turnover".²⁸² The benefits of collective bargaining are contested: it is claimed this view is held "principally by neo-classical economists who see unions as 'labour cartel' organisers which

²⁷⁹ Welch 1996 *ILJ* (UK) 1041-1042.

²⁸⁰ Deakin and Morris point out that the term *social legislation* in the broad sense refers to the field of employment law and may be one of two types, namely *regulatory legislation* or *auxiliary legislation*. *Regulatory legislation* "directly affects employment relationships, typically by laying down statutory norms that override the parties' own agreement" and, for example, can include minimum wage legislation and unfair dismissal legislation (that limits the power of the employer to terminate the employment relationship). *Auxiliary legislation* "consists of legal supports for the process of collective bargaining and other aspects of collective organisation; in this sense its impact on the relationship is indirect." Examples of *auxiliary legislation* include those which may require employers to recognise trade unions for the purposes of collective bargaining as well as those which oblige employers to consult with or provide representatives of the workforce with information (Deakin and Morris *Labour Law* 5).

²⁸¹ It must, however, be noted that there are many people who are employed in the labour market but who do not belong to a trade union. This, however, is a topic for another discussion.

²⁸² Barnard 2012 *E L Rev* 120.

are able to extract higher 'rents' for their members over and above the market rate for the job".²⁸³

By contrast, there is an opinion that through the incorporation of a social dialogue the value of collective bargaining to a well-functioning economy is recognised; as well as the endorsement of collective autonomy. Collective agreements have two functions: "the procedural or contractual function of regulating the relationships between the collective parties themselves and the normative or rule-making function, which consists of the establishment of terms and conditions which are applicable to the contracts of individual workers".²⁸⁴

The right to engage in collective bargaining by trade unions, employers' organisations and employers is recognised by the *Constitution*. The Constitutional Court has pointed out:

[c]ollective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers.²⁸⁵

Collective bargaining can take place at either company/enterprise/plant level or at sectoral level.²⁸⁶ The unequal bargaining power that a single individual has against that of the employer can be addressed when employees act collectively, for example, through the process of collective bargaining, negotiations and strikes. Workers, by "joining forces and acting in concert", can expect the employer (even for a limited time) to be concerned about the prospect of losing the work of all (or some) of its employees.²⁸⁷

²⁸³ Deakin and Morris *Labour Law* 5.

²⁸⁴ Deakin and Morris *Labour Law* 5.

²⁸⁵ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 17 ILJ 821 (CC) para 66.

²⁸⁶ Deakin and Morris *Labour Law* 5.

²⁸⁷ Davidov 2004 *IJCLIR* 85.

With regard to the managerial prerogative of the employer the question, remains how labour can have any influence.²⁸⁸ Decisions can be influenced in different ways; involving disclosing and sharing information, advice and consultation, co-decision-making or the self-management of employees.²⁸⁹ Employee participation should be evident on all of these levels.²⁹⁰

By bargaining collectively, employees gain a countervailing power to that of the employer:²⁹¹ it does not necessarily mean that the parties at the negotiation table possess an equal bargaining power, but the "imbalance of power can be expected to be much less dramatic under a regime of collective bargaining".²⁹² Moreover, once the position of the employees improves, "the problem of democratic deficits is also to be expected to be alleviated".²⁹³ A pluralist philosophy²⁹⁴ is central: according to this view the main object of labour law has always been and will always be "to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship".²⁹⁵ On this point Du Toit²⁹⁶ elaborates:

It may well be true that functions of 'labour' (direct production) and 'management' (co-ordination of production) will need to be fulfilled in any economic system ... What pluralism fails to establish, however, is that inequality of wealth, knowledge and power must necessarily exist between members of society fulfilling these respective functions.

²⁸⁸ Blanpain 1974 *ILJ* (UK) 7.

²⁸⁹ Blanpain 1974 *ILJ* (UK) 7.

²⁹⁰ Employee participation on these different levels are discussed in detail in chapters 4-7 below.

²⁹¹ Davidov 2004 *IJCLIR* 85.

²⁹² Davidov 2004 *IJCLIR* 85.

²⁹³ Davidov 2004 *IJCLIR* 85.

²⁹⁴ Own emphasis. The pluralist industrial relations paradigm works as follows: it analyses "work and the employment relationship from a theoretical perspective rooted in an inherent conflict of interest between employers and employees interacting in an imperfect labour market. The employment relationship is viewed as a bargaining problem between stakeholders with competing interest; employment outcomes depend on the varied elements of the environment that determine each stakeholder's bargaining power. Modelling the employment relationship as a bargaining problem raises central questions about distribution of resources and the rules governing interactions between employers and employees. As a result, corporations, labour unions, public policies, and dispute resolution procedures are important in pluralist industrial relations. Moreover, individual employees, managers, owners, and union leaders are viewed as human agents rather than purely economic, rational agents" (Kaufman *Theoretical Perspectives* 195).

²⁹⁵ Davies and Freedland *Kahn-Freund* 18.

²⁹⁶ Du Toit 1993 *Stell LR* 335.

Collective bargaining has limits. A growing number of individuals are excluded from collective bargaining because their work status falls outside the [formal] employment model so they are not covered by collective agreements.²⁹⁷ Collective bargaining fails to take into account a wide range of regulatory influences that fall outside the labour law framework, thus:

the debate which affects the interests of 'labour' and 'workers' today, in addition to the debate concerning employment conditions and job regulation (labour law), substantially occurs in legal and regulatory categories that do not directly regulate the employment relationship itself.²⁹⁸

The right to strike, (accompanied by the freedom of association) is integral in attaining industrial democracy and are fundamental to achieving success in collective bargaining.²⁹⁹

Four justifications exist for the right to strike:

the equilibrium argument – labour needs a tool to resist the otherwise total prerogative of management; the need for autonomous sanctions to enforce collective bargains – self-government being better than legal regulation and enforcement; the voluntary labour argument – that compulsion to work is nothing else than serfdom; and the psychological argument – that strikes are a necessary release of tension in industrial relations.³⁰⁰

²⁹⁷ Deakin 2007 *MULR* 1166 where he refers to Mitchell *Redefining Labour Law*.

²⁹⁸ Deakin 2007 *MULR* 1167.

²⁹⁹ The right to strike, freedom of association and organisation and how it fits into the collective bargaining framework in South Africa is addressed in detail in chapter 5 below.

³⁰⁰ Kahn-Freund and Hepple *Laws against Strikes* 5-8; Van Niekerk and Smit (eds) *Law@work* 415.

The right to strike is a powerful economic weapon in the hands of employees.³⁰¹ It is emphasised that the "operation of collective bargaining would be undermined if trade unions did not have the power to put pressure on employers or employers' associations to enter into collective agreements on reasonable terms".³⁰² Collective action is a means of equalising power relations and is an important and effective way for employees to express their concerns, so "strike action is the corollary of collective bargaining".³⁰³

The notion of employees being able to control or influence decisions affecting their working lives is central to industrial democracy,³⁰⁴ in that it enables employees to participate in decision-making.³⁰⁵ Furthermore, industrial democracy involves more than employee participation: issues, such as participative management, employee involvement and workers' control, emphasise particular forms of industrial democracy. The forms of industrial democracy range from human management techniques, (boxes are set up to receive employees' written suggestions) to more fundamental forms, such as participation on supervisory boards.³⁰⁶

The field of industrial democracy is divided into two categories: control through ownership and control against ownership.

- (i) Control through ownership initiatives "accept[s] the right of capitalists/shareholders to exercise direct control, but seek[s] to acquire this right by converting the workers themselves into owners", where they obtain more or less control of the company by acquiring shares.³⁰⁷

³⁰¹ The court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 17 ILJ 821 (CC) para 65 held that "the effect of including the right to strike does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers". The court noted that the right to bargain collectively is expressly recognised by the text of the *Constitution*.

³⁰² Barnard 2012 *E L Rev* 121.

³⁰³ Barnard 2012 *E L Rev* 121.

³⁰⁴ See chapter 4 below for a detailed discussion on industrial democracy.

³⁰⁵ Mitchell 1998 *IJCLIR* 5. See also chapter 4 below for a detailed discussion of the various levels and forms of employee participation.

³⁰⁶ Mitchell 1998 *IJCLIR* 5. For a detailed discussion on supervisory boards see chapter 7 below.

³⁰⁷ Mitchell 1998 *IJCLIR* 6.

- (ii) Control against ownership initiatives "challenge[s] the belief that ownership of a firm gives capitalists/shareholders the right to exercise control, and seek to expropriate those rights for the workers".³⁰⁸

In a democratic firm, control can be vested in the hands of employees in at least two ways:

(a) *Influence*

Influence refers to the extent to which employees influence decision-making. The extent can range from no employee influence at one end of the spectrum to unilateral influence at the other. Between the two extremes, employers may advise employees on decisions they have already made regarding the operation of the firm, consult with them, or bargain with them.³⁰⁹ Consultation, however, must not be confused with collective bargaining. In *Metal & Allied Workers Union v Hart Ltd*³¹⁰ the court noted that there is a distinct and substantial difference between consultation and bargaining. The court explained this difference:

To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise and agreement.³¹¹

Consultation, in terms of the LRA, appears to be "identical to what was previously understood as 'good faith' bargaining", where consensus must be reached.³¹² The employer must disclose relevant information and consider all representations by the consulting partner and, where it does not agree with the consulting party, provide reasons

³⁰⁸ Mitchell 1998 *IJCLIR* 6.

³⁰⁹ Mitchell 1998 *IJCLIR* 7.

³¹⁰ *Metal & Allied Workers Union v Hart Ltd* 1985 6 *ILJ* 478 (IC) 1985 6 *ILJ* 478 (IC).

³¹¹ *Metal & Allied Workers Union v Hart Ltd* 1985 6 *ILJ* 478 (IC) 493H-I.

³¹² Godfrey *et al Collective Bargaining* 231.

for the disagreement.³¹³ Consultation involves "representatives of management seeking and listening to employee suggestions and opinions, considering these opinions but then making the final decision themselves".³¹⁴ On the other hand, bargaining "involves management and employees compromising to reach a mutually acceptable decision".³¹⁵

The LRA makes provision for workplace forums: a mechanism to provide workers with a voice in the workplace. Workplace forums³¹⁶ drew upon the model of the German works council system and were enacted to "introduce a form of participatory workplace governance" and to create a system of participatory decision-making in addition to or alongside (adversarial) collective bargaining.³¹⁷ Consultation (in the context of workplace forums), for example, is required for the matters listed in section 84 of the LRA, and joint decision-making is required for the matters listed in section 86. Consultation requires the employer "to do more than notify the forum of any proposal and in good faith to consider any suggestions it may make".³¹⁸ The drafters of the LRA, it seems, wished to depart from the tradition of collective bargaining between trade unions and employers, to provide instead for "more co-operative interaction between management and labour alongside collective bargaining" in order to allow non-wage issues "that previously fell within the scope of managerial prerogative"³¹⁹ to be dealt with through consultation and joint-decision-making.

(b) Level of employee participation and involvement

The second dimension of control relates to the level at which employees are involved in the decision-making process, as well as to the level at which they are allowed to

³¹³ Godfrey *et al Collective Bargaining* 231.

³¹⁴ Godfrey *et al Collective Bargaining* 231.

³¹⁵ Godfrey *et al Collective Bargaining* 231.

³¹⁶ See ss 78-94 of the LRA. Workplace forums are provided for in chapter V of the LRA. See also Grogan *Workplace Law* 330-335 in this regard. Workplace forums and works councils are discussed in chapters 6 and 7 below.

³¹⁷ Davis and Le Roux 2012 *Acta Juridica* 318.

³¹⁸ Grogan *Workplace Law* 332.

³¹⁹ Godfrey *et al Collective Bargaining* 231.

participate. Two variables determine the level of employee participation, namely, the manner or directness of worker control and the scope of the matters which are decided with worker input. The directness of control varies from a direct or participatory level of interaction between the management and the employees at the workplace to an indirect or representational level of interaction between employee representatives (who are elected or nominated by the employees) and the management.³²⁰ The scope of matters that can be dealt with varies from employee influence at higher levels of the organisation, such as the distribution of profits, investments, financing and budgets, to lower levels, such as annual leave entitlements and the administration of welfare services.³²¹

In a discussion of industrial democracy cognisance must be taken of representation at workplace/enterprise level as well as collective bargaining. Labour law traditionally relies significantly on collective bargaining to address the inequality in the relationship between employers and employees. The debate today is concerned with placing the company (the corporation) in a greater social context, so that labour law and the rights of employees are on the agenda of corporate responsibility.³²² It is submitted that in this broader perspective of the business corporation, labour law not only meets employee-ownership theories but takes stakeholder capitalism models into account.³²³ If labour and company law are split, a division is made between economic and social matters.³²⁴ This division should not be seen as essential but as a construction: "this distinction does not explain why employee participation should be acceptable in the social sphere but not in the economic sphere, when the reality is that measures adopted in the social sphere will have an impact on the economic sphere"³²⁵ and *vice versa*.³²⁶ It is submitted there is a need to integrate company and labour law principles when it comes to the employees' voice in companies: corporate law can no longer primarily focus on shareholders and ignore employees as stakeholders.

³²⁰ Mitchell 1998 *IJCLIR* 7.

³²¹ Mitchell 1998 *IJCLIR* 8.

³²² Zumbansen 2006 *Ind J Global Legal Studies* 278. Corporate social responsibility is discussed in chapter 3 below.

³²³ Zumbansen 2006 *Ind J Global Legal Studies* 278.

³²⁴ Villiers *European Company Law* 190.

³²⁵ Villiers *European Company Law* 190.

³²⁶ Cochon 2011 <http://etui.org/research/publications12>.

The purposes and functions of labour law can be contrasted with those of company law, which will be addressed below.

2.4 Company law perspectives and theories

2.4.1 Theories and models of companies

Modern corporate law³²⁷ has progressed significantly. The impact of globalisation has had an impact on how corporations conduct themselves when they do business. This scenario is applicable to South Africa, where there was a need to rejuvenate corporate law in order to keep up with trends locally and internationally. Corporations now need to subscribe to the principles of the *Constitution*, and, as legal persons they are also afforded rights, such as dignity and privacy, for example.³²⁸

"Corporate governance" is a broad concept, with no general or universally accepted definition.³²⁹ The concept is "ambiguous" and "depends on the historical and cultural background of the country defining it".³³⁰ It deals not only with the common-law and statutory duties of directors³³¹ but includes structures and processes that deal with control, management and decision-making in organisations.³³² Corporate governance can be said to be "the whole set of legal, cultural, and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised, and how the risks and returns from the activities they undertake are allocated".³³³ Another useful definition of corporate governance that is proposed is:

³²⁷ See chapter 1 above for the developments regarding the South African company law.

³²⁸ See chapter 1 above for a discussion on the impact of the *Constitution* on company law.

³²⁹ Cohen, Krishnamoorthy and Wright 2010 *Am J Comp L* 757.

³³⁰ Flay 2008 *Waikato L Rev* 308.

³³¹ Esser and Delport 2011 *THRHR* 449.

³³² Cassim *et al Contemporary Company Law* 472.

³³³ Clarke 2011 *Am J of Comp L* 78.

The system of regulating and overseeing corporate conduct and of balancing the interests of all stakeholders and other parties (external stakeholders, governments and local communities) who can be affected by the corporation's conduct, in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.³³⁴

The role of companies in the promotion of corporate governance revises the issue of what exactly constitutes a company. A company³³⁵ is a juristic person that exists separately from its management and shareholders. A company (or corporation) has a broader existence than in a simply legal context, it also has political, sociological and economic aspects.³³⁶ The "separateness"³³⁷ of a company forms a foundation for company law, because several consequences flow from it: the limited liability of shareholders; the fact that the company can sue and be sued in its own name; the fact that the property, profits, debts and liabilities of the company belong to it and not the shareholders; *et cetera*.³³⁸ Shareholder primacy seems underlies the distribution of profits other stakeholders have become important in company law as well. The question, "To whom does the corporation account?"³³⁹ is an important one.

Many theories and models have been developed in order to determine the nature of a company.³⁴⁰ Companies play an important role in the creation of wealth. Millions of people are dependent on the income they receive from corporations in the form of wages (salaries): their livelihoods depend upon these wages because, in most instances, it is their only source of income. The dependency on wages means society consists of "wage

³³⁴ Du Plessis, Hargovan and Bagaric *Principles* 10.

³³⁵ A company is defined in s 1 of the *Companies Act* as: "a juristic person incorporated in terms of this Act, a domesticated company, a juristic person that, immediately before the effective date- (a) was registered in terms of the- (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2; (b) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act No. 61 of 1973); or was registered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act".

³³⁶ Bone 2011 *CJLJ* 283.

³³⁷ See chapter 1 above for a discussion on the basic legal characteristics/attributes of the business corporation that can be identified.

³³⁸ Cassim *et al Contemporary Company Law* 28.

³³⁹ Bone 2011 *CJLJ* 284.

³⁴⁰ See the general discussion above.

earners", therefore it is important for society as a whole, and not just for corporations and their shareholders, that wealth creation takes place in a continuous and sustainable manner. In this context corporate accountability plays an important role. According to Bone, corporate accountability "defines who is a recognized stakeholder, and what substantive legal rights stakeholders have in relation to the board of directors".³⁴¹ Corporate accountability is civil society's response to mitigate the social and environmental impacts of corporate power.³⁴² It is important to look at the different theories on the nature of a company: three theories that can be identified - the contractual, communitarian and concessionary theories.

2.4.1.1 Contractual theory

According to contractual theory two or more parties come together and come agree about the commercial activity they want to get involved in.³⁴³ The company is born from this pact between the various contracting parties and the "interests of the company" are limited to the interest of the contractors.³⁴⁴ The theory stipulates that various operational contracts exist between various corporate constituents and that the corporation is accountable only to shareholders and any other constituent with which it has a contract.³⁴⁵ The company is seen as a "nexus of contracts, with a series of ongoing negotiations between management, shareholders, employees and the various corporate constituents".³⁴⁶ The creation of the corporation is seen as a right, and the corporate constitution is a contract between the shareholders and the directors of the corporation which recognises the shareholders as corporate owners who delegate authority to the directors of the corporation. The directors, in theory, hold the corporate property in trust: thus the managers' act as trustees or

³⁴¹ Bone 2011 *CJLJ* 284.

³⁴² Armour, Hansmann and Kraakman 2009 <http://www.law.harvard.edu>.

³⁴³ Dine 1998 *TSAR* 246.

³⁴⁴ Dine 1998 *TSAR* 246.

³⁴⁵ Bone 2011 *CJLJ* 285.

³⁴⁶ Bone 2011 *CJLJ* 285.

³⁴⁶ Bone 2011 *CJLJ* 285.

³⁴⁶ Bone 2011 *CJLJ* 285.

agents in accordance with their fiduciary obligation.³⁴⁷ The supremacy of the shareholder is upheld by this theory: some variants of the theory include shareholder primacy, stakeholder theory and the team production model.³⁴⁸

2.4.1.2 *Communitarian theory*

In terms of communitarian theory the company is granted the status of an instrument of the state itself and is not merely a concession by the state.³⁴⁹ Corporate obligation, according to the theory, is extended to include shareholders, creditors, labour, suppliers, customers and the public, as well as the environment. The company is regarded as a community of constituencies in which directors owe duties to all the stakeholders and not only to shareholders as the dominant constituency.³⁵⁰ The theory is based on a political rather than economic basis.³⁵¹ Two consequences stem from the theory: first, the company does not have a strong commercial identity, even though the company might have a strong social responsibility; and second, the corporate veil will be more or less non-existent as the state uses the corporation as an instrument merely to further its ends.³⁵² Communitarian theory, it is opined, describes how "to make the best society we can aspire towards, and give individuals a richer sense of identity and self".³⁵³ Corporate obligations should include ethical aspects that enhance and protect the welfare of all corporate constituents and embrace corporate social responsibility ideals.³⁵⁴ Foremost, communitarian theory acknowledges the public role of corporations, as opposed to thinking of a corporation as a mere nexus of private contracts: corporations are seen as individuals that are created by law with certain rights and obligations.³⁵⁵ At the heart of the

³⁴⁷ Bone 2011 *CJLJ* 285.

³⁴⁸ Bone 2011 *CJLJ* 284. Attention will only be given to the shareholder primacy and stakeholder models. These models will be discussed below.

³⁴⁹ Dine 1998 *TSAR* 247.

³⁵⁰ Dine 1998 *TSAR* 293.

³⁵¹ Smit 2006 *TSAR* 158.

³⁵² Dine 1998 *TSAR* 247.

³⁵³ Bone 2011 *CJLJ* 292.

³⁵⁴ Bone 2011 *CJLJ* 293.

³⁵⁵ Bone 2011 *CJLJ* 293.

communitarian theory is the belief that "there is a role for public regulation of corporations to ensure that the public trust is not abused by corporate power". Corporate influence, therefore, should be used in the broad public interest.³⁵⁶

2.4.1.3 *Concession theory*

Concession theory has two branches:³⁵⁷ first, the company is viewed as a concession by the state, which provides it with the ability to trade as a corporation.³⁵⁸ Especially in the case of limited liability:³⁵⁹ the state has the power to revoke corporate powers because the company was afforded limited liability by the state and because the concession of authority could be legitimised only through a public purpose.³⁶⁰ The difference between the communitarian and concession theories is that the latter "accept[s] that the state has a limited role to play in ensuring that corporate governance structures are fair and democratic, but do[es] not force the company to realign its aims to reflect the social aspirations of the state".³⁶¹ According to Dine, concession theory "does not give a clear signal as to the 'interests of the company' although it may remove some of the more extreme emphasis on the interests of the founders and thus be responsible for a more equitable mix of interests".³⁶² Particularly where the public interest is at stake the state is encouraged to penetrate the corporate veil because the company essentially is a creation of the state.³⁶³ The second branch is the "bottom-up concessionary theory":³⁶⁴ the company is an extension of the contracting parties' or partners' original agreement. Here, the theory seeks to show that the contracting parties have created an instrument, which has a real identity that is separate and quite distinct from the original contracting parties.

³⁵⁶ Bone 2011 *CJLJ* 293-294.

³⁵⁷ Dine 1998 *TSAR* 246.

³⁵⁸ Bone 2011 *CJLJ* 293; Dine 1998 *TSAR* 245.

³⁵⁹ Bone 2011 *CJLJ* 293; Dine 1998 *TSAR* 245.

³⁶⁰ Bone 2011 *CJLJ* 293.

³⁶¹ See Lombard *Directors' Duties* 20 where she refers to Dine *The Governance Corporate Groups* 21.

³⁶² Dine 1998 *TSAR* 246-247.

³⁶³ Dine 1998 *TSAR* 247.

³⁶⁴ Dine 1998 *TSAR* 247.

The identity is achieved when the parties come together and make use of the corporate instrument to create the company: the company stands free of its founders and becomes a separate person with its own interests.³⁶⁵ The notion also enables the use of a constituency model, because the interests of the company are no longer limited to those of the contracting party but are extended to include its employees, creditors and customers.³⁶⁶ These parties join the original contracting parties as part of the commercial concern. The concession model provides for the constituencies, but is limited in that it does not provide for an explanation of "how to balance the competing interests and arrive at the interests of the company as a whole".³⁶⁷

Models relevant to employee participation in decision-making are now considered.

2.4.2 Overview of shareholder and stakeholder models

Before the enactment of the *Companies Act* other than labour legislation little attention was given to the voice of employees. In order to enhance the position of employees within the field of corporate law various avenues should be pursued: generally speaking, these avenues should, firstly "seek to ensure that corporations pay attention to the interests of their employees, communicate with them (particularly on day-to-day issues that concern them) and act in ways that sustain and enhance their reasonable expectations".³⁶⁸ Secondly, they should involve "attempts to provide employees with positions of influence in terms of corporate decisions that affect them and thus accord[s] them a role in corporate decision-making".³⁶⁹

³⁶⁵ Dine 1998 *TSAR* 247.

³⁶⁶ Dine 1998 *TSAR* 247; Smit 2006 *TSAR* 158.

³⁶⁷ Dine 1998 *TSAR* 247.

³⁶⁸ Smit 2006 *TSAR* 153.

³⁶⁹ Smit 2006 *TSAR* 153.

Various models stem from the theories discussed above. The development and recognition of a stakeholder model as an alternative to the shareholder primacy model will now be discussed.

2.4.2.1 Shareholder Primacy Model

The shareholder primacy model (also known as the contractual model) deems the interests of shareholders to be the only consideration in decisions of the management of the company because they are required to act "in the best interests of the company".³⁷⁰ The goal of the corporation is to maximise shareholder wealth and, by doing so, benefits society.³⁷¹ The model is unconcerned with the interests of creditors and employees because the company is the sole property and concern of the contracting parties.³⁷²

2.4.2.2 Stakeholder Theories

The stakeholder model of company law (also known as the constituency model) considers the interest of other parties in the decision-making process of the directors: the employees, consumers, the general public, and the environment. The position regarding stakeholders as can be summarised as follows:

Stakeholder theory is primarily used to understand and inform the management of an organisation's stakeholders. Stakeholders are those who both impact on and are or impacted by an organisation's actions. These include groups such as employees, shareholders, suppliers, the government and even the natural environment and local community. Some suggest however, that this definition is too broad. There are two general perspectives of managing stakeholders. The normative perspective views stakeholders as having intrinsic value. The strategy of normative stakeholder management is thus driven by a moral/philosophical grounding. The instrumental perspective views stakeholder management as a tool in reaching traditional organisational goals such as increased profitability. Essentially, instrumental stakeholder management is driven by strategy whereas normative

³⁷⁰ Dine 1998 *TSAR* 248; Bone 2011 *CJLJ* 286; Millon 1990 *Duke LJ* 201 220.

³⁷¹ Botha 1996 *SA Merc LJ* 33.

³⁷² Dine 1998 *TSAR* 248; Smit 2006 *TSAR* 160.

strategy is determined by a philosophical approach to managing stakeholders. Although there is evidence that a convergence may actually exist and normative approaches may also lead to instrumental benefits. Because an organisation cannot often meet all stakeholder demands at once, the salience of a stakeholder is important. Stakeholder levels of power, legitimacy, and urgency relating to resource dependence determines their salience in an organisation and thus their influence. How much attention a stakeholder gains is also dependent on the personal characteristics and values of the manager/CEO/decision-maker and their interpretation of a stakeholder's attributes. Networks and collective pressure can influence their decision, but no matter what the stakeholder's attributes, in the end, the decision-maker determines which stakeholders are addressed by an organisation.³⁷³

Because stakeholder theory specifically includes shareholders, creditors and other groups who contribute towards corporate profitability, it acknowledges "a moral obligation" to these stakeholders in the form of a "social contract".³⁷⁴ The social contract "reduces the corporation to an entity of relations between corporate constituents" and the corporation can be seen as "a nexus of associations that imports stakeholder rights and social obligations under the banner of a business enterprise".³⁷⁵ It is submitted that the existence of a "new concept of a company" must be acknowledged: which has been expressed in the following terms:

There was a time when business success in the interests of shareholders was thought to be in conflict with society's aspirations for people who work in the company or in supply chain companies, for the long-term well-being of the community and for the protection of the environment. The law is now based on a new approach. *Pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones.*³⁷⁶

A strong basis for this model is the "bottom-up" concessionary theory (discussed above). Two variants of the model can be identified: the first variant, which sees the company run in the interests of shareholders, assumes that it is in the interests of shareholders to take into account other interest groups, because to ignore them would damage the interests of

³⁷³ Elkin 2007 *Ot Man Grad Rev* 25.

³⁷⁴ Bone 2011 *CJLJ* 288.

³⁷⁵ Bone 2011 *CJLJ* 288. See also Davies 2000 *Comp Lab L & Pol'y J* 138.

³⁷⁶ My emphasis. Margaret Hodge, Minister of State for Industry and Regions (UK Department of Trade and Industry, 2007 2), as quoted in Brammer, Jackson and Matten 2012 *Socio-Economic Review* 12.

shareholders.³⁷⁷ Legislation creates and details the interests that must be considered when directors exercise their duties, but enforcement is left in the hands of the shareholders.³⁷⁸ This variant is closely related to the "enlightened shareholder value"³⁷⁹ approach, which provides for the maximal protection of shareholders but also considers other stakeholders.³⁸⁰ The interests of these stakeholders, however, are subordinate to those of shareholders and, in the end profit-maximisation is the main goal of the directors. Shareholder interests retain their primacy and the interests of other stakeholders are considered only insofar as they promote the interests of shareholders.³⁸¹

In terms of the second variant "the company is seen as encompassing interests other than those of the shareholders" and the "interests of the company" are seen to include those at least of shareholders, employees and creditors.³⁸² The directors should consider all constituents of the corporation:³⁸³ the directors have direct fiduciary duties to the different stakeholders of the company. This variant belongs to the school of "pluralism". It asserts that co-operative and productive relationships will be optimised only if "directors are permitted (or required) to balance shareholders' interests with those of others committed

³⁷⁷ Dine 1998 *TSAR* 249.

³⁷⁸ Dine 1998 *TSAR* 249.

³⁷⁹ Rogers 2008 *Comp Lab L & Pol'y* J 95 101; Esser 2007 *THRHR* 410; Esser 2009 *THRHR* 192; Esser 2005 *Obiter* 720. Lombard *Directors' Duties* 20 articulates the view that the enlightened shareholder value approach would seem to be in line with the notion of the company as proposed by commentators such as Goldenberg 1998 *The Company Lawyer* 36-37, whose view is as follows: "This obligation to have regard to the interests of shareholders is *not* related to the actual shareholders at any particular moment in time, but to the general body of shareholders from time to time ... Accordingly, the duty of directors is to maximise the company's value on a *sustainable* basis. There is nothing in law to prevent directors from having regard to the interests of third parties with whom the company has a relationship ... if they judge, reasonably and in good faith, that to do so is conducive to the success of the company".

³⁸⁰ The "enlightened shareholder value" approach is embodied as a key aspect in the regulatory environment in the United Kingdom (UK). S 172 of the *Companies Act* 2006 (UK) describes the duties of directors as "a duty to promote the success of the company". According to the Department of Trade and Industry, "this will ensure that 'regard has to be paid by directors to the long term as well as the short term, and to wider factors where relevant such as employees, effects on the environment, suppliers and customers'. This will principally be achieved through the high-level 'statement of directors' duties set out in the Act ... to clarify the duties and responsibilities of directors" (Du Plessis, Hargovan and Bagaric *Principles* 45).

³⁸¹ Lombard *Directors' Duties* 18-19.

³⁸² Dine 1998 *TSAR* 249.

³⁸³ Bone 2011 *CJLJ* 287.

to the company".³⁸⁴ The approach directly benefits the "company as a whole"³⁸⁵ and, as an inclusive approach, is in line with *King I, II* and *III*.³⁸⁶ The approach recognises that a company is represented by the interests of shareholders, employees and creditors: directors "should act in the best interests of the company as a separate legal entity" because an interest that "may be paramount at one point in time in a company's existence" may become secondary at a later stage.³⁸⁷

As noted earlier, an important question in company law is in whose interest the company should be managed. One view is that a company can best be described as "a series of contracts concluded by self-interested economic actors":³⁸⁸ equity investors (shareholders), managers, *employees*³⁸⁹ and creditors. These contracts taken together make up the structure of the company and, when the contracts are evaluated, those with the shareholders hold sway.³⁹⁰ Ultimately, the company operates to serve their interests.³⁹¹ According to this view it is clear that the shareholders expect the company to be profitable and that the company's directors and managers are tasked primarily with the duty of creating corporate governance structures "which ensure[s] that the company conducts its business so as to maximise the returns of these investors".³⁹²

³⁸⁴ DTI Policy Paper 24; Lombard *Directors' Duties* 18.

³⁸⁵ Smit 2006 *TSAR* 160; Esser 2009 *SA Merc LJ* 317 323.

³⁸⁶ Esser 2007 *THRHR* 411; Esser 2009 *THRHR* 192; Esser 2005 *Obiter* 720. See also Charreaux and Desbrières 2001 *JMG* 107-128, where they discuss the pluralist view of the firm and stakeholder value. The UK Company Law Steering Group viewed the "enlightened shareholder value" approach as being different from the pluralist approach as follows: "There will inevitably be situations in which the interests of shareholders and other participants will clash, even when the interests of shareholders are viewed as long-term ones. Examples include a decision whether to close a plant, with associated redundancies, or to terminate a long-term supply relationship, when continuation in either case is expected to make a negative contribution to shareholder returns. In such circumstances, the law must indicate whether shareholder interests are to be regarded as overriding, or some other balance should be struck. This requires a choice ... between the enlightened shareholder value and pluralist approaches. An appeal to the 'interests of the company' will not resolve the issue, unless it is first decided whether 'the company' is to be equated with its shareholders alone (enlightened shareholder value) or the shareholders plus other participants (pluralism)". (Du Plessis, Hargovan and Bagaric *Principles* 45-46).

³⁸⁷ Esser 2009 *SA Merc LJ* 323-324.

³⁸⁸ Davis and Le Roux 2012 *Acta Juridica* 307.

³⁸⁹ My emphasis.

³⁹⁰ Davis and Le Roux 2012 *Acta Juridica* 307.

³⁹¹ Davis and Le Roux 2012 *Acta Juridica* 307.

³⁹² Davis and Le Roux 2012 *Acta Juridica* 307.

By contrast, a corporation "cannot be reduced to the sum of a series of contracts" because it is vital to take into account a wide range of stakeholders whose interests may overlap or be in conflict with one another.³⁹³ In applying corporate governance principles, it is important "the board and management of corporations strike a balance between the interests of their various stakeholders".³⁹⁴ It is necessary for any corporation to determine which groups will be regarded as "stakeholders". Varying weight needs to be attached to the interests represented in a company and the interests of various groups of people connected with the corporation must be weighed at different stages of the company's existence.³⁹⁵ Directors should be aware of the interests of various stakeholders afforded to them by legislation, in order to properly balance these interests.³⁹⁶ For example, the interests of employees as stakeholders of the company may receive preference over those of shareholders collectively.³⁹⁷

As indicated earlier, an underlying philosophy in *King III* is that companies should be regarded as good corporate citizens if they subscribe to the sustainability considerations that are rooted in the *Constitution*. This assessment of worth entails that they should adhere to the basic social contract which they have entered into and their responsibility to promote the realisation of human rights.³⁹⁸ The social contract implies some form of altruistic behaviour, which, in essence, is "the converse of selfishness", in a view which equates self-interest with selfishness.³⁹⁹ The *Companies Act*, in its purpose provision, *inter alia* aims to promote compliance with the Bill of Rights in the application of company law, as well as to the development of the South African economy by "encouraging transparency and high standards of corporate governance".⁴⁰⁰ These principles are further enhanced by the fact that the Act acknowledges the significant role of enterprises within the social and

³⁹³ Davis and Le Roux 2012 *Acta Juridica* 307.

³⁹⁴ Rossouw 2008 *Afr J Bus Ethics* 29.

³⁹⁵ Dine 1998 *TSAR* 249; Smit 2006 *TSAR* 160; Esser 2009 *SA Merc LJ* 324.

³⁹⁶ Esser 2009 *SA Merc LJ* 324.

³⁹⁷ Esser 2007 *THRHR* 411.

³⁹⁸ Institute of Directors *King Report III* 11.

³⁹⁹ Crowther and Jatana *International Dimensions* viii.

⁴⁰⁰ S 7(a)-(b)(iii) of the *Companies Act*.

economic life of the nation,⁴⁰¹ aims to balance the "rights and obligations of shareholders and directors"⁴⁰² within companies and encourages the efficient and responsible management of companies.⁴⁰³

It has been argued that the traditional view of company law, based on notions that "corporations are voluntary, private, contractual entities, that they have broad powers to make money in whatever way and in whichever locations they see fit"⁴⁰⁴ and that management has an obligation to its shareholders and to shareholders alone, is too narrow and out-dated. It is suggested that a new set of principles and policies for corporate law should be developed. These principles are as follows:⁴⁰⁵

2.4.2.2.1 Principle 1

*The ultimate purpose of corporations should be to serve the interests of society as a whole.*⁴⁰⁶

It has been argued that a company cannot be considered to be successful if the "total social value it creates is less than the social costs it throws off".⁴⁰⁷ If the interests of society as a whole matter more than the profit of the company, then profit cannot be the only indicator of success.⁴⁰⁸ The cost side of the equation is also important.⁴⁰⁹ This equation, not shareholder primacy, is to be viewed as the foundational principle: the way in which success is measured should change in order to determine if the best interests of society as a whole have been served.⁴¹⁰ The financial report alone is insufficient, as, for example, it tends not to take into account externalities, such as the value of the company

⁴⁰¹ S 7(b)(iii) of the *Companies Act*.

⁴⁰² S 7(i) of the *Companies Act*.

⁴⁰³ S 7(j) of the *Companies Act*.

⁴⁰⁴ Greenfield 2005 *Hastings Bus LJ* 87-88.

⁴⁰⁵ This section of the discussion borrows heavily from Greenfield 2005 *Hastings Bus LJ* 89.

⁴⁰⁶ Greenfield 2005 *Hastings Bus LJ* 89.

⁴⁰⁷ Greenfield 2005 *Hastings Bus LJ* 90.

⁴⁰⁸ Greenfield 2005 *Hastings Bus LJ* 90.

⁴⁰⁹ Greenfield 2005 *Hastings Bus LJ* 90.

⁴¹⁰ Greenfield 2005 *Hastings Bus LJ* 91.

to its workers or to the communities in which it does business, or to the environmental costs of the company's products or services (other than costs relevant to the shareholders).⁴¹¹ Nor does the report take human rights violations into consideration: information which is important not only to citizens but to decision-makers. If society requires corporations to be more accountable, a broader view should be taken of their responsibilities and the focus should not be on shareholder returns.⁴¹² The sustainability⁴¹³ of the company is another issue that needs to be considered: the ability of the business to survive over time is important not only to the company but also to society at large.⁴¹⁴ Companies maintain a safe and healthy work environment but this requirement should survive over time. Thus, a corporation "creating wealth for society" must sustain itself.⁴¹⁵

2.4.2.2.2 Principle 2

*Corporations, distinctively, contribute to the societal good by creating financial prosperity.*⁴¹⁶

The transferability of shares, limited liability, specialised and centralised management and perpetual existence as creations of law are a few of the characteristics that distinguish modern public corporations from other kinds of businesses.⁴¹⁷ Society establishes the framework of corporate law within which corporations create wealth in the economy. When society acts collectively, decisions are made that put other values ahead of wealth.⁴¹⁸ For example, we strive to end racial injustice even though it will "cost" us in terms of financial health, or we prohibit companies from discriminating against potential employees on the basis of their disability even if such an accommodation is costly:⁴¹⁹ "[w]e collectively *value*

⁴¹¹ Greenfield 2005 *Hastings Bus LJ* 91.

⁴¹² Greenfield 2005 *Hastings Bus LJ* 92.

⁴¹³ Sustainability is discussed in chapter 3 below.

⁴¹⁴ Greenfield 2005 *Hastings Bus LJ* 92.

⁴¹⁵ Greenfield 2005 *Hastings Bus LJ* 93.

⁴¹⁶ Greenfield 2005 *Hastings Bus LJ* 93.

⁴¹⁷ Greenfield 2005 *Hastings Bus LJ* 94.

⁴¹⁸ Greenfield 2005 *Hastings Bus LJ* 96.

⁴¹⁹ Greenfield 2005 *Hastings Bus LJ* 96.

*justice, fairness, equality, and human rights"*⁴²⁰ though it "costs" money and resources to protect these values".⁴²¹

2.4.2.2.3 Principle 3

*Corporate law should further principles one and two.*⁴²²

Law is necessary to ensure that corporations serve the interests of society (principle one) and create wealth (principle two).⁴²³ Agreement needs to be reached on how corporations should be measured to advance the interests of society, as well as on the comparative advantage they enjoy in building wealth for all the stakeholders. If corporate law reinforces these principles, the question becomes "how specifically corporate governance might advance these goals".⁴²⁴

2.4.2.2.4 Principle 4

*A corporation's wealth should be shared fairly among those who contribute to its creation.*⁴²⁵

This principle, non-controversially, rests on the notion that corporations are collective enterprises.⁴²⁶

Corporations require a multitude of inputs, all of which are essential. The firm needs financial capital, which they get from equity investors, debt creditors, consumers who pay money for the firm's goods and services, and sometimes from government. The firm depends on labour, which they get from salaried employees, hourly-wage workers, and independent contractors. The firm depends on infrastructure, which comes from governments of various stripes.

⁴²⁰ My emphasis. Greenfield 2005 *Hastings Bus LJ* 96.

⁴²¹ Greenfield 2005 *Hastings Bus LJ* 96.

⁴²² Greenfield 2005 *Hastings Bus LJ* 99.

⁴²³ Greenfield 2005 *Hastings Bus LJ* 98.

⁴²⁴ Greenfield 2005 *Hastings Bus LJ* 106. Principles four and five focus on this question.

⁴²⁵ Greenfield 2005 *Hastings Bus LJ* 106.

⁴²⁶ Greenfield 2005 *Hastings Bus LJ* 106.

Finally, the firm depends on a social fabric of laws and norms that create and sustain the marketplace and enable a stable society in which the company can operate. The notion that corporations depend on multiple stakeholders is implicit in most theories of the firm and is not particularly contentious. The difficulty, of course is what to do with that insight.

The mainstream view of what to do with the insight is nothing; the shareholder is supreme and should be the sole beneficiary of the management's fiduciary duties. The management's sole obligation within corporate law is to serve the shareholder, usually by maximizing the share price. The others that contribute to the firm protect themselves through contract or government regulation. The management has no obligations to these additional stakeholders other than those that arise from their market power, from contractual commitments, or from some non-corporate source of law.

Once we take Principle One to heart, however, this fixation on shareholder gain is revealed as a mistake. It is not based on a shareholder 'right' to the exclusive attention of the management, and it is unlikely to further the interests of society as whole. Rather, the real reason for shareholder primacy in corporate *law* has to do with the primacy of shareholders in the market. Capital is much more mobile than labour or infrastructure, so it can extract in the corporate 'contract' the right to be the sole beneficiary of management's fiduciary duties. This does not settle, of course, the normative argument. The market is a creature of law, and law can certainly constrain it. The law need not mimic the market's power hierarchy. Indeed, if the purpose of corporate law is to serve society as a whole, the law emphatically should not mimic the market.⁴²⁷

In this view "fairness" plays an important role because society is not exclusively concerned with the maximisation of aggregate wealth, but also with the equability of its distribution.⁴²⁸ "Economic" justice is mostly ignored in mainstream corporate law: if "people use bargained-for exchange to distribute goods, the weaker bargainer will be less able to extract concessions from the other".⁴²⁹ The less-well-off party is marginally better off, but the more powerful party to the contract will tend to be much better off: unless there is "some explicit constraint on the ability of corporations to pass along the lion's share or profit to shareholders, the nation's inequality will worsen over time".⁴³⁰ Conversely, in this view corporate law is best suited to and is a more efficient means to promote fairness, and to redistribute wealth and income than other areas of regulation.⁴³¹ A stakeholder-oriented corporate law "would work at the initial distribution of the corporate

⁴²⁷ Greenfield 2005 *Hastings Bus LJ* 106-107.

⁴²⁸ Greenfield 2005 *Hastings Bus LJ* 109-110.

⁴²⁹ Greenfield 2005 *Hastings Bus LJ* 111.

⁴³⁰ Greenfield 2005 *Hastings Bus LJ* 111.

⁴³¹ Greenfield 2005 *Hastings Bus LJ* 111.

surplus and would benefit stakeholders up and down the economic hierarchy".⁴³² If "fairness" is taken seriously as a value, a corporate law framework that does not promote fairness is unacceptable.⁴³³

2.4.2.2.5 Principle 5

*Participatory, democratic corporate governance is the best way to ensure the sustainable creation and equitable distribution of corporate wealth.*⁴³⁴

The "fair" allocation of corporate surplus (principle four above) "is essential to sustaining socially-beneficial corporations over time, but allocative decisions are extremely difficult, especially *ex ante*".⁴³⁵ Corporate governance should focus on procedural fairness rather than trying to reach agreement *ex ante* about substantive fairness: the crucial objective is "to create methods of decision-making"⁴³⁶ that offer procedural fairness among the various stakeholders. If a corporation is to serve its stakeholders by creating wealth in a sustainable way and share the wealth in an equitable manner, management needs to be subjected to different constraints. The fiduciary duty of directors and management should thus be changed and should be owed to the firm as a whole in circumstances which empower stakeholders with an enforcement mechanism,⁴³⁷ such as a civil action for a breach of the duty of care, or by providing for the election of representatives to the board,⁴³⁸ employees elect a portion of the board.⁴³⁹ German co-determination is an example of the last practice where half of the supervisory board of major companies consists of worker representatives.⁴⁴⁰ A "pluralistic" composition of the board could "retard those selfish impulses because any behaviour that benefits one stakeholder at the expense

⁴³² Greenfield 2005 *Hastings Bus LJ* 112.

⁴³³ Greenfield 2005 *Hastings Bus LJ* 112.

⁴³⁴ Greenfield 2005 *Hastings Bus LJ* 112.

⁴³⁵ Greenfield 2005 *Hastings Bus LJ* 113.

⁴³⁶ Greenfield 2005 *Hastings Bus LJ* 113.

⁴³⁷ Greenfield 2005 *Hastings Bus LJ* 114-115.

⁴³⁸ Greenfield 2005 *Hastings Bus LJ* 115.

⁴³⁹ Greenfield 2005 *Hastings Bus LJ* 115.

⁴⁴⁰ Greenfield 2005 *Hastings Bus LJ* 115. German co-determination is discussed in chapter 7 below.

of the firm must be done in the view of the others".⁴⁴¹ The probable effect of a broadening of the composition of the board would be that non-shareholder stakeholders speak for other stakeholders to gain a "larger share of the pie than they now get".⁴⁴² It is claimed boards stand to benefit from "a greater openness and diversity", and such "openness would not only make for better decision-making but likely fairer decision-making as well".⁴⁴³

2.5 Conclusion

The discussion of the functions of labour law and the theories and models about the nature of companies, demonstrate that labour law largely provides for and applies a protective view when it comes to the advancement of employees' rights. The managerial prerogative is still important in the sphere of both labour and company law, but this prerogative is not absolute: employees can limit its effects by acting in concert and making use of collective-bargaining structures to prevent exploitation by the employer. However, it does not mean that the prerogative has superseded: employees are obliged to work and act in good faith and the employer has the right to direct and allocate the work in terms of this prerogative.

The introduction of the notion of industrial democracy provides employees with a means to have a say in what goes on in the corporation: for example, they do not simply have to accept the demands made by the employer with regard to changes in conditions of employment. Labour law protects employees with regard to unilateral changes to their employment contracts, but employers are still entitled to change work practices unilaterally: the managerial prerogative grants them this power. The collective-bargaining process and consultation are valuable in enabling employees to address inequality in the management-labour power struggle, and central to the collective-bargaining process is the

⁴⁴¹ Greenfield 2005 *Hastings Bus LJ* 116-117.

⁴⁴² Greenfield 2005 *Hastings Bus LJ* 116-117.

⁴⁴³ Greenfield 2005 *Hastings Bus LJ* 118.

right to strike. If participation in decision-making is viewed on a continuum, the disclosure of information and consultation is one end and joint-decision-making is the other end. It is submitted the right to strike could be utilised in order to achieve a form of participation further along the continuum if employees do not have a legal right to participate in decision-making. The right to strike has a valuable function in South Africa: it has been given the status of a fundamental right in the *Constitution* and, in more practical terms, provides employees with a powerful economic weapon in the collective-bargaining process, when deadlock is reached in the negotiation process.

The changing role of companies as members of society cannot be overstated. Corporate law traditionally focused on shareholder wealth creation, but developments in corporate law and corporate governance jurisprudence indicate that the policy of shareholder primacy is questioned: shareholders no longer are regarded as the only stakeholders, or even the most important stakeholders in companies. Recent theories and models of companies indicate that shareholder primacy no longer is the preferred or appropriate model. The pluralist approach maintains, as stakeholders, employees have an important role to play in advancing the interests of the company as a whole: which, as well, is demonstrated in the various reports on corporate governance in South Africa and the *Companies Act*. Companies, in making decisions, should take note of the protection and rights granted to employees by other legislation, including the rights afforded to employees by the *Companies Act* itself.

The extent to which and the level(s) at which employees should participate in corporate decision-making is still undecided. In subsequent chapters the parameters of the question will be examined by looking at the types of processes and norms in place in labour and company law and by looking at other jurisdictions for guidance. It is clear that companies no longer can ignore the interests of employees or their voice about what goes on in the organisation.

CHAPTER 3 – RESPONSIBILITIES OF COMPANIES TOWARDS EMPLOYEES

3.1 General

The 19th century saw the foundations being laid down for modern corporations: this was the century of the entrepreneur. The 20th century became the century of management: the phenomenal growth of management theories, management consultants and management teaching (and management gurus) all reflected this pre-occupation. As the focus swings to the legitimacy and the effectiveness of the wielding of power over corporate entities worldwide, the 21st century promises to be the century of governance.⁴⁴⁴

The trajectory outlined in the above quotation indicates a shift in focus:⁴⁴⁵ The nineteenth-century entrepreneur owned his business which, in comparison to the twentieth-century corporation, was smaller and with fewer employees: the relationship between employer and employee was more personal.⁴⁴⁶ In the 20th century, the era of Fordism, economies of scale became the requirement for the enterprise to survive with numerous employees. Post second world war Keynesian economic policy saw employees arranged in a hierarchy:⁴⁴⁷ unskilled labour at the bottom, a number of levels of supervisors, followed by managers. Management was divided into different levels: lower, middle and top management. A structure typical of hierarchies such as armies.⁴⁴⁸

In large enterprises the relationship between the employer (now a company and no longer an individual) and the employee was no longer personal. In industrialised economies employees' interests were generally protected by trade unions and a process of collective bargaining regulated employer-employee relations: institutionalised conflict and protection of employees from "arbitrary management action".⁴⁴⁹ The need to remain competitive in a

⁴⁴⁴ Institute of Directors *King Report III* para 24 14.

⁴⁴⁵ Vettori *Alternative Measures* 353.

⁴⁴⁶ Vettori *Alternative Measures* 353.

⁴⁴⁷ Vettori *Alternative Measures* 353.

⁴⁴⁸ Vettori *Alternative Measures* 353.

⁴⁴⁹ Anstey 2004 *ILJ* 1829-1830; Vettori *Alternative Measures* 353.

global economy resulted in a quest for flexibility⁴⁵⁰ and produced flatter management structures, “atypical” employees, centralised collective bargaining, the individualisation of the employment relationship as well as a worldwide decline in union membership and power.⁴⁵¹

Corporate governance has become important, not only because employees need protection from exploitation as a result of the imbalance of power between employers (companies) and employees, but also because employees have become very important stakeholders in companies. Participation rights are newly granted by which companies are held accountable to act in a responsible and ethical manner.

In this scenario new corporate law and a corporate governance regime no longer focuses on shareholder wealth creation and accountability to the company itself: in its decision-making process the board should take into account the legitimate interests and expectations of stakeholders in making decisions in the best interest of the company.⁴⁵² The emphasis is on inclusivity: the inclusive approach recognises employees of the company, as well as other stakeholders such as customers and the community in which it operates.

The topic under investigation is multi-dimensional: in the previous chapter the following issue was addressed, “*The different worlds of labour and company law: truth or myth?*”⁴⁵³ in which the different functions, theories and models of labour and company law were explored in order to examine how they accommodate and promote the interests of employees in corporations.

In this chapter the focus is on employees as an important category of stakeholders of the company. The new focus in corporate law and the corporate governance regime on

⁴⁵⁰ See chapter 5 below for a discussion on flexibility.

⁴⁵¹ Vettori *Alternative Measures* 354.

⁴⁵² Institute of Directors *King Report III* 10.

⁴⁵³ See chapter 2 above for a discussion of this issue.

employees' legitimate interests and expectations, *prima facie*, is promising for employee voice to be heard in the workplace. The question under investigation is whether the *Companies Act* goes far enough to protect employees as stakeholders? This chapter investigates this question by looking at corporate governance and corporate responsibility principles, as well as at the duties of directors and the regulation of employee interests in the realm of corporate law and governance, and provides suggestions as to how the interests of employees could better have been protected in the *Companies Act*.

3.2 Corporate Law, Governance and Employees

3.2.1 The interaction between Corporate Governance and Corporate Social Responsibility

It was pointed out earlier⁴⁵⁴ that corporate governance is a broad concept, that there is no general or universally accepted definition⁴⁵⁵ and that the concept is "ambiguous" and "depends on the historical and cultural background of the country defining it".⁴⁵⁶ Not only is the concept dealt with common-law and the statutory duties of directors,⁴⁵⁷ but it includes the structures and processes involved in the control, management and decision-making of organisations.⁴⁵⁸

⁴⁵⁴ In chapter 2 above.

⁴⁵⁵ Cohen, Krishnamoorthy and Wright 2010 *Am J Comp L* 757.

⁴⁵⁶ Flay 2008 *Waikato L Rev* 308. See chapter 2 above.

⁴⁵⁷ Esser and Delport 2011 *THRHR* 449.

⁴⁵⁸ Cassim *et al Contemporary Company Law* 472. For the various definitions of corporate governance see para 24.1 above.

A long-established principle in company law is that a company has a separate legal personality in that its existence is separate from those who manage it and its shareholders.⁴⁵⁹

From the various *King* reports,⁴⁶⁰ as well as the *Companies Act*, the practice of adherence to good corporate governance principles, clearly, is not only good for business but is of great value to companies in terms of establishing themselves as corporate citizens and as an example of how business should be done. The *Companies Act* drastically changes the corporate law landscape in South Africa: changes evident in the introduction of new concepts into corporate law literature and resulting from the inclusion of provisions in the *Companies Act* that extend “new” rights to employees. New corporate law concepts have developed over the years, such as solvency and liquidity, disclosure and transparency, new standards of accountability, market manipulation, shareholder appraisal rights, corporate rescue as well as in new approaches to mergers and acquisitions.⁴⁶¹

The importance of corporate governance in the new corporate law framework cannot be overstated. *King II* lists seven principles of corporate governance, namely discipline, transparency, independence, accountability, responsibility, fairness and social responsibility; *King III* focuses on leadership, sustainability and corporate citizenship. Companies are integral to society: they create wealth and employment; they have access to the greatest pool of human capital as well as monetary resources which are applied

⁴⁵⁹ See chapter 1 above for a discussion on *Salomon v Salomon and Co Ltd* 1897 AC 22 (HL), *Dadoo v Krugersdorp Municipal Council* 1920 AD 530, sec 19(b) of the *Companies Act*; *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 2 SA 303 (C) regarding the issue of separateness as well as *Shipping Corporation of India Ltd v Evdomon Corporation* 1994 1 SA 550 (A), *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 4 SA 790 (A) *Botha v Van Niekerk* 1983 (3) SA 513 (W) as well as *Manong & Associates v City of Cape Town* 2009 1 SA 644 (EqC) and *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd* 2012 2 All SA 9 (SCA) and s 20(9) of the *Companies Act* regarding instances when the “corporate veil” be pierced. S 22 of the *Companies Act* also provides that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. This will also result in the personal liability of the directors of the company.

⁴⁶⁰ Institute of Directors *King Report I*, Institute of Directors *King Report II* and Institute of Directors *King Report III*.

⁴⁶¹ See also s 4 of the *Companies Act*, Van der Linde 2009 TSAR 224-240 as well as Cassim *et al Contemporary Company Law* 3.

“enterprisingly in the expectation of a return greater than a risk-free investment”.⁴⁶² Thus, it is important to take cognisance of the following points: business corporations “have an enduring impact on societies and economies”,⁴⁶³ and

how corporations are *governed* – their ownership and control, the objectives they pursue, the rights they respect, the responsibilities they recognize, and how they distribute the value they create - has become a matter of the greatest significance, not simply for their directors and shareholders, but for the wider communities they serve.⁴⁶⁴

It was pointed out in chapter two above that an important question in company law still today is, *In whose interest the company should be managed*.⁴⁶⁵ It was also mentioned that various contracts that make up the structure of the company as well the interests of shareholders and other stakeholders should in this context be considered by the board and management of corporations and that they should strike a balance between the interests of various stakeholders in their application of corporate governance principles.⁴⁶⁶ It is necessary for a corporation to determine which groups will be regarded as “stakeholders”.

However the concept of “stakeholder” has many definitions.⁴⁶⁷ According to one commentator, stakeholders include “any group or individual who can affect or is affected by the achievement of the organization’s objectives”,⁴⁶⁸ another states that it “can encompass a wide range of interests: it refers to any individual or group on which the activities of the company have an impact”.⁴⁶⁹ Whatever the definition the importance of the notion cannot be over-emphasised.

Therefore, corporate governance addresses the entire span of responsibilities to stakeholders of the company such as customers, *employees*, shareholders, suppliers, and

⁴⁶² Institute of Directors *King Report III* 10.

⁴⁶³ Clarke and dela Rama 2008 <http://www.ccg.uts.edu.au>.

⁴⁶⁴ Clarke and dela Rama 2008 <http://www.ccg.uts.edu.au>.

⁴⁶⁵ My emphasis. See the discussion in chapters 1 and 2 above.

⁴⁶⁶ Rossouw 2008 *Afr J Bus Ethics* 29. For a detailed discussion see chapter 2 above in this regard.

⁴⁶⁷ See chapters 1 and 2 above for an analysis of the concept stakeholder.

⁴⁶⁸ Freeman *Strategic Management* 46.

⁴⁶⁹ Mallin *Corporate Governance* 49.

the community at large.⁴⁷⁰ Both internal as well as external stakeholders are important to organisations as multiple agreements are entered into between internal stakeholders, such as employees, managers and owners, and the corporation, as well as between the corporation and external stakeholders, such as customers, suppliers and competitors.⁴⁷¹ Additional stakeholders that are of importance include government and local communities who are responsible for setting legal and formal rules within which corporations operate.

If corporate governance "*is focused on the interests of shareholders only*",⁴⁷² internal as well as external corporate governance is regarded as being shareholder orientated.⁴⁷³ As a result of the separation of ownership and control, the shareholder model increasingly is associated with agency theory, which holds that "managers are the agents of shareholders (or owners) and in their capacity as agents are obligated to act in the best financial interest of the shareholders of the corporation".⁴⁷⁴

It is submitted that this view is too narrow and is out-dated because *shareholders are no longer the only primary stakeholders*⁴⁷⁵ of a corporation and that the corporation takes the interests of all stakeholders into consideration, even those of constituents such as pressure groups or non-governmental organisations, "public interest bodies that espouse social goals relevant to the activities of the company".⁴⁷⁶ In balancing these interests the key to understanding and execution lies in the distinction between corporate law and corporate finance law. Three different groups are formally recognised in terms of corporate law, namely, shareholders, directors and officers of a company, arising from which, rights and obligations are obtained, imposed and distributed among the different role-players.⁴⁷⁷ When money is raised by the company for utilisation in its business operations, corporate finance law is relevant. The law of corporate finance is important, especially, in pre-

⁴⁷⁰ Hurst 2004 <http://www.scu.edu>. See also Clarkson 1995 *Ac Man Rev* 106.

⁴⁷¹ Freeman and Reed 1990 *JBE* 337.

⁴⁷² My emphasis. See the discussion in chapters 1 and 2 above

⁴⁷³ Rossouw 2008 *Afr J Bus Ethics* 29. See the discussion in chapters 1 and 2 above

⁴⁷⁴ Rossouw 2008 *Afr J Bus Ethics* 29. See the discussion in chapters 1 and 2 above

⁴⁷⁵ My emphasis.

⁴⁷⁶ See Du Plessis, Hargovan and Bagaric *Principles* 24.

⁴⁷⁷ Aka *NC Int'l Law Journal* 237.

incorporation contracts, the incorporation and commencement of business of the company, financing of shares, share capital.⁴⁷⁸

To make a profit, however, is not the only function of a corporation. Corporations should be active members of the society and community in which they operate and, thus, should act in a socially responsible manner towards society at large: in other words, corporate social responsibility.

The notion of “corporate social responsibility” (CSR)⁴⁷⁹ has gained prominence in the last decade. It relates to the relationship between organisations and society: as a part of society and the community, corporations are required to be socially responsible and to be more accountable to all stakeholders.⁴⁸⁰ Socially responsible behaviour has been described as “action that goes beyond the legal or regulatory minimum standard with the end of some perceived social good rather than the maximisation of profits”.⁴⁸¹ CSR is variously defined and no consensus can be reached on what exactly it entails: arguably, it also means something different in the context of developed and developing countries.⁴⁸² A starting point in considering socially responsible behaviour is the distinction between “relational responsibility” and “social activism”.⁴⁸³ “Relational responsibility” deals with the promotion of or assistance to groups such as employees, customers, suppliers or the

⁴⁷⁸ Aka *NC Int'l Law Journal* 238.

⁴⁷⁹ Hodes is of the view that a company should be socially responsible when the directors of the company can manage the company in a way that the company “voluntarily expends its resources to do something not required by law and without immediate economic benefits” (Hodes 1983 *SALJ* 468). According to Hodes various theories relating to social responsibility exist: the functional, pragmatic and social theories. The functional theory holds that the function of business is to provide good and services to consumers, which they sell at a reasonable profit. Society will benefit if these tasks are performed well. The pragmatic theory holds that the bigger the company’s profits the bigger the dividends shareholders would receive. The community will ultimately benefit when the company improves its commercial services when they render goods and services and maintain high profits. According to the social theory companies need not concern themselves with social responsibility issues as it is the government’s responsibility (Hodes 1983 *SALJ* 486-492).

⁴⁸⁰ Crowther and Jatana *International Dimensions* vi.

⁴⁸¹ Slaughter 1997 *The Company Lawyer* 321.

⁴⁸² Horrigan *Corporate Social Responsibility* 37.

⁴⁸³ Parkinson, *Corporate Power & Responsibility* 267; Kayiket 2012 *Ank Bar Rev* 80.

community who are affected by the business activities of the company.⁴⁸⁴ Important factors are the maintenance of the company's image as well as the application of fairness when dealing with these groups of stakeholders. Social activism, on the other hand, deals with beneficiaries who fall outside the scope of the company.⁴⁸⁵ The company addresses social issues that exist independently from the way it conducts its business activities and social activism is an extension of corporate activity into non-commercial spheres: issues such as human rights and non-involvement in criminal activities.⁴⁸⁶

Problems exist with the appropriate taxonomy for CSR, as is explained below:

Given the diversity of terms deployed to cover the various ethical issues relating to business, it is impossible to find a meaning that will accommodate even the majority of actual uses of the term, 'CSR', let alone its increasingly popular surrogate 'corporate responsibility' ... CSR is drenched in alternate notions of 'meeting societal preconditions for business', 'building essential social infrastructure', 'giving back to host communities', managing business drivers and risks', 'creating business value', 'holding business accountable' and sharing collective responsibility'...

Classic attempts to define CSR are packed with notions of voluntarism, social altruism and profit-sacrificing, as in its use 'to denote the obligations and inclinations, if any, of corporations organized for profit, voluntarily to pursue social ends that conflict with the presumptive shareholder desire to maximize profit'. Yet, this risks [sic] making CSR marginal to core corporate concerns, and framing it in opposition to corporate profit-making and shareholder wealth-generation. Alternative formulations embrace the full gamut of CSR's profit-enhancing and profit-sacrificing forms. For example, Professor Campbell views CSR as encompassing 'those obligations (social or legal) which concern the major actual and possible social impact of the activities of the corporation in question, whether or not these activities are intended or do in fact promote profitability of the particular corporation', in a way that distinguish between 'corporate philanthropy' (i.e. corporate humanitarianism that is not central to core business, 'corporate business responsibility' towards shareholders and free-market competition, and 'corporate social responsibility' i.e. obligations arising from the consequences of business activity).

This account of CSR includes the two limbs of 'instrumental CSR' (which is pursued for business profitability and 'intrinsic CSR' (which is pursued regardless of its connection to business profitability). Such definitional nuances are the gateway to important questions in delineating corporate responsibilities towards groups and communities beyond shareholders justifying corporate profitability by reference to its underlying socio-ethical utility, and

⁴⁸⁴ Parkinson, *Corporate Power & Responsibility* 267; Kayiket 2012 *Ank Bar Rev* 80.

⁴⁸⁵ Parkinson, *Corporate Power & Responsibility* 267; Kayiket 2012 *Ank Bar Rev* 80.

⁴⁸⁶ Kayiket 2012 *Ank Bar Rev* 80.

recognizing the limits of a conception of CSR solely in the norms and values of open market competition.⁴⁸⁷

The connotations of what CSR entails vary from “business ethics or philanthropy or environmental policy”, to “corporate social performance and corporate citizenship” and to “social accounting or corporate accountability”.⁴⁸⁸ Two of the most frequently cited definitions are those of the European Commission and the World Business Council for Sustainable Development.⁴⁸⁹ The European Commission defines CSR as “[a] concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a *voluntary basis*”;⁴⁹⁰ the World Business Council for Sustainable Development defines it as “the commitment to contribute to sustainable economic development working with *employees*, their families, the local community and society at large to improve their quality of life”.⁴⁹¹

In the South African context a definition of CSR is:

Corporate responsibility is the responsibility of the company for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that: contributes to sustainable development, including health and the welfare of society; takes into account the legitimate interests and expectations of stakeholders; is in compliance

⁴⁸⁷ Horrigan *Corporate Social Responsibility* 34-35. Welling holds a different view regarding CSR: “I’ve been told that the Corporate Social Responsibility movement began some 25 years ago. It appears to be based on some assumptions. First, it asserts that shareholders are ‘corporate owners’. Second, it describes the traditional view of a corporation as a ‘shareholder focused entity’. Having made those assumptions, CSR proponents then urge a change to a ‘stakeholder’ model. I don’t share those assumptions. Corporations either (i) are people in law, or (ii) have the legal rights and liberties of humans. People, and anyone with humans’ rights and liberties, can’t be owned. Nor is a corporation a ‘shareholder focused entity’: it is just a legal person, focused on its own selfinterests. Having rejected those assumptions, I see no reason to adopt a ‘stakeholder’ model. ...We digressed from our review of corporate social responsibility with onepoint left to consider. That point involved the possibility that, as a general legal proposition, a director owes a legal duty to consider the interests of stakeholders’. I said that must be incorrect” (Welling 2009 *Corporate Governance eJournal* 1-7).

⁴⁸⁸ Young and Thyl 2013 *J Bus Ethics* 3.

⁴⁸⁹ Villiers “Corporate Social Responsibility” 171.

⁴⁹⁰ My emphasis. Communication from the Commission concerning Corporate Social Responsibility 2011 <http://eur-lex.europa.eu>.

⁴⁹¹ My emphasis. The World Business Council for Sustainable Development 2002 <http://www.wbcsd.org>.

with applicable law and consistent with international norms of behaviour; and is integrated throughout the company and practiced in its relationships.⁴⁹²

It is submitted that (large) corporations are crucial to sustainable development: they possess considerable financial and political power. The CSR dimension gives rise “to an expectation that they will also participate in sustainable development activities, since CSR and sustainable development are closely linked”:⁴⁹³ frequently, they are treated as interchangeable concepts. It has been pointed out that the definitional problems surrounding CSR are compounded by the emergence of new concepts, such as corporate sustainability and corporate citizenship, “which cover the same or similar territory”.⁴⁹⁴ Other commentators regard CSR to be synonymous with sustainable business practices and responsible corporate governance.⁴⁹⁵ It is claimed corporate citizenship, stakeholder engagement and sustainability reporting “are imperative to ensure the long-term success and continuing existence of an organisation, but they also bring immediate benefits such as increased investor interest, a better corporate reputation and, possibly, an increased customer base”.⁴⁹⁶ In terms of *King III*, sustainability⁴⁹⁷ is “the primary moral and economic imperative of the 21st century” and is “one of the most important sources of both opportunities and risks for businesses”.⁴⁹⁸ It is argued that decision-makers should note a fundamental shift in the way companies and directors act and organise themselves as the current incremental changes towards sustainability are insufficient.⁴⁹⁹

Zerk states that the term CSR refers to the notion

⁴⁹² Institute of Directors *King Report III* 118.

⁴⁹³ Villiers “Corporate Social Responsibility” 171. See also Horrigan 2007 *MqJBL* 85-122 with regard to more detail on CSR trends and the regulation of corporate responsibility, governance and sustainability.

⁴⁹⁴ Zerk *Multinationals and Corporate Social Responsibility* 32.

⁴⁹⁵ Keith 2010 *Bus Law Int'l* 273.

⁴⁹⁶ Marx and Van Dyk 2011 *JEFS* 84.

⁴⁹⁷ See chapter 1 above for the definition of sustainability.

⁴⁹⁸ Institute of Directors *King Report III* 11.

⁴⁹⁹ Institute of Directors *King Report III* 11.

that each business enterprise, as a member of society, has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society and health.⁵⁰⁰

Importantly, the “potential role of corporations through their CSR activities in sustainable development is significant for workers and trade unions because sustainable development is widely considered to include recognition of the need and relevance of labour”.⁵⁰¹ Thus, CSR might be considered as “an open door for a more participatory role for workers and their representatives and for achieving better and stronger labour standards”.⁵⁰² CSR amplifies workers’ voices in the workplace.

The conception in corporate law of corporate responsibility and governance faces 21st century pressures:

In conventional corporate theory, a strong connection exists between corporate responsibility and governance according to law (as distinct from corporate amenability to other societal norms), the sets of interests regulated by corporate law (as distinct from other laws), and the social benefits of private interests using capital for private purposes (as distinct from the social benefits served by pursuit of social goals). In other words, a common thread runs through the orthodox divide between public and private interests, corporate law and non-corporate law, and corporate and social responsibility. Given its overall grounding in underlying strands of political legitimacy, social efficiency and governance workability, this thread points towards *a* (if not *the*) major contemporary normative objection to CSR, which is that pursuit of social goals is better justified by a mandate from the body politic through law than by a self-adopted and ‘open-minded internal social welfare instruction’ for boards and other corporate actors.⁵⁰³

CSR and corporate governance are interrelated fields: a “growing convergence between corporate governance and corporate responsibility issues can be observed”⁵⁰⁴ in that codes and the advocates of corporate governance now include corporate responsibility issues in the domain of the fiduciary responsibility of boards and directors and of good risk

⁵⁰⁰ Zerk *Multinationals and Corporate Social Responsibility* 32.

⁵⁰¹ Villiers “Corporate Social Responsibility”171.

⁵⁰² Villiers “Corporate Social Responsibility”171.

⁵⁰³ Horrigan *Corporate Social Responsibility* 10.

⁵⁰⁴ Da Piedade and Thomas 2006 *SA J of Hum Res Man* 65.

management practices as well as recognition “to the fact that without proper governance and management accountability, corporate responsibility will not be able to be effectively institutionalised within organisations”.⁵⁰⁵

In the context of corporate governance CSR has been defined as a “system of checks and balances, both internal and external to companies which ensures that companies discharge their accountability to all of their stakeholders and act in a socially responsible way in all areas of their business activity”.⁵⁰⁶ CSR is also regarded as “extended corporate governance”; “CSR extends the concept of fiduciary from a mono-stakeholder setting (where the sole stakeholder with fiduciary duties is the owner of a firm), to a multi-stakeholder one in which the firm owes all its stakeholders fiduciary duties (the owners included) which cannot be achieved without corporate transparency and disclosure and is predicated on communication with and fair treatment of all stakeholder groups”.⁵⁰⁷

Clearly CSR and corporate governance are mutually supportive and interrelated. Effective and responsible leadership is at the heart of good corporate governance: four basic values, responsibility, transparency, fairness and accountability, should be taken into account in decision-making and management.⁵⁰⁸ These values are important not only for how corporations conduct business but also in regard to how they treat their stakeholders, including employees. The ethics of governance place the following five moral duties on directors, namely,

- (i) conscience,⁵⁰⁹

⁵⁰⁵ Da Piedade and Thomas 2006 *SA J of Hum Res Man* 65.

⁵⁰⁶ Solomon *Corporate Governance* 7.

⁵⁰⁷ Young and Thyil 2013 *J Bus Ethics* 3.

⁵⁰⁸ See Institute of Directors *King Report III* 10 as well as *South African Broadcasting Corporation Ltd v Mpofu* 2009 4 All SA 169 (GSJ) par 64 where the court stressed that “good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly”. *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 5 SA 333 (W) para 16.7.

⁵⁰⁹ Directors should avoid conflict of interests by acting with intellectual honesty in the best interest of the company and all its stakeholders in accordance with the inclusive shareholder value approach. They should also apply independence of mind to ensure that the best interest of the company and its stakeholders is served (Institute of Directors *King Report III* 21).

- (ii) inclusivity of stakeholders,⁵¹⁰
- (iii) competence,⁵¹¹
- (iv) commitment,⁵¹² and
- (v) courage.⁵¹³

The role of the corporation has changed from the conventional view that the corporation primarily operates to advance the interests of its shareholders to a view that the corporation should operate to benefit a wider range of constituents.⁵¹⁴ The “triple bottom line”⁵¹⁵ is important when a corporation conducts business and decisions are made: a corporation and its responsible leaders not only balance but also integrate in their strategies and operations sustainable economic, social and environmental aspects and interests.⁵¹⁶ The drive towards achieving the goals of a triple bottom line approach is opposed to the view of Milton Friedman who once commented that “there is but one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game”.⁵¹⁷ What corporations do matters to their shareholders, society (including employees) and the world at large.⁵¹⁸ companies are expected to conduct themselves as good corporate citizens and

⁵¹⁰ When achieving sustainability the inclusivity of stakeholders as well as their legitimate interests and expectations must be taken into account by directors for decision-making and strategy purposes (Institute of Directors *King Report III* 22).

⁵¹¹ Knowledge and skills are required for the effective governance of the company, which should be continuously, developed (Institute of Directors *King Report III* 22).

⁵¹² Diligence should be at the order of the day when performing directors’ duties and sufficient time should be devoted to company affairs. Ensuring company performance and compliance is a primary concern (Institute of Directors *King Report III* 22).

⁵¹³ Directors should have the courage to take the risks associated with directing and controlling a successful sustainable enterprise. In addition, directors should have the courage to act with integrity in all board decisions and activities (Institute of Directors *King Report III* 22).

⁵¹⁴ Olson 2010 *Acta Juridica* 221-222.

⁵¹⁵ The “triple bottom line” phrase was coined by John-Elton who is a pioneer in the corporate responsibility movement (Olson 2010 *Acta Juridica* 222). See also chapter 1 above regarding the triple bottom line.

⁵¹⁶ Institute of Directors *King Report III* 10-11.

⁵¹⁷ See Friedman *The New York Times Magazine* as quoted in Olson 2010 *Acta Juridica* 222.

⁵¹⁸ Horrigan *Corporate Social Responsibility* 4.

it is expected that companies will adopt “the inclusive approach to corporate governance and that it will enlighten shareholders”.⁵¹⁹

CSR and corporate citizenship, in certain aspects, are two distinct terms in *King III*; specifically, the chapters dealing with stakeholder protection and corporate citizenship, yet “these concepts and the inclusive and triple-bottom line approaches can be used interchangeably”.⁵²⁰ A strong nexus exists between CSR, corporate governance and sustainable business development; responsible business practices are integral parts of corporate governance practices and the integration of governance, environmental and social governance issues into investment decisions are critical to “valuing long-term investments”.⁵²¹

Thus, corporate activity should be guided and encouraged in a manner that requires corporate decisions to be based on ethical principles.⁵²² In this context the law could promote CSR:⁵²³

by pushing companies towards institutions of continuous internal inquiry and debate about how well their responsibility inducing processes and outcomes inculcate an “ethic of

⁵¹⁹ Institute of Directors *King Report II* 452.

⁵²⁰ Esser 2009 *SA Merc LJ* 319.

⁵²¹ Horrigan *Corporate Social Responsibility* 13.

⁵²² Keith 2010 *Bus Law Int'l* 273. The meaning attributed to corporate citizenship in *King III* is as follows: “Responsible corporate citizenship implies an ethical relationship between the company and the society in which it operates. As responsible corporate citizens of the societies in which they do business, companies have, apart from rights, also legal and moral obligations in respect of their economic, social and natural environments. As a responsible corporate citizen, the company should protect, enhance and invest in the wellbeing of the economy, society and the natural environment” (Institute of Directors *King Report III* 117).

⁵²³ The law and CSR interact in various ways: “(i) the corporate and non-corporate laws of many countries reflect at least some CSR concerns; (ii) law controls what business can and cannot do; (iii) law provides mechanisms to incorporate CSR standards (e.g. contractual adoption of codes); (iv) law provides the frame for CSR ‘boundary’ disputes about accountability for corporate irresponsibility (e.g. multinational corporate group liability for corporate harm); (v) ‘soft law’ standards influence the evolution of CSR (and vice versa); (vi) law informs whole-of-organization CSR approaches (e.g. corporate inculcation of internationally recognized human rights standards); (vii) international and regional agreements on trade, investment and the environment influence CSR actors towards CSR public policy goals; and (viii) even technically non-binding CSR standards can have a normative effect on corporate activity and influence the development of legal doctrines affecting corporations too” (Horrigan *Corporate Social Responsibility* 28).

responsibility' and a 'corporate conscience', within a legal framework that is sensitized by CSR-friendly public policies and interests, as well as providing organs of government with the stimulus and material to become vehicles of public dialogue and action orientated around shaping laws and policies to reflect both of these institutional goals.⁵²⁴

An underlying philosophy in *King III* is that companies can be regarded as good corporate citizens in that they subscribe to sustainability considerations that are rooted in the *Constitution*. It entails that they should adhere to the basic social contract which, as fellow South Africans, they have entered into, as well as fulfil their responsibilities in order to promote the realisation of human rights.⁵²⁵ A social contract carries an implication of altruistic behaviour, which in essence is "the converse of selfishness".⁵²⁶

The *Companies Act*, in its purpose provision, *inter alia*, has a commitment to promoting compliance with the Bill of Rights in the application of company law, as well as to the development of the South African economy by "encouraging transparency and high standards of corporate governance".⁵²⁷ These principles are furthered by the acknowledgement of the significant role of enterprises within the social and economic life of the nation,⁵²⁸ as well as the aim to balance the "rights and obligations of shareholders and directors"⁵²⁹ within companies and to encourage the efficient and responsible management of companies.⁵³⁰

Companies obtain various benefits from society, such as the recognition of a separate legal personality as well as the regulatory framework within which it operates.⁵³¹ In return

⁵²⁴ Horrigan *Corporate Social Responsibility* 27.

⁵²⁵ Institute of Directors *King Report III* 11.

⁵²⁶ Crowther and Jatana *International Dimensions* viii.

⁵²⁷ S 7 (a)-(b)(iii) of the *Companies Act*.

⁵²⁸ S 7(b)(iii) of the *Companies Act*.

⁵²⁹ S 7(i) of the *Companies Act*.

⁵³⁰ S 7(j) of the *Companies Act*. Katzew 2011 *SALJ* 691 points out the following with reference to aspects covered in s 7 of the *Companies Act* and the effect thereof: "impact on the very core of the established understanding of a company as a vehicle to maximise shareholder profits. They express goals that are a departure from the traditional philosophical basis of South African company law, which has been concerned with much narrower interests, such as the advancement of shareholders interests".

⁵³¹ Katzew 2011 *SALJ* 695. See also chapter 1 and 2 above.

companies have obligations, such as to comply with human rights imperatives: the “social contract” requires, in exchange for these benefits, that the company has corresponding obligations towards society.⁵³² The first of these obligations is “to do no harm”, yet it may also be required to take positive steps to improve the society in which it operates by achieving social benefits.⁵³³ Companies do not operate in isolation, they are regarded as being members of a society and this view reinforces “the notion of a mutually beneficial relationship between the company and its community ... alluded to in s 7 of the Companies Act”.⁵³⁴ Violations of the company’s obligations include human rights abuses, such as abusive labour practices, environmental damage or violations of the fundamental rights to equality, dignity and freedom and constitute an infringement of the negative duty not to cause harm.⁵³⁵ The connection between business and human rights (in the context of the economic downturn, but not limited to it, as emphasised and recognised by the UNSRSG⁵³⁶ in the 2009 report) can be summarised as follows:

It is often mused that in every crisis there are opportunities. In operationalising the ‘protect, respect and remedy’ framework, ... to identify such opportunities in the business and human rights domain and demonstrate how they can be grasped and acted upon ... In the face of what may say be the worst worldwide economic downturn in a century, however, some may be inclined to ask: with so many unprecedented challenges, is this the appropriate time to be addressing business and human rights? This report answers with a resounding ‘yes’. It does so based on three grounds.

First, human rights are most at risk in times of crisis, and economic crises pose a particular risk to economic and social rights ... Second, ... the same types of governance gaps and failures that produces the current economic crisis also constitute ... the permissive environment for corporate wrongdoing in relation to human rights ... Third, the ‘protect, respect and remedy’ framework identifies specific ways to achieve these objectives.⁵³⁷

In order to conduct themselves as corporate citizens companies should prescribe to the following key principles: integrated and sustainable decision-making, stakeholder

⁵³² Katzew 2011 *SALJ* 695.

⁵³³ Katzew 2011 *SALJ* 695.

⁵³⁴ Katzew 2011 *SALJ* 696.

⁵³⁵ Katzew 2011 *SALJ* 696.

⁵³⁶ United Nations Special Representative to the Secretary General.

⁵³⁷ Horrigan *Corporate Social Responsibility* 14 where he quotes from the UNSRSG’s 2009 report to the UN Human Rights Council.

engagement, transparency, consistent business practices, accountability, community interest as well as precautionary measures.⁵³⁸ Thus, it can be expected that “a more holistic and systematic approach to corporate responsibility and its governance and regulation, signalled by heightened discussions amongst political, business and community leaders about responsible market and lending behaviour, fair business regulation, enhanced business ethics, and other features of truly sustainable businesses and economics” will be applied.⁵³⁹

The inward-looking and outward-looking dimensions of sustainable corporate success “are inextricably connected to sustainable societal well-being”.⁵⁴⁰ Therefore, companies should report on the triple bottom line and highlight issues such as social, environmental and economic issues.⁵⁴¹ A responsible business, for example, doing business in an emerging economy, such as South Africa, could add value by “building human capital by investing in education and transferring skills, encouraging good governance, assisting social cohesion, strengthening economies, protecting the environment, and addressing health related matters, in particular HIV/AIDS”.⁵⁴² They could demonstrate that the society in which they operate matters to them and be good corporate citizens.

Thus, it is important that integrated reporting addresses not only financial but also sustainability issues:⁵⁴³ stakeholders are better able to assess the economic value of a company. Companies should report information that enables stakeholders to know how the company has “impacted positively and negatively on the economic life of the community in

⁵³⁸ Keith 2010 *Bus Law Int'l* 274.

⁵³⁹ Horrigan *Corporate Social Responsibility* 14.

⁵⁴⁰ Horrigan *Corporate Social Responsibility* 14.

⁵⁴¹ It appears that major companies worldwide are making the transition from environmental reporting to “more expansive sustainability reporting” under a combination of regulatory initiatives. This includes trends such as such socially responsible investing (SRI) and environmental, social and governance (ESG) considerations in investment decision-making (Horrigan *Corporate Social Responsibility* 17). Corporate responsibility and sustainability reporting “is increasingly integrating financial and non-financial information as well as performance indicators that all link ESG, SRI and CSR concerns to company specific business drivers and risks” (Horrigan *Corporate Social Responsibility* 18).

⁵⁴² Da Piedade and Thomas 2006 *SA J of Hum Res Man* 66.

⁵⁴³ See Institute of Directors *King Report II* 453 as well as Institute of Directors *King Report III* 13.

which it operated during the year under review” as well as how the company plans to approach the coming year “to enhance the positive aspects and eradicate or meliorate the negative aspects that impacted on the economic life of the community in which it operated”.⁵⁴⁴ Integrated reporting satisfies the need of stakeholders for “forward-looking information” that, in return, increases the trust and confidence of stakeholders and the legitimacy of the company’s operations.⁵⁴⁵

The focus of the *Companies Act* is disclosure of the financial aspect, however, compliance with the *Companies Act*, as well as *King III*, “will result in South African companies being in the forefront with regard to holistic corporate reporting”.⁵⁴⁶ The duties of directors in the context of company law and the promotion of corporate governance with specific reference to the importance of a stakeholder inclusive approach will be addressed below.

3.2.2 Duties of directors

3.2.2.1 General

The duties of directors has been a contentious issue in company law jurisprudence.⁵⁴⁷ These duties play a role in ensuring the promotion of corporate governance principles.⁵⁴⁸

In this context and the light of the discussion of the debate in company law around what constitutes “the best interests of the company”⁵⁴⁹ must be re-evaluated.

⁵⁴⁴ See Institute of Directors *King Report II* 453 as well as Institute of Directors *King Report III* 13.

⁵⁴⁵ Institute of Directors *King Report III* 13.

⁵⁴⁶ Institute of Directors *King Report II* 453.

⁵⁴⁷ See Naudé *Die regsposisie van die maatskappydirekteur* regarding the duties of directors and the concept company.

⁵⁴⁸ Mongalo *Corporate Law* 158.

⁵⁴⁹ Davis and Le Roux 2012 *Acta Juridica* 309.

A critical issue that follows from it is: *Should the directors, particularly of a public company, be required to run the company exclusively for the benefit of shareholders or should they be managed to take into account the interest of other stakeholders, such as employees, creditors, customers, suppliers, the environment and the local community in which the corporation is located?*⁵⁵⁰

The 1973-*Companies Act*⁵⁵¹ did not contain clear rules regarding the duties and liabilities of directors and corporate governance.⁵⁵² The regulation of these aspects was left to *King I*⁵⁵³ and the common law.⁵⁵⁴

⁵⁵⁰ Davis and Le Roux 2012 *Acta Juridica* 309-310.

⁵⁵¹ *Companies Act* 61 of 1973.

⁵⁵² The *Companies Act* 61 of 1973 was repealed by the 2008-act. The 1973-act, however, did not deal with matters of corporate governance. These matters were dealt with exclusively as voluntary codes by *King I*, and its successor *King II*.

⁵⁵³ Davis *et al Companies* (2009) 101.

⁵⁵⁴ Davis *et al Companies* (2011) 110. Sealy points the following out regarding the duties of directors: "Although the separate personality of the company was acknowledged long before it gave immortality to Mr. Salomon in 1897, there is abundant evidence that 'the company' was regarded as the associated members rather than the legal entity: the company was 'they' and not 'it'. We have, of course, left this way of thinking behind us long ago. It would be hard, anyway, to conceive of the one-person company, the wholly-owned subsidiary or many other typical modern incorporations as 'they', or indeed as an association of any kind. Much of the law handed down to us reflects this Victorian perception of the company, in particular (for present purposes), the idea of the director as trustee or agent for his (or her) constituents, the company in the sense of the collective corporate membership. It is they who have chosen him, warts and all; they who can remove him; they who can ratify his acts in excess of authority and forgive his sins; even, for many decades, they who could dictate to him and his co-directors how to run the business.' His duties of care and skill can properly be assessed by subjective criteria, since he has been elected for whatever qualities he has. And in fixing his duties to the company it is right to take account of the particular terms of the members' social contract (i.e. the memorandum, including the objects clause, and the articles of association), since all concerned are party to it. The language of trust, as Lord Lindley and his predecessors would have understood and used it, was apt to meet the claims of the day against delinquent directors. One could abuse (or breach) a 'trust' without being formally constituted a trustee of particular property; there could be a 'fraud' on a discretionary power without any imputation of dishonesty; the use of powers for an improper purpose was not a "bona fide" exercise of those powers, irrespective of any question of motive; and one could be held accountable in equity for one's wrongdoing without bringing into play all the ramifications of the constructive trust as it is generally understood nowadays. If the law on directors' duties is to be re-stated so as to make the best sense to us latterday twentieth-century lawyers, it might well be best to avoid old terms like these which contain the seeds of much misconception" (Sealy 1987 *Monash U Law Rev* 165-166).

The common-law fiduciary duties of directors require them to exercise their powers *bona fide* and for the benefit of the company.⁵⁵⁵

In addition, they have the duty to display reasonable care and skill in carrying out their functions:⁵⁵⁶

- (i) they should act in the best interests of the company,⁵⁵⁷

⁵⁵⁵ Delpont points out that the *Companies Act* “does not exclude the common law, and to the extent that it is not in conflict with a statutory provision, it still applies. When determining a matter brought before it in terms of the Act, or making an order contemplated in the Act, a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act. A basic exposition of the common law duties of directors will therefore be necessary to determine the interaction between the common law and the duties in terms of the Act, and especially to determine the content of the duties. The statutory duties are not an exclusive or even a proper codification of the common law duties” (Delpont *New Companies Act* 90).

⁵⁵⁶ Benade *et al Entrepreneurial Law* 130.

⁵⁵⁷ Benade *et al Entrepreneurial Law* 130; see also the English case of *Parke v Daily News Ltd* 1962 Ch 929. This case is a good illustration of this point because the company wanted to pay the balance of the purchase price to employees as remuneration for redundancy after the board decided to sell the newspaper. The court found that the payments were *ultra vires* because they were not to the benefit of the company as a whole. Regarding the interests of the company Delpont points the following out: “The question will then be who the company is, as there is a multiplicity of ‘stakeholders’ inside the company, (for example, the shareholder/s) as well as ‘outside’ the company (such as the creditors, employees, the state and the community). The basic principle is that the company must be used for profit maximisation in favour of the shareholders, and the shareholders as body will therefore be the ‘company’ in this sense”: “This viewpoint has been questioned by two opposing alternatives; the one being that the directors can, under certain circumstances, ignore the interests of the shareholders in favour of the interests one of the other stakeholders (‘pluralist approach’) and the other that the interests of another stakeholder can also be taken into account if it promotes the interests of the shareholders (‘enlightened shareholders approach’). This debate is far from over, but the latter approach is the more acceptable” (Delpont *New Companies Act* 90).

- (ii) avoid conflicts,⁵⁵⁸
- (iii) do not take corporate opportunities or secret profits,⁵⁵⁹
- (iv) do not fetter their votes, and
- (v) use their powers for the purpose conferred and not for a collateral purpose.⁵⁶⁰

The duty of care and skill underwent a total revamp in the 2008 Companies Act and the level of the duty is much more complicated and totally different from what it is/was under the common law. The duty of care, skill and diligence entails that “directors must manage the business of the company as a reasonably prudent person would manage his own affairs”.⁵⁶¹

Delpont points out that the director “must also exercise care and skill in the execution of his functions or powers within the company. In contrast to fiduciary duties, liability will

⁵⁵⁸ In *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 3 SA 806 (C) the court emphasised the fact that a fiduciary duty exists between a company and its directors. The court also stated that even non-executive directors have this fiduciary relationship towards the company. The court confirmed that the fiduciary duty of directors can be remedied by means of an interdict. This duty has a more far-reaching effect on senior employees and directors than on junior employees because the latter group’s duty only extends to confidential information and trade secrets. The fiduciary duty is therefore owed by senior management and this common-law duty extends even after a director’s appointment has come to an end (820f-i). In *Howard v Herrigel* 1991 2 SA 660 (A) 678 the court held as follows: “In my opinion it is unhelpful and even misleading to classify company directors as ‘executive’ or ‘non executive’ for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in statute. At common law, once a person accepts an appointment as director, he becomes fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case ... However, it is not helpful to say of a particular director that, because he was not an ‘executive director’, his duties were less onerous than they would have been if he were an executive director. Whether the inquiry be one in relation to negligence, reckless conduct or fraud, the legal rules are the same for all directors”. See also *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 4 All SA 403 (SCA) 411, *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 198d-h; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54; *Daewoo Heavy Industries (SA) Ltd v Banks* 2004 2 All SA 530 (C) 533c-e; and *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) 628f-g in this regard.

⁵⁵⁹ Delpont *New Companies Act* 91.

⁵⁶⁰ Institute of Directors *King Report III* 12.

⁵⁶¹ Institute of Directors *King Report III* 11; Benade *et al Entrepreneurial Law* 131.

be on the basis of delict; therefore all the elements of a delict must be proved.”⁵⁶²

The *Companies Act* contains provisions dealing with directors’ general duties that are comparable to the common-law duties of directors:⁵⁶³ the *Companies Act*’s provisions pertaining to the duties of directors are a semi- or *quasi*-codification of their common-law duties.⁵⁶⁴ Katz is of the view that this codification “does not in reality alter the common-law position ... [i]t is merely descriptive of the common law”.⁵⁶⁵

⁵⁶² Delpont points out that the *Companies Act* “does not exclude the common law, and to the extent that it is not in conflict with a statutory provision, it still applies. When determining a matter brought before it in terms of the Act, or making an order contemplated in the Act, a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act. A basic exposition of the common law duties of directors will therefore be necessary to determine the interaction between the common law and the duties in terms of the Act, and especially to determine the content of the duties. The statutory duties are not an exclusive or even a proper codification of the common law duties” (Delpont *New Companies Act* 90).

⁵⁶³ Esser and Du Plessis 2007 *SA Merc LJ* 347.

⁵⁶⁴ McClennan 2009 *TSAR* 184.

⁵⁶⁵ Katz 2010 *Acta Juridica* 261.

King III specifically provides for the “apply or explain” principle that must be applied by directors when acting on behalf of the company.⁵⁶⁶ *King III* indicates how the duties must be complied with, not what the duties are. In an “apply or explain” regime the following issues should be addressed:

... the board of directors, in its collective decision-making, could conclude that to follow a recommendation would not, in the particular circumstances, be in the best interests of the company. The board could decide to apply the recommendation differently or apply another practice and still achieve the objective of the overarching corporate governance principles of fairness, accountability, responsibility and transparency. Explaining how the principles and recommendations were applied, or if not applied, the reasons, results in compliance. In reality, the ultimate compliance officer is not the company’s compliance officer or a bureaucrat ensuring compliance with statutory provisions, but the stakeholders.⁵⁶⁷

Hindsight is a perfect judge whether a board’s determination in applying practice was justified as in the best interests of the company.

⁵⁶⁶ Sealy points out that “In the traditional model of the company as an object of directors’ duties, it is perceived entirely in terms of the members, present and future propose to refer to this concept of the company as ‘the corporate membership’. This simple model is inadequate when ‘wider’ interests have to be reckoned in. If directors are to be required to have a concern for (say) employees and creditors, it is no longer appropriate to regard the membership alone as the constituent body so as (for example) to entrust it with an unfettered power to ratify and condone directors’ irregular acts; and surely an objective yard- stick ought to be used to measure directors’ standards of care and skill, since these new beneficiaries of that care and skill have had no say in choosing them. Moreover, while it may be both reasonable and proper to bring the members’ associative contract into the picture when the law is treating the membership as the body corporate, it is not obvious that we should do so when wider interests are affected - indeed, with the abolition of the doctrine of constructive notice of the memorandum and articles, there is no reason to suppose that non-members can have any knowledge of these documents. ... All these considerations suggest that for the future it may be necessary for the law to conceptualise ‘the company’ not as the corporate membership but as the corporate enterprise, as an aid to the formulation of new rules of directors’ duties in cases where interests other than purely membership-interests are affected. A workable ‘proper purposes’ rule could not any longer resolve disputes by reference simply to the interests of the shareholders. Such an approach would, indeed, more accurately reflect the modern directors’ own attitudes: of course they are conscious that their company has share- holders, but they are just as keenly aware that it has customers, a workforce, goodwill, a product, a brand-name and logo, possibly even a company flag and anthem. If disaster is threatening, their conscience stirs for the suppliers and other creditors who may be drawn in by the company’s collapse. In fact, despite the time-honoured formulations to the contrary, there are clear instances of this thinking already in a good number of the decided cases - cases where the interests of a section of even the whole of the membership have been sacrificed for what was considered the good of the enterprise as a going concern. To rationalise this as a decision in the ‘long-term’ interests of the membership or by invoking the spectre of the ‘individual hypothetical member’ is surely a far more artificial exercise” (Sealy 1987 *Monash U Law Rw* 173).

⁵⁶⁷ Institute of Directors *King Report III* 7.

A hybrid system exists in which corporate governance principles of fairness, accountability, responsibility and transparency principles override a specific recommended practice, subject to the fact that some principles and recommended practices have been legislated. Thus, there must be compliance with the letter of the law, which leaves no room for interpretation.⁵⁶⁸ The “apply and explain” principle can be seen as a refinement of the “comply and explain” principle that applied in *King II*.⁵⁶⁹ However, it is unclear what should be explained and complied with. Also, it is, unclear whether *King II* merely suggested or created an expectation.⁵⁷⁰

The *King III* committee found “apply” to be more appropriate than “comply” for the following reasons:⁵⁷¹

The ‘comply or explain’ approach could denote a mindless response to the King Code and its recommendations whereas the ‘apply or explain’ regime shows an appreciation for the fact that it is often not a case of whether to comply or not, but rather to consider how the principles and recommendations can be applied.⁵⁷²

The standards of directors’ conduct are covered by section 76 of the *Companies Act*. Section 76(3) provides:

[A] director of a company, when acting in that capacity, must exercise the powers and perform the functions of director -

- (a) in good faith and for a proper purpose;
- (b) in the best interests of the company; and

⁵⁶⁸ Institute of Directors *King Report III* 8.

⁵⁶⁹ See Esser and Delpont 2011 *THRHR* 450.

⁵⁷⁰ Esser *Recognition of Various Stakeholder Interests* 295.

⁵⁷¹ See Esser and Delpont 2011 *THRHR* 450. Institute of Directors *King Report II* 454 notes that in formulating the code of governance for the United Nations, the words “‘comply or explain’ led to some observers at the United Nations believing that the word ‘comply’ connoted regulation and consequently that the Code was based on the principle ‘adopt or explain’. The Netherlands has gone even further and its Code is based on ‘apply or explain’. It has been commented in the United Kingdom that perhaps they ‘missed a trick’ in continuing with ‘comply or explain’. King III had adopted ‘apply or explain’.”

⁵⁷² Institute of Directors *King Report III* 7.

- (c) with the degree of care, skill and diligence that may reasonably be expected of a person;
- (i) carrying out the same functions in relation to the company as those carried out by that director; and
- (ii) having the general knowledge, skill and experience of that director.

In dealing with the duty of care, skill and diligence in terms of section 76(3) of the *Companies Act*, the guidelines in *King III* are useful in order to determine whether a director acted with the necessary care and skill.⁵⁷³ The guidelines regarding the duty of care, skill and diligence explain:

As far as the body of legislation that applies to a company is concerned, corporate governance mainly involves the establishment of structures and processes, with appropriate checks and balances that enable directors to discharge their legal responsibilities, and oversee compliance with legislation. In addition to compliance with legislation, the criteria of good governance, governance codes and guidelines will be relevant to determine what is regarded as an appropriate standard of conduct for directors. The more established certain governance practices become, the more likely a court would regard conduct that conforms with these practices as meeting the required standard of care. Corporate governance practices, codes and guidelines lift the bar of what are regarded as appropriate standards of conduct. Consequently, any failure to meet a recognised standard of governance, albeit not legislated, may render a board or individual director liable at law.⁵⁷⁴

Fisheries Development Corporation of SA Ltd v Jorgensen is an illustration of this duty: the court stated:⁵⁷⁵

- A considerable degree of the nature of the company's business and of any particular obligations assumed by or assigned to a director must be taken into account when dealing with a director's duty of care and skill. A distinction must also be drawn between the so-called full-time or executive director, and the non-executive director. An executive director participates in the day-to-day management of the company's affairs or of a portion thereof whereas a non-executive director has not undertaken any special obligation and is not bound to give constant consideration to the affairs of the company. The latter's duties are of an irregular nature in that he can be required

⁵⁷³ See also Esser and Delport 2011 *THRHR* 450.

⁵⁷⁴ Institute of Directors *King Report III* 8.

⁵⁷⁵ *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W) 165g-166e.

to attend periodic board meetings, and any other meetings which may require his attention. He is not, however, bound to attend all such meetings, though he ought to whenever he is reasonably able to do so. He can also call for further meetings if he believes that they are reasonably necessary.⁵⁷⁶

- The duties and qualifications of a director are not listed as being equal to those of an auditor or accountant nor is he required to have special business acumen or expertise, or ability or intelligence, or experience in the business of the company. He is nevertheless expected to exercise the care, which can reasonably be expected of a person with his knowledge and experience. He is not liable for mere errors of judgment.
- A director can delegate any duty that may properly be left to some other official. When doing so a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. He is entitled to rely upon and accept the judgment, information and advice of the management, unless he has proper reasons for querying it. He is also not bound to examine entries in the company's books, however; he should not accept information and advice blindly. When he accepts information and advice, he is entitled to rely on it, but he should give due consideration and exercise his own judgment in the light thereof.

The standard of care as set out by section 76 is "precisely descriptive of the common law-position",⁵⁷⁷ which is reinforced in the Act in relation to the determination of liability in the event of a breach of a director's duties. If a director is in breach of his duty of care, skill

⁵⁷⁶ *King III* makes provision for the composition of the board of directors and clearly provides that it must be independent. *King III* provides "the board should ensure an appropriate balance of power and authority on the board" and the majority of the board should be non-executive directors (Institute of Directors *King Report III* 38 par 62-64). It draws a distinction between executive and non-executive directors. An executive director is involved in the day-to-day management of the company or is in the full-time salaried employment of the company whereas non-executive directors are not involved in the management of the company (Annex 2.2 and 2.3 of Institute of Directors *King Report III* 53). This distinction, however, is not made in the *Companies Act*.

⁵⁷⁷ Katz 2010 *Acta Juridica* 261.

and diligence he is liable to the company in delict⁵⁷⁸ for damages and, in addition, if a contract exists between the director and his company, he is also guilty of breach of contract.⁵⁷⁹ The duty of care, skill and diligence in section 76(3) can be regarded as the “statutory equivalent of the common law duty of care and skill, but goes beyond the common law, not only in respect of the content of the duties, but also as to the level of compliance”.⁵⁸⁰ The common law duties “were determined with a subjective/objective test, but the minimum was always the lower of the two”.⁵⁸¹

The standard of care is a “mixed objective and subjective test”: it is objective in the sense that it considers as a minimum standard what a reasonably prudent person would have done in the same circumstances faced by a director and is subjective in that the skills, knowledge or experience of that particular director should be taken into account.⁵⁸² It has been argued that there is not a clear line between the fiduciary duty and the duty of care and skill and that an overlap exists. If such overlapping indeed exists it is known as the “business judgment rule”.⁵⁸³ The objective-subjective test can be found in sections 76(3)(c)(i) and (ii) of the *Companies Act*.⁵⁸⁴ Subsection (c)(i) contains the objective test and (c)(ii) the subjective. The objective-subjective test is compatible with the so-called “business judgment rule”.⁵⁸⁵ The subjective standards of “the general knowledge, skill and experience of that director” may overshadow the objective standards and might confuse the courts in the interpretation of the director’s duties.⁵⁸⁶ the solution, is that the objective test is a base-line standard before the subjective elements are considered.⁵⁸⁷ The statutory “business judgment rule” can be found in section 76(4) of the *Companies Act*.

⁵⁷⁸ Katz 2010 *Acta Juridica* 261.

⁵⁷⁹ Cilliers and Benade *Corporate Law* 148.

⁵⁸⁰ See also Esser and Delport 2011 *THRHR* 450.

⁵⁸¹ See also Esser and Delport 2011 *THRHR* 450.

⁵⁸² McClennan 2009 *TSAR* 186; Cassim *et al Contemporary Company Law* 559.

⁵⁸³ See Mongalo *Corporate Law* 170 as well as Havenga 2000 *SA Merc LJ* 25.

⁵⁸⁴ McClennan 2009 *TSAR* 186; as well as Meskin *et al Henochsberg* 462.

⁵⁸⁵ See also Delport *New Companies Act* 59 in this regard.

⁵⁸⁶ Bekink 2008 *SA Merc LJ* 111.

⁵⁸⁷ Bekink 2008 *SA Merc LJ* 111.

As is illustrated by *Fisheries Development Corporation of SA Ltd v Jorgensen*⁵⁸⁸ directors cannot be held liable for mere errors in judgment. Directors' should act in the best interest of the company and with the required care and skill: they must take reasonably diligent steps to be informed about the matter at hand and although they are allowed to take risks they cannot do so in a reckless fashion. The directors of a company should promote the interests and success of the company in the collective best interest of stakeholders: employees, customers and suppliers, as the circumstances require. It should be noted that the common-law "enlightened shareholder value" approach has not been changed by the *Companies Act* and that the statutory "business judgment rule" caters for the interests of the company. The company, as an entity, does not consist of stakeholders: however, cognisance is required of the so-called "stakeholder-inclusive approach" in *King III*, which recognises the various stakeholders of a company as important role players in the promotion of corporate governance principles.⁵⁸⁹ In this light it is submitted that the existence of a "new concept of a company" must be acknowledged. This new concept of a company has been expressed in the following terms:

There was a time when business success in the interests of shareholders was thought to be in conflict with society's aspirations for people who work in the company or in supply chain companies, for the long-term well-being of the community and for the protection of the environment. The law is now based on a new approach. *Pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones.*⁵⁹⁰

Section 77(2)(a) of the *Companies Act* provides that a director of a company may be held liable in accordance with the common law principles of a breach of a fiduciary duty. This liability is for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty by him (i) to disclose a personal financial interest;⁵⁹¹

⁵⁸⁸ *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W).

⁵⁸⁹ See chapter 2 above for a detailed discussion of this issue.

⁵⁹⁰ My emphasis. Margaret Hodge, Minister of State for Industry and Regions (UK Department of Trade and Industry, 2007 2), as quoted in Brammer, Jackson and Matten 2012 *Socio-Economic Review* 12.

⁵⁹¹ S 75 of the *Companies Act*.

(ii) to avoid a conflict of interest;⁵⁹² and (iii) to act in good and for proper purpose, or in the best interests of the company.⁵⁹³ According to Delpont⁵⁹⁴ the liability of the director “for any benefit irrespective of the damage to the company” is apparently not covered by section 77(2)(a) of the *Companies Act* and it is “not clear whether the common law will apply in this regard”.⁵⁹⁵ Section 77(2)(b) further provides that liability of a director can take place in accordance with the common-law principles relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of (i) a duty to act with the required degree of care, skill and diligence;⁵⁹⁶ (ii) any provision of the Act not otherwise mentioned in that section; or (iii) any provision of the company’s Memorandum of Incorporation.⁵⁹⁷

Section 218(2) is important in that it provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention. Although the statutory fiduciary duties apply between the directors and the company and not, for example, with regard to employees, employees can hold directors liable for breach of their duties provided that they have suffered losses as a result of such a breach. Section 218(2) imposes strict liability⁵⁹⁸ and is available to employees and their trade unions, by contrast, section 20(6) of the *Companies Act*, is available only to shareholders.⁵⁹⁹ If a director, fails to maintain his/her unfettered discretion the common law applies since the *Companies Act* does not contain a provision to this effect - section 218(2) is not applicable. The cause of action in this instance will be *sui generis* based on breach of trust in terms of common law: employees can hold the directors accountable if they act in breach of their duties.

⁵⁹² S 76(2) of the *Companies Act*.

⁵⁹³ S 76(3)(a)-(b). This provision will be applicable except where the business judgment rule in terms of s 76(4)(a) is applicable.

⁵⁹⁴ Delpont *New Companies Act* 63.

⁵⁹⁵ See *Regal (Hastings) Ltd v Gulliver* 1967 2 AC 134 (HL); and *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 4 All SA 403 SCA.

⁵⁹⁶ See 76(3)(c) of the *Companies Act*.

⁵⁹⁷ This provision will be applicable except where the “business judgment” rule in terms of s 76(4)(a) is applicable.

⁵⁹⁸ Cassim *et al Contemporary Company Law* 832

⁵⁹⁹ Wiese 2013 *ILJ* 2477.

3.2.2.2 *Achieving a balancing act?*

The stakeholder debate (as illustrated above)⁶⁰⁰ as well as the debate over CSR and corporate citizenship are integral and prominent issues in the field of corporate governance.⁶⁰¹

It has been established that the role that stakeholders play cannot be overemphasised: its importance is summarised below:

A key aspect of corporate governance is concerned with ensuring the flow of external capital to companies both in the form of equity and credit. Corporate governance is also concerned with finding ways to encourage various stakeholders in the firm to undertake economically optimal levels of investment in firm-specific human and physical capital. The competitiveness and ultimate success of a corporation is the result of teamwork that embodies contributions from a range of different resource providers including investors, employees, creditors and suppliers. Corporations should recognise that the contributions of stakeholders constitute a valuable resource for building competitive and profitable companies. It is, therefore, in the long-term interest of corporations to foster wealth-creating co-operation among stakeholders. The governance framework should recognise that the interests of the corporation are served by recognising the interest of stakeholders and their contribution to the long-term success of the corporation.⁶⁰²

The board of directors as the custodians of the company's corporate reputation should accept that stakeholder interests and expectations, even unwarranted or illegitimate ones, must be dealt with and cannot be ignored.⁶⁰³ The company's reputation is important for long-term growth and stability so it is important to note the importance of stakeholders' overall assessments which represent its corporate reputation measured by the company's performance against the legitimate interests and expectations of stakeholders.⁶⁰⁴

⁶⁰⁰ See chapter 2 above regarding the stakeholder debate.

⁶⁰¹ Du Plessis, Hargovan and Bagaric *Principles* 8.

⁶⁰² See Du Plessis, Hargovan and Bagaric *Principles* 9. See also Organisation for Economic Cooperation and Development (OECD) <http://www.oecd.org>.

⁶⁰³ Institute of Directors *King Report III* 100.

⁶⁰⁴ Institute of Directors *King Report III* 100.

The company's reputation impacts on the economic value of the company, therefore, the board should take account of and respond to the legitimate interests and expectations of stakeholders, including employees, in its decision-making. Legitimate interests or expectations are those "a reasonable and informed outsider would conclude it to be valid and justifiable on a legal, moral or ethical basis in the circumstances".⁶⁰⁵ The board not only is responsible for the management of stakeholder relationships but is also directed by law to act in the best interests of the company: *King III* states, "within these confines", the board should strive to "achieve an appropriate balance between the interests of various stakeholders" and, in so doing, "should take account, as far as possible, of the legitimate interests and expectations of its stakeholders in its decision-making".⁶⁰⁶ A complicated balancing act can be achieved:

Board decisions on how to balance interests of stakeholders should be guided by the aim of ultimately advancing the best interests of the company. This applies equally to the achievement of the 'triple context' and the notion of good corporate citizenship ... This does not mean that a company should and could always treat all stakeholders fairly. Some may be more significant to the company in particular circumstances and it is not always possible to promote the interests of all stakeholders in all corporate decisions. It is, however, that stakeholders have confidence that the board will consider their legitimate interests and expectations in an appropriate manner and guided by what is the best interests of the company.⁶⁰⁷

The *Companies Act* focuses on more than increasing the wealth of shareholders.⁶⁰⁸ Directors must act in the best interests of shareholders, but collectively, they must also consider the interests of other stakeholders. Because section 76(3)(b) of the *Companies Act*, in terms of which directors should act "in the best interests of the company", does not define "company" it has been pointed out "it follows that the common-law meaning attributed to this word must apply".⁶⁰⁹ The concept "company" is defined in section 1 of

⁶⁰⁵ Institute of Directors *King Report III* 100.

⁶⁰⁶ Institute of Directors *King Report III* 102.

⁶⁰⁷ Institute of Directors *King Report III* 102.

⁶⁰⁸ Olson 2010 *Acta Juridica* 225.

⁶⁰⁹ Cassim *et al Contemporary Company Law* 515.

the *Companies Act*, namely as a “juristic person incorporated in terms of the Act”, however, the definition is regarded as being of little relevance when dealing with section 76(3)(b).⁶¹⁰ In accordance with this line of thought the concept “company” refers to “the interests of the collective body of present and future *shareholders*”,⁶¹¹ and the provision in section 7(d) of the *Companies Act* must be taken note of. Section 7(d) of the *Companies Act* provides that directors would manage a company in such a manner that promotes economic and social benefits. Delpont *et al*⁶¹² point out that it “is doubtful that s 7(d) establishes a new, *sui generis*, duty on directors”: instead the interpretation attached to section 7(d) should be one that entails that directors must pay attention to the interests of stakeholders. However, it does not provide stakeholders with direct rights.⁶¹³ It is claimed, if the “legislator wanted to create a new duty applicable to directors it would have been done explicitly (maybe by listing it in s 76 with the other duties) and not by merely incorporating it into the ‘purpose’ provision”.⁶¹⁴ Thus, it is submitted enlightened-shareholder value is the preferred purpose by which directors have to consider stakeholder interests, “but only as in far as this will promote long-term profit maximisation”.⁶¹⁵

The *Companies Act* strives to create a balance between creating a flexible business environment and regulation which is designed to hold the company and its office bearers accountable to the stakeholders of the company.⁶¹⁶ Directors, traditionally, were mandated to take account of the interests of present and future shareholders “but could not exercise their powers for the benefit of the company as a legal or commercial entity *distinct* from that of the shareholders”.⁶¹⁷ Although this view supports an interpretation of the word “company” to equate to “the shareholders of the company”,⁶¹⁸ academic writers and the

⁶¹⁰ Cassim *et al Contemporary Company Law* 515.

⁶¹¹ Davis and Le Roux 2012 *Acta Juridica* 313. Original emphasis.

⁶¹² Delpont *et al Henochsberg* 46(5).

⁶¹³ Delpont *et al Henochsberg* 46(5).

⁶¹⁴ Delpont *et al Henochsberg* 46(5).

⁶¹⁵ Delpont *et al Henochsberg* 46(5).

⁶¹⁶ Delpont *et al Henochsberg* 46(5).

⁶¹⁷ Davis and Le Roux 2012 *Acta Juridica* 314. Original emphasis.

⁶¹⁸ See Cassim *et al Contemporary Company Law* 515 as well as Davis and Le Roux 2012 *Acta Juridica* 314 in this regard.

courts have argued differently: “a glaring corporate law anomaly in modern times [is] to insist that the interests of employees do not form part of the interests of the company”.⁶¹⁹

3.2.2.3 *Employees as stakeholders in companies*

3.2.2.3.1 General

The provisions of the *Companies Act* highlight that employees play an important role in the structures and processes that deal with control by management and decision-making in corporations. Principles of governance underpin the participation of employees: they ensure that companies (and organisations in general) are partially governed by the employees. Three approaches to employee governance can be distinguished, namely employee share ownership, election of employee representatives to the board of directors and employee involvement,⁶²⁰ for example, in works councils or quality circles.⁶²¹ Employee governance and stakeholder governance are “complementary and mutually beneficial” in that their goals are to “protect their firm-specific assets and to satisfy their risk preferences”.⁶²² Employees are involved in the governance of the corporation by taking part in the process of collective bargaining, making representations in decision-making and

⁶¹⁹ See Cassim *et al Contemporary Company Law* 521. See also *Teck Corp Ltd v Millar* 1972 33 DLR (3rd) 288 BCSC 313 where Berger J said that traditional legal principles should yield to the facts of modern life in that “[i]f today directors of a company were to consider the interest of employees no one would argue that in so doing they were not acting *bona fide* in the interest of the company itself” but it would be a breach of their duty if they discharge “entirely the interests of a company’s shareholders in order to confer a benefit on its employees”. If the directors “observe a decent respect for other interests lying beyond those of the company’s shareholders in the strict sense, that will not in my view, leave directors open to discharge that they have failed in their fiduciary duty to the company”.

⁶²⁰ Webster and Macun 1998 *LDD* 66 draws a distinction between employee involvement and workplace participation as follows: “Employee involvement is a much broader phenomenon than that of workplace representation and incorporates a variety of schemes aimed at enhancing quality, productivity and motivation amongst the workforce. It is a form of direct involvement in the immediate work environment and constitutes an example of what Pateman calls ‘pseudo participation’, or techniques which persuade employees to accept decisions that have already been made by management. ... Workplace representation, on the other hand, involves formal mechanisms of management-worker interaction that seek to ‘institutionalise rights of collective worker participation, including rights to information and consultation on the organisation of production and, in some cases formal co-determination in decision-making”.

⁶²¹ McDonnell “Public Law” 13.

⁶²² Boatright 2004 *Bus Ethics Quart* 16.

by becoming shareholders of the company. If companies maintain poor employee relations it can result not only in a decline in morale but also cause problems with the recruitment and retention of staff, as well as productivity, creativity and loyalty problems.⁶²³ Some form of workplace governance is necessitated by the requirement of a structure for making rules and the decisions regarding conditions of employment, as well as a structure of rights and reciprocal obligations in the employment relationship.⁶²⁴ Examples of workplace governance rules and decisions can include aspects regarding standards of work that must be performed, the termination of employment contracts and compensation systems.⁶²⁵ Mahoney and Watson identify three models of workplace governance, namely:⁶²⁶

- The authoritarian form of governance where the principal employs subordinates to further its objectives. Adversarial relationships and divergent interests are assumed whereby decision-making is centralised and there is a lack of trust. This form is also characterised by the fact that no performance takes place beyond the contract and in extreme cases employees have no voice and the only option for an unhappy employee is to exit the workplace.
- Collective bargaining, which emphasises the exchange between employer and the collective workforce where economic exchange as well as the negotiation of other aspects is fundamental.
- Employee involvement, which has, direct participation as a central element. Here a social exchange of obligations is extended beyond the employment contract and economic exchange because of reciprocal extension of trust and discretion.

In addition to being stakeholders of the company employees contribute to a company's prosperity. A company that employs and retains talented and hardworking employees will reap the benefit: employees are more than valuable "assets" of the company, they play an

⁶²³ Institute of Directors *King Report III* 115 par 45.

⁶²⁴ Metcalf 1995 *Employee Relations* 8.

⁶²⁵ Metcalf 1995 *Employee Relations* 8.

⁶²⁶ Metcalf 1995 *Employee Relations* 9.

important role in the sustainability and long term-growth and prosperity of the company. Intellectual capital rather than resources, for example natural resources, machinery and financial capital, have become an indispensable “asset” of corporations.⁶²⁷ The welfare of employees and customers⁶²⁸ contribute to the long-term increase of the profits: a social responsibility commitment and attention to the needs of employees and consumers ultimately benefit shareholders.⁶²⁹ The satisfaction of employees “will lead to greater productivity and thus to increased profits, in this way maximising the interests of both employees and shareholders”.⁶³⁰ Employee interests extend beyond financial well-being and financial reward/participation in companies.

A company typically responds to pressure from employees threatening industrial action by negotiating with trade union representatives. Or, in the event price increases by suppliers, a company responds by entering into an agreement that the company to buy in bulk to curb price increases or conclude an exclusivity agreement with a specific supplier.

The decisions affect the interests of employees: the role of employees as stakeholders in a corporation is summarised as follows:

The employees of a company have an interest in the company as it provides their livelihood in the present day and at some future point, employees would often also be in the receipt of a pension provided by the company’s pension scheme. In terms of present day employment, employees will be concerned with their pay and working conditions, and how the company’s strategy will impact on these. Of course the long-term growth and prosperity of the company is important for the longer term view of the employees, particularly as concerns pension benefits in the future ...

Many companies have employee share schemes which give the employees the opportunity to own shares in the company, and feel more part of it; the theory being that the better the company does (through employees’ efforts, etc), the more the employees themselves will benefit as their shares increase in price ...

Companies need also consider and comply with employee legislation whether related to equal opportunities, health and safety at work, or any other aspect. Companies should also have in

⁶²⁷ Summers and Hyman 2005 www.jrf.org.uk.

⁶²⁸ Dodd 1931-1932 *Harv L Rev* 1156.

⁶²⁹ Dodd 1931-1932 *Harv L Rev* 1156.

⁶³⁰ Davis and Le Roux 2012 *Acta Juridica* 310.

place appropriate whistle-blowing procedures for helping to ensure that if employees feel that there is inappropriate behaviour in the company, they can 'blow the whistle' on these activities whilst minimizing the risk of adverse consequences for themselves as a result of this action (emphasis added.)⁶³¹

Companies have cognisance of the *Constitution* as well as labour legislation with regard to the protection provided by the law and the recognition of employees as stakeholders. The *Constitution* (as pointed out earlier) recognises core labour rights⁶³² and fair labour practices,⁶³³ as fundamental in that "social justice is a necessary precondition for creating a durable economy and society, and places obvious limitations on the policy choices open to those who seek to regulate the labour market".⁶³⁴ Labour policy is not purely a question of economics: the requirements of the *Constitution* need to be taken into account when choices are made as well as to justify any limitation of the rights.⁶³⁵ The *Constitution*,⁶³⁶ as well as the enabling legislation such as the LRA, BCEA and EEA, plays an important role in the protection of the right to fair labour practices, as with the rights to freedom of association, freedom of expression, privacy and equality. A social justice obligation is provided for in the LRA and the BCEA. The LRA, in its objectives, aims to "advance economic development, social justice, labour peace and the democratisation of the workplace".⁶³⁷

The incorporation of human rights (including fundamental labour rights) is an important corporate responsibility issue for companies in South Africa, as well as for multi-national companies.⁶³⁸ Corporate governance and social responsibility programmes⁶³⁹ play a

⁶³¹ Du Plessis, Hargovan and Bagaric *Principles* 26 referring to Mallin *Corporate Governance* 51.

⁶³² S 1 of the *Constitution*. For a detailed discussion on labour rights see chapter 2 above. Also see chapter 2 above for a discussion on *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 1 as well as *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) para 25 discussed in chapter 2 above.

⁶³³ S 23(1)(a) of the *Constitution*. See chapter 2 above for a detailed discussion of *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) paras 33 and 39.

⁶³⁴ Van Niekerk and Smit (eds) *Law@work* 8.

⁶³⁵ Van Niekerk and Smit (eds) *Law@work* 8-9.

⁶³⁶ See chapter 2 above.

⁶³⁷ S 1 of the LRA. See chapter 2 above.

⁶³⁸ See also chapter 2 above for a discussion on human and fundamental rights.

⁶³⁹ See chapter 2 above.

significant role in the establishment and enforcement of basic labour rights, “especially in host countries that have little in the way of labour market regulation, or where to attract investment or for want of resources, minimum labour standards are not enforced”.⁶⁴⁰ Developments in corporate governance may serve to promote collective-bargaining (to the extent that basic labour rights include the rights to organise and to bargain collectively), especially in a legislative environment that is hostile to labour rights.⁶⁴¹ Labour law originally focused on employment relations in order to regulate the conditions of tangible labour and to extend protection to workers’ physical bodies.⁶⁴² It evolved to protect “employment” and to organise workers collectively within the enterprise (which is the economic locus of decision-making) to the point where workers’ interests are taken into account as well as their level of input in decision-making.⁶⁴³ The role of employees has been neglected within company law: they “tend to be regarded as outsiders rather than as insiders within the company and so are forced to rely on labour law protections rather than be integrated into the corporate law system”.⁶⁴⁴ Workers are not given priority over other stakeholder groups in CSR initiatives and they compete with other stakeholder interests, yet they play an important role in the success of any organisation.

CSR has a role in the advancement of employee interests. CSR is regarded as a form of corporate investment, characterised by a dual orientation towards “the improvement of *social welfare* and of *stakeholder relations*”.⁶⁴⁵ The focus on stakeholder relations reveals the impact of employees on CSR policy in three ways, namely,

- (i) employees can act as agents for social change when they “push corporations to adopt socially responsible behaviour”;⁶⁴⁶
- (ii) environmental policy demonstrates that the support of employees is necessary to secure effective CSR programmes and policies; and

⁶⁴⁰ Van Niekerk and Smit (eds) *Law@work* 10.

⁶⁴¹ Van Niekerk and Smit (eds) *Law@work* 10.

⁶⁴² Morin 2005 *Int'l Lab Rev* 11.

⁶⁴³ Morin 2005 *Int'l Lab Rev* 11.

⁶⁴⁴ Villiers “Corporate Social Responsibility” 178.

⁶⁴⁵ Gond “Corporate Social Responsibility” 7. Original emphasis.

⁶⁴⁶ Villiers “Corporate Social Responsibility” 176.

- (iii) employees, as stakeholders, not only perceive CSR programmes and actions but also evaluate, judge and react to them. CSR, seen voluntary, is problematic to trade unions on two levels.⁶⁴⁷

First, “there is no guarantee of what corporations will do in order to meet their CSR aspirations” as, if voluntary, they will treat CSR initiatives not as obligations but as good behaviour, “almost as charity, philanthropy, or even kindness, all of which companies are under no legal duty to offer”.⁶⁴⁸ If CSR is not mandatory, competing demands on a corporation affect how it regards its CSR requirements and workers have no guarantee that their interests will be accommodated.⁶⁴⁹ Second, the voluntary nature of CSR “renders it a subject for managerial discretion”;⁶⁵⁰ although trade unions might try to influence the exercise of managerial discretion, corporate managers, in reality are able to take CSR decisions with or without the input of the trade unions. This probability limits the potential effect of CSR and, most likely, lessens the practical impact of CSR initiatives.⁶⁵¹

Companies should offer an opportunity for stakeholders to align their expectations, ideas and opinions on certain issues with those of the company.⁶⁵² The legitimate interests of employees (with reference to *King III*)⁶⁵³ as stakeholders should be considered by companies. Sustainable development is important for the protection of employment. An underlying philosophy of *King III* is that companies should be good corporate citizens⁶⁵⁴ and subscribe to sustainability considerations. Sustainability⁶⁵⁵ encompasses inclusivity of stakeholders, innovation,⁶⁵⁶ fairness and collaboration⁶⁵⁷ as well as social transformation

⁶⁴⁷ Villiers “Corporate Social Responsibility” 176.

⁶⁴⁸ Villiers “Corporate Social Responsibility” 176.

⁶⁴⁹ Villiers “Corporate Social Responsibility” 176.

⁶⁵⁰ Villiers “Corporate Social Responsibility” 177.

⁶⁵¹ Villiers “Corporate Social Responsibility” 177.

⁶⁵² Institute of Directors *King Report II* 110–111.

⁶⁵³ See above a discussion on legitimate interests.

⁶⁵⁴ See chapter 1 and above for a detailed discussion on good corporate citizenship.

⁶⁵⁵ Institute of Directors *King Report III* 13.

⁶⁵⁶ Innovation will include new ways in which companies are doing things and will include, for example, profitable responses to sustainability (Institute of Directors *King Report III* 13).

⁶⁵⁷ Collaboration should not amount to “anti-competitiveness”(Institute of Directors *King Report III* 13).

and redress.⁶⁵⁸ The manner in which corporations treat employees is important: fairness is an underlying principle that is applied in labour law (and also in corporate law). The LRA provides for the protection of employees against unfair labour practices and unfair dismissal.⁶⁵⁹ Fairness⁶⁶⁰ is a means of addressing social injustice,⁶⁶¹ which is unsustainable and counter-productive. Fairness plays an important role in that society is not exclusively concerned with the maximisation of aggregate wealth but also with equality in its distribution.⁶⁶² Nevertheless, it appears that corporate law is well suited and an efficient means to promote fairness and to redistribute wealth and income; more than other areas of regulation.⁶⁶³ A stakeholder-oriented corporate law “would work at the initial distribution of the corporate surplus and would benefit stakeholders up and down the economic hierarchy”.⁶⁶⁴ If fairness is valued, then a corporate law framework that does not promote fairness cannot be acceptable.⁶⁶⁵ Corporate governance should focus on procedural fairness (rather than trying to reach agreement *ex ante* about substantive fairness): its crucial objective is “to create methods of decision-making”⁶⁶⁶ that offer procedural fairness among the various stakeholders. In order for a corporation to serve its stakeholders by creating wealth in a sustainable way and to share the wealth in an equitable way, management needs to be subjected to constraints: good corporate governance in which the advancement of sustainability is a fundamental component, has the potential to benefit the owners of the corporation as well as those they employ.⁶⁶⁷ At a very basic level employees would like corporations (as employers) to fulfil their basic needs, such as the

⁶⁵⁸ Social transformation and redress from the policies of “apartheid” are important and should be integrated within the broader transition to sustainability because by integrating sustainability and social transformation “in a strategic and coherent manner will give rise to greater opportunities, efficiencies, and benefits, for both the company and society” (Institute of Directors *King Report III* 13).

⁶⁵⁹ Section 186(2) of the LRA contains the definition of an unfair labour practice whereas section 186(1) contains the definition of dismissal. See also *National Entitled Workers’ Union v CCMA* 2003 24 ILJ 2335 (LC) 2339 discussed in chapter 2 above.

⁶⁶⁰ See chapter 2 above for a discussion on fairness.

⁶⁶¹ Institute of Directors *King Report III* 13.

⁶⁶² Greenfield 2005 *Hastings Bus LJ* 109-110.

⁶⁶³ Greenfield 2005 *Hastings Bus LJ* 111. See chapter 2 above for a detailed discussion on the role economic justice and fairness in corporate law.

⁶⁶⁴ Greenfield 2005 *Hastings Bus LJ* 112.

⁶⁶⁵ Greenfield 2005 *Hastings Bus LJ* 112.

⁶⁶⁶ My emphasis. 2005 Greenfield *Hastings Bus LJ* 113.

⁶⁶⁷ Le Roux “The Purpose of Labour Law” 242.

payment of a fair wage, the provision of safe working conditions, job security and future career opportunities.⁶⁶⁸

In order to properly balance the interests of stakeholders directors (as pointed out earlier) should be aware of the interests afforded by legislation of various stakeholders.⁶⁶⁹ The interests of employees, as stakeholders of the company may, for example, receive preference over shareholders collectively.⁶⁷⁰ That is the question Davies poses: are there good arguments for privileging employees over other stakeholders (suppliers, customers, creditors) in the company in respect to corporate governance? To which he responds:

Although stakeholder theories of corporate governance appear to give the case for worker representation a way of breaking down the supremacy of shareholders, in some ways stakeholder theories go too far from the point of view of employee representation. Stakeholding, at least in the economic form of the argument, suggests that governance protections are needed for all those who make firm specific investments against the expropriation of which by the controllers of the firm contractual protections are ineffective. Employees may be the paradigm example of such a group, but they are not the only example ... Modern stakeholding theories have thus generated a problem for labor lawyers, which, it seems to me, they have not yet squarely addressed. Talk of 'the two sides of industry' or of 'labour and capital' or, even 'the social partners' does not fit well within the pluralism of stakeholding, which embraces all those contracting with the company who cannot specify in advance a complete set of contractual terms to govern their relationship. It may be possible to distinguish workers from other stakeholders, not on the basis that other stakeholders can effectively rely on other bodies of law, insolvency law or commercial law, for example, to protect them. However, it is a matter for further analysis whether insolvency and commercial law contain effective mechanisms, which labor law lacks and cannot develop.⁶⁷¹

3.2.2.3.2 Participation of employees in companies

The legal structure of authority within corporations is important in dealing with participation of employees in decision-making as well as the appropriate level of decision of decision-making. Performance-enhancing mechanisms that are conducive to employee

⁶⁶⁸ See chapter 2 above.

⁶⁶⁹ Esser 2009 *SA Merc LJ* 324.

⁶⁷⁰ Esser 2007 *THRHR* 411. See chapter 2 above in this regard.

⁶⁷¹ Davies 2000 *Comp Lab L & Pol'y J* 138-139.

participation in corporate governance may, directly as well as indirectly, be beneficial to companies.

These benefits obviously, will be achieved by means of the readiness of employees to invest in firm-specific skills. Examples of mechanisms for employee participation vary from employee participation on company/supervision boards to governance processes, such as work councils, where the viewpoints of employees with regard to key decisions are considered. Employee stock ownership plans or other profit sharing mechanisms serve as examples of performance enhancing mechanisms.⁶⁷² These, and other issues in the context of corporate law will be explored below.

3.2.2.3.2.1 Advancement of employee rights in corporate law

The *Companies Act* brought major changes to governance with regard to employee participation: it “entrenched certain rights of employees to a point which extends their labour rights”.⁶⁷³ Employees are “given significant rights of participation in the governance of companies as a matter of company law, as opposed to industrial or labour relations law”.⁶⁷⁴ A company assumes a specific role and place in society “*how, a company treats its people*”,⁶⁷⁵ may be seen as a litmus test of corporate values, pivotal to and emblematic of an enterprise’s engagement with its socio-economic environment”.⁶⁷⁶

Section 13 of the *Companies Act* makes provision for any person or a number of persons to incorporate a company by completing and signing a memorandum of incorporation (MOI) and filing a notice of incorporation (NOI). A “person” in the definition includes a juristic person,⁶⁷⁷ thus, trade unions, as representative of employees, can be a party to the

⁶⁷² OECD *Principles of Corporate Governance* 47.

⁶⁷³ Davis and Le Roux 2012 *Acta Juridica* 312.

⁶⁷⁴ Katz 2010 *Acta Juridica* 261.

⁶⁷⁵ My emphasis.

⁶⁷⁶ Du Toit 2009 *ILJ* 2227.

⁶⁷⁷ S 1 of the *Companies Act*.

formation of a company,⁶⁷⁸ for example, where a new venture or a subsidiary is formed together with the employer. The amendment of the MOI, by means of special resolution, is left to the board of the company or shareholders entitled to exercise at least 10 percent of the voting rights that may be exercised on such a resolution.⁶⁷⁹ An alternative arrangement is provided for in section 16(2) whereby the MOI requirements regarding proposals for amendments “seem to suggest that a MOI can allow for a trade union⁶⁸⁰ or worker representative to propose such an amendment”.⁶⁸¹ The *Companies Act* does not allow employees to vote for such a proposal unless they are also shareholders.⁶⁸²

The board of directors is entitled to issue shares subject to authorisation by or in terms of the MOI⁶⁸³ and, similarly, to obtain the right to increase or decrease the authorised share capital, except to the extent that the MOI provides otherwise.⁶⁸⁴

⁶⁷⁸ Wiese 2013 *ILJ* 2471.

⁶⁷⁹ S 16(1)(c) of the *Companies Act*.

⁶⁸⁰ The *Companies Act* does not define the concept “trade union” but a representative trade union is defined by s 1 to mean a trade union registered in terms of s 96 of the LRA. However, there are inconsistencies that exist in the *Companies Act* as it does not consistently refer to registered trade union and often refers only to “trade union representing employees of the company” (Schoeman 2012 *PER* 238). Schoeman adds that it “is unfortunate that the *Companies Amendment Act* 3 of 2011 does not rectify the situation despite one of the aims of the *Companies Amendment Act* being to correct certain errors resulting in inconsistency, disharmony and ambiguity in the principal Act” (Schoeman 2012 *PER* 238). The LRA affords rights only to registered trade unions, but also distinguishes between majority representative, sufficiently representative as well as minority trade unions. The organisational rights afforded (or not afforded) to different trade unions will depend on their representivity in the workplace of such a company or employer.

⁶⁸¹ Wiese 2013 *ILJ* 2471.

⁶⁸² S 16(1)(c)(ii) of the *Companies Act*. Wiese 2013 *ILJ* 2471.

⁶⁸³ S 38 of the *Companies Act*.

⁶⁸⁴ S 36(3) of the *Companies Act*. S 41(1) of the *Companies Act* places some limits on the board’s authority and provides as follows: “Subject to subsection (2), an issue of shares or securities convertible into shares, or a grant of options contemplated in section 42, or a grant of any other rights exercisable for securities, must be approved by a special resolution of the shareholders of a company, if the shares, securities, options or rights are issued to a- (a) director, future director, prescribed officer, or future prescribed officer of the company; (b) person related or inter-related to the company, or to a director or prescribed officer of the company; or (c) nominee of a person contemplated in paragraph (a) or (b)”. In this regard s 41(3) of the *Companies Act* provides as follows: “An issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions”.

In this regard Wiese points out that the provisions of the *Companies Act* authorise the board to issue shares without shareholder approval (which is contrary to the position under the 1973-*Companies Act*, where shareholder approval was required). These provisions facilitate both worker participation and black economic empowerment transactions in terms of the *Broad-Based Black Economic Empowerment Act* (BBBEE Act)⁶⁸⁵ by “allowing the board to bypass recalcitrant shareholders”,⁶⁸⁶ and, thus, is a powerful tool in the hands of the board of directors as they can effectively enhance worker participation through share ownership.⁶⁸⁷ In terms of section 40(1) of the *Companies Act* the board can issue authorised shares only for adequate consideration to the company (as determined by the board) or in terms of conversion rights associated with previously issued securities of the company, or as a capitalisation share as contemplated in section 47. A consideration, in this regard, means anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value. Thus, it will include any money, property, negotiable instrument, securities, investment credit facility, token or ticket; or any labour, barter or similar exchange of one thing for another; or any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly.⁶⁸⁸ These provisions also facilitate economic participation by unions or workers.⁶⁸⁹ The board, in terms of section 44, is authorised to provide financial assistance pursuant to an employee share scheme that satisfies the requirements of section 97. Shareholder approval is not required in such an instance.

The provision in the *Companies Act* regarding business rescue-proceedings (in chapter 6) is a fundamental change to employee participation.⁶⁹⁰ Sections 129 and 131 provide that the business-rescue procedure can be initiated by means of a resolution of the board of

⁶⁸⁵ *Broad-Based Black Economic Empowerment Act* 53 of 2003.

⁶⁸⁶ Wiese 2013 *ILJ* 2478.

⁶⁸⁷ See chapter 4 below.

⁶⁸⁸ S 1 of the *Companies Act*.

⁶⁸⁹ Wiese 2013 *ILJ* 2478. See chapter 4 below for a discussion on economic participation.

⁶⁹⁰ See also Loubser and Joubert 2015 *ILJ* 21-39 regarding the role of trade unions and employees in South Africa’s business rescue proceedings.

directors or by court order applied for by an affected person: an affected person includes any registered trade union representing employees of the company and, if there is no such trade union representing employees, the employees themselves or their representatives.⁶⁹¹ A trade union must be given access to a company's financial statements for purposes of initiating a business-rescue process.⁶⁹² The trade union representing employees or employees who are not represented may apply to a court to place a company under supervision and commence business-rescue proceedings. The business-rescue provisions in the *Companies Act* not only is a job-security measure but also acknowledges the fact that employees, as stakeholders, have an interest to be informed and to participate in the formulation of the business-rescue plan.⁶⁹³ Employees, however, cannot vote on the approval of the business-rescue plan, except to the extent that they are also creditors⁶⁹⁴ and, thus, are "treated as lesser stakeholders than creditors".⁶⁹⁵ Employees remain employees of the company during the company's business-rescue proceedings on the same terms and conditions unless changes occur in the ordinary course of attrition or the employees and the company, in accordance with the applicable labour laws, agree different terms and conditions.⁶⁹⁶ Any retrenchments of employees contemplated in the company's business rescue plan are subject to the provisions of section 189 or 189A of the LRA and other applicable labour legislation.⁶⁹⁷

⁶⁹¹ S 128(1)(a) of the *Companies Act*.

⁶⁹² S 31(3) of the *Companies Act*. The right to access to information contained in the *Companies Act* is in addition to the rights in terms of the *Constitution* and the *Promotion to Access to Information Act 2 of 2000* (PAIA) (see also Wiese 2013 *ILJ* 2472 in this regard). See also the type of information that a trade union is entitled to in terms of the LRA. Section 16 of the LRA provides that only relevant information that will allow a trade union representative to perform his or her functions referred to in section 14(4) of the LRA must be disclosed and not information that is legally privileged or information that the employer is by law or order of court not allowed to disclose or is confidential and, if disclosed, may cause substantial harm to an employee or the employer or is private personal information relating to an employee, unless that employee consents to the disclosure of that information. Wiese points out that when trade unions negotiate with private companies they are at a disadvantage as they are not subject to an audit. Wiese points out that the lack of information available to such a trade union will mean that it is likely that it is not even aware that the company is in financial distress (Wiese 2013 *ILJ* 2472).

⁶⁹³ Wiese 2013 *ILJ* 2475.

⁶⁹⁴ S 144(3)(f) of the *Companies Act*.

⁶⁹⁵ Wiese 2013 *ILJ* 2475.

⁶⁹⁶ S 136(1)(a) of the *Companies Act*.

⁶⁹⁷ S 136(1)(b) of the *Companies Act*.

If a sale of business occurs or in case of a merger, no worker involvement is contemplated by the *Companies Act*.⁶⁹⁸ Sections 197 and 197A of the LRA contain the provisions regarding a transfer of business and the automatic transfer of employment contracts. The transferee's right to retrench employees due to a transfer as a going concern would be regarded as a dismissal in terms of section 186 of the LRA and an automatic unfair dismissal in terms of section 187.⁶⁹⁹ An employer, however, may retrench the transferred employees later if it can prove an operational reason, in which case consultation must take place with the trade union representatives or other worker representatives.

The *Companies Act* contains a number of other rights. A registered trade union or another representative of employees may apply to a court for an order declaring a director delinquent or under probation in the circumstances provided by the statute.⁷⁰⁰ Instances covered here include the following:

- (i) where a director grossly abused the position of director;
- (ii) where a director took personal advantage of information or an opportunity, contrary to section 76(2)(a);
- (iii) where a director intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(a);
- (iv) where a director acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or contemplated in section 77(3)(a), (b) or (c).⁷⁰¹

Section 20(4) of the *Companies Act* provides that shareholders, directors, prescribed officers⁷⁰² or a trade union representing employees of the company "may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent

⁶⁹⁸ Wiese 2013 *ILJ* 2475.

⁶⁹⁹ See also chapter 2 above regarding dismissal protection in terms of the LRA.

⁷⁰⁰ S 162(2) of the *Companies Act*.

⁷⁰¹ S 162(5)(c) of the *Companies Act*.

⁷⁰² See Botha 2012 *TSAR* 786-800 regarding the position of prescribed officers in terms of the *Companies Act*.

with this Act". If the board of a company adopts a resolution in favour of granting financial assistance in terms of section 45, the company must provide written notice of that resolution, *inter alia*, to any trade union representing the company's employees "within 10 days after the board adopts the resolution, if the total value of the loans, debts, obligations or assistance contemplated in that resolution, together with any previous resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution" or "within 30 days after the end of the financial year, in any other case".⁷⁰³

The Act abolishes the common-law derivative action and substitutes a statutory derivative action. Thus, it empowers a registered trade union that represents the employees of the company or another representative of employees of the company to bring a statutory derivative action.⁷⁰⁴

As part of the promotion of good corporate governance principles the Act grants employees whistle-blower protection.⁷⁰⁵

The *Companies Act* provides for alternative dispute resolution mechanisms, in that a dispute can be referred for conciliation, mediation or arbitration to the tribunal, accredited entity or any other person,⁷⁰⁶ for example, disputes between a trade union and the company can be referred for alternative dispute resolution if the union is entitled to apply for relief or file a complaint in terms of the *Companies Act*.⁷⁰⁷ Wage disputes, however, are not be covered and will have to be resolved in terms of the LRA.⁷⁰⁸

⁷⁰³ S 45(5) of the *Companies Act*.

⁷⁰⁴ S 165(2)(c) of the *Companies Act*.

⁷⁰⁵ S 159 of the *Companies Act*. This type of protection is already granted to employees by the *Protected Disclosures Act 26 of 2000* (PDA) and is merely an extension of the protection already granted. S 159 of the *Companies Act* protects other stakeholders, such as shareholders, directors, company secretaries, prescribed officers, registered trade union representatives of the employees, suppliers of goods and services to the company or even employees of a supplier. See also Botha and Van Heerden 2014 *TSAR* 337-358 regarding the integration of various pieces of whistle-blowing legislation.

⁷⁰⁶ S 166(1) of the *Companies Act*.

⁷⁰⁷ S 166(1) of the *Companies Act*.

⁷⁰⁸ Wiese 2013 *ILJ* 2476.

3.2.2.3.2.2 Participation at Board Level

The legal structure of authority within corporations is effectively three-tiered: shareholders are at the one end of the spectrum followed by the board of directors and management.⁷⁰⁹ In general terms, companies have a choice between a unitary board and a two-tier board⁷¹⁰ structure, but the distinction is not always clear-cut, especially when it comes to large public companies.⁷¹¹ The traditional unitary board structure consists of a board of directors and managing directors where the board of directors oversees and guides the managing directors who are responsible for the day-to-day affairs of the company. A two-tier board system, on the other hand, is a system best suited to facilitate employee participation in decision-making because it helps to manage the information flow and improve board efficiency.⁷¹² The two-tier system, typically, is followed in Germany;⁷¹³ the unitary board structure is typical in South Africa.⁷¹⁴

Section 66(2) of the *Companies Act* provides that the board of a company, in the case of a private company or a personal liability company, must comprise at least one director; in the case of a public company or a non-profit company, must comprise at least three directors. In addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its MOI, the company must appoint an audit committee or a social and ethics committee as contemplated in section 72(4). The board of directors should be comprised of a majority of non-executive directors, who should be independent.⁷¹⁵

⁷⁰⁹ O'Regan 1990 *Acta Juridica* 122.

⁷¹⁰ See chapter 7 for a detailed discussion on the unitary and two-tier board structures.

⁷¹¹ Esser 2007 *THRHR* 415.

⁷¹² Mintz 2006 *Corporate Ownership & Control* 33. The supervisory board oversees the management board. Worker representatives are elected on the supervisory board. The management board is responsible for the day-to-day management of the company.

⁷¹³ Du Plessis 1996 *TSAR* 21; Esser 2007 *THRHR* 415; Mintz 2006 *Corporate Ownership & Control* 33. See chapter 7 for a detailed discussion of the two-tier board structure in Germany.

⁷¹⁴ Esser 2007 *THRHR* 415.

⁷¹⁵ Institute of directors *King Report III* discussed earlier regarding non-executive directors.

The *Companies Act* provides for two primary organs,⁷¹⁶ namely the board of directors and the shareholders in general meeting. Section 66(1) of the *Companies Act* provides that:

[t]he business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

In consequence of which Delpont points out that

the effect is now that the ultimate power in the company is not with the shareholders in meeting but with the directors, '... except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise'⁷¹⁷ and ... therefore, where the Act states that 'the company can...', the organ that can act for the company will be the Board.⁷¹⁸

It has been argued that the fiduciary duty of directors and management should be changed and it should be owed to the firm as a whole and it should empower stakeholders with some enforcement mechanisms.⁷¹⁹ Such changes could be accompanied, for example, by empowering non-shareholder stakeholders to bring a civil action against a breach of duties of care or by providing for the election of their own representatives to the board:⁷²⁰ for example, employees could elect a portion of the board.⁷²¹ In German co-determination

⁷¹⁶ In *John Shaw and Sons (Salford) Ltd v Shaw* 1935 2 KB 113 (CA) 134 the court stated that "[a] company is an entity distinct alike from its shareholders and its directors. Some of its powers, may according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of shareholders can control the exercise of powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders".

⁷¹⁷ Delpont *New Companies Act* 67.

⁷¹⁸ Delpont *New Companies Act* 67.

⁷¹⁹ Greenfield 2005 *Hastings Bus LJ* 114-115.

⁷²⁰ Greenfield 2005 *Hastings Bus LJ* 115.

⁷²¹ Greenfield 2005 *Hastings Bus LJ* 115.

half of the supervisory board of major companies consists of worker representatives.⁷²² This type of composition establishes the board as “pluralistic” and could “retard those selfish impulses because any behavior that benefits one stakeholder at the expense of the firm must be done in the view of the others”.⁷²³ The probable effect of such broadening will be that non-shareholder stakeholders speak for other stakeholders and, in effect, they will get a “larger share of the pie that they now get”.⁷²⁴ Boards stand to benefit from “a greater openness and diversity”, as such “openness would not only make for better decision-making but likely *fairer* decision-making as well”.⁷²⁵

3.2.2.3.2.3 The Social and Ethics Committee

Section 72(1) of the *Companies Act* provides, except to the extent that the MOI provides otherwise, that the board of a company may appoint any number of committees of directors and delegate to any committee any of the authority of the board. An example of such a committee provided for by the *Companies Act* is the social and ethics committee. It has been established earlier that a company’s governance structure should encompass CSR matters. There are different ways of achieving this result, and although in the:

comprehensive changes brought about by the [Companies] Act no express reference is made to the companies’ social responsibility ... and as long as no legal requirement is set to integrate CSR issues into their decision-making and governance structures businesses will not be obliged to act in a socially responsible manner. The legislature has taken cognisance of the fact that the public is increasingly paying attention to social issues, and has through section 72 of the Act without specifically referring to CSR made an attempt to ensure that CSR becomes infused and embedded in a company’s governance structures.⁷²⁶

The social and ethics committee is a troublesome “organ” in/of the company and especially the relationship between the social and ethics committee and the board has been subject

⁷²² Greenfield 2005 *Hastings Bus LJ* 115.

⁷²³ Greenfield 2005 *Hastings Bus LJ* 116-117.

⁷²⁴ Greenfield 2005 *Hastings Bus LJ* 116-117.

⁷²⁵ Greenfield 2005 *Hastings Bus LJ* 118.

⁷²⁶ Kloppers 2013 *PER* 166-167.

to much debate and academic comment.⁷²⁷

Before the enactment of the *Companies Act* an array of labour as well as other statutes provided “a much more detailed and specific set of criteria for assessing the impact of CSR codes”.⁷²⁸ The LRA regulates, *inter alia*, organisational rights, centralised and non-centralised bargaining as well as strikes and lock-outs, dispute resolution, dismissal, unfair labour practices and business transfers. The BCEA regulates issues such as work hours, leave, termination of employment, wage regulating measures in non-organised sectors. The EEA regulates, *inter alia*, issues such as the prohibition of unfair discrimination and the implementation of employment equity plans including action measures. Other legislation of relevance includes the *Occupational Health and Safety Act* 85 of 1993, COIDA, SDA, UIA,⁷²⁹ as well as the BBBEE Act.

Although the *Companies Act* does not specifically refer to CSR, a CSR perspective can be found in section 72(4)(a).⁷³⁰ The Minister of Trade and Industry is authorised to prescribe through the use of regulations that companies have a social and ethics committee if

⁷²⁷ Delpont *et al* raises the following concern: “The question remains whether the social and ethics committee is a board committee or a company committee. Although s 72 provides for “board committees” in the short title, it is submitted that this is not conclusive to categorise the social and ethics committee, and in respect of the social and ethics committee, the references are that the “company” must appoint the committee, which is clearly different from, eg, sub-s (1) which provides that the “board” may appoint committees (... To categorise the social and ethics committee as a “hybrid” committee does not solve the uncertainty). Also, the social and ethics committee has a responsibility to report directly to the shareholders (reg 43 (5) (c)) but must only draw the attention of the board to certain matters (reg 43 (5) (b)) ... The distinction between a board committee and a company committee is important because if the social and ethics committee is a board committee, the board can delegate powers and authority to the committee, in addition to those expressly provided for in the Act (sub-s (8)) and regulations (reg 43 (5)). However, if it is a company committee with its powers and authority based on the Act and regulations, it only has the powers and authority as provided in the Act and regulations. Section 94 (7) (i) empowers the board to delegate additional functions to the audit committee, a provision that is however not present in respect of the social and ethics committee. Subsection (8) contains an exhaustive list of powers (ie the “social and ethics committee is entitled to ...”), which does not include the power of appointment of eg any consultant or specialist as provided for in sub-s (9), although such power of appointment may be implied in sub-s (9) ... An interesting consequence of classifying the social and ethics committee as a company committee, is that eg s 76 will not apply to the members of the committee” (Delpont *et al Henochsberg* 277-278)

⁷²⁸ Du Toit 2009 *ILJ* 2236.

⁷²⁹ Du Toit 2009 *ILJ* 2236.

⁷³⁰ See also Kloppers 2013 *PER* 167 as well as Esser 2007 *THRHR* 325 in this regard.

deemed desirable having regard to the annual turnover, workforce size or the nature and extent of the activities of such companies. Regulation 43(1) of the Companies Regulations⁷³¹ requires state-owned companies as well as listed public companies to appoint such a committee. Any other company that in any two of the previous five years scored above 500 points (in terms of Regulation 26(2))⁷³² in the calculation of its public interest score is required to appoint such a committee.

The committee must comprise at least three directors or prescribed officers of the company. At least one of them must be a non-executive director who was not involved during the three previous financial years in the day-to-day management of the company's business.⁷³³ It is not specifically stated that each member of the committee must be a director but at least one of whom must be a director; thus, it seems, in view of the non-director requirement, that employees, for example, can be members of the committee.⁷³⁴ The committee is not a board committee and is appointed by the company (shareholders).⁷³⁵ The committee as such, is a separate organ of the company. It has been suggested, therefore, that the social and ethics committee will split the South African board into a two-tier board.⁷³⁶

⁷³¹ GN 351 in GG 34239 of 26 April 2011.

⁷³² Regulation 26(2) of the Companies Regulations provides the method to be used to determine a company's "public interest score" for the purposes of regulation 43. It requires every company to calculate its public interest score at the end of each financial year. This should be the sum of (i) a number of points equal to the average number of employees of the company during the financial year, and (ii) one point for every R1 million (or portion thereof) in third-party liability of the company, and (iii) one point for every R1 million (or portion thereof) in turnover during the financial year, and (iv) one point for every individual who at the end of the financial year is known by the company to directly or indirectly have a beneficial interest in any of the company's issued securities or in the case of a non-profit company to be a member of the company or a member of an association that is a member of the company..

⁷³³ Regulation 43(4) of the Companies Regulations.

⁷³⁴ Esser 2007 *THRHR* 326.

⁷³⁵ Delpont *New Companies Act* 88.

⁷³⁶ Esser 2007 *THRHR* 326.

The functions⁷³⁷ of the social and ethics committee include the monitoring of the company's activities having regard to any relevant legislation, other legal requirements or prevailing codes of best practice relating to matters such as:

- (i) social and economic development;⁷³⁸
- (ii) good corporate citizenship;⁷³⁹
- (iii) the environment, health and public safety, including the impact of the company's activities and its products and services;
- (iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws as well as

⁷³⁷ Regulation 43(5)(a) of the Companies Regulations. Delport *et al* points the following out regarding the functions of the social and ethics committee: "It is submitted that the proposed functions of the social and ethics committee as in reg 43 (5) are the factors that must be taken into account to determine whether it is reasonably necessary and in the public interest to have such a committee. However, if the quantitative criterium (ie the public interest score) has already determined that a social and ethics committee is required, the question is, what should be taken into account to determine whether if it is not reasonably necessary in the public interest to have such a committee as neither the Act nor the regulations provides for different levels of such a score for purposes of determining the public interest, and there is no qualitative criteria in the elements that are used to calculate that score which can be used to determine that although the quantitative criterium has been met, it is not reasonably necessary in the public interest to have the social and ethics committee. ... Subsection (5) (b) does not prescribe or define either the *nature* or the *extent* of the activities, but it is submitted that reg 43 (5) can be used to determine the public interest, as well as the qualitative criteria as discussed above. Therefore, the quantitative criteria (extent of the activities, although it also includes elements of the qualitative criteria) is determined by the public interest score, but it is submitted that the qualitative criteria, and also the public interest element, must be determined with reference to reg 43 (5). It may therefore be applied in practice as follows— (a) the contribution of the company (qualitative criterium) to social and economic development *of the community in which it operates* (public interest) (reg 43 (5) (a) (i));(b) the effect of the company as a corporate citizen (qualitative criterium) *in the particular community* (public interest) (reg 43 (5) (a) (ii)); (c) the effect (qualitative criterium) that the company's activities and products has on *environment, health and public safety* (public interest) (reg 43 (5) (a) (iii)); (d) the actions of the company (qualitative criterium) *in respect of consumers*, including advertising, public relations and consumer protection (public interest) (reg 43 (5) (a) (iv));(e) the company's actions (qualitative criterium) *in respect of its employees and its employment practices*, which obviously includes compliance with labour relations but which should also encompass general employee "well-being" (public interest) (reg 43 (5) (a) (v)). There is, however, still a mismatch between the criteria that determine the appointment of the social and ethics committee, apparently based on requirements for the financial disclosure for public interest companies as initially in clause 9 of the 2007 Companies Bill, and the criteria that must be applied to determine whether there should be an exemption from the appointment of the committee" (Delport *et al Henochsberg* 277-278).

⁷³⁸ This includes including the company's standing in terms of the goals and purposes of the 10 principles set out in the United Nations Global Compact Principles; the OECD recommendations regarding corruption; the EEA; and the BBBEE Act.

⁷³⁹ The promotion of equality, prevention of unfair discrimination, and reduction of corruption; contribution to the development of communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and record of sponsorship, donations and charitable giving are included here.

(v) labour and employment.⁷⁴⁰

It is unclear whether the board may refuse an instruction from this committee. The functions of the committee are limited to those in the Regulations and, therefore, it plays only a supervisory role and is not be concerned with strategic matters.⁷⁴¹ That employees are not represented on the social and ethics committee can be seen as a lost opportunity by the drafters of the *Companies Act* as representation would have provided them with the opportunity to input on issues such as health and safety and labour and employment. As well it would have provided an opportunity for employees to have a louder voice in a structure in a company and would have extended their participation rights within such a company.

3.2.2.3.2.4 Access to information, consultation and collective bargaining

Although trade unions have access to information in terms of the *Companies Act*, this information is limited to relevant information as described in sections 16 and 89 of the LRA.⁷⁴² A company is under no obligation to provide, for example, financial information to trade unions. A trade union must be given access to a company's financial statements for purposes of initiating a business-rescue process only (as referenced by section 31(3) of the *Companies Act*), in which event it is too late for the trade union to become aware of the fact that the company is financially distressed. With reference to section 31(3) of the *Companies Act* the trade union will be granted access to the financial statements of the company. This financial information is regarded as relevant under these circumstances. The right to information-sharing is similar to that found in the LRA: legally privileged or information that the employer is by law or order of court not allowed to disclose or is confidential and, if disclosed, may cause substantial harm to an employee or the employer

⁷⁴⁰ This includes the company's standing in terms of the ILO Protocol on decent work and working conditions; and the company's employment relationships, and its contribution toward the educational development of its employees. See also Regulation 43(5) of the Companies Regulations.

⁷⁴¹ Esser 2007 *THRHR* 325.

⁷⁴² See chapters 5 and 6 regarding access to information in terms of the LRA.

or is private personal information relating to an employee, unless that employee consents to the disclosure of that information will be excluded from the information-sharing obligation.⁷⁴³

The rights to be consulted and to collective bargaining⁷⁴⁴ appear, also, to fall outside the ambit of the *Companies Act* and are confined to labour law. An ideal opportunity was on offer to extend and enhance issues, such as information-sharing, consultation as well as collective bargaining, under the labour and employment issues covered by the social and ethics committee.

3.3 Conclusion

The changing role of companies as members of society cannot be overstated. Traditionally, corporate law focused on shareholder wealth creation. As a result of developments in corporate law and corporate governance, jurisprudence articulates the view that shareholder primacy is an out-dated concept and that shareholders no longer are recognised as the only, or even the most important stakeholder in companies. The *Companies Act* empowers employees as stakeholders of the company by granting them access to information under certain circumstances and by giving them access to a statutory derivative action.

Companies must be cognisant of the triple-bottom line, communicate with stakeholders and take note of their legitimate interests and expectations. These are important factors in the new corporate law regime. Company law, to some extent, addresses the social component of the relationship between employees and companies. Because companies are to take note of not only economic but also of social benefits, it indicates the importance of CSR in corporate governance. Society demands that corporates act in a responsible

⁷⁴³ See also s 14 and 16 of the LRA discussed in chapter 5 below.

⁷⁴⁴ For a detailed discussion on consultation and collective bargaining see chapter 2 above as well as chapters 4, 5 and 6 below.

manner and be good corporate citizens. Issues such as integrity, accountability and sustainability are fundamental components of the new corporate law regime and of how directors exercise their duties. The obligations on companies and directors benefit employees. The management of stakeholder relationships is an important duty of the board of directors as they act in the best interests of the company. By being cognisant of the legitimate interests and expectations of its stakeholders in its decision-making the board should strike an appropriate balance between the interests of various stakeholders, for example, employees and shareholders. If the company finds itself in a financially distressed situation, information disclosed to the trade unions could help to find a solution through a consultation process. Or if the company wants to reduce the size of the workforce due to unprofitability or to expand its business operations, consultation with employee representatives is key when decisions are made.

The *Companies Act* grants new rights to employees which are to their benefit. Previously, employees were not recognised by company law as stakeholders and they had to utilise the protection conferred by labour law to enforce any rights against companies (in the capacity of their employer). Although these developments are good and employees now participate in different ways by exercising various rights and enforcing various duties by the company, the *Companies Act* fails to grant employees a real voice when it comes to decision-making. Nevertheless, employee governance includes employee share ownership schemes, the election of employee representatives to the board of directors, and employee involvement. Employee share ownership schemes have limitations (see chapter four) as they focus only on the financial aspect and provide only a short-term monetary solution to employee concerns. Representation by employees on the boards or other structures, such as the social and ethics committee can be more beneficial as it grants employees direct consultation and decision-making rights by means of which they are partners in decision-making. Employee involvement, which has direct participation as a central element is an option which extends social, as well as the economic exchange of obligations, beyond the employment contract: a reciprocal extension of trust and discretion takes place.

The *Companies Act* introduced significant changes to the corporate law landscape in South Africa: employees are now more visible in corporate law and issues such as human rights are now recognised as important. The *Companies Act* addresses the issue of worker participation, for example, in the formulation of a business rescue plan, but it fails to involve employees in the approval of the plan as employees cannot vote on this issue. It is submitted the provision would have been more meaningful if the *Companies Act* actually granted trade unions sufficient participation rights regarding the approval of the business rescue plan. The same problem applies to the social and ethics committee: the failure to grant employees' representation rights on the social and ethics committee is a lost opportunity on the part of the drafters of the *Companies Act* to enable input on issues such as health and safety and labour and employment, as well as other issues relating to employees (see list above).

These matters affect employees directly; they could have given companies, as employers, the opportunity to split so-called wage issues from non-wage issues, as well as providing employees with the opportunity to have a greater voice in the structure of a company which would expand their participation rights within a company. Although a more inclusive approach and a recognition of stakeholder rights is evident, the enlightened shareholder approach is still preferred in the *Companies Act*. The issue of representation on company boards is contentious: there are calls that South Africa should introduce representation at board level (as in Germany) or the direct obligation by the board to take employees into account (as in England). At the same time, it has been pointed out that the German two-tier structure cannot simply be copied in South Africa due to major social, economic and political differences between the two countries.

The one-tier board structure in South Africa can work: if the provisions of the *Companies Act*, especially regarding issues directly affecting employees are noted. Employees will have a meaningful voice if they have a seat on the social and ethics committee, which will require an amendment of the *Companies Act*. The social and ethics committee should be granted more meaningful authority and powers in decision-making so as to be more than

another tick-box exercise for companies. The *Companies Act* does not fail employees: for example, the proposition that a direct obligation is imposed on the board to take employees into account (as in England). Further consideration of the issue is required: cutting and pasting from the English system will not achieve much.

Companies in South Africa can and should be more accountable and responsible to their employees, for example, if they want to implement changes in strategy that directly and indirectly affect employees, as well as impact on in the community (and society at large) within which it operates. For example, if a company wants to utilise more cost-effective machinery, which will have an impact on job losses, the company could consider alternatives such as utilising the employees differently within the organisation or retraining them to operate the new machinery. Retrenching employees suggests a corporation is not acting responsibly; as does paying huge bonuses to executives in economically distressed times and after retrenchments. Other legislation, like the LRA, offers employees a greater voice and participation. The LRA makes provision for workplace forums, a form of worker participation that, however, has proved to be unsuccessful in South Africa. It is suggested that the provisions regarding workplace forums should be reworked in order to bring them inline with the provisions of the *Companies Act*, especially regarding non-distributive or production issues. A synergy between the issues identified in the LRA regarding consultation and joint-decision making powers in the workplace forum and the work of the social and ethics committee is possible if there is an overlap between the issues that fall within the ambit of the social and ethics committee and those granted by the LRA to workplace forums. These suggestions address the problems relating to the adversarial nature of collective bargaining as non-distributive or production issues will be removed from collective bargaining and will be dealt with by the social and ethics committee, which possibly could enhance efficiency in the workplace. The issues include restructuring of the workplace, changes in the organisation of work, export promotion, job grading, education and training in so far as they impact employees.

The purpose of CSR initiatives, as well as corporate governance frameworks, is to make employees feel as insiders. CSR, for example, should not be merely voluntary: there is no guarantee for trade unions (and employees) that the company will regard CSR aspirations as not obligatory and subject to managerial discretion. CSR initiatives which fall within the ambit of the social and ethics committee calls for trade union involvement to ensure that companies meet their obligations and to guarantee that companies report on these issues. In this regard I propose a recommendation in the final chapter of the thesis.

Employees, almost exclusively, are dependent on labour law to exercise their right to participation and to make their voice heard. Collective bargaining, an adversarial system, remain the employees' primary and, perhaps, default means of having a say in companies. To this effect employees are empowered by a right to strike. However, it should be exercised as the last resort as it is at considerable cost to employees, their families and the greater society (including the employer). Therefore, the position remains unsatisfactory. Effective mechanisms should be provided for in insolvency, as well as commercial law, to recognise employees as stakeholders as they are still vulnerable and find themselves last in the spectrum of stakeholders. These mechanisms could provide protection where labour law falls short, for example, in instances such as insolvency or business rescue the status of employees as creditors and stakeholders could be expanded beyond what is currently provided for by the LRA, BCEA and other labour legislation. Additional remedies could be provided, such as liability of the board of directors specifically to employees, especially if the company finds itself in a financially-distressed situation and directors fail to inform trade unions or to engage with them, or if the operations of the company are conducted in a reckless manner, or if employees are retrenched but the directors are paid performance bonuses in financially-distressed times. These possibilities will be canvassed further in chapter eight.

Chapters four, five and six address issues such as employee participation, the forms of employee participation, how collective bargaining is used and can be used as tool to gain

greater access to decision-making in companies and why workplace forums are not successful, as well as address issues such as empowerment initiatives.

CHAPTER 4 – EMPLOYEE PARTICIPATION AND VOICE

4.1 General

The introduction of the LRA in 1995 gave a “fresh impetus to the worker participation debate at the level of the enterprise”⁷⁴⁵: a refreshed enthusiasm that the LRA would change things regarding the position of employees and their voice in decision-making in organisations.

Labour can be seen as a group, community or society in its own right in the arena in which economic actors meet in order to cooperate with regards to goods and services: but the dialogue between capital and labour should “occur not only at the enterprise level but also at the level of the broader economy”.⁷⁴⁶ Because work plays a central part in the well-being of individuals, it is important that work is organised in such a way as to promote the well-being of labour.⁷⁴⁷ Thus, labour “should play an active part in decision-making that vitally concerns its interests”.⁷⁴⁸ Lower submits, at the level of the “economy, of the state and internationally, this participation will necessarily be through representative institutions such as trade unions”.⁷⁴⁹ He argues that trade unions are “an indispensable element of [economic] and social life”: they are an expression of the freedom of association and are central to defending the vital interests of workers.⁷⁵⁰ The administration of labour is important because it ensures an effective functioning of models of information and consultation in the workplace, as well it deals with issues such as health and safety and working conditions in employment.⁷⁵¹ Klerck addresses the changes in the South African labour market in the context of globalisation and international practice as follows:

⁷⁴⁵ Anstey *Employee Participation* 1.
⁷⁴⁶ Lower *Employee Participation* 150.
⁷⁴⁷ Lower *Employee Participation* 151.
⁷⁴⁸ Lower *Employee Participation* 151.
⁷⁴⁹ Lower *Employee Participation* 151.
⁷⁵⁰ Lower *Employee Participation* 151.
⁷⁵¹ Arrigo and Casale 2010 www.ilo.org.

The struggle around the future structure of labour relations in South Africa takes place within a specific global and local context. Internationally, the current conjuncture is one in which the labour movements of many countries are under attack, trade unionism is on the decline in its traditional strongholds, and management has seized the initiative in the restructuring of production and the transformation of labour relations. Much ink has been spilled in an effort to present new 'cooperative' strategies as a necessary part of capital and the state's response to the vagaries of globalization. The only choice sanctioned by the 'new world order', we are told, is to increase managerial control and emasculate the unions or attempt to harness the power of the unions by incorporating them in bargaining and participatory structures. Webster and Adler, for example, endorse 'a class compromise between capital and labour: a left version of social democracy' and insist that 'socialist solutions are unfeasible' ... The impact of the increasing globalization of production, together with the loss of traditional political identities, have led many unions in Europe to either a 'strategic disorientation' or a 'syndicalist opportunism' While the outlook for South Africa's labour movement is certainly more optimistic, its strategic options are severely curtailed by widespread poverty, low levels of economic growth, adversarial and low-trust labour relations, and neo-liberal economic policies. The sway and leverage of trade unions mean that employers in South Africa are unable to compete on the basis of labour costs with many newly industrialising countries. The pursuance of a low-cost strategy presupposes the suppression of the labour movement and leads to conflict with the unions or takes the form of 'productivity alliances' such as the enterprise unions in Japan. A relatively stable, productive and equitable labour relations regime in South Africa will demand incorporation and empowerment, rather than marginalisation and restraint, of trade unions. This, in turn, will require a move away from a low-skill, low-productivity, low-wage, low investment in research and development, and a low-value-added economy. Such a drastic shift in the economy will, of course, be conditioned by South Africa's insertion into the international division of labour. While the labour movement has the power, influence and resources necessary to obstruct the cheap-labour route to increased competitiveness, the question remains whether it can also constitute the driving force behind a high-wage/high-skill route. The modalities of such an endeavour will be decisively influenced by (amongst others) the scope for conflict and compromise within the institutions of labour relations.⁷⁵²

Workers participation or employee involvement focuses on issues, such as stability, productivity and a labour relations regime that is equitable, which demand incorporation and empowerment. The debate over worker participation (and to what extent) in corporate decision-making, at present, is not only a central issue in labour law but extends into company law.⁷⁵³ Employers (even today) still construct the terrain of employee representation:⁷⁵⁴ for example, they still have control over an employee share-ownership

⁷⁵² Klerck 1999 *Transformation* 3-4.

⁷⁵³ See chapters 2 and 3 above.

⁷⁵⁴ Klerck 1999 *Transformation* 5.

scheme or collective bargaining or the initiation of joint consultation channels.⁷⁵⁵ Managerial strategies⁷⁵⁶ still constrain the options for and outcomes of participatory arrangements.⁷⁵⁷ There has been a call for corporate law and corporate governance regimes to be amended to grant employees' greater participation and voice in the workplace and promote the interests of stakeholders other than those of shareholders.⁷⁵⁸ However, South African labour legislation continues to reflect, largely, a "rigid adversarial system",⁷⁵⁹ which, if it continues, will be "incongruent with the direction which we suggest the new corporate project could take".⁷⁶⁰

This chapter explores various ways in which participation and voice can be achieved, as well as the different forms of participation. It also evaluates the different underpinnings of industrial and economic democracy juxtaposing these two constructs and explores empowerment and financial participation as ways in which to achieve participation, especially of previously disadvantaged employees. The chapter, however, does not look at collective bargaining and co-determination in South Africa: these aspects are reserved for detailed discussion in chapters five and six below.

⁷⁵⁵ Klerck 1999 *Transformation* 5.

⁷⁵⁶ Godfrey, Hirschsohn and Maree 1998 *LDD* 89 point out the following out regarding strategic management: "The central strand in development of the concept strategy in the business world has been the notion of strategic management. Strategic management is a wider concept than management strategy in that it is presented as a way of managing the entire business; it therefore proposes an overarching strategy for the management of a business rather than a discrete strategy for a particular management function or a particular management objective. ... The concept of strategic management can be seen as having three essential features. Firstly, it emphasises rationality in management's decision-making. Secondly, strategic management is situated at the pinnacle of the business, that is, it is the preserve of senior management. Thirdly, the objective of this type of management is to provide an overall plan that *integrates* the many diverse decisions taking place at various levels and in the different functional areas of the organisation. The aim is to co-ordinate all these layers and functional divisions in the firm's interaction with its present and (predicted) future competitive environment and thereby optimise its ability to achieve its objects" (original emphasis).

⁷⁵⁷ Klerck 1999 *Transformation* 5.

⁷⁵⁸ See chapters 2 and 3 above.

⁷⁵⁹ Adversarialism will be discussed in chapter 5 below.

⁷⁶⁰ Davis and Le Roux 2012 *Acta Juridica* 315.

4.2 Employee participation and voice

4.2.1 *Conceptual misperceptions, misnomers and organisational constructions*

4.2.1.1 *The notions industrial democracy and economic democracy*

Commentators from a variety of circles in South Africa have argued the case for co-operation, workplace democracy and worker control, as well as participation, in forms that vary in intensity but which are dominated by so-called "co-determination".⁷⁶¹ With regard to co-determination Streeck points out:

Co-determination presupposes that unions assume that somehow they have to come to terms with capital. On the other hand co-determination presupposes the recognition on the part of capital that unions will be around for some time, and that one has to come to terms with a unionised workforce that makes its interests heard at the workplace.⁷⁶²

In the South African context, a description is as follows:

... co-determination can be taken to refer to joint decision-making, where decisions can be made only if they are agreed to by both parties. Co-determination as a form of decision-making can be usefully distinguished from consultation, which involves obligations, usually from management, to inform workers before taking a decision, to wait for a response or counterproposal, and take any response or counterproposal into consideration when deciding the issue.⁷⁶³

Workplace democracy⁷⁶⁴ in South Africa is a key feature of the new constitutional and labour dispensation. The LRA and the *Constitution* not only afford key rights to workers but also protect these rights.⁷⁶⁵ Du Toit submits that democratisation of the employment relationship is essential to both "*democracy and increased production and redistribution of*

⁷⁶¹ Jarvis and Sitas 1998 *LDD* 27.

⁷⁶² Streeck 1994 *South African Labour Bulletin* 87.

⁷⁶³ Webster and Macun 1998 *LLD* 66.

⁷⁶⁴ Patel 1998 *LDD* 111-114.

⁷⁶⁵ See chapter 2 above in this regard.

wealth".⁷⁶⁶ With reference to "democratic participation", Hepple points out that it is "key to the effective enforcement of socio-economic rights and the right to equality".⁷⁶⁷ The enforcement of socio-economic rights and equity rights and the realisation of participation will be successful only if those already affected have "an effective voice" in the implementation, which requires devising of institutions of "deliberative democracy":⁷⁶⁸ to create a space in which dialogue and contestation, truly, are possible.⁷⁶⁹ Mureinik maintains that economic rights cost a great deal of money and have a huge impact on budgetary decisions and, in a well-ordered democracy, that it is not the responsibility of the unelected judiciary to decide what society can afford and what its priorities are, rather it is the responsibility of the legislature.⁷⁷⁰ This argument is regarded as "being dubious": on the grounds that the exclusion of socio-economic rights in a constitution is detrimental to democracy.⁷⁷¹ Chicktay submits that strikes promote democracy in the workplace rather than deny it and that employees, through collective action, can challenge the employer's control over determining the conditions of employment, thus having a greater say within the workplace.⁷⁷²

Hepple states that two models of participation realising socio-economic rights and employment equity have emerged in South Africa: First, "meaningful engagement": the Constitutional Court developed this principle in a series of cases (mainly dealing with housing convictions) and, second, the statutory duty of employers under the EEA to take reasonable steps to "consult and reach agreement" with trade union representatives with regard to employment equity plans.⁷⁷³ Participation is not limited to these instances. In the context of workplace forums the LRA has identified instances of where consultation and

⁷⁶⁶ Du Toit 1993 *Stell LR* 325. Original emphasis.

⁷⁶⁷ See discussion on equality in chapter 2 above. Hepple 2012 *SALJ* 248.

⁷⁶⁸ Hepple 2012 *SALJ* 248.

⁷⁶⁹ Hepple refers to former Chief Justice Pius Langa "Transformative Constitutionalism" 2006 *Stell LR* 354 (Hepple 2012 *SALJ* 248).

⁷⁷⁰ Mureinik 1994 *SAJHR* 467.

⁷⁷¹ Chicktay 2006 *Obiter* 346.

⁷⁷² Chicktay 2006 *Obiter* 346.

⁷⁷³ Hepple 2012 *SALJ* 249.

joint decision-making can take place.⁷⁷⁴ In the *Companies Act* employees are now provided with additional rights.⁷⁷⁵ When a change to a process, for example, is considered it is important to involve employees (and their representatives) and provide them with a voice in order to take account of their interests in the decisions that are made.⁷⁷⁶

The *Reconstruction and Development Programme (RDP) White Paper* explained the democratic imperative as follows:

Industrial democracy will facilitate greater worker participation and decision-making in the workplace. The empowerment of workers will be enhanced through access to company information. Human resource development, and education and training are key inputs into policies aimed at higher employment, the introduction of more advanced technologies, and reduced inequalities. Discrimination on the grounds of race and gender must end. Parties to collective bargaining will be encouraged to negotiate affirmative action policies to address discrimination and the disparities of power between workers and employers. (Para 3.11.4.)⁷⁷⁷

That notions such as “worker participation”, “industrial democracy” and “economic democracy” sometimes are used as synonyms does not further the debate as to what exactly worker participation entails.⁷⁷⁸ Participation and industrial democracy means different things to different authors, for some the term “industrial democracy” implies “a process of exercising election rights in industry similar to those done in politics”.⁷⁷⁹ If taken literally, “it would imply that workers had the power to change the ‘government’ in industry as they do in the political sphere”.⁷⁸⁰ From section 25 of the *Constitution* it is clear that workers cannot change the “government in industry”, as they may be able to do in the political sphere: such power is not extended to industry. They cannot vote the board of directors out and appropriate the company’s property.

⁷⁷⁴ See chapter 6 below for a discussion on workplace forums.

⁷⁷⁵ See chapters 1-3 above for a discussion on employee rights in corporate law.

⁷⁷⁶ Hayter (ed) *Collective Bargaining* 107.

⁷⁷⁷ Du Toit 1997 *LDD* 42 where he refers to the RDP. Satgar 1997 *LDD* 49 points out that the “ideological prism of The Industrial Court – essentially pluralist industrial relations theory – failed to contribute to a labour law project industrial that achieved industrial democracy”.

⁷⁷⁸ Arrigo and Casale 2010 www.ilo.org.

⁷⁷⁹ Bank *Trade Union* 41.

⁷⁸⁰ Bank *Trade Union* 41.

Workers, as citizens when they are unhappy with how the government is run can vote them out in by-elections, provincial, municipal and national elections. Section 25(1) of the *Constitution* for example provides that “[n]o one may be deprived of property except in terms of the law of general principles, and no law may permit arbitrary deprivation of property”: by implication, though workers might be unhappy with the board of directors, they cannot strip them of their proprietary rights or vote them out. A general meeting of shareholders alone is entitled to remove the board of directors.⁷⁸¹

With regard to the constituent elements of “industrial democracy” there is a level of agreement. Industrial democracy sometimes is used interchangeably with concepts such as “workers participation” and “employee involvement” in decision-making.⁷⁸² The context in which it is used and the meaning that is attached to it will determine if the concept translates meaningfully into rights and a voice for employees. Industrial democracy is a broad concept and includes “workers participation” and “employee involvement” in decision-making.

Industrial democracy has been described as follows:

Its central objective is the establishment of employee self-management within an organisation, whose ownership is vested in either the employees or the State and whose managerial function is exercised ultimately through a group, elected by the employees themselves, which has the authority over all decisions of the organisation, including the allocation of ‘profits’ between extra wages and reinvestment.⁷⁸³

In its objectives⁷⁸⁴ the LRA aims to “advance economic development, social justice,⁷⁸⁵ labour peace and the democratisation of the workplace”,⁷⁸⁶ but the LRA does not define

⁷⁸¹ See chapter 3 above for a discussion on the general meeting.

⁷⁸² *Bank Trade Union* 41.

⁷⁸³ Salamon *Industrial Relations* (1992) 353-354.

⁷⁸⁴ See chapter 2 above for a detailed discussion on the objectives of the LRA.

⁷⁸⁵ See chapter 1 and 2 above for more detail on social justice.

⁷⁸⁶ S 1 of the LRA.

“democratisation of the workplace”, nor does the RDP spell out what “industrial democracy” entails.⁷⁸⁷ As illustrated earlier, different meanings and contexts have been attached to the concept “industrial democracy”. It “cannot be explained meaningfully in terms of institutions or structures, any more than ‘political democracy’ can be defined in terms of a parliamentary or presidential system of government”.⁷⁸⁸ It is submitted (in the context of the RDP White Paper and the objectives of the LRA, in particular, with regard to workplace forums),⁷⁸⁹ that with regard to “industrial democracy” the following carries weight:

... industrial democracy is concerned with redressing ‘disparities of power between employers and workers. Historically and legally, employers have enjoyed unilateral powers of command over workers. In this context industrial democracy must be understood as a project of worker empowerment; and the various objectives ... (giving workers access to information, abolition of discrimination, etc) may be regarded as means towards this end.’⁷⁹⁰

In the broadest sense

industrial democracy is practiced where workers voice their opinions and make suggestions to the employer on issues which affect them. The employer gives serious consideration to these opinions and suggestions, but reserves the right to undertake the final decision-making.⁷⁹¹

In a narrow sense “it means that both parties share equally in all decisions which affect the attaining of organizational goals. Workers and employers are then held jointly responsible for the outcome of such decisions”.⁷⁹² If employees are granted a voice in organisations, they can achieve some level of equality of power, as well as responsibilities in terms of the impact of their decisions. Industrial democracy consists of two elements: (a) the opportunity of employees to influence decisions (which indicates their power within the workplace) and (b) the impact of employees’ involvement in decisions in the workplace

⁷⁸⁷ Du Toit 1997 *LDD* 42.

⁷⁸⁸ Du Toit 1997 *LDD* 41.

⁷⁸⁹ Workplace Forums will be discussed in detail in chapter 6 below.

⁷⁹⁰ Du Toit 1997 *LDD* 42-43.

⁷⁹¹ Nel 1984 *SA J of Lab Rel* 6.

⁷⁹² Nel 1984 *SA J of Lab Rel* 6.

(which refers to the number of organisational decisions they exert influence on and their importance from the employees' position).⁷⁹³ It is an important pre-requisite that trust exists between employees and management to enable them to share information and communicate effectively.⁷⁹⁴

Industrial democracy⁷⁹⁵ is a contested concept, operating at different levels and made up of different elements, which relies on a notion of employee influence or control over decisions. This notion of influence or control affects their working lives and grants them the opportunity not only to participate in decision-making but also provides them with the capacity, through the utilisation of adequate information, to take advantage of that opportunity.⁷⁹⁶ Traditional management theory is directly challenged: "unilateral" decision-making is transformed into "bilateral" decision-making.⁷⁹⁷ Industrial democracy encompasses a variety of concepts such as employee participation, participative management, employee involvement, as well as workers' control, each of which "emphasises particular forms of industrial democracy".⁷⁹⁸ For example, it includes employee participation on supervisory boards.⁷⁹⁹ Thus, it is important to properly classify the forms of industrial democracy. One classification system separates industrial democracy into two groups: (i) control through ownership and (ii) control against ownership. Control through ownership initiatives "accept the right of capitalists/shareholders to exercise direct control, but seek to acquire this right by converting the workers themselves into owners":⁸⁰⁰ the workers obtain more or less control in the company by acquiring shares.⁸⁰¹ Thus industrial democracy is achieved through an

⁷⁹³ Nel 1984 *SA J of Lab Rel* 6.

⁷⁹⁴ See chapter 3 above and chapter 5 below with reference to information sharing between employees and management.

⁷⁹⁵ See also chapter 2 above for a discussion on ownership and control.

⁷⁹⁶ Mitchell 1998 *IJCLIR* 1. The classification of industrial democracy was also mentioned in chapter 2 above.

⁷⁹⁷ Mitchell 1998 *IJCLIR* 1.

⁷⁹⁸ Mitchell 1998 *IJCLIR* 1.

⁷⁹⁹ See chapter 7 below for a detailed discussion on supervisory boards.

⁸⁰⁰ Mitchell 1998 *IJCLIR* 6.

⁸⁰¹ Mitchell 1998 *IJCLIR* 6.

increase in worker control.⁸⁰² Control against ownership initiatives “challenges the belief that ownership of a firm gives capitalists/shareholders the right to exercise control, and seek to expropriate those rights for the workers”.⁸⁰³

Control against ownership initiatives more often are associated with the notion of “industrial democracy” “in common parlance”, than control through ownership initiatives. It is possible to acquire different degrees of control against ownership.⁸⁰⁴ Control is entirely in the hands of capital in a purely capitalist firm; in a democratic firm control vests in the hands of employees on two dimensions.⁸⁰⁵ The dimensions of employee control, for example, are the *influence*: the extent to which workers influence decision-making, the level at which employees are involved in the *decision-making* process as well as the level at which they are allowed to *participate*.⁸⁰⁶

In determining what the notion “industrial democracy” entails it is important to look at the concept “democracy”. Mitchell points out that democracy is a difficult term to define: The word derives from “the Greek words *kratos* (power to rule) and *demos* (the people or the many)”.⁸⁰⁷ Thus, democratisation can be said to be “the process by which those to whom decisions relate are given a greater say in the process of decision making ...”.⁸⁰⁸ Democratic principles are confirmed in the *Constitution*. Section 7(1) of the *Constitution* provides that “[t]he 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”. Broadly speaking, democracy is a theory of government which attempts to link the people to their government and is based on “a belief in the value of the individual human being, and so it demands that the citizen is regarded as the sovereign of the state, and has the right to decide matters of general

⁸⁰² Mitchell 1998 *IJCLIR* 6.

⁸⁰³ Mitchell 1998 *IJCLIR* 6.

⁸⁰⁴ Mitchell 1998 *IJCLIR* 6.

⁸⁰⁵ Mitchell 1998 *IJCLIR* 6.

⁸⁰⁶ Mitchell 1998 *IJCLIR* 7. My emphasis.

⁸⁰⁷ Mitchell 1998 *IJCLIR* 5.

⁸⁰⁸ Brassey *Employment and Labour Law* 1-5.

concern".⁸⁰⁹ In light of the fact that democracy requires popular rule, a vital question in the context of industrial democracy can be asked: *How far should popular rule extend and which issues should be determined by the people as a whole, and which should be left for private individuals to decide for themselves?*⁸¹⁰ In answering this question, a distinction is made between liberal versus radical democracy.⁸¹¹

Liberal democratic theories, based on liberal individualism, generally restrict the operation of democracy to "political" matters.⁸¹² The meaning of "political" depends on "assumed and often unexamined beliefs".⁸¹³ John Locke maintains individuals surrender certain powers to the elected government which is the representative of the people.⁸¹⁴ The representative and elected government is entitled to determine political matters for the people as a whole and is required (as a democratic government) to protect the natural rights of citizens and no more.⁸¹⁵ The function of government is protective and democratic decision-making is limited (by liberal democratic theory) "to the creation of a framework for the community within which individuals are free to conduct their day to day lives and pursue their own interests".⁸¹⁶ By contrast radical democracy "prescribes the application of democratic principles and processes throughout all aspects of social existence".⁸¹⁷ Liberal democracy operates on the first sphere of democracy, which is the political sphere, whereas radical democracy views the economic and social spheres as equally important.

Economic democracy "requires collective control of the means of production", whereas social democracy "requires social equality among individuals".⁸¹⁸ Thus, there is a juxtaposition of economic and industrial democracy. Historically, the notion of "economic democracy" becomes relevant with the critical evaluation of the notion of democracy as

⁸⁰⁹ Mitchell 1998 *IJCLIR* 5.

⁸¹⁰ Mitchell 1998 *IJCLIR* 6.

⁸¹¹ See also Koopman "Democracy" 1.

⁸¹² Mitchell 1998 *IJCLIR* 16.

⁸¹³ Mitchell 1998 *IJCLIR* 16.

⁸¹⁴ Mitchell 1998 *IJCLIR* 16.

⁸¹⁵ Mitchell 1998 *IJCLIR* 16.

⁸¹⁶ Mitchell 1998 *IJCLIR* 16.

⁸¹⁷ Mitchell 1998 *IJCLIR* 16.

⁸¹⁸ Mitchell 1998 *IJCLIR* 17.

linked to political representation.⁸¹⁹ The need for “substantive democracy” was proposed as a result of the supposed weakness or inadequacy of a purely formal model of democracy.⁸²⁰ The starting point of a radical criticism of the elements of formal democracy is that an economic democracy programme aims to underscore that democracy cannot be separated from the economic structure in which it exists.⁸²¹ The wider concept and programme of “economic democracy” is “not infrequently juxtaposed with the notion of industrial democracy”.⁸²²

In the Anglo-Saxon experience the notion of industrial democracy originated from a non-organic set of theoretical foundations, which included a variety of mechanisms.⁸²³ These mechanisms range from those typical in the early days of the workers’ movement in the defence of labour to those intended to influence the “industrial process” itself. The former set of mechanisms include issues such as representation in factories, resistance funds, mutual aid associations, which are regarded as forms of “social organisation” and which are linked to “associative democracy”.⁸²⁴ The latter set of mechanisms operate through collective conflict and the

valorisation of the bargaining method which tends to absorb and, within itself, resolve the participatory aspects; and on to (the elaboration of) forms of workers’ participation in the governing bodies of commercial enterprises, with a view to ‘democratizing’ employment relations within companies and ‘changing society’ – mechanisms, which go beyond the negotiating method.⁸²⁵

The term “industrial democracy” is a fairly ample: a well-established body of opinion holds that it is “correct to speak of industrial democracy only with reference to the formation and

⁸¹⁹ Arrigo and Casale 2010 www.ilo.org.
⁸²⁰ Arrigo and Casale 2010 www.ilo.org.
⁸²¹ Arrigo and Casale 2010 www.ilo.org.
⁸²² Arrigo and Casale 2010 www.ilo.org.
⁸²³ Arrigo and Casale 2010 www.ilo.org.
⁸²⁴ Arrigo and Casale 2010 www.ilo.org.
⁸²⁵ Arrigo and Casale 2010 www.ilo.org. My emphasis.

construction of powers that counter-balance those of management".⁸²⁶ In this regard the following is emphasised:

Until recently, this juxtaposition of economic and industrial democracy met with consensus – at least in theory –, owing to a sort of misunderstanding or change in the terminology. This, however, enables us to appreciate the complexity of the 'theory' and 'practice' of democracy in the workplace, in the economy and in society as a whole (industrial democracy, economic democracy and political democracy). These forms of expressing democracy seem to be linked by relations of continuity and causality where industrial democracy decides on the purposes and allocation of production in an entire industry, these decisions will necessarily influence (and be influenced by) national economic policy as a whole, which must necessarily engage with both production and distribution. Here, industrial democracy must agree with economic democracy and also with political democracy.

A closer link operates in the other direction: economic democracy concerns the fair distribution, not just of the gross national product, but also of other social assets including the possibility to enter well-paid and fulfilling jobs. One of the aims of economic democracy seems therefore to coincide with some of the objectives of industrial democracy. Continuity between economic and industrial democracy also consists in the fact that any participation in the economy of the enterprise requires a certain degree of participation in management decisions ...⁸²⁷.

From this quotation, evidently, industrial and economic democracy are closely linked: when decisions are made in the industrial democracy sphere regarding the purposes and allocation of production in an entire industry it will have an influence on national economic policy and also be influenced by national economic policy. In addition to the alignment of industrial and economic policy evidently, there is a link between industrial democracy and economic democracy. Economic democracy's concern with the fair distribution of the gross national product and of other social assets, including the possibility to enter well-paid and

⁸²⁶ Du Toit 1993 *Stell LR* point out that "'worker control' ... or, perhaps more accurately, 'industrial democracy'" is fundamentally a different proposition because the management function is exercised exclusively by employees as they do not "participate" in management rather *are* management (original emphasis).

⁸²⁷ Arrigo and Casale 2010 www.ilo.org. Arrigo and Casale formulated the following regarding economic democracy: "The formula of economic democracy, as manifested in the theoretical evolution and experience of some European national systems, in effect synthesizes the essential terms of democracy, labour and the enterprise. This formula essentially poses two questions: a) whether and in what form economic forces are present and active in the structures of the democratic system, and whether there are disparities or distortions between legal provisions (including those of Constitutional relevance) and actual circumstances; and b) whether the principles and rules of democracy are exercised and effective in the encounter between entrepreneurial initiative and organized labour" (Arrigo and Casale 2010 www.ilo.org).

fulfilling jobs, is at the heart of the achievement of social justice and the advancement of the economic development of workers and is reflected in the objectives of the LRA. Cognisance must be taken of all three facets with regard to “voice”, “participation” and “decision-making” powers of employees.

Through political, economic and social spheres democracy is extended to all areas of life: the goals of radical democracy mirror socialist aspirations for the democratisation of economic life through the collectivisation of wealth and worker self-management.⁸²⁸ The rationale for “voice” and “representation” includes the following: issues such as self-empowerment and the right to dignity of workers in South Africa appear to be central to achieving some form of voice in organisations and the improvement of working conditions; the terms and conditions of employment.

4.2.1.2 *The notions of employee participation, involvement and employee voice*

4.2.1.2.1 Employee participation

In the words of Schregle⁸²⁹ worker participation is -

to cite the title of a famous novel, ‘a many-splendoured thing’. The snag is that everybody who uses this expression has a clear and definite form of workers’ participation in mind, but since such definitions vary greatly from country to country international dialogue is extremely difficult.

Employee (worker) participation⁸³⁰ needs clarification: there is no single, unambiguous meaning attached to the term “worker participation”.⁸³¹ What constitutes workers’ participation also differs in the various national systems. It is a term, which has been

⁸²⁸ Mitchell 1998 *IJCLIR* 17.

⁸²⁹ Schregle 1976 *Int'l Lab Rev* 2.

⁸³⁰ The concept “worker participation” will be used interchangeably with the concept “employee participation”.

⁸³¹ Arrigo and Casale 2010 www.ilo.org.

widely debated and which has different meanings depending on whether it is viewed from an employee, trade union, employer, or state perspective.⁸³²

In order to better understand the importance of employee participation in corporate decision-making the motives and reasons for its existence and implementation must be investigated and established. Different role players have different interests in the outcome of employee participation: these include employees, trade unions, managers (directors), owners and the state.⁸³³ Conflicting interests result in conflicting views, depending from which viewpoint employee participation is approached: trade unions push for a greater voice in the organisation whereas owners do not readily want to relinquish power and control over the organisation.

Ethical, political, social and economic ideologies underpin the debate over the greater influence of labour on management (corporate) decision-making.⁸³⁴ The historical concept of participation dates back to the Greek Polis. In *The Republic* Plato argues that the interests of the city are best served if the citizens directly participated via the Polis in governance matters.⁸³⁵ Strauss maintains that participation is “a theory, in part because *when it works* (a key point), it provides a win-win solution to a central organizational problem: how to satisfy workers’ needs while simultaneously achieving organizational objectives”.⁸³⁶ The term “participation” covers a wide variety of processes and institutions and has taken on many forms: “definitions abound, many ideologically loaded”.⁸³⁷ “Participation”, broadly, is “a process that allows employees to exercise some influence over their work and the conditions under which they work”.⁸³⁸ Heller *et al* note the following:

⁸³² Finnemore *Labour Relations* 207.

⁸³³ Maree 2000 *Society in Transition* 112.

⁸³⁴ Blanpain 1974 *ILJ* (UK) 5.

⁸³⁵ Valoyi, Lessing and Schepers 2000 *J Ind Psych* 32.

⁸³⁶ Strauss 2006 *Industrial Relations* 778.

⁸³⁷ Strauss 2006 *Industrial Relations* 779.

⁸³⁸ Heller *et al* *Organizational Participation* 15; Strauss 2006 *Industrial Relations* 779. My emphasis.

Some authors insist that participation must be a group process, involving groups of employees and their bosses; others stress delegation, the process by which the *individual* employee is given greater freedom to make decisions on his or her own. Some restrict the term 'participation' to formal institutions, such as work councils; other definitions embrace 'informal participation', the day-to-day relations between supervisors and subordinates in which subordinates are allowed substantial input into work decisions. Finally, there are those who stress participation as a process and those who are concerned with participation as a *result*.⁸³⁹

Both formal and informal participation platforms should be provided for. Although it is important that participation takes place through formal institutions, such as work councils, inputs on work processes that impact the way a production process is affected or can be changed or how a production line can be more efficiently and effectively be operated, also grant employees voice, albeit, informally. The process as well as the result is important because, without focusing on the process (formal or informal) and how it manifests, the result will directly or indirectly be affected and could mean a decision is either good or bad.

Strauss is of the opinion that participation is about the "*actual* influence, not *feeling* of influence that is important": that workers voice is meaningless if the message is ignored.⁸⁴⁰ This point is important in considering the different channels through which participation can be effected as well as the mechanisms: "employee voice" can be effected by means of trade unions which represent them or through direct or indirect means where issues are left to consultation or to joint decision-making processes. Employees, directly or indirectly, are involved in the decision-making process and are meaningful partners in consultation. In this context the main feature of participation lies in its dynamic nature: like democracy in general, it is "a lengthy, prolonged process" that includes "the digesting of experience gained and the drawing on new ideas, events, actions, policies and strategies which either directly or indirectly increase (but may also reduce) worker influence".⁸⁴¹ Democratic participation "is a dynamic process that has to be constantly proposed, learned and defended", but "whatever the conjunctural fate of worker participation, worker control

⁸³⁹ Heller *et al* *Organizational Participation* 15.

⁸⁴⁰ Strauss 2006 *Industrial Relations* 779. Original emphasis.

⁸⁴¹ Kester, Zammit and Gold "New Frontiers" 4.

or worker self-management in different moments of history, the subject matter appears to retain a fundamental attraction".⁸⁴²

Thus, participation is defined as "a process, a movement, which sets in motion a democratic way of thinking – even when the actual forms of participation have functioned with great defects".⁸⁴³ Participation entails either a formal or informal process, a movement that is driven by the state, industry, trade unions, social partners, management or employees themselves, in which employees are included or excluded from decision-making (obviously depending on the type of decision that is made and the information that is provided to them). Thus, it does not matter whether decision-making takes place through collective bargaining, works councils (workplace forums), supervisory boards or other means: a democratic way of thinking, ultimately, is what drives the movement as well as the process of decision-making.

Salamon (as referred to in chapter 1 above) describes employee participation as:

a philosophy or style of organisational management which recognises both the need and the right of employees, individually or collectively, to be involved with management in areas of the organisation's decision-making beyond that normally covered by collective bargaining.⁸⁴⁴

Salamon proposes, due to the fact that the term "worker participation" does not have a universally accepted meaning, that three quite different interpretations are possible:

(1) As a *socio-political concept of industrial organisation* generally reflecting an approach which in its ultimate form would see a form of employee self-management prevail in organisations whether owned by employees or the state. The managerial function is exercised through a group of elected representatives which has responsibility for organisational decision-making including the allocation of profits or surplus value. Major changes in economic and authority relations in organisations and the wider society would be required to achieve the "vision" of this approach on a wide front.

⁸⁴² Kester, Zammit and Gold "New Frontiers" 4.

⁸⁴³ Kester, Zammit and Gold "New Frontiers" 4.

⁸⁴⁴ Salamon *Industrial Relations* (1987) 296, (1992) 341.

(2) As a *generic term to encompass all processes and institutions of employee influence* within organisations ranging from simple managerial information giving through joint consultation to collective bargaining, works councils and forms of worker control.

(3) As a *term denoting a phase in the evolutionary development of traditional joint regulation process* envisaging a move beyond traditional collective bargaining, and certainly mere information giving and consultation ('pseudo participation')⁸⁴⁵ to new levels of shared responsibility and shared decision-making ('real participation').⁸⁴⁶

According to Du Toit, worker participation (in the sense Salamon uses) "may be seen as a form of democratisation to the extent that it makes inroads into management prerogative",⁸⁴⁷ but, by definition, is limited.⁸⁴⁸ In a similar vein, Olivier points out that "participation in decision-making cannot realistically be seen as industrial democracy in the true sense of the word" because at "best it reflects inroads into management prerogative, but certainly not industrial democracy in the sense that [the] collective voice of the workers will constitute or even determine the eventual business decision to be implemented in the enterprise".⁸⁴⁹ It has been argued that representation in the workplace is a basic human right not confined to trade union members alone:⁸⁵⁰ participation by employees "is a value in its own right" because it "corresponds to the aspirations and sense of responsibility of people".⁸⁵¹ Worker participation is "a means to the representation of interests and an indispensable basis for the trade union movement towards realisation

⁸⁴⁵ In 1970 Pateman identified three different kinds of participation: "(a) *pseudo participation* – management uses participation as a way of persuading workers to accept decisions that have already been made; (b) *partial participation* – two or more parties are able to influence the decision that are made but the final power rests with one of them; and (c) *full participation*—a process where each member of a decision-making body has equal power to determine the outcome of decisions. The problem with such a demarcation of forms of representational participation is that it rides roughshod over the actual variety of possible types" (Klerck 1999 *Transformation* 9).

⁸⁴⁶ Anstey *Worker Participation* 3-4. Emphasis in original.

⁸⁴⁷ Du Toit *et al Labour Relations Law* (2006) 342 point out criticisms of employee participation: "... much of the criticism of employee participation is bound up with its (perceived) impact on power relations in the workplace. From an employer's point of view it may be seen as restricting managerial prerogative and flexibility of decision-making. Conversely, trade unions have been concerned that it may blur the distinction between management and employee interests, thus undermining the basis of trade union organisation in the workplace".

⁸⁴⁸ Du Toit 1993 *Stell LR* 326.

⁸⁴⁹ Olivier 1996 *ILJ* 806. See also Du Toit 1993 *Stell LR* 326-327.

⁸⁵⁰ Du Toit *et al Labour Relations Law* (2006) 342.

⁸⁵¹ Du Toit *et al Labour Relations Law* (2006) 342.

of its own policy aims”.⁸⁵²

4.2.1.2.2 Approaches to employee participation

After examining various schemes and approaches to worker participation Godfrey, Hirschsohn and Maree identify two approaches that can be adopted by management:⁸⁵³ a tendency either to place emphasis on structure for participation (the structural approach) or on the process for employee involvement (the process approach).⁸⁵⁴

The *structural approach* “tended to emerge at firms where there were powerful unions present with strong shop floor organisation”,⁸⁵⁵ where managers had to engage with the union at collective level in an attempt to make changes in order to respond to environmental pressures.⁸⁵⁶ Here, engagement structures had to be set up within which participation could take place. This approach is characterised by being largely representative and is governed by collective agreements that entrench structures with “clear rights to decision-making” and that cover a range of issues.⁸⁵⁷ In its most developed form, these structures were situated at various levels, such as operational, business unit and strategic levels of decision-making.⁸⁵⁸

The *process approach*, on the other hand, “saw performance improvement in response to environmental pressures as an on-going process that utilised a variety of structures at the operational level to increase employee involvement and commitment”.⁸⁵⁹ The requirement of performance improvement is dominant, irrespective of the fact that these were structures for participation: the structures were utilised, primarily, to advance performance

⁸⁵² Du Toit *et al Labour Relations Law* (2006) 342.

⁸⁵³ Godfrey, Hirschsohn and Maree 1997 *LDD* 98.

⁸⁵⁴ Godfrey, Hirschsohn and Maree 1997 *LDD* 98.

⁸⁵⁵ Godfrey, Hirschsohn and Maree 1997 *LDD* 98.

⁸⁵⁶ Godfrey, Hirschsohn and Maree 1997 *LDD* 98.

⁸⁵⁷ Godfrey, Hirschsohn and Maree 1997 *LDD* 98.

⁸⁵⁸ Godfrey, Hirschsohn and Maree 1997 *LDD* 98.

⁸⁵⁹ Godfrey, Hirschsohn and Maree 1997 *LDD* 98.

improvement.⁸⁶⁰ Employee participation in the process approach is largely individual and direct and enforced through structures that are situated at the operational level.⁸⁶¹ If high-level structures exist, they tend to be of the steering committee type that “sought to monitor and facilitate the process rather than to entrench firmly workers rights to decision-making”.⁸⁶²

Firms that utilise the structural approach saw participation primarily in *industrial relations* terms, whereas the process approach emphasises the *human resource development aspects* of participation. In terms of the structural approach, participation is part of an industrial relations strategy “in the face of strong and active trade unions that sought to overcome or significantly reduce adversarialism”, whereas the process approach sees participation as “a way of improving employee commitment and performance as an important process of improving the competitive performance of the firm”.⁸⁶³

Both approaches are evident in the past when employee participation was lacking: a characteristic of the pre-LRA era. In the post-LRA era, through trade unions, workers are granted access to information and decision-making in organisations; they have access to collective-bargaining processes, as well as having power through the right to strike if there is deadlock in negotiations. Workplace forums are provided for as an alternative to address the so-called non-distributive, or production or non-wage, issues: the workplace forum either takes part in the consultation process, or joint-decision-making must take place.⁸⁶⁴ It is evident in the thought process underlying the LRA that both approaches are present in South Africa.

⁸⁶⁰ Godfrey, Hirschsohn and Maree 1997 *LDD* 99.

⁸⁶¹ Godfrey, Hirschsohn and Maree 1997 *LDD* 99.

⁸⁶² Godfrey, Hirschsohn and Maree 1997 *LDD* 99.

⁸⁶³ Godfrey, Hirschsohn and Maree 1997 *LDD* 99.

⁸⁶⁴ See chapter 6 below for a discussion on workplace forums and consultation and joint decision-making regarding non-distributive issues.

Du Toit *et al*⁸⁶⁵ identified three broad approaches to participation: the transformative, the best practice and managerialist approaches.⁸⁶⁶ These approaches are summarised as follows:

- 1 *The transformative approach:* It is a basic democratic right for employees to participate in managerial decision-making.⁸⁶⁷ Section 8(2) of the *Constitution* is relevant - the Bill of Rights is binding on juristic persons to the extent it applies to them.⁸⁶⁸
- 2 *The best practice approach:* Employee participation is “encouraged on the basis that it is in keeping with current managerial best practice” and is consistent with the pluralist approach to industrial relations. This approach is also consistent with the recognition of common and conflicting interests between management, labour and the state.⁸⁶⁹ The approach is consistent with the view of Webster and Macun who describe the outcomes of worker participation in South Africa as “enhancing and improving the operations of firms”.⁸⁷⁰
- 3 *The managerialist approach:* In terms of this approach employers establish structures with “the primary intention of providing opportunities for employers to consult directly with employees rather than for employees to participate via representatives in decision making” and it includes structures such as quality circles,⁸⁷¹ team briefing meetings,⁸⁷² and so on.⁸⁷³

⁸⁶⁵ Du Toit *et al Workplace Forums* as referred to by Steadman 2004 *ILJ* 1180.

⁸⁶⁶ Steadman 2004 *ILJ* 1180.

⁸⁶⁷ Steadman 2004 *ILJ* 1180.

⁸⁶⁸ Steadman 2004 *ILJ* 1180. See also chapters 1 and 3 above with reference to the application of the *Constitution* to juristic persons.

⁸⁶⁹ Steadman 2004 *ILJ* 1180-1181.

⁸⁷⁰ Steadman 2004 *ILJ* 1180. See also Webster and Macun 1998 *LDD* 63-84 for more detail in this regard.

⁸⁷¹ Quality circles are “small groups meeting voluntarily to perform quality control functions in the workplace” and is “usually part of a larger companywide quality improvement programme” (Anstey *Employee Participation* 7).

⁸⁷² Teams can be used to improve organisational performance, improve problem solving, raise quality and coordinate functions and specific projects involving a variety of specialities (Anstey *Employee Participation* 7). A team can be defined as “... a small number of people with complementary skills who are committed to a common purpose, performance goals, and approach for which they hold themselves mutually accountable” (Anstey *Employee Participation* 9 referring to Katzenbach and Smith 1994:45). Quality circles are regarded to be teams (Anstey *Employee Participation* 9).

⁸⁷³ Steadman 2004 *ILJ* 1181.

An alternative approach to employee participation, however, is supported by unions, and which is located in the socialist theory, and from which two theories about participation have been advanced. According to the first theory, participation is regarded as “negative and limiting”:⁸⁷⁴ it claims that workers and employers “belong to two social classes with antagonistic interests, which limit the attainment of industrial democracy”,⁸⁷⁵ and thus rejects worker participation on the basis that it presupposes co-operation between the two social classes. In terms of the second theory, participation is seen as “positive and constructive because through the consensus achieved as a result of participation, inroads can be made into capitalism, as a basis for eventual transition to socialism”.⁸⁷⁶ Thus, it is considered as “an opportunity to achieve ‘worker control’ of decision-making”.⁸⁷⁷

4.2.1.2.3 Rationale for employee participation

Weiss makes the case in favour of employee participation:

If the employee is not to be treated as a mere object it is also necessary that the democratic structure of modern society is reflected in the employment relationship. Therefore, it is necessary that the employee is not merely an object of management’s decision making but participating – either directly or by representatives – in the decision-making process. Employee involvement in management’s decision making is becoming more and more important. Even if its driving force is the idea of workplace democracy it should be seen that employees’ involvement in management’s decision making has also advantages for the respective companies and for the economy as a whole. The legitimacy of management’s decision making is increased, implementation of decisions is facilitated and conflicts are absorbed. The permanent dialogue between management and employees or their representatives helps to build up trust and confidence on both sides. The need to justify the planned decisions towards employees or their representatives evidently leads to more careful and, therefore, better decision making. Since employees and their representatives tend to favour long-term strategies, the stability of the companies is supported.⁸⁷⁸

⁸⁷⁴ Steadman 2004 *ILJ* 1181.

⁸⁷⁵ Steadman 2004 *ILJ* 1181.

⁸⁷⁶ Steadman 2004 *ILJ* 1181.

⁸⁷⁷ Steadman 2004 *ILJ* 1181.

⁸⁷⁸ Weiss “Re-inventing Labour Law” 50-51.

Worker participation cannot be understood purely in economic terms: it has political and social implications.⁸⁷⁹ The brief to the drafting team of the LRA was to give effect, *inter alia*, to as the Reconstruction and Development Programme (RDP) of government, as well as relevant ILO conventions⁸⁸⁰ and the interim *Constitution*.⁸⁸¹ The RDP calls for the facilitation of worker participation and decision-making in the world of work, including issues such as the obligation of employees to negotiate on substantial changes concerning workplace organisation within a nationally negotiated framework.⁸⁸²

Strauss points out, though for other authors participation is about the various mechanisms used to involve the workforce in decisions at all levels of the organisation, for him the distinction is between “influence” and “involvement”. He explains the difference as follows:

Involvement is often passive; influence is active. I may be involved in a sporting event or a good book; I don't influence them. Many forms of 'financial participation', such as stock options, may involve workers, but make no provision for them to exercise influence.⁸⁸³

The involvement of employees means “*any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company*”.⁸⁸⁴ Employee participation and involvement, broadly, can be interpreted to incorporate any mechanism designed to increase employee input into managerial decision-making and often are seen as the “political democratisation of the workplace in so far as it facilitates the redistribution of decision making power away from management and towards employees”.⁸⁸⁵ The influence on decisions, as a rule, is

⁸⁷⁹ Du Toit 1997 *LDD* 39.

⁸⁸⁰ See chapter 2 above regarding the ILO conventions.

⁸⁸¹ Du Toit 1997 *LDD* 39

⁸⁸² Du Toit 1997 *LDD* 39 where he discusses the RDP.

⁸⁸³ Strauss 2006 *Industrial Relations* 779.

⁸⁸⁴ My emphasis. This is the definition according to the Council Directive supplementing the Statute for a European Company, approved by the Employment and Social Affairs Council of 8 October 2001 (Art. 2h) (Blanpain “Globalisation” 65-66).

⁸⁸⁵ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

"limited to information and consultation, leaving the prerogative of management intact
... " 886

Blanpain points out in this regard:

... the objective that goes along with 'involvement of employees' has to my mind, less to do with power, in the sense that employees get a chance to influence management decision-making regarding important issues such as company restructuring.

Involvement of employees has, in the first place, to do with the fact that enterprises need the support of their employees, collaborators in a competitive environment in which creativity and information-in-action are the basic ingredients for economic success. Information and consultation are a must in the information society and an essential factor for companies to be competitive and for employees to obtain good wages and working conditions.⁸⁸⁷

In the context of what is said above, however, the power to manage the enterprise belongs to the employer and the employer has the right to make decisions regarding the aims of the organisation and the way in which the organisation will achieve these aims.⁸⁸⁸ The managerial prerogative is usually seen as being of special importance when dealing with decisions about the human resources utilised by the organisation because it is linked to the employer's ability to control the activities of employees in the workplace. The employer is in control of the information that will be shared with employees, as well as the topics for consultation. Social and economic considerations cannot provide a legal basis for the employer's right to manage employees and, conversely, for employees to obey instructions:⁸⁸⁹ to be legally enforceable the managerial prerogative has its origins in law; in the contract of employment in which employees are subordinate to the authority of the employer.⁸⁹⁰ In order for information sharing and consultation properly to be facilitated

⁸⁸⁶ Blanpain "Globalisation" 66.

⁸⁸⁷ Blanpain "Globalisation" 66-67.

⁸⁸⁸ See also chapter 2 above for a detailed discussion on the managerial prerogative.

⁸⁸⁹ Strydom 1999 *SA Merc LJ* (part 1) 49.

⁸⁹⁰ Strydom 1999 *SA Merc LJ* (part 1) 49.

“unilateral” decision-making must be transformed into “bilateral” decision-making and proper collaboration should take place between employees and managers.⁸⁹¹

The emphasis is on presenting a pluralist view. Industrial-relations authors tend to hold a pluralist view of industrial relations because they regard the undertaking as “a coalition of diverse interest groups such as employees and their trade unions, shareholders and consumers, presided over by a top management which serves the long-term needs of the organisation by paying due concern to all these different interests”.⁸⁹² In this view employers should be accountable for their actions to employees.⁸⁹³ The employer’s prerogative can be limited not only by means of collective bargaining⁸⁹⁴ but also through market control and accountability⁸⁹⁵ through corporate governance mechanisms.

From the above the rationale for employee participation is threefold:⁸⁹⁶

- (i) First, by granting employees a voice in the workplace, participation not only fulfil the non-pecuniary need for social approval, achievement and creativity, it also promotes employees’ sense of competence, self-worth and self-actualisation as the workforce becomes more educated in the process and basic material needs are better satisfied.⁸⁹⁷

⁸⁹¹ Strydom 1999 *SA Merc LJ* (part 1) 49.

⁸⁹² Strydom 1999 *SA Merc LJ* (part 1) 51. Kochan *Collective Bargaining* 43 emphasise that “industrial relations theories, research, and policy prescriptions must be conscious of the relationships among the goals of workers, employers, and the larger society and seek ways of achieving a workable and equitable *balance* among these interests” (original emphasis). Kaufman (ed) *Theoretical Perspectives* 196 with reference to the pluralist view adds the following: “Imbalance of income, from a pluralist perspective, can reduce economic growth by depressing consumer purchasing power and preventing investments in human and physical capital. Excessive corporate power that creates substandard wages and working conditions can burden society with welfare-reducing social costs. Behavioral elements of decision making imply that individual perceptions of balance or fairness can affect employee turnover, productivity, and other industrial relations outcomes. A central analytical tenet of the pluralist school, therefore, is that employment relations outcomes emerge and persist not because they are necessarily the most efficient – as would be the case under a neoclassical paradigm – but because they strike a balance between the competing interests of different individuals, stakeholders, and institutions.”

⁸⁹³ Flanders *Management and Unions* 136-139.

⁸⁹⁴ Collective bargaining will be addressed in chapter 5 below.

⁸⁹⁵ The employer’s prerogative is at its strongest in a weak economy when there is job scarcity and a large potential workforce for employers to choose from (Flanders *Management and Unions* 136-139).

⁸⁹⁶ Markey 2004 *IJCLIR* 534.

⁸⁹⁷ Markey 2004 *IJCLIR* 534.

- (ii) Second, employee participation, seen as a form of power-sharing on the basis of democratic principles⁸⁹⁸ by which, on the left of the spectrum, “workers’ control is extended as the polar opposite of the managerial prerogative and thus also entails empowerment of employees through participation”.⁸⁹⁹ Employees, through empowerment, influence not only the structure but also the process of decision-making.
- (iii) Third, employee participation contributes substantially to efficiency because it enhances not only the quality of decision-making by broadening the inputs, it also improves motivation, communications and cooperation in the workplace.⁹⁰⁰ It may also reduce the workload of supervisors, encourage skills development in the workforce and contribute to a general improvement of the employee/employer relationship.⁹⁰¹

Worker participation is not an equivalent to industrial democracy: it “does not, in any conventional meaning of the term, redress the disparity of power between employers and workers”.⁹⁰² Power in the workplace still resides decisively with the employer.⁹⁰³ However, it is not the case in all instances. In terms of sections 84 and 86 of the LRA a workplace forum should be consulted by the employer with a view to reaching consensus on the matters listed in section 84 and participate in joint decision-making about the matters referred to in section 86.⁹⁰⁴

According to Schregle workers’ participation, in its weakest form, starts where workers:

are merely informed beforehand of management decisions. In its strongest form, workers’ participation comprises arrangements under which workers manage their enterprises

⁸⁹⁸ This is sometimes referred to as “industrial citizenship” but those who advance this argument for participation commonly favour the term “industrial democracy” although the latter is not preferred by employers (Markey 2004 *IJCLIR* 534).

⁸⁹⁹ Markey 2004 *IJCLIR* 534.

⁹⁰⁰ Markey 2004 *IJCLIR* 535.

⁹⁰¹ Markey 2004 *IJCLIR* 535.

⁹⁰² Du Toit 1997 *LDD* 43.

⁹⁰³ Du Toit 1997 *LDD* 43.

⁹⁰⁴ Consultation and joint decision-making will be addressed in chapter 6 below.

themselves, as is the case in Yugoslavia, although strictly speaking this is no longer workers' participation but workers' management, or as some prefer to say, 'workers' self-management'. In between these two extremes, there are various shades of mutual dealings, including consultation, discussion, co-decision, protest and negotiation.⁹⁰⁵

Worker participation "may represent a lesser or greater degree of democratisation evolving within the matrix of contradictory interests and expectations".⁹⁰⁶ Not only employers and workers (broadly speaking) compete, other stakeholders should be taken into account:⁹⁰⁷ such as trade unions, which may have institutional interests that differ from the interests of their members (let alone that of employers), and stakeholders outside the enterprise (such as consumers or environmental groups).⁹⁰⁸ Employers and employees may be exposed to market and political pressures, over which they have no or little control. Worker participation "must seek to give expression to worker interests in context of these contradictory dynamics, subject to the employer's residual power of command".⁹⁰⁹ Employee participation, moreover, is "a process of interaction whereby employees, directly or indirectly through their representatives, are able to influence decision-making which affects their power, status, remuneration and working conditions".⁹¹⁰ Worker participation, like other forms of democratisation, is essentially concerned with empowerment and human development and, at the same time, is rooted in the world of work: if it is to be viable, "it should enhance not only the quality of working life but also the product, and productivity, of labour".⁹¹¹

The definition of worker participation includes diverse notions and disciplines that correspond to the different degrees of "producers' cooperation" that "acquire significance in any given system of labour administration, including industrial relations".⁹¹² The forms and models of participation are conditioned by diverse factors, such as the labour

⁹⁰⁵ Schregle 1976 *Int'l Lab Rev* 3.

⁹⁰⁶ Du Toit 1997 *LDD* 43.

⁹⁰⁷ Du Toit 1997 *LDD* 43.

⁹⁰⁸ Du Toit 1997 *LDD* 43.

⁹⁰⁹ Du Toit 1997 *LDDt* 43.

⁹¹⁰ Finnemore *Labour Relations* 207.

⁹¹¹ Du Toit 1997 *LDD* 43.

⁹¹² Arrigo and Casale 2010 www.ilo.org.

administration system, models of representation of workers', the nature of the employment relationship (whether private or public), the organisational dimension of markets and enterprises and the relationship between contractual and legislative sources.⁹¹³ The functional diversity of representation and bargaining systems depends on diverse trade union traditions and practices, collective action at firm level, industrial sectors and general economic policy, which not only differ from country to country but also from region to region.⁹¹⁴ Workers' participation, therefore, includes numerous and diverse regulatory concepts and techniques through which collective representatives seek to influence decisions made by the enterprises that employ them, as well as to share in the economic and financial consequences of these decisions.⁹¹⁵

A central feature of a pluralist industrial relations paradigm is balancing competing interests in the employment relationship:

If the democratic state is to attain its fullest and finest development, it is essential that the actual needs and desires of the human agents concerned should be the main considerations in determining the conditions of employment. ... We see, therefore, that industrial administration is, in the democratic state, a more complicated matter than is naively imagined by the old-fashioned capitalist, demanding the 'right to manage his own business in his own way.' ... In the interests of the community as a whole, no one of the interminable series of decisions can be allowed to run counter to the consensus of expert opinion representing the consumers on the one hand, the producers on the other, and the nation that is paramount over both.⁹¹⁶

4.2.1.2.4 Objectives of employee participation

Four major objectives of worker participation exist: the redistribution of power in labour relations, the humanisation of capital, the redistribution of income and employment (equity) and efficiency and productivity.⁹¹⁷ The redistribution of power in labour relations is instrumental to the development of democracy; the humanisation of capital enhances the

⁹¹³ Arrigo and Casale 2010 www.ilo.org.

⁹¹⁴ Arrigo and Casale 2010 www.ilo.org.

⁹¹⁵ Arrigo and Casale 2010 www.ilo.org.

⁹¹⁶ Kaufman *Theoretical Perspectives* 203 where Webb and Webb 1897 821-823 is quoted.

⁹¹⁷ Kester *Trade Unions* 3.

self-respect and dignity of employees.⁹¹⁸ According to Kester there are five classical aims of worker participation: (i) humanisation of work and of workplace social relations, (ii) democratisation of decision-making, (iii) improvement of productivity and efficiency, (iv) greater economic equity with respect to income and jobs, and (v) solidarity.⁹¹⁹ Du Toit points out that these aims are inter-related: the economic potential of worker participation, which is the productivity and efficiency element, cannot be realised without investing in the necessary "social" infrastructure, the humanisation, democratisation, economic equity, solidarity elements:⁹²⁰ "greater productivity cannot be achieved by the instrumentalist route of merely establishing structures and expecting them to work".⁹²¹

4.2.1.2.5 Employee voice

From the above discussion a fundamental of the democratisation of the workplace is to provide workers with a louder "voice" when it comes to decisions that affect their work and working conditions. The notion "employee voice" is a growing interest, not only of academics but also practitioners: other terms for it, such as participation, engagement, involvement or empowerment, are often used interchangeably without extracting the conceptual meanings or inherent differences.⁹²² "Voice", in general terms, refers to "how employees are able to have a say regarding work activities and decision making issues within the organization in which they work".⁹²³ There is growing interest in employee voice by those desiring a better system of employee representation and by those looking for higher levels of organisational performance.⁹²⁴ From a public policy perspective the environment is sympathetic towards trade unions and the notion of employee rights.

⁹¹⁸ Kester *Trade Unions* 3.

⁹¹⁹ Kester *Towards Effective Worker Participation* 3.

⁹²⁰ Du Toit 1997 *LDD* 43.

⁹²¹ Du Toit 1997 *LDD* 43.

⁹²² Wilkinson and Fay 2011 *Hum Res Man* 65.

⁹²³ Wilkinson and Fay 2011 *Hum Res Man* 65.

⁹²⁴ Dundon *et al* 2004 *Int J Hum Res Man* 1149.

The disagreement as to what constitutes/comprises “voice” can be illustrated as follows. It has been suggested, historically, that voice meant collective bargaining and that this “chosen method of joint regulation became a straitjacket inhibiting the very things needed to win and keep customers”.⁹²⁵ Blame was largely placed on management, suggesting that the shift to direct involvement reflects a desire to improve organisational performance. It has been argued that “collective voice achieves what the lone voice could never do: it humanises and civilizes the workplace, arguing that collective representation is the foundation of a partnership relationship that brings positive benefits for business”.⁹²⁶ Also, the way employees are treated, such as through the provision of opportunities to voice their interests may have a more significant impact on commitment than the way employees are paid.

It is apparent that there “are competing meanings of the term ‘employee voice’, and that quite different purposes can underpin a desire for collective voice rather than for individual voice”.⁹²⁷ The best-known use of the word “voice” is found in Hirschman’s⁹²⁸ classic study in 1970 of African railways: he conceptualised voice as “an option for customers in a context of how organizations respond to decline”.⁹²⁹ Freeman and Medoff, in 1984, argued that it made good sense for both employer and employee to have a voice mechanism, which “had both a consensual and a conflictual image: on the one hand, participation could lead to a beneficial impact on quality and productivity, while, on the other, it could deflect problems which otherwise might explode”.⁹³⁰ Trade unions (according to Freeman and Medoff) are regarded as the best agents to provide such “voice” because they are independent of the employer, which adds a degree of legitimacy.⁹³¹ Some commentators regard independent unions as the only source of a genuine “voice” and in this context,

⁹²⁵ Dundon *et al* 2004 *Int J Hum Res Man* 1150.

⁹²⁶ Dundon *et al* 2004 *Int J Hum Res Man* 1150.

⁹²⁷ Dundon *et al* 2004 *Int J Hum Res Man* 1150.

⁹²⁸ Wilkinson and Fay 2011 *Hum Res Man* 65 refers to Hirschman who conceptualised “voice” in a very specific way and in the context of how organizations respond to decline, though the term has been used in rather different contexts and applications since. His own definition was “any attempt at all to change rather than to escape from an objectionable state of affairs (30).”

⁹²⁹ Dundon *et al* 2004 *Int J Hum Res Man* 1151.

⁹³⁰ Dundon *et al* 2004 *Int J Hum Res Man* 1151.

⁹³¹ Dundon *et al* 2004 *Int J Hum Res Man* 1151.

“much of the industrial relations literature views the articulation of grievances, either on an individual or collective basis, as the sole component of voice”.⁹³² Summers observed, with regard to workers’ voice:

... I believe, that no industrial society can compete and prosper in the world market unless there is cooperation and mutual problem solving between management and workers. Workers – even unskilled and uneducated workers – know things about the reality of production processes in their workplaces, the causes of defective products, lost time and work injuries, and the potential for improvement which management never learns. At the same time, workers have the choice to do the least required or the most possible, which employers cannot control by command. Every knowledgeable personnel expert agrees that giving the workers a voice in the decisions which affect their working life is essential for productivity and profitability. And giving workers a voice is equally essential for improving the quality of the employees’ working life and providing a democratic workplace. The worker’s voice cannot be shouts of protests or demands, answered by the employer’s assertion of management prerogatives. The worker’s voice must be one which answer management’s seeking of assistance with a willingness to listen – a willingness to share in problem solving and a willingness to consider employees not as suppliers of labour but as partners in the enterprise.⁹³³

Four manifestations of employee voice can be identified.⁹³⁴ First, voice can be articulated as *individual dissatisfaction* which is aimed at addressing a specific problem or issue with management and thus finding expression in a grievance procedure or speak-up programme.⁹³⁵ Second, voice can be seen as the expression of *collective organisation* in which voice acts as a countervailing source of power to management and which, for example, takes place through trade unionisation and collective bargaining.⁹³⁶ Third, there is voice as a form of contribution to *management decision-making*, which is generally concerned with improvements in work organisation, quality, productivity and efficiency. Here quality circles or team working is of central importance and voice is evident through the high involvement of management and high commitment initiatives.⁹³⁷ Fourth, voice can

⁹³² Dundon *et al* 2004 *Int J Hum Res Man* 1151.

⁹³³ Summers 1995 *ILJ* 806.

⁹³⁴ Dundon *et al* 2004 *Int J Hum Res Man* 1152.

⁹³⁵ Dundon *et al* 2004 *Int J Hum Res Man* 1152.

⁹³⁶ Dundon *et al* 2004 *Int J Hum Res Man* 1152.

⁹³⁷ Dundon *et al* 2004 *Int J Hum Res Man* 1152.

be seen as a form of *mutuality*. Here employee-employer partnership, which is focused on delivering long-term viability for the organisation and its employees, is central.⁹³⁸

The precise meaning of the term “employee voice”, however, is open to question, and its rationale may be based on economic, moral or pragmatic grounds. It can take a variety of forms in practice, and the extent to which traditional methods of providing a voice for employees, such as collective-bargaining and grievance procedures have been combined with or superseded by more consensual methods such as joint consultation, team working or problem-solving groups, is an issue that confronts many organisations. The way employers articulate employee voice in light of regulation, as well as a link between employee voice and employee satisfaction and its perceived effectiveness, are two issues concerning voice that can be highlighted.⁹³⁹

Research indicates that the literature on employee voice has four strands.

- (i) The first strand is found in Human Resource Management (HRM) literature, which focuses on *performance*.⁹⁴⁰ Informing employees and allowing them to have input in work and business decisions helps to create better decisions, more understanding and commitment.⁹⁴¹ Voice is a key ingredient in creating organisational commitment and leads to substantial high performance. Together with the practice of engagement it appears to have clear implications for managing employee participation in organisations.⁹⁴² Hierarchy and compliant rule-following are inappropriate measures in creating performance, especially if employees are expected to expend discretionary effort.

⁹³⁸ Dundon *et al* 2004 *Int J Hum Res Man* 1153.

⁹³⁹ Budd, Gollan and Wilkinson 2010 *Human Relations* 306.

⁹⁴⁰ Wilkinson and Fay 2011 *Hum Res Man* 65.

⁹⁴¹ Wilkinson and Fay 2011 *Hum Res Man* 65.

⁹⁴² Wilkinson and Fay 2011 *Hum Res Man* 65.

There are three ways by which employee voice has a positive impact.⁹⁴³ First, if employee contributions are valued, it leads to improved employee attitude and behaviour, loyalty, commitment, and relations that are more cooperative.⁹⁴⁴ Second, employee voice leads to improved performance:⁹⁴⁵ an increase in general productivity and the individual performance of employees due to lower absenteeism and greater teamwork. Third, managerial systems can be improved by employee voice as employees' ideas, knowledge, and experience are tapped.⁹⁴⁶ In turn, this promotes a greater diffusion of information. When employees are treated as stakeholders in the organisation, similar outcomes can be achieved as employees develop and invest significant firm-specific human capital in the organisation and, as do shareholders, have earned the right to a voice.⁹⁴⁷ If employees are provided with a voice, in turn it provides a rationale for further emotional and human capital investment by them. The main aim of this approach to employee voice reflects a management agenda concerned with increasing understanding and commitment from employees and enhancing contributions to the organisation, and does not involve any *de jure* sharing of authority or power.⁹⁴⁸ Some forms of this approach may provide employees with new channels by which their influence is enhanced, but there is not always a link between voice and decision-making: indeed, it can "be voice without muscle".⁹⁴⁹

- (ii) The second strand of literature is taken from political science, which sees voice in terms of *rights*, linking this to notions of *industrial citizenship* or *democratic humanism*.⁹⁵⁰ The concept of industrial democracy (which draws upon notions of industrial citizenship):⁹⁵¹ views "participation as a fundamental democratic right for

⁹⁴³ Wilkinson and Fay 2011 *Hum Res Man* 66.

⁹⁴⁴ Wilkinson and Fay 2011 *Hum Res Man* 66.

⁹⁴⁵ Wilkinson and Fay 2011 *Hum Res Man* 66.

⁹⁴⁶ Wilkinson and Fay 2011 *Hum Res Man* 66.

⁹⁴⁷ Wilkinson and Fay 2011 *Hum Res Man* 66.

⁹⁴⁸ Wilkinson and Fay 2011 *Hum Res Man* 67.

⁹⁴⁹ Wilkinson and Fay 2011 *Hum Res Man* 67.

⁹⁵⁰ Wilkinson and Fay 2011 *Hum Res Man* 67.

⁹⁵¹ See earlier discussion above.

workers to extend a degree of control over managerial decision making”.⁹⁵² “Organisational democracy”, a more recent term, is beginning to be used and conveys a notion of free speech and human dignity.⁹⁵³ Hence, the argument that workplace democracy “allows skills and values to develop, which then have a role in broader society”.⁹⁵⁴

- (iii) A third strand, is drawn from industrial relations (IR) literature and is not related to the above. In this strand *voice is representative (and largely union voice)*.⁹⁵⁵ The concept of “voice” used in this strand was popularised by Freeman and Medoff (see discussion above) who argued that “it made good sense for both company and workforce to have a voice mechanism”.⁹⁵⁶ A variation in this strand looks at representative voice but takes into account non-union forms of employee representation and the efficacy of such structures.⁹⁵⁷ The “debate on workers’ losing their voice was originally premised on union decline, but unions’ losing their place does not mean employees have a reduced appetite for voice”.⁹⁵⁸ In many European countries the state plays an active role on top of “voluntary collective bargaining”.⁹⁵⁹ France has statutory elected workers’ councils; in Germany there is a system of works councils and workers’ directors which is known as co-determination.⁹⁶⁰
- (iv) A fourth strand is rooted in organisational behaviour (OB) literature and relates to task autonomy in the context of *work groups’ acquiring a greater degree of control*.⁹⁶¹ Creating semi-autonomous work groups (commonly referred to as team-working or self-managing teams) gives workers a say in issues pertaining to their

⁹⁵² Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁵³ Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁵⁴ Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁵⁵ Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁵⁶ Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁵⁷ Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁵⁸ Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁵⁹ Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁶⁰ Wilkinson and Fay 2011 *Hum Res Man* 67.
⁹⁶¹ Wilkinson and Fay 2011 *Hum Res Man* 68.

jobs.⁹⁶² These issues include the allocating of tasks, scheduling, monitoring attendance, health and safety issues, the flow and pace of production, the setting of improvement targets, as well as the responsibility for recruitment and training and controlling overtime levels.⁹⁶³ "Skill discretion", which involves problem solving with the knowledge of the group as well, and "means discretion", which involves choice in organising the means and tools of work, are central powers these teams have. These practices seek to counter the degradation of work and employee alienation.⁹⁶⁴

4.3 Forms of employee participation

As has been pointed out earlier, the difficulty associated with workplace participation is that it has many forms and meanings. Not all forms of participation necessarily lead to democratic participation at work.⁹⁶⁵ For instance, in managerial inspired schemes of participation there usually is no genuine sharing of power and control: rather "than promote a sense of political efficacy, such schemes may be more productive of apathy and cynicism among participants".⁹⁶⁶

Collective bargaining, seen in Europe as "a relatively restricted form of genuine participation", resulted in worker participation becoming a "democratic imperative".⁹⁶⁷ There were a number of proposals for industrial democracy or for worker representation on company boards as elected representatives in order to extend worker influence on managerial decisions that were beyond the reach of collective bargaining and trade unions.⁹⁶⁸ Industrial democracy, today is "a term with little currency and as a set of ideas and practice has largely disintegrated".⁹⁶⁹ It has been replaced by the managerial initiative

⁹⁶² Wilkinson and Fay 2011 *Hum Res Man* 68.

⁹⁶³ Wilkinson and Fay 2011 *Hum Res Man* 68.

⁹⁶⁴ Wilkinson and Fay 2011 *Hum Res Man* 68.

⁹⁶⁵ D'Art and Turner 2007 *BJIR* 107.

⁹⁶⁶ D'Art and Turner 2007 *BJIR* 107.

⁹⁶⁷ D'Art and Turner 2007 *BJIR* 107.

⁹⁶⁸ D'Art and Turner 2007 *BJIR* 107.

⁹⁶⁹ Hyman and Mason *Managing Employee Involvement* 193.

of involvement.⁹⁷⁰ These schemes primarily are designed to serve managerial and commercial objectives rather than those of employee interests: with “global competition acting as the prime motor for management practice, it seems likely that the bulk of employees will be left with few resources, either to query or contest the direction taken by management control, despite the rhetoric of empowerment, involvement and a host of other metaphors”.⁹⁷¹ At best such schemes are “unlikely to promote a sense of political efficacy”.⁹⁷² These “pessimistic prognostications” are likely to be fully realised only in the absence of collective bargaining and trade unions.⁹⁷³

It has been argued that employees should be allowed a form of voice in organisations (and thus companies) and participate at various levels and in different ways in decision-making. This premise is based on the “all-affected principle”:

*“Everyone who is affected by the decisions of a government should have the right to participate in that government”.*⁹⁷⁴

This principle relies on the view that individuals, generally speaking, are dependent on others and, because we do not act in isolation from others and are incapable of realising some of our objectives alone, we need to co-operate with others.⁹⁷⁵ From this realisation arises the question of how the decisions in an organisation are to be made.⁹⁷⁶

The principle of equal liberty suggests that the decision-making process should maximise the extent to which an individual’s choices govern his or her actions in ways that are compatible with the equal freedoms of others. Unless a “collective decision is unanimous, each individual who is affected by the decision lacks complete control over that

⁹⁷⁰ D’Art and Turner 2007 *BJIR* 107.

⁹⁷¹ D’Art and Turner 2007 *BJIR* 107-108.

⁹⁷² D’Art and Turner 2007 *BJIR* 107-108.

⁹⁷³ D’Art and Turner 2007 *BJIR* 108.

⁹⁷⁴ Mitchell 1998 *IJCLIR* 18. My emphasis.

⁹⁷⁵ Mitchell 1998 *IJCLIR* 17.

⁹⁷⁶ Mitchell 1998 *IJCLIR* 17.

decision".⁹⁷⁷ Individual control and influence over collective decision-making processes "must be partial, and shared with others who are affected by the decision".⁹⁷⁸

The all-affected principle must be considered further in light of values such as *competence* and *economy*.⁹⁷⁹ The right to participate may be qualified in some situations as a certain minimum level of *competence* is required.⁹⁸⁰ The value of the *economy* means that "we will often accept a decision-making process that is less than 'ideal' because it saves time and energy".⁹⁸¹ These requirements provide an explanation as to why the majority of participatory decision-making is indirect and not direct.⁹⁸² As argued earlier⁹⁸³ employees, as stakeholders in a corporation, are interested in the outcome of decisions that affect them directly and indirectly.⁹⁸⁴ Salamon proposes that three constituent elements that should be promoted in order to understand the various forms of employee participation:

- (i) the method or extent of participation (direct or indirect forms of participation): the former reflects an active individual involvement in decision-making processes the latter takes place through representatives);

⁹⁷⁷ Mitchell 1998 *IJCLIR* 18. Mitchell distinguishes between liberty and licence (with reference to Locke) as follows: "Locke has refined the liberal notion of liberty by arguing that a distinction should be drawn between liberty and licence, the first being a requirement of human fulfilment, the second a debasement of human fulfilment. Liberty arises where a law is used to maximise the freedom of society as a whole, even though it may restrict the freedom of an individual or group of individuals. Conversely, licence arises where a law grants freedom to an individual and in doing so limits the freedom of another individual and of society as a whole. It is 'freedom that is exercised only at risk to another's freedom: to forbid it is not to lower but to increase the sum total of individual liberty. In both cases, a law grants permission to individuals to do something, but one is distinguished from the other by intuition as to when this grant of permission is right and when it is wrong. This intuitive conclusion may depend on whether permission is granted to an individual to do something that that individual has a *right* to do, or to do something that *infringes* another individual's rights. The distinction between licence and liberty recalls the principles of equal equality, which states that individuals should have the maximum freedom that is compatible with an equivalent level of freedom for all other individuals" (Mitchell 1998 *IJCLIR* 12).

⁹⁷⁸ Mitchell 1998 *IJCLIR* 18.

⁹⁷⁹ Mitchell 1998 *IJCLIR* 18.

⁹⁸⁰ This will be the instance why children and the mentally incapacitated are denied to vote in elections (Mitchell 1998 *IJCLIR* 18).

⁹⁸¹ Mitchell 1998 *IJCLIR* 18.

⁹⁸² Mitchell 1998 *IJCLIR* 19.

⁹⁸³ See chapters 1-3 above.

⁹⁸⁴ Flay 2008 *Waikato L Rev* 310.

- (ii) the level in the organisation (which varies from work stations to board levels of participation); and
- (iii) the scope of participation (which varies from lower-level direct forms of participation to higher level indirect forms of participation. The former tend to be task-centred and are primarily concerned with the operational work situation, the latter tend to be power centred and focus on managerial authority and decisions which determine the framework or environment within which the operational decisions have or tend to be made).⁹⁸⁵

Employee participation in management (corporate) decision-making is either direct or indirect and takes place on different levels (for example at sectoral or workplace level). Indirect participatory decision-making occurs where participation is through representatives. Employee participation takes on various forms (but not limited to) other than collective bargaining and consultation, such as (1) co-ownership [with other shareholders] where employees become shareholders of the company with the objective that they will receive [a percentage of up to] more than half⁹⁸⁶ of the issued shares within a certain period of time, (2) separation of powers by way of works councils, and (3) employees appointed as directors.⁹⁸⁷

The paragraphs below focus on the different direct and indirect forms of participation that are found in South Africa, as well as on financial participation and empowerment initiatives.

⁹⁸⁵ Anstey *Worker Participation* 5.

⁹⁸⁶ It must be noted that one can exercise substantial control at lower levels, eg, the ability to block special resolutions.

⁹⁸⁷ Delpont 1995 *De Jure* 414.

4.3.1 Direct participation

Various definitions exist of the concept “direct participation”. Direct participation “encompasses any initiatives which provide for greater direct employee involvement in decisions affecting their jobs and immediate work environment”.⁹⁸⁸ Another definition refers to the process of direct participation or involvement, as the “process whereby employees are themselves directly associated with the employer in some form of participatory process”.⁹⁸⁹ Salamon describes direct participation as follows:

This strategy may be referred to as descending involvement, in so far as management invariably initiates the development for its own purposes (involvement is offered) and, as part of the change, may transfer authority and responsibility from itself to the employees for a limited range of work-related decisions (methods of working, allocation of tasks, maintenance of quality, etc.). However, the content of the process is confined largely to the implementation phase of operational decisions already made by management. This approach is intended to motivate the individual employee directly, to increase job satisfaction and to enhance the employee’s sense of identification with the aims, objectives and decisions of the organisation (all of which have been determined by management).⁹⁹⁰

Direct employee participation is captured under “the rubric” of employee involvement and may take a variety of forms, such as briefing groups, quality circles, consultative meetings and team working,⁹⁹¹ as well as information sharing, team participation,⁹⁹² financial participation and the exercise of control through co-operatives.⁹⁹³ Direct forms of employee participation are normally introduced at management’s behest and often are used as part of a change initiative whereby management transfers responsibility to employees for a limited range of job-related decisions, such as working methods or task allocation.⁹⁹⁴ Not all forms of direct participation should be legislated. The law should facilitate issues, such

⁹⁸⁸ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

⁹⁸⁹ Finnemore *Labour Relations* 212.

⁹⁹⁰ Salamon *Industrial Relations* (1998) 357.

⁹⁹¹ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

⁹⁹² Teams consist of a small number of persons with complementary skills, experiences and insights which are formed for various purposes and are generally self-directed (Finnemore *Labour Relations* 213).

⁹⁹³ A workers’ cooperative is defined as “an enterprise which is collectively owned and democratically controlled by those who work in it” (Finnemore *Labour Relations* 215).

⁹⁹⁴ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

as financial participation and information sharing, in order to assist employees in the equalisation of power, whereas issues such as briefing groups, quality circles, consultative meetings and team working should be left to the parties to reach agreement on a voluntarily basis.

Kester and Pinaud are of the view that direct participation involves the participation of employees in the workplace either as individuals or as groups of individuals, and usually is characterised by participation in management (although this may also take place through structures of representative participation).⁹⁹⁵ Participation in management refers to instances where workers directly are involved in executive management, achieved through schemes such as quality circles and employee participation.⁹⁹⁶ An example is autonomous production teams, in which workers are partners in production rather than partners in strategic decision-making processes.⁹⁹⁷ As well, to a limited extent, workers may be directly involved in higher levels of decision-making,⁹⁹⁸ for example, supervisory board participation, as well as issues covered in section 84 and 86 of the LRA regarding consultation and joint decision-making of workplace forums.

The following three aspects of participation in management exist: participation in the job, participation in problem-solving and participation in planning and evaluation.⁹⁹⁹ Participation in the job deals with the amount of discretion that an individual worker can exercise, which will vary depending on the organisation of work, technology, and management practices.¹⁰⁰⁰ Participation in problem-solving is generally inspired by Japanese management methods such as quality circles, which tend to be organised through special, targeted groups of workers.¹⁰⁰¹ Participation in planning and evaluation involves a scenario in which where some employers and trade unions perceive a need to

⁹⁹⁵ Kester and Pinaud 1998 www.academia.edu.

⁹⁹⁶ Kester and Pinaud 1998 www.academia.edu.

⁹⁹⁷ Kester and Pinaud 1998 www.academia.edu.

⁹⁹⁸ Kester and Pinaud 1998 www.academia.edu.

⁹⁹⁹ Kester and Pinaud 1998 www.academia.edu.

¹⁰⁰⁰ Kester and Pinaud 1998 www.academia.edu.

¹⁰⁰¹ Kester and Pinaud 1998 www.academia.edu.

involve all employees not only in analysing the enterprise's situation but also planning for the development and implementation of these plans.¹⁰⁰² The aim of the latter is to link the strategic decision-making with participation in daily work.¹⁰⁰³

4.3.2 Indirect participation

Indirect participation refers "to those processes and structures in which employees participate by way of representatives who are generally elected by employees themselves".¹⁰⁰⁴ Indirect participation normally is termed "representative participation": it is an "indirect form of employee influence whereby employee views and input are articulated through the use of some form of employee representation".¹⁰⁰⁵ Examples include works councils (known as workplace forums in South Africa), collective bargaining, corporate decision-making by the board of directors and participation on regional or national socio-economic councils or other statutory bodies.¹⁰⁰⁶ Employee representatives, such as trade unions or works councils, are generally are elected or nominated by the broader worker body.¹⁰⁰⁷ They carry a mandate to represent the interests and views of the workers they represent and do not act in a personal capacity but as "a conduit through which the broader mass of workers can influence organisational decision making".¹⁰⁰⁸

Representative participation is largely concerned with "redistributing decision-making power in favour of employees"¹⁰⁰⁹ and "seeks to reduce the extent of management prerogative"¹⁰¹⁰ and "effect greater employee influence on areas of decision making which traditionally have been the remit of senior management".¹⁰¹¹ Generally, it is employee

¹⁰⁰² Kester and Pinaud 1998 www.academia.edu.

¹⁰⁰³ Kester and Pinaud 1998 www.academia.edu.

¹⁰⁰⁴ Finnemore *Labour Relations* 219.

¹⁰⁰⁵ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰⁰⁶ Finnemore *Labour Relations* 219-225.

¹⁰⁰⁷ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰⁰⁸ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰⁰⁹ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰¹⁰ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰¹¹ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

driven: the demands comes from either workers or their trade unions for a greater input into organisational decision-making.¹⁰¹²

Forms of representative participation include collective bargaining,¹⁰¹³ co-management and co-determination.¹⁰¹⁴ Collective bargaining involves negotiation between organised workers, mainly through trade unions, management and/or employers' organisations, and deals with terms and conditions of the employment contract and working conditions.¹⁰¹⁵ It may also include issues of the rights of trade unions and workers, and takes place at any level of interaction between the representatives of workers and employers; from the workplace to industry or national level.¹⁰¹⁶ Trade unions play a dual role in collective bargaining as they not only “stand up against employers whose interests, as in all conflicts of power, are clearly different from their own; and at the same time, they assume the role of an independent opposition, abiding by democratically accepted rules”.¹⁰¹⁷

Co-management on the other hand can be found in regional, national or international bodies.¹⁰¹⁸ These bodies consist of union and employer representatives and can include representatives of the state.¹⁰¹⁹ They can control large budgets, such as for unemployment compensation, social security and vocational training and can be a forum for consultation, as in the case of social and economic councils, health and safety committees and the ILO.¹⁰²⁰

Co-determination differs from collective bargaining “in that it is a democratic institution in itself and worker influence is exerted through special procedures” and involves a process in

¹⁰¹² Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰¹³ Collective bargaining will be addressed in chapter 5 below.

¹⁰¹⁴ Gunnigle 2004 <http://hdl.handle.net/1044/100>. Co-determination will be addressed in chapters 6 and 7 below.

¹⁰¹⁵ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰¹⁶ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰¹⁷ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰¹⁸ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰¹⁹ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰²⁰ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

which workers gain access to decision making via their representatives.¹⁰²¹ Co-determination is directly concerned with financial, organisational and work environment problems and takes place on levels from the shop floor to higher levels in the company.¹⁰²² The best known example of co-determination is the German *Mitbestimmung*¹⁰²³ in which worker and trade union representatives are represented on the supervisory boards of companies and on shop floor level works councils.¹⁰²⁴

4.3.3 Table reflecting weak and strong forms of participation as well as direct and indirect forms of participation in South Africa

From the above a summary can be made of which forms of participation presently are available in South Africa, as well as which of these forms are weak or strong forms of participation.

¹⁰²¹ Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰²² Gunnigle 2004 <http://hdl.handle.net/1044/100>.

¹⁰²³ This form of co-determination will be discussed in chapter 5 below.

¹⁰²⁴ Works councils will be discussed in chapter 5 of this thesis.

The following table represents weak and strong forms of participation:¹⁰²⁵

Weak	Examples
<p>Right of information sometimes preceding consultation procedures either recognised by law and/or collective agreements. Information and consultation are (in most countries) not linked and sequential.</p> <p>In some countries they may be functionally linked and give rise to "joint examination" and negotiating activities for the purpose entering into collective agreements.¹⁰²⁶</p>	<p>Company crisis or reorganisation, restructuring or reconversion processes that may result workforce cuts or transfer of business</p>
Strong	Examples
<p>These forms corresponds mainly to rights of co-determination or closer and more stable forms of cooperation by enterprise-level employee representatives in the decision-making of companies or decisions that take effect, generally, only as a result legislative provisions, subject to prior information and consultation which resulted from either consensus reached with the employees' representatives or without their consensus.¹⁰²⁷</p>	<p>The most complete model of participation considered to be the German one in which enterprise level, in the form of co-determination employers are obliged not only consult but also to co-decide with the Works Council on some issues (<i>Betriebsrat</i>) and the Works Constitution Act (<i>Betriebsverfassungsgesetz</i>) and, at the level joint stock companies, (<i>unternehmerische Mitbestimmung</i>)</p>

¹⁰²⁵ This table is based on the discussion of Arrigo and Casale 2010 www.ilo.org.

¹⁰²⁶ These forms of so-called *weak* participation express two convergent trends. These are: (a) "a tendency for negotiation to be transformed into a set of relations – which is to varying degrees stable and organized – between management and workers. This occurs particularly in market crisis situations which require a high degree of "dialogue" and "social consensus" in company decisions (a trend that is more evident today during an economic and financial crisis situation"; (Arrigo and Casale 2010 www.ilo.org); (b) "a tendency for participation to take the form of a prelude to negotiating and sometimes contractual activities between management and workers enterprise-level bodies (in single-channel systems of representation). This applies when the issue at stake is to reconcile in a non-conflict manner (and preferably out-of-court, by envisaging arbitration fora, including at company-level) conflicts of interests between management and workers following decisions by the enterprise that would have negative social consequences" (Arrigo and Casale 2010 www.ilo.org).

¹⁰²⁷ Participatory functions may be exhausted in "a-contractual" or "pre-contractual" negotiating procedures and alternatively may give rise to true "company agreements" (*Betriebsvereinbarungen*). For example, when "joint decisions" or "arbitration in the internal arbitration forum" (*Einigungsstelle*) are implemented. These agreements are distinguished in terms of cause and object, as well as of parties to the agreement as well as by the economic and regulatory collective contract (*Tarifvertrag*), which the "external" trade union (*Gewerkschaft*) enters into with a company and its associations (Arrigo and Casale 2010 www.ilo.org).

The following table represents direct and indirect forms in South Africa (in both labour and company law):¹⁰²⁸

Forms of participation	Presently in South Africa
Participative work organisation	To some extent ✓
Consultation	Mostly left to collective bargaining if there are no workplace forums in place. Also takes place with individual employees. ✓
Joint decision-making	Mostly left to collective bargaining if there are no workplace forums in place. ✓
Collective bargaining	✓
Works council (workplace forums)	To some extent when they are in place. ✓
Employee directors	To some extent, not very popular. This is characteristic of the German supervisory model. ✓
Worker control	To some extent depending on the organisation and empowerment initiative. ✓

From the above tables an abstract ranking of the forms of participation in terms of strength and power is not possible.¹⁰²⁹ Multiple factors need to be taken into account, such as:

- (i) the different legal nature and diverse rationale and purposes of the various forms of participation;¹⁰³⁰
- (ii) the position of these in the sphere of relations – within the enterprise – among the management, the workers and their representatives;¹⁰³¹ and
- (iii) the diverse nature and role of the holders of participation rights.¹⁰³²

As a result there is a need to reflect on the general themes regarding the existence of a network or continuum between the procedures and institutes of participation and between

¹⁰²⁸ This table is based on a figure in Anstey *Worker Participation* 6.

¹⁰²⁹ Arrigo and Casale 2010 www.ilo.org.

¹⁰³⁰ Arrigo and Casale 2010 www.ilo.org.

¹⁰³¹ Arrigo and Casale 2010 www.ilo.org.

¹⁰³² Arrigo and Casale 2010 www.ilo.org.

participation and negotiation, and, more specifically, (i) the role participatory bodies in industrial relations systems play, as well as, (ii) the structure and functions of employee representation and collective bargaining.¹⁰³³

4.3.4 Financial participation

A further variation of the concept of participation is that of economic and financial participation.¹⁰³⁴ In South Africa the majority of agreements concerning financial participation takes place by means of collective bargaining in which trade unions or employee representatives negotiate, on an annual basis, improvements in the financial elements of employee packages, and so forth. There are other ways to achieve financial participation which will be discussed below. Financial participation can be defined as a “method of participation whereby employees are given opportunity to secure a financial stake in the prosperity of the organisation”,¹⁰³⁵ and is linked to the organisational goals and is promoted by the employer.¹⁰³⁶ Financial participation can be achieved voluntarily, where the employer decides to grant employees a financial stake in the prosperity of the organisation, or as a result of negotiations between the employer and the workers’ representatives, or by means of legislation or codes.

¹⁰³³ Arrigo and Casale 2010 www.ilo.org.

¹⁰³⁴ Arrigo and Casale 2010 www.ilo.org. According to Arrigo and Casale “The idea of workers’ participation in the economy specifically the enterprise economy was re-launched in several countries in the early 1980s. This took place against the background of the debate on the “share economy”. This revisited a project dating from the 1920s-30s (and subsequently re-appearing in various countries in the 1950s and ‘60s) and is based on the reformist parties and unions’ need to redefine their political mindset with respect to the classic models of economic planning and the incipient success of neo-liberalist theories and programmes. Difficulties in expanding (but sometimes of asserting) what might be called the “classic” experiences of industrial democracy, derived from or supported by both contractual and legislative sources, undoubtedly contribute to the rebirth of the idea of workers’ participation in the economy. The need thus arises to extend the notion of democracy to the economic sphere, as affirmed on several occasions in the 1990s by the international union movement” (Arrigo and Casale 2010 www.ilo.org).

¹⁰³⁵ Finnemore *Labour Relations* 215.

¹⁰³⁶ Finnemore *Labour Relations* 215.

Some commentators are of the view that economic democracy can be structured effectively in the economic macro-system; others prefer “a pathway free from ‘political’ implications – a goal that would be achieved by matching economic democracy with a more democratic management of individual enterprises (bordering on self-government), without paying heed to its macro-economic implications and effects”.¹⁰³⁷ With regard to economic participation, in particular, it should be noted that the capital reallocation processes induced by privatisation policies and globalisation open up new prospects for employee participation in the capital and governance of the enterprise.¹⁰³⁸ On the one hand, the transformation of the ownership and governance structure takes place as a consequence of shareholdings, and on the other, there is increased importance of “human capital” in companies’ value creation.¹⁰³⁹ These are the driving factors in overcoming the traditional, “subjective”, division between capital and labour “from the point of view of responsibility for guiding the enterprise and related sources of revenue, such as profits for capital, or employment income for labour”.¹⁰⁴⁰ The allocation of workers’ savings, also, is developing along these lines, notably applied to social insurance savings.¹⁰⁴¹ Social insurance savings “tend to shift from strongly public intermediation – through the public debt – and a pay-as-you-go pension system to forms based more closely on the stock market, especially from a long-term perspective”.¹⁰⁴² Consequently, a framework in which employees’ shareholdings have acquired a “physiological” association in the functioning of the market economy is created.¹⁰⁴³ This framework is not about the redistribution of wages but about the creation of “intrinsic value for the enterprise’s functions”.¹⁰⁴⁴

The most significant employee shareholding experience has developed in the Anglo-Saxon countries,¹⁰⁴⁵ where the growth in employees’ participation in companies’ capital is

¹⁰³⁷ Arrigo and Casale 2010 www.ilo.org.

¹⁰³⁸ Arrigo and Casale 2010 www.ilo.org.

¹⁰³⁹ Arrigo and Casale 2010 www.ilo.org.

¹⁰⁴⁰ Arrigo and Casale 2010 www.ilo.org.

¹⁰⁴¹ Arrigo and Casale 2010 www.ilo.org.

¹⁰⁴² Arrigo and Casale 2010 www.ilo.org.

¹⁰⁴³ Arrigo and Casale 2010 www.ilo.org.

¹⁰⁴⁴ Arrigo and Casale 2010 www.ilo.org.

¹⁰⁴⁵ Arrigo and Casale 2010 www.ilo.org.

encouraged through specific incentive policies.¹⁰⁴⁶ Employee shareholding (in the most market-oriented models, characterised by the prevalence of public companies and “institutionalised” forms of managing workers’ savings) “has played a growing role in pursuing company growth strategies that are consistent with the enhancement of human resources in terms both of employment and of increasing workers’ overall income”.¹⁰⁴⁷

Financial participation takes on a form which gives workers, in addition to a fixed wage, a variable portion of income directly linked to profits, or some other measure of enterprise performance which is specifically linked to enterprise results and is not expressed as a predetermined proportion of their wages.¹⁰⁴⁸ It is evident that employers can distribute the financial results of improved enterprise performance to their employees through profit-sharing or workers' share-ownership.¹⁰⁴⁹

Profit-sharing bonuses “can be distributed on a deferred basis, with sums being invested in enterprise funds or frozen in special accounts for a specific period, or be paid directly in cash”:¹⁰⁵⁰ examples include cooperatives (in which all the firm's shares are collectively owned by its workforce), ESOPs (employee share-ownership plans, which involve a loan to an employee benefit trust) and employee buy-outs (under which the company's shares are exclusively purchased by its individual workers).¹⁰⁵¹ Financial participation, depending on the kind of control or influence such schemes have over decision-making, may take the form of direct or representative participation.¹⁰⁵²

¹⁰⁴⁶ Arrigo and Casale 2010 www.ilo.org.

¹⁰⁴⁷ Arrigo and Casale 2010 www.ilo.org.

¹⁰⁴⁸ Kester and Pinaud 1998 www.academia.edu.

¹⁰⁴⁹ Kester and Pinaud 1998 www.academia.edu. See also Anstey *Employee Participation* 122.

¹⁰⁵⁰ Kester and Pinaud 1998 www.academia.edu.

¹⁰⁵¹ Kester and Pinaud 1998 www.academia.edu.

¹⁰⁵² Kester and Pinaud 1998 www.academia.edu.

4.3.5 Empowerment Initiatives

Employees' goals should be aligned with those of the company/organisation. Employees should understand the organisational objectives, directions and goals of the company and the strategic involvement of employees in the improvement and growth of the business.¹⁰⁵³

Empowerment can be explained as follows:

To empower means to enable; it means to help people develop a sense of self-worth; it means to overcome causes of powerlessness or helplessness; it means to energise people to take action; it means to mobilise intrinsic excitement factors in work. It is more than merely giving power to someone. Power does allow us to get things done, but empowerment involves not only the capacity to accomplish a task but also includes a way of defining oneself. Empowered people not only possess the wherewithal to accomplish something, they also think of themselves differently than they did before they were empowered.¹⁰⁵⁴

A prerequisite for successful empowerment is the existence of a synergy between the company or organisation and the employee.¹⁰⁵⁵ Employee empowerment grants employees with the freedom to question the way their jobs, goals and priorities are structured, as well as their role and how to reorganise their work and become more efficient.¹⁰⁵⁶ Klerck points out that the "ideology of 'empowerment' is thus nullified by the real imperative of lean production: getting employees to work harder".¹⁰⁵⁷

4.3.5.1 Empowerment through Employee Share Ownership Schemes

Empowerment can succeed only where the necessary legal framework is in place. In terms of the 2008-*Companies Act* employees can participate as shareholders through the issue of shares in terms of section 38, or through a consideration for shares in terms of section

¹⁰⁵³ Institute of Directors *King Report III* 115 para 46.

¹⁰⁵⁴ Whetten, Cameron and Woods *Developing Management Skills* 405.

¹⁰⁵⁵ Tromp 2008 *Management Today* 37.

¹⁰⁵⁶ Van Jaarsveld 2005 *SA Merc LJ* 263.

¹⁰⁵⁷ Klerck 1999 *Transformation* 5.

40.¹⁰⁵⁸ The 2008-*Companies Act* provides for financial assistance in the subscription of securities and employee share schemes in section 44.¹⁰⁵⁹

A way of empowering employees is by means of Employee Share Ownership Plans (ESOPs). Employee share schemes are described as “a scheme for encouraging or facilitating the holding of shares in a company, for the benefit of *bona fide* employees or former employees of the company”.¹⁰⁶⁰ Section 1 of the *Companies Act* provides that an “employee share scheme” has the meaning as set out in section 95(1)(c) of the *Companies Act*. In terms of section 95(1)(c) an “employee share scheme” means:

a scheme established by a company, whether by means of a trust or otherwise, for the purpose of offering participation therein solely to employees, officers and other persons closely involved in the business of the company or a subsidiary of the company, either-

- (i) by means of the issue of shares in the company; or
- (ii) by the grant of options for shares in the company.

Section 96(1)(f) of the *Companies Act* further states that an offer is not an offer to the public if it pertains to an employee share scheme that satisfies the requirements of section 97.

¹⁰⁵⁸ See chapter 3 above a discussion on the issue of shares and consideration for shares in terms of the *Companies Act*.

¹⁰⁵⁹ See chapter 3 above a discussion on employee share schemes and financial assistance in terms of the *Companies Act*.

¹⁰⁶⁰ Blackman *et al Companies Act* 5-50.

Section 97(1) sets out the standards for qualifying employee share schemes as follows:

- (1) An employee share scheme qualifies for exemptions contemplated in sections 41(2)(d),¹⁰⁶¹ 44(3)(a)(i)¹⁰⁶² or 45(3)(a)(i)¹⁰⁶³ or otherwise contemplated in this Chapter, if -
 - (a) the company has-
 - (i) appointed a compliance officer for the scheme to be accountable to the directors of the company;
 - (ii) states in its annual financial statements the number of specified shares that it has allotted during that financial year in terms of its employee share scheme; and
 - (b) the compliance officer has complied with the requirements of subsection (2).

Section 97(2) of the *Companies Act* further spells out the responsibilities of a compliance officer who is appointed in respect of employee share schemes. These responsibilities include

- (a) the administration of the scheme;
- (b) the provision of a written statement to any employee who receives an offer of specified shares in terms of that employee scheme;¹⁰⁶⁴
- (c) ensuring that copies of the documents containing the information¹⁰⁶⁵ are filed within 20 business days after the employee share scheme has been established; and

¹⁰⁶¹ S 41(2)(d) of the *Companies Act* states an issue of shares or securities convertible into shares, or a grant of options contemplated in section 42, or a grant of any other rights exercisable for securities, must be approved by a special resolution of the shareholders of a company, if the shares, securities, options or rights are issued does not apply if the issue of shares, securities or rights is pursuant to an employee share scheme that satisfies the requirements of section 97.

¹⁰⁶² S 44(3)(a)(i) of the *Companies Act* provides that despite any provision of a company's MOI to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless the particular provision of financial assistance is pursuant to an employee share scheme that satisfies the requirements of section 97.

¹⁰⁶³ S 45(3)(a)(i) of the *Companies Act* provides that despite any provision of a company's MOI to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless the particular provision of financial assistance is pursuant to an employee share scheme that satisfies the requirements of section 97.

¹⁰⁶⁴ The written statement must sets out the following: (i) full particulars of the nature of the transaction, including the risks associated with it; (ii) information relating to the company, including its latest annual financial statements, the general nature of its business and its profit history over the last three years; and (iii) full particulars of any material changes that occur in respect of any information provided in terms of subparagraph (i) or (ii)). See s 92(2)(b) of the *Companies Act*.

¹⁰⁶⁵ Referred to in s 92(2)(b) of the *Companies Act*.

- (d) the filing of a certificate within 60 business days after the end of each financial year, certifying that the compliance officer has complied with the obligations in terms of this section during the past financial year.

As a result of the changes in social and economic conditions that have taken place in South Africa ESOPs have become an important issue that concerns the legitimate demands made by employees for share ownership and economic inclusion in corporations. ESOPs provide for *financial participation* of employees through their ownership of shares in the company they are working for.¹⁰⁶⁶ Employees, through financial participation, especially ESOPs, share in the costs and benefits associated with the company's financial well-being and prosperity. Significantly, Klerck points out that new managerial strategies attempt to promote financial rather than participative-democratic forms of employee involvement.¹⁰⁶⁷ These forms include employee share-ownership and profit-related pay schemes that place an emphasis on the individual's involvement through his/her financial stake in the company.¹⁰⁶⁸ O'Regan feels that participation in ownership, in general terms, does not mean participation in decision-making, especially with reference to ESOPs.¹⁰⁶⁹ Although ESOPs are structured in various ways, characteristically, they are the same: they provide employees with the option only of buying shares, voting and obtaining dividends.¹⁰⁷⁰ The objectives of ESOPs are, generally,

- (i) to identify with the organisation and to promote greater loyalty,
- (ii) to encourage shareholder interest which will result in better governance and information disclosure to trade unions, employees and the community at large,
- (iii) to provide greater resources for employee retirement or resources that can be used as collateral for loans and thus create a form of investment for employees and

¹⁰⁶⁶ Finnemore *Labour Relations* 215.

¹⁰⁶⁷ Klerck 1999 *Transformation* 5.

¹⁰⁶⁸ Klerck 1999 *Transformation* 5.

¹⁰⁶⁹ O'Regan 1990 *Acta Juridica* 122.

¹⁰⁷⁰ O'Regan 1990 *Acta Juridica* 122.

- (iv) to promote greater commitment by employees to be productive and to the long-term survival of the company or organisation.¹⁰⁷¹

From a management perspective ESOPs have been praised because they improve economic growth and productivity, increase employees' share in the economy and lower unemployment.¹⁰⁷² Some trade unions, like the National Union of Mineworkers (NUM), are of the opinion (in 1987 after the wage strike of that year) that ESOPs are an attempt to co-opt employees and weaken or destroy the trade unions.¹⁰⁷³ This form of economic empowerment plays an important role, especially when coupled with a transformation initiative. ESOPs have become a major means of promoting economic empowerment by redistributing wealth to previously disadvantaged individuals and communities.¹⁰⁷⁴

By empowering employees through share-ownership options, companies create confidence in the promotion of corporate-governance principles in the workplace in line with a stakeholder-inclusive approach and the DTI's policy paper to "promote competitiveness and development of the South African Economy".¹⁰⁷⁵ The United Kingdom has created a new regime for employee shareholders, enacted in section 31 of the *Growth and Infrastructure Act*, 2013 and by inserting a new section 205A into the *Employment Rights Act*, 1996 and which makes incidental amendments.¹⁰⁷⁶ In this regime the employee becomes an employee shareholder and is to receive shares to the value of £2,000 and such individual will then waive rights normally found in the *Employment Rights Act* 1996, which includes protection, such as the right not to be unfairly dismissed. The employee is still protected by section 94 of the *Employment Rights Act* 1996 against dismissal for automatically unfair dismissal and termination of employment in contravention of the *Equality Act* 2010.¹⁰⁷⁷ Section 205A expands the list of automatically unfair reasons for

¹⁰⁷¹ Finnemore *Labour Relations* 215.

¹⁰⁷² O'Regan 1990 *Acta Juridica* 125.

¹⁰⁷³ Finnemore *Labour Relations* 215-216.

¹⁰⁷⁴ Van Jaarsveld 2005 *SA Merc LJ* 263.

¹⁰⁷⁵ DTI Policy Paper 9.

¹⁰⁷⁶ Prassl 2013 www.labournetwork.eu.

¹⁰⁷⁷ Prassl 2013 www.labournetwork.eu.

dismissal to include the refusal to accept an offer to become an employee shareholder.¹⁰⁷⁸ Employee shareholders are subject to longer notice periods regarding their return from maternity leave, as well as parental or adoption leave.¹⁰⁷⁹ These provisions are drastic and will arguably not work in the current labour law and corporate law dispensation in South Africa in which rights against unfair dismissal and discrimination protect employees (as well as new rights that are now afforded by corporate law to employees in order to achieve

¹⁰⁷⁸ See for example, *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport and Allied Workers Union of SA* 2009 ILJ 1099 (LC) in which the applicant company approached the Labour Court because the first respondent union, TAWUSA, and the respondent employees demanded a 20% equity shareholding in the company. The company alleged that this did not constitute a lawful demand as contemplated in ss 64, 65 and 67 of the LRA and that their demand did not constitute a matter of mutual interest. The company wanted to prohibit them from embarking on a strike. The company already allocated 10% of its shareholding to employees in accordance with an ESOP which formed part of a larger BEE agreement involving the shareholding of the company. The second respondent union, SATAWU, and its members had accepted the allocation of shares as set out in the draft collective agreement. The court held that the establishment of the ESOP was indeed a matter of mutual interest (1119b). The court then added the following dictum: "[I]f a demand for a higher percentage of shares to be allocated is impossible to meet, that may in and by itself enable the company to resist protracted strike action. The fact that employees may bargain with their employer to make a percentage of its shares available to be owned by the employees, or a demand for a higher percentage share allocation, obviously also does not mean that such a demand must be met by the employer. It also does not mean that if employees may demand a higher percentage allocation of shares, that they are entitled thereto. A demand by employees for shares to be allocated by the employer to a share incentive in which employees participate is in my view a legitimate subject-matter for collective bargaining, and if necessary, industrial action to secure such new right for employees" (1120d-f). *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport and Allied Workers Union of SA* 2009 ILJ 1099 (LC) is important because it dealt with the creation of new rights, that is, the right to a higher percentage of equity shareholding. The decision in this case is important because the machinery of collective bargaining and the use of industrial action can be utilised with regards to participation in a company (in the capacity of employees as shareholders and not directly in management). It must, however, be noted that the decision to establish employee share schemes in corporate law lies with the company itself and that the power to issue and allot shares to employees in terms of employee share schemes under both the 1973-*Companies Act* and the 2008-*Companies Act* lies with the board, which under the Companies Act requires prior approval of shareholders via an ordinary resolution. Employee demands play no direct role in the decision-making process to issue shares. Directors hold a fiduciary responsibility to ensure, in issuing the shares, that they exercise the power to do so for its proper purpose, in the best interest of the company and not for their self-interest. Shares can never be demanded but are issued in return for something of value to the company, unless the issue is in terms of conversion rights or capitalisation shares where a consideration is not required (s 40 of the 2008-*Companies Act*). See also Botha and Morajane 2011 TSAR 174-185 for a discussion of *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport and Allied Workers Union of SA* 2009 ILJ 1099 (LC).

¹⁰⁷⁹ Prassl 2013 www.labournetwork.eu. The employee shareholder, for example, must inform their employer of the intention to return to work during the leave period 16 weeks in advance. This is normally 8 weeks notice.

economic as well as social justice and voice in companies). The goal is to maximise the economic benefits and, at the same time, minimise the economic risks.¹⁰⁸⁰

4.3.5.2 *Empowerment through Black Economic Empowerment*

South Africa is a special case because of previous economic exclusion and the imbalances created by such exclusion. The empowerment of black South Africans became a priority for government, and resulted in the BBBEE Act.¹⁰⁸¹ According to Finnemore, the “momentum to create ESOPs in South Africa has accelerated, as they have become a major means of promoting compliance” with the BBBEE Act. Finnemore further points out:

[t]heir purpose has thus gone beyond that normally associated with ESOPs. ... there has recently been a tremendous surge in ESOPs as companies have scrambled to put their Black Economic Empowerment (BEE) strategies into place, in order to be able to add such to their balanced scorecard of empowerment.¹⁰⁸²

Regarding the rationale for the BEE Act Kloppers states the following:

Government’s commitment to empowering previously disadvantaged South Africans and achieving socio-economic transformation is underlined by its enactment of the Broad-Based Black Economic Empowerment Act which is aimed at advancing social and economic justice. This Act represents an attempt by government to achieve substantive equality by placing black people in a position to fully participate in all spheres of society in order to develop their full human potential. The Act strives towards transforming society through the dismantling of economic inequality and is widely regarded as the pre-eminent vehicle for the redistribution of wealth in post-apartheid South Africa. It further represents an attempt to address the disadvantages and vulnerability caused by apartheid and consequently has a clear remedial nature.¹⁰⁸³

¹⁰⁸⁰ Wiese 2013 *ILJ* 2480.

¹⁰⁸¹ Broad-based Black Economic empowerment goes beyond the scope of this thesis and will not be discussed in detail. The discussion in the chapter extends only to its relevance regarding the financial empowerment of employees. See also chapter 3 above for a discussion on the BBBEE Act and empowerment.

¹⁰⁸² Finnemore *Labour Relations* 216.

¹⁰⁸³ Kloppers 2014 *LDD* 58-59.

An initiative to involve previously disadvantaged persons is the so-called Black Economic Empowerment (BEE) strategy, which was introduced in order to “contribute to the formation of a non-class based economy”.¹⁰⁸⁴ The policy of apartheid and the use of race to control access to South Africa’s productive resources and to skills excluded the majority of South Africans from ownership of productive assets and the possession of advanced skills provided for by the economy.¹⁰⁸⁵

The preamble to the BBBEE Act states that the legislation provides a framework

to promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy, and promote a higher growth rate, increased employment, and more equitable income distribution.¹⁰⁸⁶

Section 9(2) of the *Constitution*, which provides that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Section 9(2) endorses not only legislative but also policy measures “that target particular persons or categories of persons for special measures in order to level the playing field and facilitate substantive equality”.¹⁰⁸⁷

Esser and Dekker illustrate the importance of the BBBEE Act as follows:

¹⁰⁸⁴ Banda, Herzenberg and Paremoer 2003 *Epolitisca* 2.

¹⁰⁸⁵ See the preamble of the BBBEE Act. See also *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 1 SA 327 (CC) with regard to the exclusion of black people in the previous dispensation.

¹⁰⁸⁶ See the preamble of the BBBEE Act. See also *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (2014 (1) SA 604 (CC) with regard to the justification for black economic empowerment.

¹⁰⁸⁷ Broembsen 2012 *LDD* 20. See also *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) discussed in chapter 2 above with reference to the achievement of substantive equality.

The BBBEE Act is but one example of the use of legislation to guide the corporate conscience. The Act confronts companies with the political and socio-economic reality in the country within which they operate and involves them in the process of reform and reconciliation. It is crucial that the corporate conscience and Government efforts for reforms are combined and coordinated to ensure that it functions to the benefit of the country at large.¹⁰⁸⁸

It is important to define broad-based black economic empowerment. BBBEE is defined as:

the economic empowerment of *all black people* including women, *workers*,¹⁰⁸⁹ youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to-

- increasing the number of black people that manage, own and control enterprises and productive assets;
- facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- human resource and skills development;
- achieving equitable representation in all occupational categories and levels in the workforce;
- preferential procurement; and
- investment in enterprises that are owned or managed by black people.¹⁰⁹⁰

The BBBEE Act objectives are as follows:¹⁰⁹¹

- (i) the promotion of economic transformation in order to enable meaningful participation of black people in the economy;
- (ii) the achievement of substantial change in the racial composition of ownership and management structures and the skilled occupations of existing and new enterprises;
- (iii) to increase the extent to which communities, *workers*,¹⁰⁹² cooperatives, and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;

¹⁰⁸⁸ Esser and Dekker 2008 *JICLT* 169.

¹⁰⁸⁹ My emphasis.

¹⁰⁹⁰ S 1 of the BBBEE Act.

¹⁰⁹¹ S 2 of the BBBEE Act.

¹⁰⁹² My emphasis.

- (iv) to increase the extent to which black women own and manage existing and new enterprises, and increase their access to economic activities, infrastructure and skills training;
- (v) to promote investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
- (vi) to empower rural and local communities by enabling access to economic activities, infrastructure and skills training;
- (vii) to promote access to finance for black start-ups, small medium and micro enterprises, co-operatives, black entrepreneurs, including those in the informal business sector; and to increase effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support.

Economic empowerment is integral in the transformation process: it encourages the redistribution of wealth and opportunities to previously disadvantaged individuals including employees.¹⁰⁹³ These forms of empowerment target certain categories of workers (for example black persons) but can be viewed as participation or the “voice” of employees as they are granted access to economic resources they previously did not enjoy. A variety of economic empowerment options are open to black people: worker co-operatives, the development of small businesses, the establishment of black enterprises, the application of affirmative action, and so forth.¹⁰⁹⁴

Participation is not limited to economic empowerment, but extends to issues such as skills development and socio-economic development. Broembsen points out that the references (in the BBBEE Act) to “*effective* participation”, “*equitable* income distribution” and “*meaningful* participation”, “give expression to ‘the constitutional right to equality’ and

¹⁰⁹³ Van Jaarsveld 2005 *SA Merc LJ* 264.

¹⁰⁹⁴ Van Jaarsveld 2005 *SA Merc LJ* 264.

signify that participation envisaged is not simply procedural but also substantive”.¹⁰⁹⁵ This insight is true not only in context of BEE, but also in greater participation and “voice” in corporate decision-making.

Corporations should actively invest in the social, as well as economic, well-being of their employees in general. The process should not merely be a box-ticking exercise to say that they have complied with legislation and have reached numerical targets, but should translate into issues such as the promotion of skills development. In essence the social investment that corporations undertake ultimately will lead to economic investment and empowerment. Consultation with trade unions as to the type of skills that should be addressed, as well as the social role of corporations in their immediate environment, can be a fruitful exercise in which the immediate community benefits not only from the financial impact of the corporation but also from its social investment through educational programmes, the betterment of the environment, and so on. The role of the company goes beyond empowering employees and furthering their skills and extends to the development of the skills of the community in which the corporation conducts its operations. In essence, the company advances the socio-economic conditions of workers as well as the local community.

Other legislation, such as the EEA, is relevant with regard to equality and to addressing the imbalances of the past.¹⁰⁹⁶ The EEA prohibits unfair discrimination in the workplace and requires the development of previously disadvantaged groups that fall within the designated group: black people, women and persons with disabilities. The measure designed to advance the designated group is affirmative action in employment.¹⁰⁹⁷

¹⁰⁹⁵ Broembsen 2012 *LDD* 20.

¹⁰⁹⁶ See chapter 2 above regarding a discussion on equality.

¹⁰⁹⁷ Chapters 2 and 3 of the EEA.

The SDA is another relevant piece of legislation with regard to empowerment. The SDA creates a framework for the development, training and education of the workforce.¹⁰⁹⁸ Through skills development the competencies of black employees can be addressed and measured by employers.¹⁰⁹⁹ The following is highlighted in the context of the importance of skills development and its role in empowerment:

Skills development and business education lie at the core of the notion of empowerment – the higher the skill level of the national workforce, the greater the benefit would be not only to the economy but also to the beneficiaries of Black economic empowerment. A skilled workforce is a central element of sustainable economic and social development and is essential to achieving global economic competitiveness. Achieving a skilled workforce should consequently be included as a distinct aim in any programme aimed at empowering previously disadvantaged South Africans.¹¹⁰⁰

4.4 Conclusion

The discussion has shown the various theories, models and views regarding constructs such as “industrial democracy”, “employee voice” and “employee participation”. All of the theories, models and views recognise employees as important stakeholders whose views should be taken into account by management when decisions that affect the corporation are taken, as well as decisions that affect them as important stakeholders in the

¹⁰⁹⁸ The vision of the National Skills Development Strategy Document is (i) the development of skills by empowering and enabling persons through the acquisition of certain competencies in demand; (ii) the establishment of a productive citizenship in that employees are able to engage in workplace decisions relating to such things as productivity, entrepreneurship, sustainability et cetera and (iii) the creation of opportunities for the employed, unemployed, and for persons who have for a long periods not been valued for their capabilities (available at <http://www.skillsportal.co.za/features>). Another example of empowerment legislation is The Preferential Procurement Policy Framework Act 5 of 2000, which makes provision for a procurement policy of state organs based on preferential treatment. The framework requires contracts to be awarded by rating tenders on a preference point in accordance with the racial composition in order to ensure that previously disadvantaged persons are granted preference in this process. The National Empowerment Fund Act 105 of 1998’s purpose is to establish a trust for the promotion and facilitation of ownership of income-generating assets by historically disadvantaged people. It will provide this category of persons with opportunities to directly or indirectly acquire shares or interests in state owned commercial enterprises. For a detailed discussion on the BBBEE Act and the Preferential Procurement Policy Framework Act, see Marias and Coetzee 2006 *Obiter* (part 1) 111-127 and Marias and Coetzee 2006 *Obiter* (part 2) 503-538).

¹⁰⁹⁹ Kloppers 2014 *LDD* 67.

¹¹⁰⁰ Kloppers 2014 *LDD* 67.

corporation. Labour should play an active role in decision-making that directly and indirectly affects the interests of employees: decisions a corporation takes impact workers economically and socially.

In chapter two above it was pointed out that if one views participation in decision-making along a continuum, then the disclosure of information and consultation is at one end and joint-decision-making is at the other. The provisions of the *Constitution* as well as labour legislation, such as the LRA, need to be taken into account in examining participation. Legislation protects employees against arbitrary decisions by employers, for example, unfair dismissal or discrimination. Employees have had louder voice since 1994 regarding their treatment by employers and are seen as an important partner in the collective bargaining process. The provisions of the LRA and the *Constitution* promote industrial democracy in that trade unions and their members have access to collective bargaining and freedom of association and organisation, and trade unions (depending on their size and registered status) have access to certain organisational rights. Collective bargaining has limits (see also chapter five below) and does not address all the issues relating to decision-making in the workplace. The need exists for a form of co-determination, for example, through workplace forums (see chapter six below) in conjunction with collective bargaining as a complementary process. However, workplace forums have been a failure in this regard. Therefore, an alternative means of addressing “voice” and participation is required.

Included in the process of giving a voice to workers are the freedom of association and the right to strike. These freedoms and rights, however, have and assist employees only up to a point. To provide meaningful participation labour law and corporate law should find common ground (as indicated in chapter three above). The recognition of employees as important stakeholders as well as empowerment should be at the forefront of the company agenda. Corporations should take not only economic aspects but also social issues into account.

It is important when corporations make decisions that employees' should be included in the decision-making process. It is suggested (see chapter three above) that non-distributive issues could be dealt with differently and that corporations should actively engage with trade unions regarding these issues: social partners consult or jointly reach decisions regarding these type of issues. Although financial participation is important, it has limitations. Financial participation, for example through ESOPs, addresses only financial aspects: ESOPs do not provide for participation in decision-making. Corporations, through empowerment initiatives which include ESOPs; coupled with skills development; participative structures, such as supervisory boards, collective bargaining and socio-economic development, can achieve greater voice and participation in decision-making by employees.

In chapter three it was shown that sustainability and sustainable development should be at the heart of how decisions are made by corporations. Sustainable development is significant not only to workers and trade unions, because it includes recognition of the need and relevance of labour, but is relevant in the CSR initiatives of corporations and the advancement of "voice" in corporations. Trade unions, who bargain from a sustainability perspective, for example, could negotiate long-term agreements with employers and may also negotiate not only monetary increases but also other benefits and positive changes to the living conditions of employees.

Such an approach is wider and is not limited to the constraints of a workplace or company building. However, it must be stressed that ESOPs, in fact, have benefits. A company creates an ESOP that empowers employees in decisions that not only affect them as employees but also as shareholders, employees might realise more is at stake than them losing an income or job. If the company does not prosper, due to unproductivity or unrealistic demands made by trade unions, the corporation might end up closing its doors: a lose-lose situation.

Employees need to have input into the strategic as well as operational aspects of the company. If the company wants to expand its operations, employees could have insight into which components work on the production side or suggest exploring a different strategy from the one the company normally adopts. Employees could provide input in the restructuring of a company or offer alternatives to job-cuts due to an economic downturn.

A fundamental pre-condition is trust: traditional collective bargaining is a fundamental shortcoming as traditional collective bargaining in South Africa is still largely adversarial. The flow of information and communication are other problems that impede trust. The type of information that is disclosed is largely left to the employer and is regulated by legislation. Employers provide relevant information to the negotiations, but do not want to lose their bargaining power and position. The same can be said of trade unions: they too do not want to let any power slip from their reach. It is submitted that alternative approaches be utilised and explored in order to achieve meaningful decision-making in corporations by employees.

At least one of the aims of economic democracy coincides with the objectives of industrial democracy: any participation in the economy of the enterprise requires a certain degree of participation in management decisions whereby employees influence management decision-making in important issues (such as company restructuring). In these circumstances, enterprises facilitate the flow of information, and through consultation with employees and in collaboration with society companies become more competitive and employees obtain good wages and working conditions. Employee participation contributes substantially to efficiency as it not only enhances the quality of decision-making by broadening the inputs but it also improves motivation, communication and cooperation in the workplace. As a result, participation can reduce the workload of supervisors, encourage skills development in the workforce and contribute to a general improvement of the relationship between employees and their employer.

In its different manifestations, “employee voice” can be articulated as follows: (i) *individual dissatisfaction* where a specific problem or issue with management can be addressed, for example, by finding expression in a grievance procedure; (ii) the expression of *collective organisation* in which voice is achieved, for example, by means of trade unionisation and collective bargaining; (iii) as a form of contribution to *management decision-making*, and is generally concerned with improvements in work organisation, quality, productivity and efficiency; and (iv) voice can be seen as a form of *mutuality* in which an employee-employer partnership is central because the focus is on delivering long-term viability to the organisation and its employees.

All four manifestations are visible in South Africa. For “voice” to be manifest in these forms trust between the parties is important, as well as sufficient information-flow and the separation of distributive and non-distributive issues a clear participation and, where applicable, dispute-resolution process. If these preconditions are present, and collective bargaining becomes less adversarial, it is possible for collective bargaining to facilitate all four manifestations of employee voice. This would be the case in a situation if there is no workplace forum or where employers have to deal with individual employees.

In order for co-determination to be successful in South Africa, trade unions (or bargaining agents) and employers need to recognise each other as long-term social partners, who (although representing different constituencies) have the same long-term goal, namely, a successful business in which employees share in the profits. Employee participation goes beyond what normally is covered by collective bargaining, but it does not mean that collective bargaining, in itself, cannot facilitate and further employee participation and voice.

Chapter five below will address collective bargaining as a primarily adversarial process. Chapter six will address co-determination through workplace forums. Both these chapters attempt to provide answers and solutions to existing problems in and limitations at decision-making levels and structures in corporations when it comes to employees.

CHAPTER 5 – ADVERSARIAL LABOUR-RELATIONS IN SOUTH AFRICA

5.1 General

Collective bargaining has a long history: as is evidenced by the developments in various countries. As well, it has played an important role in granting workers a “voice” in organisations. Collective bargaining is an adversarial process, which involves negotiation between parties with conflicting interests “seeking to achieve mutually acceptable compromises”.¹¹⁰¹ For workers it is primarily¹¹⁰² a means of maintaining “certain standards of distribution of work, of rewards and of stability of employment”, whereas employers view it as a means of maintaining “industrial peace”.¹¹⁰³ This discussion first looks at the development of collective bargaining. Godfrey *et al* aptly describes the development process:

Historically, it took shape in many countries – including South Africa – with the emergence of unions formed by skilled minorities of workers (also known as ‘craft unions’, or ‘trade’ unions in the strict sense of the word). It was, however, the emergence of unions of less skilled workers – typically, industrial or general unions – that has given collective bargaining much of its dynamism and social importance. Since these workers did not command monopolies of skills, their unions could not rely simply on wage bargaining to improve their members’ living standards. Political and social reform – the extension of the franchise, the provision of public health systems, free education and the like – was necessary to give them access to a better quality of life. As a consequence, unionisation of the majority of workers tended to be accompanied not only by the extension of collective bargaining but also by the formation of mass-based political movements pressing for social reform. ‘Social democracy’ and ‘social welfare’ as political values and principles of governance have their roots in this development.¹¹⁰⁴

¹¹⁰¹ Godfrey *et al* *Collective Bargaining* 1.

¹¹⁰² Du Toit 2007 *ILJ* 1405 points out that the “qualifier ‘primarily’ is important: power built up in the bargaining arena enables trade unions also to engage with broader issues and exert political pressure”.

¹¹⁰³ See Davies and Freedland *Kahn-Freund* 69 as well as Godfrey *et al* *Collective Bargaining* 1 and Du Toit 2007 *ILJ* 1405.

¹¹⁰⁴ Godfrey *et al* *Collective Bargaining* 1.

These developments in the practice of collective bargaining, as well as the role of trade unions in the introduction of broader socio-economic policies, has lead to the incorporation of a flexibility principle in the relationship between capital and labour. The concept of “regulated flexibility” plays a role in the workplace and in collective bargaining as a means of negotiating changes to employment, wages and work processes. Paul Benjamin introduced the concept “regulated flexibility” to South Africa based on the approach outlined in the ILO Country Review.¹¹⁰⁵ The approach includes both the employers' interest in flexibility and the employees' interest in security and it informed the recommendations of the Labour Market Commission and the Minister of Labour's approach to labour law reform. Three kinds of flexibility (as noted by the Review and the commission) exist:

- (i) employment flexibility which includes “the freedom to change employment levels quickly and cheaply”),
- (ii) wage flexibility which refers to “the freedom to determine wage levels without restraint” and
- (iii) functional flexibility which entails “the freedom to alter work processes, terms and conditions of employment, etc quickly and cheaply”.¹¹⁰⁶

Security on the other hand includes the following:

- (i) labour market security which includes opportunities for employment,
- (ii) employment security which included protection against arbitrary loss of employment,
- (iii) job security which includes “the protection against arbitrary loss of or alteration to the job”),
- (iv) work security which include health and safety in the workplace and
- (v) representation security which deals with representation in the workplace.¹¹⁰⁷

The concept of regulated flexibility “is not simply a balance between the two sets of interests but a framework within which an appropriate balance is struck”.¹¹⁰⁸ The

¹¹⁰⁵ Cheadle 2006 *ILJ* 668.

¹¹⁰⁶ Cheadle 2006 *ILJ* 668.

¹¹⁰⁷ Cheadle 2006 *ILJ* 668.

¹¹⁰⁸ Cheadle 2006 *ILJ* 668.

recognition that the labour market is both diverse and dynamic is central to the concept of regulated flexibility: it is referred to as "a one shoe that does not fit all as well as a shoe that fits all time".¹¹⁰⁹ It requires the creation of a space within which employers and workers can adapt standards over time to suit their needs subject to the particular sector, sub-sector or workplace.¹¹¹⁰ One mechanism that characterise regulated flexibility and this conception of space within which choice can be exercised is what Guy Standing calls "voice regulation"¹¹¹¹ which includes social dialogue at national or regional level, collective bargaining at sectoral or workplace level, workers' participation at the level of the enterprise and employee consultation at the level of the workplace.¹¹¹² The balance, accordingly, is "struck by accommodating the interests that each party brings to bear in these dialogues".¹¹¹³

Achieving the balance is central: not only in order to find common ground between employers and trade unions but also to reach agreement on some issues that are central in negotiating improvements to working conditions of employees. Consultation and the disclosure of information¹¹¹⁴ are central to the dialogue between employers and trade unions, especially with regard to decisions that affect not only the company but also the workplace at which employees render their services. Disclosure of information and consultation and issues regarding joint decision-making are reserved for majority trade unions and workplace forums. This chapter explores the adversarial nature of collective bargaining, how freedom of association and organisation as well as the right to strike form an integral part of the collective-bargaining framework, as well possible solutions to overcome the problems associated with collective bargaining and the law governing strikes in South Africa.

¹¹⁰⁹ Cheadle 2006 *ILJ* 668.

¹¹¹⁰ Cheadle 2006 *ILJ* 668.

¹¹¹¹ Cheadle 2006 *ILJ* 668.

¹¹¹² Cheadle 2006 *ILJ* 668.

¹¹¹³ Cheadle 2006 *ILJ* 668.

¹¹¹⁴ See chapters 2-4 above.

5.2 Collective Bargaining

5.2.1 General

Collective bargaining is one of the means by which employees can participate in decision-making in management, influencing, at least, pay and the terms of conditions of employment.¹¹¹⁵ Collective bargaining is defined as “a method of determining the terms and conditions of employment and regulating the employment relationship, which utilizes the process of negotiation between representatives of management and employees and results in an agreement which may be applied uniformly across a group of employees”¹¹¹⁶ or collective bargaining can be defined as follows:

a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.¹¹¹⁷

From the above, some of the important goals of collective bargaining can be summarised as follows:

[B]y bargaining collectively with organised labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc., should not be frustrated through interruptions of work. By bargaining collectively with management,

¹¹¹⁵ Gold and Weiss *Employment and Industrial Relations in Europe* 35. See also *Rand Tyre and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal), Minister for Labour & Minister for Justice* in 5.3 below with regard to matters of mutual interest. See also the discussion on collective bargaining in chapter 2 and 3 above.

¹¹¹⁶ Salamon *Industrial Relations* (2000) 323.

¹¹¹⁷ International Labour Organization (ILO) “Organizing for Social Justice – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work” (2004).

organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and so to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure.¹¹¹⁸

With regard to the employer-employee relationship, the employer provides the capital and commands access to capital, information and legal opinion. Employees work in order to make a living.¹¹¹⁹ The employer is in a stronger bargaining position and can dictate the terms and conditions of contracts of employment.¹¹²⁰ In general, the parties to collective bargaining engage in the process because employees are not happy with a decision of management: collective bargaining, thus, is more re-active than pro-active. Traditional collective bargaining¹¹²¹ is a mechanism to negotiate the terms and conditions of employment and is not a vehicle to facilitate joint decision-making.¹¹²²

The contract of employment situates employees at a distance from decision-making because the employer controls employees. The social component of an employment relationship is largely neglected because the individual and collective interests of employees are not fully recognised. Consultation, at least as an initial step, can assist employers and employees in achieving a true democratisation of the workplace,¹¹²³ and as a form of participation, should not be underestimated.

Kahn-Freund observes that “the principal interest of management in collective bargaining has always been the maintenance of industrial peace over a given area and period”¹¹²⁴ and “the principal interest of labour has always been the creation and the maintenance of

¹¹¹⁸ Davies and Freedland *Kahn-Freund* 69.

¹¹¹⁹ Strydom 1999 *SA Merc LJ* (part 1) 311–312.

¹¹²⁰ Strydom 1999 *SA Merc LJ* (part 1) 311–312.

¹¹²¹ Van Jaarsveld is of the view that collective bargaining at present is not doing well, especially in the United Kingdom where voluntary collective bargaining rather than regulatory legislation is “seen as the major obstacle to growth in a flexible workforce, resulting in policies and legislation”. She adds that global trends embracing decentralisation of bargaining at enterprise level combined with deregulation can be attributed to the decline of trade unions and collective bargaining. (Van Jaarsveld 2009 *THRHR* 228–229).

¹¹²² Esser 2007 *THRHR* 425.

¹¹²³ Smit *Labour Law Implications* 55.

¹¹²⁴ Davies and Freedland *Kahn-Freund* 69.

certain standards over a given area and period, standards of distribution of work, or rewards, and of stability of employment".¹¹²⁵ It is submitted that this position remains valid. The differing interests present in collective bargaining inevitably result in conflict between labour and management, although the degree of opposition varies.

Four different models of participatory structures can be identified in terms of their relationship to collective bargaining:¹¹²⁶

- (i) an alternative to collective bargaining;
- (ii) marginal to collective bargaining;
- (iii) competing with collective bargaining; and
- (iv) an adjunct to collective bargaining.

The third model above refers to centralised bargaining forums in which employee participation is an extension of collective bargaining.¹¹²⁷ This is an approach which the unions already understand. It is argued that this approach "does not depend for its success on receiving cooperation from management, the union structure remains independent of managerial structures in the workplace, and the union retains control over the shopfloor component of the programme".¹¹²⁸ Adversarial bargaining at a centralised level has a number of consequences for the initiation and development of workplace forums.¹¹²⁹

The fourth model is the one proposed by the LRA.¹¹³⁰ In terms of the model collective bargaining and participatory structures are kept separate: the latter handles issues not covered by the former. These activities, however, are viewed as complementary. The logic of to approach is that

¹¹²⁵ Davies and Freedland *Kahn-Freund* 69.

¹¹²⁶ Marchington as referred to by Klerck 1999 *Transformation* 19.

¹¹²⁷ Klerck 1999 *Transformation* 19.

¹¹²⁸ Klerck 1999 *Transformation* 19.

¹¹²⁹ Workplace forums are discussed in detail in chapter 6 below.

¹¹³⁰ Klerck 1999 *Transformation* 19.

strong workplace organisation will prevent consultative bodies from undermining negotiating bodies, the central role of shop stewards is protected through involvement in both channels, and management is committed to and perceives real benefits from involvement in participatory arrangements.¹¹³¹

It is crucial in evaluating workplace forums and co-determination to understand collective bargaining¹¹³² that the “existence of legislated centralised bargaining facilitates the separation of the relationship between workers and management into a collective bargaining channel and a co-determination channel”.¹¹³³

From a workers’ point of view there are compelling reasons for collective action. In advanced industrial societies employers always have greater economic and social power than any individual worker, though a worker occasionally may find himself or herself in a stronger bargaining position if he or she possesses experience or skills that are much in demand.¹¹³⁴ In general, however, workers can influence power in their employment relationship only by collectively furthering their demands and only then stand a chance of counterbalancing the power of the employer.¹¹³⁵

Collective bargaining (as indicated earlier) is widely accepted as the primary means of determining terms and conditions of employment in South Africa. Due to South Africa’s particular history, collective bargaining has been “underlined by the legacy of deep adversarialism” between employers and organised labour.¹¹³⁶ Various types of behaviour in the selection of collective representatives, the conduct of collective bargaining and the enforcement of collective agreements are prescribed and proscribed by labour laws.¹¹³⁷ The greatest net benefit from collective bargaining can be obtained when a system is in place that promotes good faith bargaining and efficient enforcement of collective

¹¹³¹ Klerck 1999 *Transformation* 19.

¹¹³² Workplace forums and co-determination will be discussed in chapters 6 and 7 below.

¹¹³³ Patel 1998 *LDD* 118.

¹¹³⁴ Deakin and Morris *Labour Law* 771.

¹¹³⁵ Deakin and Morris *Labour Law* 772.

¹¹³⁶ Du Toit 2000 *ILJ* 1544.

¹¹³⁷ Dau-Schmidt, Harris and Lobel *Labor and Employment Law* 96.

agreements.¹¹³⁸ One of the purposes of the LRA is to promote collective bargaining¹¹³⁹ and to provide a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine conditions of employment, formulate industrial policy and provide for other matters of mutual interest.¹¹⁴⁰

5.2.2 Constitutional framework and collective bargaining

The constitutional framework supports the provisions of the LRA. Section 23(5) of the *Constitution* provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining.¹¹⁴¹ In *SA National Defence Union v Minister of Defence*,¹¹⁴² O'Regan, in an *obiter dictum*, noted the following:

[I]t should be noted that were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, courts may be drawn into a range of controversial industrial relations issues. These issues would include questions relating to the level at which bargaining should take place (ie the level of the workplace, at the level of an enterprise, or at industrial level); the level of union membership required to give rise to that duty; the topics of bargaining and the manner of bargaining. These are difficult issues, which have been regulated in different ways in the recent past in South Africa ...¹¹⁴³

The duty to bargain was deliberately excluded by the drafters of the LRA,¹¹⁴⁴ as is apparent from *The Explanatory Memorandum to the Labour Relations Bill*:

¹¹³⁸ Dau-Schmidt, Harris and Lobel *Labor and Employment Law* 96.

¹¹³⁹ Chapter III of the LRA regulates collective bargaining in s 11-63 of the Act.

¹¹⁴⁰ Preamble and section 1 of the LRA.

¹¹⁴¹ It is a widely controversial issue as to whether s 23 of the South African Constitution imposes a duty to bargain. See Cheadle, Davis and Haysom (eds) *Constitutional Law* 18-25 where Cheadle develops three arguments against interpreting the right to engage in collective bargaining so as to include a positive right to bargain. S 27(4) of the *Interim Constitution*, 1993 was worded differently as it afforded works and employers the "right to organise and bargain collectively".

¹¹⁴² *SA National Defence Union v Minister of Defence* 2007 9 BLLR 785 (CC).

¹¹⁴³ *SA National Defence Union v Minister of Defence* 2007 9 BLLR 785 (CC) para 55. See also Van Niekerk and Smit (eds) *Law@work* 366 regarding a discussion of *SA National Defence Union v Minister of Defence* 2007 9 BLLR 785 (CC).

¹¹⁴⁴ Van Niekerk and Smit (eds) *Law@work* 342.

A notable feature of the draft Bill is the absence of a statutory duty to bargain. In its deliberations on a revised system of collective bargaining, the task Team gave consideration to three competing models. The first is a system of statutory compulsion, in which a duty to bargain is underpinned by a statutory determination of the levels at which bargaining should take place and the issues over which parties are compelled to bargain. The second model is not dissimilar though more flexible. It relies on intervention by the judiciary to determine appropriate levels of bargaining and bargaining topics. The third model, unanimously adopted by the Task Team, is one that allows the parties, through the exercise of power, to determine their own arrangements. The exercise of power, or indeed persuasion, is given statutory impetus by the draft Bill's provision for organisational rights and a protected right to strike.¹¹⁴⁵

Proponents of the right to organise have argued that collective bargaining not only allows employees the opportunity to gain a larger share of the fruits of their efforts but it also promotes equity in bargaining power between labour and management.¹¹⁴⁶ The collective bargaining process therefore ensures that the interests of employees can be enforced by themselves or their trade union representatives, and also that economic exchange between the collective workforce and the employer takes place.¹¹⁴⁷ Collective bargaining can be used as a measure not only to ensure that companies comply with corporate governance principles but also to enforce these principles when they are not adhered to.

Collective bargaining, as indicated earlier, is a form of worker participation by which employees take part in decision-making. South African labour legislation is superimposed on a rigid adversarial system based upon a liberal market system.¹¹⁴⁸

Due to developments in South African corporate law and the corporate landscape, as well as the importance attached to the promotion of participation in companies, mean the continuation of a rigid adversarial system "is incongruent with the direction"¹¹⁴⁹ which

¹¹⁴⁵ 1995 *ILJ* 292.

¹¹⁴⁶ Dau-Schmidt, Harris and Lobel *Labor and Employment Law* 96.

¹¹⁴⁷ Metcalf *Employee Relations* 1995 9.

¹¹⁴⁸ See Davis and Le Roux 2012 *Acta Juridica* 316.

¹¹⁴⁹ Davis and Le Roux 2012 *Acta Juridica* 316.

many authors and commentators suggest the “new corporate project” could/should take.¹¹⁵⁰

The “liberal market system” can be contrasted with the “coordinated market system” found in certain European countries such as Germany:¹¹⁵¹ in which the relationship between the governance of a corporation and labour regulation differ. The relationship between labour law and corporate law is more harmonious in a coordinated market system because of the fact that the model seeks to institutionalise the views of employees within the company.¹¹⁵² In so doing employees are accepted as core stakeholders who contribute to the sustainability of the business and a sense of institutional responsibility is promoted.¹¹⁵³ In Germany, for example, co-determination has made a significant impact upon the regulation of executive compensation packages: national legislation, which provides for corporate governance requires labour representation on the boards of directors.¹¹⁵⁴ The practice makes it possible to develop and to adhere to policies in theory that are likely to expand or at least to protect jobs, even if shareholder value may be compromised.

In contrast to this system the predominant system of employee participation in South Africa is collective bargaining. Labour and capital are represented by trade unions and employers organisation which is evident from section 23(5) of the *Constitution*, which recognises the right to engage in collective bargaining. Nevertheless,

¹¹⁵⁰ O'Regan suggests that collective bargaining institutionalises an adversarial approach to labour relations and although “autonomous worker organisation and adversarial collective bargaining are essential, it may well be that co-operation within the enterprise should not be entirely excluded by collective bargaining” (O'Regan 1990 *Acta Juridica* 119). Du Toit points to the following regarding this view: “The problem with this approach is that it focus on the *form* of the bargaining relationship: placing the same two actors in a different forum, it suggests, could lead to better results. No doubt there is truth in this but, surely, only up to a point. Experience shows that the same conflicting *interests* embodied by management and labour will surface whether the parties meet in bargaining structures or in participatory structures, or in both” (Du Toit 1993 *Stell LR* 332).

¹¹⁵¹ Davis and Le Roux 2012 *Acta Juridica* 316.

¹¹⁵² Davis and Le Roux 2012 *Acta Juridica* 316.

¹¹⁵³ Davis and Le Roux 2012 *Acta Juridica* 316.

¹¹⁵⁴ Davis and Le Roux 2012 *Acta Juridica* 316.

"[n]otwithstanding the right [to] bargain collectively, the law generally limits collective bargaining and its impact upon the so-called 'core areas' of the managerial prerogative, ie determining the direction, plans and policies of the business."¹¹⁵⁵

The managerial prerogative of the employer entitles it to make strategic and operational decisions. Collective bargaining does not empower trade unions and employees with greater power regarding decision-making with regard to the direction, plans and policies of the business. For this reason co-determination, or joint decision-making, over key decisions relating to the running of the business are not covered by collective bargaining but are left entirely to management¹¹⁵⁶ or to consultation/ joint decision-making.

Within the statutory regulatory framework created by the LRA, collective bargaining is grounded on a form of voluntarism:

... the law does not interfere with power relations. It is the balance of forces that ultimately determines the outcome. Expressed differently, as argued by Kahn-Freund, ... labour law operates within the framework of a collective laissez-faire. This concept relates to the power by which the free play of the collective forces of labour and capital shape industrial society. Inside this framework, the law intervenes only where the disparity of these powers is great enough to prevent the successful operation of an autonomous process of negotiation and settlement.¹¹⁵⁷

Central to the collective bargaining framework is the recognition of the right to strike,¹¹⁵⁸ as well as granting representative trade unions certain organisational rights.¹¹⁵⁹ The process of collective bargaining and the provisions of a collective agreement remain subject to scrutiny, for example, if the provisions unfairly discriminate against a particular

¹¹⁵⁵ Davis and Le Roux 2012 *Acta Juridica* 316.

¹¹⁵⁶ Davis and Le Roux 2012 *Acta Juridica* 316.

¹¹⁵⁷ Godfrey *et al Collective Bargaining* 20 as well as Davis and Le Roux 2012 *Acta Juridica* 316.

¹¹⁵⁸ In *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (C) para 35 the right to strike was described as a "component of a successful collective bargaining system." See also *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* 2014 35 ILJ 1243 (LC) and *Platinum Mile Investments (Pty) Ltd t/a Transition Transport v SATAWU* 2010 31 ILJ 2037 (LAC) in this regard.

¹¹⁵⁹ Organisational rights and representation will be discussed below.

group it will constitute an infringement of the constitutional right to equality.¹¹⁶⁰ Commentators suggest that labour law in South Africa (and in Southern Africa) should take the region's particular socio-economic profile into account and develop an indigenous paradigm.¹¹⁶¹

The LRA and its provisions are formed by section 23 of the *Constitution*.¹¹⁶² The *Constitution* guarantees the universal right to fair labour practices as well as the right of workers to engage in collective bargaining and to strike. The purpose of fundamental rights, is to "[affirm] the democratic values of human dignity, equality and freedom".¹¹⁶³ The meaning of equality¹¹⁶⁴ is understood to include "the full and equal enjoyment of all rights and freedoms".¹¹⁶⁵ The *Constitution* grants all workers the right to form and join a trade union. The rights to equality, the right to strike and the right to engage in collective bargaining "are connected by the central telos of the Constitution: the right to dignity".¹¹⁶⁶ In order to understand the role of labour law in this context, the following question arises:

¹¹⁶⁰ See Slabbert *et al Managing Employment Relations* 5-69 as well as *Executive Council for Education (North-West Province) and the Minister of Education* 1997 12 BCLR 1655 CC) and *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* 1997 11 BLLR 1438 (LC).

¹¹⁶¹ Du Toit 2007 *ILJ* 1425.

¹¹⁶² Du Toit 2007 *ILJ* 1424.

¹¹⁶³ Du Toit 2007 *ILJ* 1424.

¹¹⁶⁴ With regard to equality Ngcukaitobi expresses the following views: "Trade unions continue to be an integral part of the struggle for democratic change in South Africa. The right to strike has become one of the fundamental rights of employees and is recognized by the LRA (s 64(1)) and the *Constitution* s 23(2)(c)). This right is used as a tool for workers to fight the injustices of inequality and is one of several landmarks in this struggle for social justice.

While South Africa's Constitution has been described as one of the most progressive globally, many of the rights enshrined in it cannot be fully realized by a considerable portion of society, specifically the poor. Poverty and inequality are inextricably linked with the labour market. Census-based analyses indicate that although average real incomes have been steadily increasing for all population groups, aggregate inequality measures reveal an increase in inequality over the post-apartheid years as income has become increasingly concentrated in the top income deciles.

The labour market has been identified as the leading factor driving inequality, and as the mining industry in South Africa has become much more urbanized over the years, miners are increasingly aware of, and likely to, demand their rights of equality as employees and citizens of the country. Trade unions have emerged as an important vehicle through which workers can articulate their demands concerning their conditions of employment. A central component of their strategy in recent times has been the deployment of constitutionally based rhetoric, such as the demand for equality" (Ngcukaitobi 2013 *ILJ* 843).

¹¹⁶⁵ Du Toit 2007 *ILJ* 1424.

¹¹⁶⁶ Ngcukaitobi 2013 *ILJ* 843.

how can employees effectively assert their 'right to engage in collective bargaining' in the globalized production process? How can trade unions engaged meaningfully with multinational employers? In short: in a world where the imbalance of power between worker and employer has taken on unprecedented dimensions, how can the law – through its 'auxiliary' and 'integrative' functions¹¹⁶⁷ – promote substantive equality?¹¹⁶⁸

Du Toit propose in this context:

What is certain is that the future of collective bargaining and that of labour law are intertwined and that they face common challenges. Labour law in South Africa, as in many other countries, has been premised on the principle that its "central purpose", alongside individual employee protection, is the regulation of collective bargaining. Any erosion of collective bargaining must call into question that purpose. The law can do little or nothing to reverse the trends undermining existing forms of trade union organization and collective bargaining. Widespread pressure from employers for great liberalization of labour markets makes it all the more unlikely that a legal solution will be sought. The great imponderable is the new-found ascendancy enjoyed by employers in many sectors and the ends to which it will be turned. Democratic society cannot function without machinery to regulate collective terms and conditions of employment by means of institutions. The question is how collective bargaining, in responding to broader socio-economic pressures, may need to evolve in order to continue performing that function.¹¹⁶⁹

¹¹⁶⁷ Du Toit refers to Hepple's reformulation of the law as conceived by Kahn-Freund and where he looks at the "auxiliary" and "integrative" functions of labour law: "The 'auxiliary function' of labour law, ... now needs to assume a form which is appropriate to decentralized employment relations and a wide range of methods of participation including consultation rights. The 'regulatory function', too, has taken on a new significance in the globalized setting: it will be of major importance in providing an adequate floor of rights for the growing number of workers under 'non-standard contracts'. But perhaps most importantly, Hepple suggests that a new 'integrative function' should be added to the functions of labour law identified by Kahn-Freund. By this is meant – innovative 'positive welfare' measures, which would help to combat what in the language of the European Union is called the 'social exclusion' of a growing underclass of unemployed or partially employed people. These might include the right to acquire vocational skills and further education, financial inducements to employers to engage the long-term unemployed, protection against age discrimination, and child care and parental rights which would make it easier to combine work with family responsibilities" (Du Toit 2007 *ILJ* 1423).

¹¹⁶⁸ Du Toit 2007 *ILJ* 1424. See also s 9 of the *Constitution*.

¹¹⁶⁹ Du Toit 2007 *ILJ* 1434.

5.2.3 Freedom of association and organisation

Section 23(2) of the *Constitution* grants workers not only the right to form and join trade unions but also to take part in the activities and programmes of trade unions. Section 23(4) grants trade unions the right to organise¹¹⁷⁰ and section 23(2) grants workers the right to strike.¹¹⁷¹ The rights to strike, freedom of association and organisation form integral components of the South-African collective bargaining framework.

Godfrey *et al* emphasise, by protecting the right to strike, that organisational rights, as well as other provisions aimed at promoting an environment that is conducive to trade union organisation, is created:

government set out to create a system 'which allows the parties, through the exercise of power, to determine their own [bargaining] arrangements' and in doing so, it brought collective bargaining in South Africa in line with the international norm. In the classical model, collective bargaining depended on the power of the parties to compel acceptance of their demands, including the demand to engage in collective bargaining. In this respect the LRA faithfully embraces 'the central purpose' of law according to Kahn-Freund: that is,

¹¹⁷⁰ In *National Union of Public Service & Allied Workers on behalf of Mani v National Lotteries Board* 2014 35 ILJ 1929 (CC) para 153 the Constitutional Court, for example, noted, regarding the phrase "lawful activities", in ss 4(2)(a) and 5(2)(c)(iii) as follows: "... the phrase must exclude illegal activities or activities that constitute activities that constitute contraventions of the law. It definitely excludes conduct that constitutes criminal offences. The provisions include participation by union members in union activities that form part of the core functions of a trade union. These include taking up its members' complaints or grievances with their employer, representing them in grievance and disciplinary proceedings, collective bargaining, attending statutory tribunals to represent their members' interests and communicating with its members' employer about workplace issues. In this regard s 200 of the LRA is important. It provides that a trade union may act in any or more of three capacities 'in any dispute to which any of its members is a party', namely, in its own interest, or on behalf of any of its members, or in the interest of any of its members".

¹¹⁷¹ See for example *South African Police Service v Police and Prisons Civil Rights Union* 2011 6 SA 1 (CC) para 30 where the court reiterated the importance of the right to strike as well the fact that that an important purpose of the LRA is to give effect to the right to strike. The court also stated that the process of interpretation should give effect to that purpose "so as to avoid impermissibly limiting the right to strike". See also *Eskom Holdings Ltd v NUMSA* 2012 2 SA 197 (SCA) para 28 with regard to the interpretation of the Bill of Rights to give effect to its fundamental values as well as the fact that s 1 of the LRA "expresses the LRA's primary objects amongst others as "to give effect to and regulate the fundamental rights" conferred by s 23 of the Constitution (para (a)); and to promote "orderly collective bargaining" (para (d)(i))".

'maintaining equilibrium between employers and workers by ensuring the effective operation of a voluntary system of collective bargaining.'¹¹⁷²

Chapter III of the LRA establishes various organisational rights¹¹⁷³ that can be enforced by sufficiently representative¹¹⁷⁴ and majority representative trade unions. These rights include trade union access to the workplace, deduction of trade union subscriptions, election of trade union representatives, leave for union office bearers for time off from work for union-related purposes as well the disclosure of information. In *NUMSA v Bader Bop (Pty) Ltd*¹¹⁷⁵ the court expressly noted that although employers are not compelled to recognise minority unions and, even though minority trade unions do not meet the statutory thresholds that entitle them to organisational rights, that they can still embark on industrial action in order to secure its rights.¹¹⁷⁶

¹¹⁷² Godfrey *et al Collective Bargaining* 22. See also Du Toit 2007 *ILJ* 1418 in this regard where he points out that on the one hand LRA "did away with the 'duty to bargain' which the Industrial Court had placed on employers in certain circumstances" and adopted an essentially voluntarist framework. The drafters of the Act were satisfied that the constitutional right '[did] not require Parliament to create a legally enforceable right to bargain in the statute'. At the same time the Act set out to 'unashamedly [promote] collective bargaining', inter alia by providing trade unions with a series of organisational rights and regulating the right to strike."

¹¹⁷³ S 12-16 of the LRA.

¹¹⁷⁴ See for example *SACTWU v Sheraton Textiles (Pty) Ltd* 1997 7 SALLR 48 (CCMA) regarding when a trade union will be regarded as being "sufficiently representative".

¹¹⁷⁵ *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (C).

¹¹⁷⁶ See also with regard to minority trade unions *South African Post Office v Commissioner Nowosenetz* No 2013 2 BBLR 216 (LC). Minority trade unions may be granted rights in ss 14 and 16 of the LRA in specified circumstances. Strike action in terms of s 65(2)(a) of the LRA is also permitted regarding organisational rights, excluding the right to information. Minority trade unions, however, are granted access (by the *Labour Relations Amendment Act* 6 of 2014) to acquiring organisational rights which would have ordinarily been reserved for majority unions. An arbitrator is empowered to grant a registered trade union the rights to elect trade union representatives and the disclosure of information if the applicant union meets the following criteria: (i) the applicant trade union meets the "sufficiently representativity" threshold and (ii) if there is no other union in the workplace that has been granted those rights (s 21(8A) of the 2014-*Amendment Act*). S 21(8C) of the 2014-*Amendment Act* provides that a commissioner in an arbitration may grant organisational rights (in s 12, 13 or 15) to a registered trade union or two or more registered trade unions who act jointly if such a trade union does not meet the thresholds of representativity established by a collective agreement to which the employer and other unions are party. These rights will be granted if all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings and if the union represents a significant interest or substantial number of employees in the workplace. See also *POPCRU v Ledwaba* 2013 11 BLLR 1137 (LC); *Transnet SOC Ltd v National Transport Movement* 2014 1 BLLR 98 (LC) and *UASA & AMCU v BHP Billiton Energy Cool South Africa* JS345/13 regarding granting organisational rights to minority trade unions who do not meet the required thresholds.

On the face of it, it appears that the LRA promotes pluralism when it grants organisational rights to “sufficiently representative” trade unions, even though they are not majority trade unions.¹¹⁷⁷ “Sufficiently representative” is not defined by the LRA: they are “those unions that do not have as their members the majority of employees employed by an employer at the workplace”.¹¹⁷⁸ A “representative trade union” is defined by section 11 of the LRA as “a *registered trade union*, or two or more registered *trade unions* acting jointly, that are sufficiently representative of the *employees* by an employer in a *workplace*”. The term “pluralist” was defined under the 1956-Act to describe “a model of collective bargaining that, in contrast to the ‘majoritarian’ model grants recognition to more than one trade union provided they are sufficiently representative of a defines bargaining unit”.¹¹⁷⁹ The right to appoint trade union representatives¹¹⁸⁰ and disclosure of information¹¹⁸¹ are enjoyed only by majority trade unions: the other three organisational rights mentioned earlier are afforded to both sufficiently and majority representative trade unions.¹¹⁸²

Regardless of provisions seemingly favouring a plural model, it is clear that the LRA favours majoritarianism.¹¹⁸³ The LRA’s commitment regarding majoritarianism is specifically stated when resolving disputes as to whether a trade union is “sufficiently representative”, in which case the commissioner “must seek to minimise the proliferation of trade union representation in a single workplace, and where possible encourage a system of a representative trade union in a workplace” and “minimise the financial and administrative burden requiring an employer to grant organisational rights to more than one registered trade union ...”.¹¹⁸⁴

¹¹⁷⁷ S 11 of the LRA; Du Toit *et al Labour Relations Law* (2006) 246.

¹¹⁷⁸ Van Niekerk and Smit (eds) *Law@work* 359. See also *OCGAWU v Volkswagen SA (Pty Ltd)* 2002 23 ILJ 220 (CCMA).

¹¹⁷⁹ Du Toit *et al Labour Relations Law* (2006) 246. See also Baskin and Satgar *South Africa’s New Labour Relations Act* 12 in this regard.

¹¹⁸⁰ S 14 of the LRA.

¹¹⁸¹ S 16 of the LRA.

¹¹⁸² See in this regard ss 21(8A) and 21(8C) of the LRA discussed above.

¹¹⁸³ Du Toit *et al Labour Relations Law* (2006) 246. See also *Kem-Lin Fashions CC v Brunton* 2001 22 ILJ 109 (LAC) regarding the majoritarian principle.

¹¹⁸⁴ See s 21(8)(a)(i) and (ii) of the LRA as well as Du Toit *et al Labour Relations Law* (2006) 246 and Van Niekerk and Smit (eds) *Law@work* 359.

This “winner takes all” majoritarian approach to collective bargaining protects the interests of well-established and larger unions as their strength lies in the number of workers that are members of such trade unions.¹¹⁸⁵ Majority unions

are those registered unions that on their own, or in combination with any one or more unions, have as their members the majority of the employees employed by an employer in a workplace. This requires that at least 50 percent plus one of the employees employed in the workplace must be members of the union(s).¹¹⁸⁶

Other incentives for majoritarianism include the right to enter into a collective agreement setting thresholds of representivity¹¹⁸⁷ for the granting of access to the workplace,¹¹⁸⁸ the deduction of trade union subscription fees or levies¹¹⁸⁹ and leave for trade union activities.¹¹⁹⁰ As well, they can conclude agency shop and closed shop agreements, conclude collective agreements that will bind employees who are not members of trade union or union’s party to the agreement, apply for establishing workplace forums and may choose the members of the workplace forum from among its elected representatives if it is recognised in terms of a collective agreement as the sole bargaining agent for all employees in the workplace.¹¹⁹¹ Ngcukaitobi points out that the majoritarian approach is out of tune with the realities of today's labour relations:

¹¹⁸⁵ See Ngcukaitobi 2013 *ILJ* 854 in this regard. The following can be also be added with regard to the “winner takes all” approach: “The point being made is that working outside of established bargaining structures can mean workers are subjected to decreased access to information, thereby increasing frustration and insecurity. More broadly, the effect of this approach has meant that neither employers nor employees derive the intended value from its framework. It has become increasingly difficult for employers to maintain industrial peace while workers struggle to maintain certain standards of rewards and of stability in their employment. While employers are increasingly perceived as unrelenting, workers lose faith in the negotiation process and are forced to find unconventional ways to air their concerns” (See Ngcukaitobi 2013 *ILJ* 854).

¹¹⁸⁶ Van Niekerk and Smit (eds) *Law@work* 359.

¹¹⁸⁷ S 18 of the LRA.

¹¹⁸⁸ S 12 of the LRA.

¹¹⁸⁹ S 13 of the LRA.

¹¹⁹⁰ S 15 of the LRA.

¹¹⁹¹ See s 25, 26, 23(1)(d)(iii), 80 and 81 of the LRA as well as Du Toit *et al Labour Relations Law* (2006) 246 in this regard.

This winner-takes-all approach was developed and adopted when there was a fair degree of union stability, a growing consolidation within the trade union movement, and a strong commitment to social dialogue and inclusive solutions within the government, labour, business and civil society. But much has changed since then.¹¹⁹²

Against this backdrop Brassey points out the following unfortunate results of the LRA:

The LRA 1995, crafted under the abiding influence of COSATU, bears much of the blame for this unfortunate result. In its efforts to promote centralized bargaining over actual levels of wages and working conditions, it eliminated the emerging duty-to-bargain jurisdiction that was in the process of development by the erstwhile Industrial Court. In its place Parliament introduced a system of statutory organizational rights that gave complete primacy to head counting within the 'workplace'. The self-same ethos informed the union security provisions that legitimate agency and closed shop clauses, provided the union has majoritarian support in the 'workplace'. Provision was made for 'workplace forums' in which it was hoped negotiations might take place to enlarge the corporate cake before dividing it up (so-called integrative bargaining); but this too was subjected to a majoritarian override that has served to make a complete dead letter of the elaborate set of provisions. Finally, the Act made the extension of bargaining council agreements mandatory if the majoritarian principle was satisfied, a development that, by abolishing the scrutiny of the minister on matters of content, arguably contravenes the constitutional tenet that only the state may legislate.¹¹⁹³

Trade unions participate in collective bargaining in order to represent and further the interests of their members. They will try to ensure not only that their members receive the best possible wages for their labour input but that also that they enjoy job security.¹¹⁹⁴ Collective bargaining, however, cannot fully recognise or address the needs of employees.¹¹⁹⁵ Although collective bargaining promotes the interests of both employers and employees, it does not always result in employees gaining a larger share of the fruits of their efforts. Trade unions may also bargain from a position of ignorance because they cannot gain access to confidential and legally privileged¹¹⁹⁶ information. Section 16 of the

¹¹⁹² Ngcukaitobi 2013 *ILJ* 854.

¹¹⁹³ Brassey 2013 *ILJ* 833.

¹¹⁹⁴ O'Regan 1990 *Acta Juridica* 117.

¹¹⁹⁵ Esser 2007 *THRHR* 425.

¹¹⁹⁶ See Barker and Holtzhausen *South African Labour Glossary* 85 where they add that legally privileged information includes "a confidential communication between a legal practitioner and his or her client which may not be disclosed in a court of law unless the person possessing the privilege waives it".

LRA provides that only relevant information¹¹⁹⁷ that will allow a trade union representative to perform his or her functions referred to in section 14(4) of the LRA must be disclosed and not information that is legally privileged or information that the employer, by law or order of court, is not allowed to disclose or is confidential and, if disclosed, may cause substantial harm to an employee or the employer or is private personal information relating to an employee, unless that employee consents to the disclosure of that information.¹¹⁹⁸ Together with the unique nature of the work-wage bargain, these requirements put management a superior bargaining position in relation to trade unions.¹¹⁹⁹

5.3 The right to strike

5.3.1 General

It must be reiterated that the LRA sets out to promote not only “*labour peace*” but also “*orderly collective bargaining*” and “*the effective resolution of labour disputes*”.¹²⁰⁰ The “right and concomitant duty to bargain collectively is enshrined in the LRA”¹²⁰¹ and is “integral to a system that sets out to civilise the workplace, to provide for a fair distribution between wage and profits, keep the economy vibrant and contribute to the wider democratic order”.¹²⁰²

¹¹⁹⁷ See for example also section 89 of the LRA with regard to disclosure of information to a workplace forum discussed in chapter 6 below. The same rules apply disclosure of information to trade unions.

¹¹⁹⁸ See for example the types of information that trade unions are entitled with in terms of the 2008-*Companies Act* discussed in chapter 3 above.

¹¹⁹⁹ O'Regan 1990 *Acta Juridica* 117, see also Esser 2007 *THRHR* 424.

¹²⁰⁰ S 1 of the LRA. My emphasis. One of the aims of the LRA is providing “simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration.” The CCMA was established for these purposes.

¹²⁰¹ Davis and Le Roux 2012 *Acta Juridica* 317.

¹²⁰² Davis and Le Roux 2012 *Acta Juridica* 317 where they refer to Thompson 2006 *ILJ* 785.

Central to collective bargaining is the right to strike and recourse to a lock-out, respectively available to employees and employers. The processes¹²⁰³ of consultation and negotiation,¹²⁰⁴ as well as recourse to lock-out are options available to employers in their use of power in order to facilitate changes to terms and conditions of employees.¹²⁰⁵ Strike action is the economic weapon available to the employees and trade unions in collective bargaining, but is effective only in certain circumstances. A strike is defined by section 213 of the LRA as follows:

the partial or complete *concerted refusal to work*¹²⁰⁶ 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 over 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.

"*Concerted refusal to work*" and the reference to persons clearly indicate that more than one person must be involved in the refusal to work: as is indicated in *Schoeman v Samsung Electronics (Pty) Ltd*¹²⁰⁷ where the Labour Court held that an individual employee cannot strike and that a lock-out can also not be effected against a single employee. However, it is possible for a single employer to lock-out employees.

Du Toit and Ronnie point out, whereas "concerted refusal of work" may at first appear consistent with the notion of a strike as collective action,¹²⁰⁸ "it is submitted that the limitation takes on a new significance in the context of the individualisation of employment

¹²⁰³ See also the distinction between consultation and negotiation in chapter 2 and later chapter 4 of above.

¹²⁰⁴ Hepple adds the following with reference to "negotiation": "'Negotiation' is a concept not limited to interest bargaining. It is a broad enough to embrace any process which involves an active participatory role for all the parties. This approach recognises that there is no single source of power (government, employer etc) but that power comes from many sources and at different levels, and that the focus which influence the exercise of power are usually not straightforward: they may include respect for dignity, the need for political legitimacy, and business interests as well as material resources. It is essential that this negotiation does not take place in a normative vacuum" (Hepple 2012 SALJ 271).

¹²⁰⁵ Davis and Le Roux 2012 *Acta Juridica* 317.

¹²⁰⁶ My emphasis.

¹²⁰⁷ *Schoeman v Samsung Electronics (Pty) Ltd* 1997 10 BLLR 1364 (LC) 1367.

¹²⁰⁸ Du Toit and Ronnie 2012 *Acta Juridica* 206.

and lack of organization which, ... , may justify re-evaluation of the traditional approach".¹²⁰⁹ It is argued that strikes grant workers a meaningful voice regarding what goes on in the workplace and grant them power to stop production and enable them to retain their dignity by showing the employer that they are "not just cogs in a machine".¹²¹⁰

The right to strike, freedom of association and organisation and the right to bargain collectively are interrelated. Yet, Hepple points out that the imbalance of power is "often seen as an objection to negotiation."¹²¹¹ He declares:

In a bipolar adversarial system, the substantive outcome of negotiations rests in the hands of the parties. This will depend on the skills and resources available to each party, and their restrictive strategies. This classic example is collective bargaining between employers and trade unions where the ability of each side to deploy actual or threatened lock-outs and strikes is an essential element in the process. This leads to the characterisation of labour negotiation as power struggles in which the stronger party can dominate the weaker. In an attempt to strike a balance in favour of the weaker party, the law may intervene, for example by courts granting interdicts (injunctions). In some jurisdictions, labour courts or similar bodies may seek to ensure the fairness of the bargaining process by interpreting the duty as being to bargain in 'good faith'.¹²¹²

The right to strike is evidently not only an essential component of the right to freedom of association¹²¹³ but is also "inextricably linked to a process of collective bargaining".¹²¹⁴ The right to strike enjoys a "high degree of protection"¹²¹⁵ in South Africa. Thus, it can be said that the right to strike is

an essential means for the promotion of the social and economic interests of employees and trade unions, based ultimately on the proposition that trade unions should be free to organise their activities and formulate their programmes for the purposes of defending the interests of their members.¹²¹⁶

¹²⁰⁹ Du Toit and Ronnie 2012 *Acta Juridica* 206.

¹²¹⁰ Chicktay 2006 *Obiter* 348.

¹²¹¹ Hepple 2012 *SALJ* 270.

¹²¹² Hepple 2012 *SALJ* 270.

¹²¹³ Manamela and Budeli 2013 *CILSA* 308.

¹²¹⁴ Davis and Le Roux 2012 *Acta Juridica* 319.

¹²¹⁵ Du Toit and Ronnie 2012 *Acta Juridica* 204.

¹²¹⁶ Van Niekerk and Smit (eds) *Law@work* 399.

Yacoob ADCJ (in his majority judgment) in *SATAWU v Moloto*,¹²¹⁷ for example, noted the importance of the right to strike as follows:

the right to strike, rooted in collective bargaining, is premised on the need to introduce greater balance in the relations between employers and employees, where employers have the greater social and economic power.¹²¹⁸

In light of this it can be argued that the right to strike¹²¹⁹ is drawn from the institution of collective bargaining itself and, thus, it can be said that the right to strike is regarded as an essential component of the collective bargaining process.

The right to strike is regarded as “a potential weapon that serves to maintain the equilibrium between labour and the concentrated power of capital”.¹²²⁰ But it is evident from the provisions of the LRA that labour peace and orderly collective bargaining should be promoted. Strike action should be peaceful. It is clear from the provisions of the Act that strike action (and the recourse to a lock-out) should meet certain requirements for it to be protected.

The judgment in *BAWU v Prestige Hotels CC t/a Blue Waters Hotel*¹²²¹ (a pre-1995 case) illustrates that the right to strike and the institution of the lock-out is central to collective bargaining:

¹²¹⁷ *SATAWU v Moloto* 2012 6 SA 249 (CC) para 85.

¹²¹⁸ *SATAWU v Moloto* 2012 6 SA 249 (CC) para 85-86 and held as follows: “The fact that the Act, in section 64, expressly requires minimal procedural pre-conditions for the statutorily protected exercise of that right is consistent with this. It does not ask for the exclusion of uncertainty in strike action, except for certainty when the strike will start. To require more information than the time of its commencement in the strike notice from employees, in order to strengthen the position of the employer, would run counter to the underlying purpose of the right to strike in our Constitution – to level the playing fields of economic and social power already generally tilted in favour of employers”.

¹²¹⁹ See Chapter IV of the LRA with regards to the right to strike and recourse to lock-out.

¹²²⁰ Van Niekerk and Smit (eds) *Law@work* 399.

¹²²¹ *BAWU v Prestige Hotels CC t/a Blue Waters Hotel* 1993 ILJ 963 (LAC) 971J-972A.

... a law[ful] strike is by definition functional in collective bargaining. The collective negotiations between the parties are taken seriously by each other because of the awful risk they face if a settlement is not reached. Either of them may exercise its right to inflict economic harm upon the other. In that sense the threat of a strike or lock-out is conducive and functional to collective bargaining.

The question is relevant to the recent situation where strikes have lasted for long periods of time: when a strike no longer is functional and is merely carrying on for an unspecified period, the CCMA or Labour Court should intervene and suspend the strike and subject the parties to the dispute to compulsory arbitration during which workers return to work to render their services.¹²²²

However, in the LRA there is no provision regarding interest arbitration. In light of the five-month long platinum mine strike in 2014 calls have been made for the introduction of compulsory or interest arbitration when a strike is unresolved and has lasted for a prolonged period of time. However, compulsory arbitration, has its opponents and is regarded “as superficially attractive but fraught with difficulties”.¹²²³ These difficulties can be summarised as follows:

The first difficulty is the constitutionality of such a limitation of the right to strike. The Constitutional Court has recently ruled that it is not for a court to restrict the scope of collective bargaining tactics which, legitimately, may be robust. At the very moment when the strike is proving most effective the requirement to suspend the strike effectively dilutes and removes the weapon from employees. Would the final settlement in the platinum strike have been what it was if the strike had been suspended after three months? In assessing the constitutionality of a further limitation of the right to strike, one of the factors the court would have to consider is the possibility of the retrenchment consultations that an employer can trigger during a strike in terms of s 67(5). This is an existing institutionalised procedure for an employer to signal that the strike is devastating the company, alerting the union that job losses are likely unless the strike is settled. The court may well consider this mechanism is sufficient to meet the situation and is a less restrictive means to achieve the purpose.

The second difficulty with compulsory arbitration is the incentive it provides to prolong the strike in order to get to compulsory arbitration. The risks inherent in wage arbitration are seldom willingly assumed by private sector employers: the loss of control over financial planning, the unpredictability of outcome, the necessary disclosure of confidential data. Yet

¹²²² See the discussion below regarding violent strikes and balloting.

¹²²³ Rycroft 2015 *ILJ* 15.

for a union, the prolonging of the strike has the potential to wrest away from the employer its decision of a chosen settling point and to hand that to a stranger. This attractive outcome for unions therefore has the potential to lengthen rather than shorten strikes. In addition, research from the USA suggests that parties negotiating under an interest arbitration legal regime are more likely to arbitrate and push responsibility off onto the arbitrator, with union and employer leaders declining to take responsibility for making the difficult decisions necessary to respond to the economic environment.

The third difficulty is the 'chilling' and 'narcotic' effects that interest arbitration has on bargaining behaviour. Chilling occurs when neither party is willing to compromise during negotiations in anticipation of an arbitrated settlement; both parties take extreme positions and are not willing to budge. The narcotic effect refers to an increasing dependence of the parties on arbitration, resulting in a loss of ability to negotiate meaningfully.

The fourth difficulty is obtaining arbitrators who have an economic training sufficient to understand the short-term and long-term planning of large employers. An arbitrator will need to be alive to the complexity of balance sheets, long-term planning, the unpredictability of markets, and so on. Will enough CCMA commissioners have the skills to compare data, expose hidden assets, and to recognise dangers of the markets? The code of conduct for commissioners requires commissioners to accept appointments only if they believe that they are available to conduct the process promptly and are competent to undertake the assignment, and to 'decline appointment, withdraw or request technical assistance when they decide that a matter is beyond their competence'. The reference to technical assistance does open the door to the possibility for CCMA arbitrators to have accountant and economist assessors to assist in the process. It seems that if wage arbitration is going to be rational, this extra cost might be necessary. This difficulty is not confined to the level of commissioners: when the matter is taken on review, how easy will it be for LC judges to assess the financial data in order to decide if the award is one which a reasonable arbitrator could not reach?

The fifth difficulty is the terms of reference for the arbitrator. Interest arbitration often uses the criteria of affordability and comparability, but there are no norms in South Africa to assist an arbitrator in setting a wage when the offer is comparable to that offered (or actually paid) by other employers in the same sector but the employer can afford to pay more. Will the terms of reference be 'a fair wage', and if so, what criteria are to be used in arriving at that figure? Will final offer arbitration be used to avoid the chill factor or will an arbitrator be free to choose any wage between final offer and final demand? These are matters that need to be thought through carefully.

The sixth difficulty is that legislation providing for compulsory arbitration will be out of step with recommendations of the ILO. While acceptable where both parties agree to it or where a strike is not permitted, the ILO holds that where compulsory arbitration prevents strike action, it is contrary to the right of trade unions to organise freely their activities and could only be justified in the public service or in essential services in the strict sense of the term.¹²²⁴

In the context of this final point it is noteworthy to look at section 150(5) of the LRA which

¹²²⁴ Rycroft 2015 *ILJ* 15-17.

provides as follows:

Unless the parties to the *dispute* agree otherwise, the appointment of a commissioner in terms of this section does not affect any entitlement, of an *employee* to *strike* or an employer to *lock-out*, that the party to the dispute may have acquired in terms of Chapter IV.¹²²⁵

Rycroft's view of this provision is worth quoting in full:

The section required 'parties to agree' not to suspend the strike, leaving open the question if only one party agreed. One viable interpretation is that if the employer party insisted on the suspension of the strike, but the union party did not, there would have been no agreement. In such circumstances the CCMA's decision to suspend the strike would prevail.

This controversial 'forced cease-fire' was changed in the 2013 Bill to give the assurance that unless the parties agreed otherwise, the appointment of a commissioner in terms of this section did not affect any entitlement of an employee to strike or an employer to lock out where the party might have acquired rights to do so in terms of chapter IV of the LRA. This change - clearer and preferable to the 2010 version made possible a mutually agreed suspension of the strike for the duration of conciliation.

A similar proposed change was made to s 69. The 2012 amendments anticipated the suspension of a strike or lock out in a different context. Amendments provided that in picket-related disputes the Labour Court (LC) could 'grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include ... (c) in the case of a trade union, suspending the picket or strike; or (d) in the case of an employer, suspending the engagement of replacement labour even in circumstances in which this is not otherwise precluded by section 76 or suspending the lock-out'.

This innovative provision was seen to have offered 'a significant impact on strike violence'. But once again the portfolio committee deleted these provisions and the 2014 Amendment Act offers no fresh possibilities for institutionalised mechanisms for dealing with illegal or unprocedural industrial action by either employers or employees. Perhaps a more onerous role will now fall to the LC to do what it has threatened: to remove the protected status of a strike where violence renders the strike dysfunctional.¹²²⁶

To reiterate, this was a lost opportunity to curb the consequences regarding unprotected and prolonged strikes and to shed some light on the appropriate conduct of parties during collective bargaining, including how and when they utilise their respective industrial weapons.

¹²²⁵ See s 24 of the 2014-*Amendment Act*.

¹²²⁶ Rycroft 2015 *ILJ* 5-6.

5.3.2 Limitations to the right to strike

Although the right to strike is recognised by the *Constitution* in section 23(2), the right is not absolute: it may be limited under certain circumstances. First, the limitation applies only to industrial action called by a trade union in support of a demand related to the bargaining process or matters of mutual interest being recognised as a “strike”.

Although the right to strike vests in employees, strikes normally are initiated by trade unions that represent employees and are usually limited to cover “matters of mutual interest” (as discussed below). The LRA also imposes a number of substantive and procedural limitations on the right to strike.¹²²⁷

Strikes and lock-outs are dealt with in Chapter IV of the LRA. The Labour Appeal Court in *CWIU v Plascon Decorative (Inland) (Pty) Ltd*¹²²⁸ summarised this provision as follows:

Strikes and lock-outs are regulated by Chapter IV (sections 64 to 77) of the LRA. Section 64(1) provides in general terms that ‘every employee has the right to strike and every employer has the right to lock-out’, subject to certain conditions. These are set out in sub-paragraphs (a) to (d), read with subsections (2) and (3). They comprise an attempt at conciliation in regard to ‘the issue in dispute’ (sub-paragraph (a)), and notice (sub-paragraphs (b), (c) and (d)). Section 65 is headed ‘Limitations on right to strike or recourse to lock-out’. It provides that ‘no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out’ if (in summary terms) a collective

¹²²⁷

The court in *CWIU v Plascon Decorative (Inland) (Pty) Ltd* 1998 12 BLLR 1191 (LAC) para 7 pointed out the following: “Secondary strikes are dealt with in section 66. In terms of section 66(1), in section 66, ‘secondary strike’ means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees ... have a material interest in that demand’. Section 66(2) prohibits participation in a secondary strike unless the strike that is to be supported complies with the provisions of sections 64 and 65 (sub-paragraph (a)); notice has been given (sub-paragraph (b)) and the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer (sub-paragraph (c))”.

¹²²⁸

CWIU v Plascon Decorative (Inland) (Pty) Ltd 1998 12 BLLR 1191 (LAC) para 7.

agreement prohibits it, the issue in dispute is arbitrable or justiciable or (subject to exceptions) the person is engaged in an essential or a maintenance service.¹²²⁹

Du Toit and Ronnie point out that an implicit limitation which workers in standard employment may not experience as a limitation at all is that the *Constitution* extends the right to strike to every “worker” and that section 64(1) of the LRA confines it to “employees”. They add that this limitation “is significant to the extent that the term ‘worker’ is broader than the term ‘employee’, and changing patterns of production have resulted in work being performed by persons other than employees”.¹²³⁰ Thus there “is a duty on the state to ensure, as far as possible, that not only employees but all workers are able to exercise this right effectively”.¹²³¹ However, it is noted that section 213 of the LRA protects only employees, hence the limitation in section 64 that only employees have the right to strike. If we recall the discussion in chapter two it is evident that the definition of “employee” (and the rebuttable presumption of employment) is broad enough to include the majority of workers.

5.3.3 Matters of mutual interest

Although labour disputes generally are regarded as being either disputes of interest or disputes of right (this terminology is not found in the statutes, see further below), it seems that “matters of mutual interest” are broad enough to include both types of dispute.

Van Niekerk, *et al* are of the view that this classification

¹²²⁹ The recourse to lock out employees from the workplace, on the other hand, is recognised only by the LRA, but it does not mean that the status or protection thereof is lesser or weaker than the right to strike. This sentiment was illustrated in the Constitutional Court’s judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) at para 65 where the court held that: “... the effect of including the right to strike does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers. The right to bargain collectively is expressly recognised by the text...”.

¹²³⁰ Du Toit and Ronnie 2012 *Acta Juridica* 205

¹²³¹ Du Toit and Ronnie 2012 *Acta Juridica* 205

may be a convenient shorthand to distinguish respectively disputes about the creation of new rights and disputes about the application of existing rights, but these labels may lead to confusion when attempting to identify the nature of a particular dispute and its potential destinations under the dispute resolution structure established by the LRA.¹²³²

Collective bargaining mainly focuses on the setting terms and conditions of employment, as well as other matters of mutual interest between employers and employees.¹²³³ It is important to note that the protection of certain basic rights of employees in the promotion of the collective bargaining model is essential. Matters of mutual interest are not defined by the LRA and have been interpreted broadly by the courts.

Section 213 of the LRA defines “dispute” to include an “alleged dispute” whereas an “issue in dispute” in relation to a strike or lock-out, means “the demand, grievance, or dispute that forms the subject matter of the strike or lock-out”. In *City of Johannesburg Metropolitan Municipality v SAMWU*¹²³⁴ the court, with regard to the distinction between demand, grievance and dispute, stated the following:

There are no bright lines between these categories. Sometimes the word ‘demand’ is used in a generic sense to refer to all three categories of strikes; sometimes it is used to refer to demands for higher wages. But these are not statutorily sanctioned requirements. The LRA refers only to a ‘grievance’ or a ‘dispute’. There is thus no statutory requirement for the existence of a deadlock before a referral to either the CCMA or a bargaining council.¹²³⁵

On several occasions the Labour Court has considered the meaning of these concepts.¹²³⁶ In *Gauteng Provinsiale Administrasie v Scheepers*¹²³⁷ the court stated that disputes of right “concern the application or interpretation of existing rights”. A dispute of right is concerned with a right or rights and therefore the origin thereof must be indicated, be it a statute, a

¹²³² Van Niekerk and Smit (eds) *Law@work* 430.

¹²³³ See Qotoyi and Van der Walt 2009 *Obiter* 66 as well as Davis and Le Roux 2012 *Acta Juridica* 317 in this regard.

¹²³⁴ *City of Johannesburg Metropolitan Municipality v SAMWU* 2011 7 BLLR 663 (LC).

¹²³⁵ *City of Johannesburg Metropolitan Municipality v SAMWU* 668E-G.

¹²³⁶ *Sithole v Nogwaza NO* 1999 *ILJ* 2710 (LC) 2719 para 52.

¹²³⁷ *Gauteng Provinsiale Administrasie v Scheepers* 2000 *ILJ* 1305 (LAC) 1309J-1310A.

collective agreement or a contract of employment. In *SA Democratic Teachers Union v Minister of Education*¹²³⁸ the court stated that the term “dispute of interest” has been described as “a term of art” and that although it is widely used in labour relations “it has never been precisely defined but the term generally is well understood”. In *HOSPERSA v Northern Cape Provincial Administration*¹²³⁹ the court held:

A dispute of interest should be dealt with in terms of collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated ... under the pretext that it is a dispute of right. To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject matter of collective bargaining. And if such an individual employee could legitimately insist on his or her particular case being separately adjudicated, whether through arbitration or otherwise, the result would inevitably be a fundamental subversion of the collective bargaining process itself. ... If individuals can properly secure orders that have the effect of determining the evaluation of differing interests on the merits thereof, then the distinction between disputes of interest and disputes of right would be distorted and the collective bargaining process self-evidently would become undermined.

In *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union of SA*,¹²⁴⁰ the court faced the issue as to whether employees could strike in support of a demand for equity shareholding and held (after considering the definition of a strike in terms of section 213 of the LRA) that for a dispute to be brought within the ambit of the definition, it should be in respect of a matter of mutual interest. The court held that “matters of mutual interest” was a broader concept than “terms and conditions of employment” and if a matter is not a “‘term and condition of employment’”, it may still be capable of being brought within the ambit of the concept ‘matters of mutual interest’”.¹²⁴¹ In *De Beers Consolidated Mines Ltd v CCMA*¹²⁴² the Labour Court stated the following: “The term ‘mutual interest’ is not defined in the Act. It must therefore be interpreted literally to mean any issue concerning employment. It has been given a wide

¹²³⁸ *SA Democratic Teachers Union v Minister of Education* 2001 ILJ 2325 (LC) 2340E.

¹²³⁹ *HOSPERSA v Northern Cape Provincial Administration* 2000 ILJ 1066 (LAC) 1070D-H.

¹²⁴⁰ *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union of SA* 2009 ILJ 1099 (LC).

¹²⁴¹ *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union of SA* 2009 ILJ 1099 (LC) 1112g-h.

¹²⁴² *De Beers Consolidated Mines Ltd v CCMA* 2000 5 BLLR 578 (LC) 581C.

interpretation...".

In *Rand Tyre and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal), Minister for Labour & Minister for Justice*¹²⁴³ it was held that matters of mutual interest be defined as

whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them; and there can be no justification for restricting in any way powers which the legislation has been at the greatest pains to frame in the widest possible language.

In *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members*¹²⁴⁴ the court was of the view that the phrase is extremely wide, "potentially encompassing issues of employment in general, not merely matters pertaining to wages and conditions of service" and the court concludes that

the best one can say, therefore, is that any matter which affects employees in the workplace, however indirectly, falls within the scope of the phrase 'matters of mutual interest' and may accordingly form the subject matter of strike action.¹²⁴⁵

A dispute of mutual interest generally refers "to proposals for the creation of new rights or the diminution of existing rights" which are ordinarily to be resolved by collective bargaining.¹²⁴⁶ These matters, *inter alia*, include issues relating to the terms and conditions of employment, such as employee remuneration, service benefits and compensation. Disputes concerning mutual interest include issues such as higher wages, improved conditions of employment or a change to an existing collective agreement.¹²⁴⁷ In *Durban*

¹²⁴³ *Rand Tyre and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal), Minister for Labour & Minister for Justice* 1941 TPD 108 115.

¹²⁴⁴ *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members* 2014 35 ILJ 983 (LAC).

¹²⁴⁵ *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members* 2014 35 ILJ 983 (LAC) para 55-56.

¹²⁴⁶ *Gauteng Provinsiale Administrasie v Scheepers* 2000 ILJ 1305 (LAC) 1309J-1310A.

¹²⁴⁷ Davis and Le Roux 2012 *Acta Juridica* 317.

*City Council v Minister of Labour*¹²⁴⁸ the court held that the term “matter of mutual interest” cannot be without limitation, because, if unlimited, the result would be absurd.

A “matter of mutual interest” is one in which the trade union and employer have a material and simultaneous interest and must be related to the employment relationship between employee and employer. It must also be an issue that can be reduced to or regulated by a collective agreement.¹²⁴⁹ For example, the transfer of employees in terms of section 197 of the LRA is a matter of mutual interest “as bargaining collectively is to secure rights or to protect them when they are threatened by dismissal for operational requirements”.

Some matters of mutual interest are channelled through resolution by means of industrial action, whereas others are resolved through adjudication.¹²⁵⁰ Therefore, it appears that disputes of right are resolved by way of arbitration and adjudication. Disputes arising from “matters of mutual interest” are regarded as disputes of interest and normally are resolved by collective bargaining.¹²⁵¹ Matters of mutual interest, therefore, can include health and safety issues, the dismissal of workers and the negotiation of disciplinary and retrenchment procedures.¹²⁵² It is argued that if a dispute concerns “employee voice”, for example, regarding the strategy of the company, it would constitute a “matter of mutual interest” which calls for the dispute to be resolved by means of collective bargaining. The same could be said with regard to employees demanding a voice on the social and ethics committee as this would be the creation of a new right: neither the LRA nor the *Companies Act* recognises or facilitates such a demand. The dispute, therefore, would be regarded as a “matter of mutual interest”.

An important determining factor is whether such a matter can be dealt with through collective bargaining. It will not include political issues or demands against the state,

¹²⁴⁸ *Durban City Council v Minister of Labour* 1948 1 SA 220 (N) 226.

¹²⁴⁹ Mischke 2001 *CLL* 89.

¹²⁵⁰ *University of the Witwatersrand Johannesburg v Commissioner Hutchinson* 2001 *ILJ* 2496 (LC) 2499 para 7-8.

¹²⁵¹ Qotoyi and Van der Walt 2009 *Obiter* 66.

¹²⁵² Mischke 2001 *CLL* 89.

except if the state is acting as an employer.¹²⁵³ However, it is clear from the decision in *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA*¹²⁵⁴ that matters of mutual interest and interest disputes must not be confused with each other:

is clear from the statutory framework that all interest disputes (broadly, disputes about the creation of new rights) and rights disputes (broadly, disputes about the interpretation and application of existing rights) are subsets in the broader category of disputes about matters of mutual interest. In other words, all interest disputes constitute disputes about matters of mutual interest, but not all disputes about matters of mutual interest are interest disputes.¹²⁵⁵

5.3.3.1 Section 65(c) of the LRA and matters of mutual interest

In the context above regarding the limitations to the right to strike and in determining what constitutes matters of mutual interest have regard to *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA*.¹²⁵⁶

The court with reference to *NUMSA v Bader Bop (Pty) Ltd*,¹²⁵⁷ reiterated that the Constitutional Court held, where the LRA is capable of an interpretation that does not limit fundamental rights, that interpretation should be preferred.¹²⁵⁸ The court also confirmed the fundamental rights' status of the right to strike (as discussed above) and made the following important comments regarding limitations and interpretation:

It is well-established that the provisions of the Act (and in particular, sections 64 and 65, which impose limitations on the right to strike) must be interpreted and applied in a manner

¹²⁵³ Mischke 2001 *CLL* 89 as well as Manamela 2012 *SA Merc LJ* 111.

¹²⁵⁴ *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* 2014 35 *ILJ* 3241 (LC).

¹²⁵⁵ *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* 2014 35 *ILJ* 3241 (LC).

¹²⁵⁶ *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* 2014 35 *ILJ* 3241 (LC).

¹²⁵⁷ *NUMSA v Bader Bop (Pty) Ltd* 2003 2 *BLLR* 103 (CC).

¹²⁵⁸ See for example *South African Police Service v Police and Prison's Civil rights Union* 2011 6 *SA* 1 (CC) where the court confirmed that an important purpose of the LRA is to give effect to the right to strike and that the process of interpretation is important in order to give effect to the purpose "so as to avoid impermissibly limiting the right to strike" (para 30).

which gives best effect to the primary objects of the LRA and its defined purposes. It is equally well-established that where any provision of the LRA is capable of mutually contradictory interpretations, the court should adopt an interpretation that promotes the purposes of the Act, in this instance, orderly collective bargaining and the effective resolution of labour disputes. Given that a necessary element of any strike must be the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, the definition afforded to the term 'mutual interest', in effect, defines the scope of the right to strike. The broader the interpretation, the broader the scope of legitimate strike action. Conversely, were a narrow interpretation to be afforded the term, the scope of right to strike would be accordingly attenuated. For present purposes, an interpretation that gives effect to the Bill of Rights and to the purposes of the LRA requires that 'matters of mutual interest' would serve to exclude those matters that are purely political in nature, or which more properly concern the socio- economic interests of workers.¹²⁵⁹

In the context of this discussion an evaluation of section 65(1)(c) of the LRA becomes relevant. Section 65(1)(c) of the LRA (as amended by the 2014-*Amendment Act* (see below)) excludes the right to strike if "the issue in dispute is one that a party has the right to refer to arbitration or to the labour court in terms of this Act or any other employment law" (meaning a "dispute of right"). Du Toit and Ronnie point out that this prohibition (prior to the last amendments to the LRA) is "consistent with the Interim Constitution, in terms of which the LRA had been drafted, which had confined the right to strike to 'the purposes of collective bargaining'".¹²⁶⁰ They add that the reasons for excluding the right to strike in the case of disputes of right are well-known:

Despite this, the LRA goes on to create two exceptions where representative trade unions are allowed a choice between strike action and arbitration or litigation. This suggests, at the very least, that the possibility of industrial action as a deadlock-breaking mechanism should be considered in a contextual manner rather than dividing disputes into rigid categories where the right to strike is permitted, prohibited or, in terms of s 77, attenuated. It is pertinent to consider that litigation may under certain circumstances be excessively costly, time-consuming or impractical, even when workers have the law on their side, thus depriving them of remedies, and claims thus frustrated may well re-emerge later with renewed intensity. It is therefore suggested that the limitations placed on the right to strike where legal remedies are available, or in socio-economic disputes, should be more nuanced, building on the reasoning

¹²⁵⁹ *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* 2014 35 ILJ 3241 (LC) para 18.

¹²⁶⁰ Du Toit and Ronnie 2012 *Acta Juridica* 208.

reflected in ss 21 and 189A of the LRA with a view to promoting 'effective' dispute resolution rather than industrial peace as an end in itself.¹²⁶¹

The amendment to section 65(1)(c) of the LRA [in terms of the *Labour Relations Amendment Act* 6 of 2014] is extended to disputes that may be referred for adjudication or arbitration in terms of the LRA or any *other employment law*.¹²⁶² it includes not only the UIA, SDA, EEA, the *Occupational Health and Safety Act* 85 of 1993 (OHSA), COIDA, the *Unemployment Insurance Contributions Act* 4 of 2002, as well as regulation issues regulated by the BCEA (during the first year of the determination).¹²⁶³ The amendment overrides the judgment in *Mawethu Civils (Pty) Ltd v National Union of Mineworkers*¹²⁶⁴ where the court held that section 65(1)(c) (prior to the LRA amendment) is confined "to those matters which may be referred for adjudication or arbitration under the LRA. Actions in furtherance of a strike that contravenes the BCEA now constitute offences".¹²⁶⁵ It is clear that the amendment to section 65 of the LRA is to eliminate the anomalous distinction between disputes that can be adjudicated under the Act in respect of which industrial action is currently restricted and those under other employment laws in respect of which there is no equivalent restriction.¹²⁶⁶

¹²⁶¹ Du Toit and Ronnie 2012 *Acta Juridica* 208.

¹²⁶² My emphasis.

¹²⁶³ Grogan 2014 *Employment Law* 8 as well as The Labour Relations Amendment Bill 2014.

¹²⁶⁴ *Mawethu Civils (Pty) Ltd v National Union of Mineworkers* 2013 34 *ILJ* 2624 (LC).

¹²⁶⁵ Grogan 2014 *Employment Law* 8.

¹²⁶⁶ Clause 7 in the memorandum of objects on Labour Relations Amendment Bill, 2012.

5.3.3.2 Dismissal, matters of mutual interest and strikes

The LRA protects workers from dismissal for exercising their rights in terms of the LRA,¹²⁶⁷ as well as for taking part in a protected strike.¹²⁶⁸ The LRA protects the right to freedom of association of employees and prohibits the dismissal of an employee for exercising any right conferred by the LRA or for participating in any proceedings in terms of the LRA.¹²⁶⁹ The dismissal of workers who take part in a protected strike or dismissal for conduct in contemplation or furtherance of a protected strike is regarded as automatically unfair.¹²⁷⁰ However, an employer may dismiss employees taking part in a protected strike for reasons related to their conduct during the strike or for operational requirements.¹²⁷¹

A further important issue with reference to “matters of mutual interest” is the provision to

¹²⁶⁷ S 5 of the LRA.

¹²⁶⁸ S 67(4) of the LRA. For a strike to be regarded as a protected strike the dispute must be referred to the CCMA or a bargaining council for conciliation, a certificate must be issued that the dispute is unresolved or 30 days must have lapsed since the dispute was referred to the CCMA or bargaining council and then at least 48 hours written notice must be given to the employer (7 days notice if the employer is the State). See s 64(1) of the LRA in this regard. Seady and Thompson points out that the purpose of the strike notice would seem to be four-fold:

- “settlement brinksmanship. The notice tells the other party that words are about to escalate into deeds, and by that token offers a last-gasp and pressure-cooker invitation to settle;
- more orderly industrial action. Industrial action is inherently volatile. A lead-in notice affords some opportunity to regulate the event, for instance through agreed or imposed picket rules;
- damage limitation. Strikes (in particular) are intended to cause financial loss, but a notice requirement checks some of the more gratuitous associated damage. For instance, an employer working with perishable goods can take steps to protect stock once it knows that action is imminent;
- health and safety considerations. In the case of certain operations, an orderly wind-down of production might prevent or limit health and safety risks to employees and the public” (Seady and Thompson “Strikes and Lockouts” AA1-314). See also Smit and Fourie 2012 *De Jure* 426-436.

¹²⁶⁹ See s 5(2) and 187(1)(d) of the LRA in this regard.

¹²⁷⁰ S 187(1)(a) of the LRA.

¹²⁷¹ See for example *SACWU v Afrox Ltd* 1999 10 BLLR 1005 (LAC) where the employer claimed that he dismissed employees for reasons related to operational requirements but the trade union argued that the true reason was for taking part in a the strike. The court held that although nothing precludes an employer from dismissing for operational requirements when employees take part in a protected strike that it is, however, necessary to determine the “true reason” for dismissal. The court held that a two-stage approach is necessary in order to determine the “true reason” for dismissal: (i) the actual reason for the dismissal should be enquired by the court, and (ii) if the reasons for the dismissal are both for the strike and operational requirements then the “proximate reason” for dismissal should be identified i.e whether operational requirements played a role in the dismissal of the employees, and, if that is the case, whether they were the cause of the dismissal in a legal sense.

be found in section 187(1)(c) of the LRA. The pre-2014 *Amendment Act* version of section 187(1)(c) of the LRA forbids the dismissal of employees in order *to compel*¹²⁷² them to accept a demand in respect of any mutual interest matter between the employer and employees: it automatically results in unfair dismissal. Nor can an employer unilaterally change the terms and conditions of employment without consulting the trade unions. The amendment to section 187(1)(c) provides that a dismissal is automatically unfair if the reason is *a refusal by employees*¹²⁷³ to accept a demand in respect of any matter of mutual interest between them and their employer.¹²⁷⁴ The amended version makes a refusal by employees to accept a demand relating to a matter of mutual interest automatically unfair “if the dismissal takes *place in consequence* of such a refusal”.¹²⁷⁵ The change may seem small, however, it is significant¹²⁷⁶ in light of *CWIU v Algorax (Pty) Ltd*¹²⁷⁷ and *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA*.¹²⁷⁸ In *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA*¹²⁷⁹ the court held as follows:

A lock-out dismissal entails that the employer wants his existing employees to agree to a change of their terms and conditions of employment. In a lock-out dismissal the employer would take the attitude that, if the employees do not agree to the proposed changes, he would dismiss them – not for operational requirements – but to compel them to agree to the change. In such a case the employees thereafter have the opportunity to agree to the change. When they agree to the change, the dismissal ceases because it has served its purpose. If the employees do not agree to the change after they have been dismissed for the purpose of compelling them to agree, the employer dismisses them finally. The last mentioned dismissal is not a lock-out dismissal. It is an ordinary dismissal for operational requirements.

The crucial difference between the original section 187(1)(c) and the amended version is “that it is no longer a requirement for automatic unfairness that the reason for dismissal is

¹²⁷² My emphasis.

¹²⁷³ My emphasis.

¹²⁷⁴ See s 31 of the 2014-*Amendment Act*.

¹²⁷⁵ Grogan 2014 *Employment Law* 5.

¹²⁷⁶ Grogan 2014 *Employment Law* 5-6.

¹²⁷⁷ *CWIU v Algorax (Pty) Ltd* 2003 11 BLLR 1081 (LAC).

¹²⁷⁸ *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA* 2003 ILJ 133 (LAC).

¹²⁷⁹ *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA* 2003 ILJ 133 (LAC) 146G-147A.

the employer's intention to compel the acceptance of the demand".¹²⁸⁰ Thus the employer's intention is "now removed from the equation" and the dismissals in *CWIU v Algorax (Pty) Ltd*¹²⁸¹ and *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA*¹²⁸² automatically would be unfair.¹²⁸³ It is clear that the amendment to section 187(1)(c) is to give effect to the intention of the provision as enacted in the LRA in 1995, "which is to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept a demand by the employer over a matter of mutual interest"¹²⁸⁴ and is intended "to protect the integrity of the process of collective bargaining under the Act and is consistent with the purposes of the Act".¹²⁸⁵

5.3.3.3 Recourse to lock-out

The employer may negotiate with employees or resort to a lock-out.¹²⁸⁶ Employers can utilise replacement labour as a bargaining tool. Section 76(1)(b) of the LRA provides that an employer can make use of replacement labour only if the lock-out is in response to a strike. Strike action loses its edge in a depressed economy where jobs are scarce and there is a large pool of the unemployed if employers make use of scab or replacement labour when employees strike.

An employer, however, is prohibited from taking into employment any person to continue or maintain production during a protected strike if the whole or part of the employer's services has been designated a maintenance service¹²⁸⁷ or to perform the work of any employee who is locked out, unless the lock-out is in response to a strike,¹²⁸⁸ and only if

¹²⁸⁰ DLA 2014 www.cliffedekkerhofmeyer.com.

¹²⁸¹ *CWIU v Algorax (Pty) Ltd* 2003 11 BLLR 1081 (LAC).

¹²⁸² *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* 2003 ILJ 133 (LAC).

¹²⁸³ Grogan 2014 *Employment Law* 6.

¹²⁸⁴ Clause 31 in the memorandum of objects on *Labour Relations Amendment Bill*, 2012.

¹²⁸⁵ Clause 31 in the memorandum of objects on *Labour Relations Amendment Bill*, 2012.

¹²⁸⁶ Qotoyi and Van der Walt 2009 *Obiter* 67.

¹²⁸⁷ S 76(1)(a) of the LRA.

¹²⁸⁸ S 76(1)(b) of the LRA.

the lock-out is in response to a strike.¹²⁸⁹ In addition, collective bargaining does not challenge management's right to manage: management is accepted as the ultimate decision-maker and these are merely attempts by negotiation to affect those decisions.¹²⁹⁰ Therefore, it is an example of a weak form of employee voice and participation.¹²⁹¹

5.3.3.4 *Beyond wage disputes*

A particular problematic instance refers to essential services and, in general, collective bargaining in the public sector. If the right to strike is limited (as is the case in essential services), employee participation, arguably, becomes even more important. In South Africa the number of unprotected strikes in the public sector, including in essential services, such as the health care services and electricity provision, indicates that neither the collective bargaining model nor the dispute resolution system works effectively in these instances. Unfortunately, in South Africa collective bargaining has, since 2007, become increasingly adversarial, with "a decline in negotiating capacity, the re-emergence of non-workplace issues negotiations, and the rise of general mistrust between the parties"¹²⁹² as the key factors contributing to the worsening atmosphere.¹²⁹³ Demands for the inclusion of social benefit, such as medical aid schemes and the payment of transport and housing allowances, are on the increase.¹²⁹⁴ Workers are not only seeking equality in the workplace

¹²⁸⁹ S 76(2) of the LRA. Todd and Damant illustrate this point as follows: "The employer's ability to use the lock-out as a means of compulsion at the point of impasse has been severely curtailed by the prohibition on the use of replacement labour in employer initiated lock-out. It could be argued that dismissal would, in the circumstances under discussion, not be justifiable for as long as the employer could reasonably be expected to engage temporary alternative labour in place of the existing workforce. The employer could be expected to continue with the power-play rather than dismiss for as long as it could reasonably continue its business by using replacement labour. But the prohibition on the use of replacement labour in employer initiated lock-outs has the effect that an employer may find itself more quickly at the point where it is operationally and commercially justifiable on rational grounds to jettison the existing recalcitrant workforce and go to the cost and effort of replacing it and training a new workforce, rather than continuing to hold out with the existing workforce at the point of impasse" (Todd and Damant 2004 *ILJ* 920).

¹²⁹⁰ O'Regan 1990 *Acta Juridica* 119.

¹²⁹¹ See chapter 4 above.

¹²⁹² National Planning Commission 2012 para 34.

¹²⁹³ Benjamin 2014 *ILJ* 3.

¹²⁹⁴ Benjamin 2014 *ILJ* 4.

but also social justice (in the wide sense falling outside the ambit of collective bargaining) by trying to solve socio-economic conditions through adequate social services is evident from the following:

... although the Labour Relations Act (LRA) permits legitimate protest action in workplace disputes (through CCMA processes) or through socioeconomic protest (through the National Economic Development and Labour Council) it is increasingly clear that workers and broader society do not believe this actually assists them. On several occasions during the platinum-belt disputes, for example, workers raised issues that fall outside the ambit of the collective bargaining process and the scope of the CCMA — for example, demands that employers take responsibility for social delivery they believe is not coming from the government.¹²⁹⁵

The absence of a mutually acceptable benchmark to target wage increases is regarded as a further contributing factor to the difficulty in resolving wage disputes.¹²⁹⁶ There are positive indications as well: the trend to negotiate multi-year (often up to three years) collective agreements, which has become more prevalent in many sectors, contributes to a stable bargaining climate.¹²⁹⁷ These long term-agreements are preferred by employers, notably in the steel and engineering, mining and automobile sectors, to “ensure labour stability in the short/medium term”.¹²⁹⁸

Unfortunately, rivalry within and between trade unions affect dispute resolution in many sectors: “trade union leaders facing a challenge to their position may be pressured into being less conciliatory in negotiations to ward off any criticism that they are insufficiently militant”.¹²⁹⁹ Traditional collective bargaining, in which “deep-seated antagonism rather than any form of partnership or dialogue operates to solve the dispute”, in that the parties go back and forth with high demands and low counter-offers (whichever is more favourable), negotiations resemble no more than a series of “perfunctory motions”.¹³⁰⁰ After a period of back-and-forth, the parties “incrementally remove non-wage related

¹²⁹⁵ Kahn 2012 <http://www.ccma.org.za/News.asp?L1=37>.

¹²⁹⁶ Benjamin 2014 *ILJ* 4.

¹²⁹⁷ Benjamin 2014 *ILJ* 4.

¹²⁹⁸ Benjamin 2014 *ILJ* 4.

¹²⁹⁹ Benjamin 2014 *ILJ* 4.

¹³⁰⁰ Davis and Le Roux 2012 *Acta Juridica* 319-320.

issues from the table”; it then becomes increasingly difficult to breach the gap between their positions, as is especially evident when the issue relates to monetary demands.¹³⁰¹ Then the parties resort to the use of power to put pressure on each other, which, on the part of trade unions, invariably ends in full-blown strike action,¹³⁰² which sometimes becomes violent.

5.3.3.5 *Violent and destructive behaviour*

Benjamin points out that industrial action in recent years “has been characterized by violent and destructive behaviour, as well as ‘an observable contempt of the LRA and court orders’”.¹³⁰³ In this view the use of collective violence, which is aimed either at the employer or at non-striking workers or the general public “to strengthen a bargaining position relative to the employer”, has been normalised to such an extent that it has been established as a tradition.¹³⁰⁴ It is submitted that a violent strike is not “functional to collective bargaining as it is not conducive to bargaining in good faith.”¹³⁰⁵ It is clear that the right to strike does not afford striking employees a licence to engage in criminal and unruly conduct: violence in the course of a strike can be regarded as “an abuse of the right to strike”.¹³⁰⁶ A violent strike is very counterproductive to worker interests, “in that workers do not have the resources to sustain their strikes for any protracted period of time”.¹³⁰⁷ It also “costs employers large amounts in damage to property, the expense of hiring private security firms, and the costs involved in litigation”.¹³⁰⁸

¹³⁰¹ Davis and Le Roux 2012 *Acta Juridica* 320.

¹³⁰² Davis and Le Roux 2012 *Acta Juridica* 320.

¹³⁰³ Benjamin 2014 *ILJ* 10.

¹³⁰⁴ Benjamin 2014 *ILJ* 10.

¹³⁰⁵ Manamela and Budeli 2013 *CILSA* 323.

¹³⁰⁶ Manamela and Budeli 2013 *CILSA* 323. See also *Transport & General Workers Union of Southern Africa v Ullman Bothers (Pty) Ltd* 1989 *ILJ* 1154 (IC); *Food & Allied Workers Union v National Co-operative Dairies Ltd (2)* 1989 *ILJ* 490 (IC); *National Union of Metalworkers of SA v GM Vincent Metal Sections (Pty) Ltd* 1993 *ILJ* 1318 (IC).

¹³⁰⁷ Manamela and Budeli 2013 *CILSA* 323.

¹³⁰⁸ Manamela and Budeli 2013 *CILSA* 323.

5.3.3.6 *Liberals and socialists: addressing the disequilibrium*

Fairness¹³⁰⁹ plays a central role in labour relations in South Africa. Brassey is of the view that the free-market should be a starting-point: “freedom is to be cherished and should not be truncated without cogent and compelling justification”, in addition, the free market is “the best way in which the lives of poor people can be materially improved”.¹³¹⁰ He points out, since “inequality is a source of grievance and social unrest, there is naturally a debate over whether socio-economic relations are best left to the free market”; libertarians and liberals who are ranged against the socialists and social democrats differ on means and methods rather than the object to be achieved.¹³¹¹ Ultimately they share a desire for the same result, which is a society that is genuinely fair.¹³¹²

In the context of the liberal and socialist ideology,¹³¹³ Brassey shows (surprisingly) liberals and socialists¹³¹⁴ find common ground in recognising the benefits of collective bargaining. Brassey adds the following:

Socialists have no qualms with the process, though they sometimes treat it as no more than an intermediate step to a full-blown managed economy. Liberals are more equivocal, but their stance, supposing it comprises more than a knee-jerk reaction, tends to turn on whether they believe the law should control cartels, of which unions and employers' organizations are manifestly a species. Hayek, perhaps the foremost modern exponent of free market principles, is against the regulation of cartels, which he regards as inherently unstable and so self-destructing. As a result, he accepts collective bargaining through unions and employers' organizations, which he rightly sees as but an expression of the corporate

¹³⁰⁹ See chapter 2 above for a discussion on fairness.

¹³¹⁰ Brassey 2013 *ILJ* 824.

¹³¹¹ Brassey 2013 *ILJ* 824.

¹³¹² Brassey 2013 *ILJ* 824.

¹³¹³ See chapter 4 above for a discussion on social and liberal theories.

¹³¹⁴ Brassey points the differences between the liberals and socialists as follows: “Liberals (I leave libertarians aside) seem generally to believe that the solution lies in deregulating the markets. By these means, capitalists are deprived of the benefits of feather-bedding and are subjected to a greater degree of competition that, besides improving the lot of the public generally, expands the pool of job opportunities. Socialists and, in measure, social democrats believe in contrast that the imbalances in the market can only be remedied by a more extensive level of regulation that will act as a corrective. Forget about trickle down, they say, rather we must move directly towards an immediate solution to the problem through social welfare schemes and similar regulatory interventions” (Brassey 2013 *ILJ* 827).

impulse that is revealed in other voluntary associations and in the ordinary trading company.¹³¹⁵

This overlap between the free market and socialist ideologies “may be instrumental in nature, but that is not a reason to regret the happy coincidence.”¹³¹⁶ In acting collectively workers exert power and, to some extent, counteract the structural imbalances in the labour market: that they resort to collective action is of itself natural. The same can be said of the process of collective negotiation:¹³¹⁷ collective bargaining “provides a sensible means for expressing demands that originate in a natural impulse towards collective action.”¹³¹⁸ The benefit of collective bargaining is more than purely instrumental or functional; it also “provides a means by which its institutions can promote democracy within a society that values a plurality of views and their proper expression”.¹³¹⁹ In the workplace how this works is obvious: “collective representatives, assuming they respect the mandates they are given, can speak on behalf of the constituencies they represent and management can respond in kind.”¹³²⁰

5.3.3.7 *Strike ballots*

A possible solution to the problems of lengthy strikes, and/or violent strikes can be found in a call to reintroduce strike ballots, which in an initial amendment to the LRA in 2012.¹³²¹ It is felt with strikes under the spotlight it is necessary to consider whether balloting should be made compulsory or whether compulsory arbitration should be implemented (when strikes are too damaging) and what sanctions “can be meted out for the strike violence that now seems to be regarded as *de rigueur*”.¹³²² These sanctions can include damages

¹³¹⁵ Brassey 2013 *ILJ* 827.

¹³¹⁶ Brassey 2013 *ILJ* 828.

¹³¹⁷ Brassey 2013 *ILJ* 828.

¹³¹⁸ Brassey 2013 *ILJ* 829.

¹³¹⁹ Brassey 2013 *ILJ* 829.

¹³²⁰ Brassey 2013 *ILJ* 829.

¹³²¹ *Labour Relations Amendment Bill*, 2012.

¹³²² Brassey 2013 *ILJ* 827-829.

¹³²² Brassey 2013 *ILJ* 834.

based on violent or unlawful conduct, as well as derecognising and the consequential loss of statutory privileges in cases where trade unions fail to take reasonable steps to control their members.

The amendment to section 64 of the Act and the reintroduction of a ballot before a protected strike or lock-out may commence is not included in the final version of the 2014-*Amendment Act*. The introduction of strike balloting was intended to prevent industrial action being staged if it enjoys only minority support, as violence or intimidation are more likely to occur under these circumstances. The change was proposed in order to respond to the unacceptable high levels of unprotected strike action, as well as the accompanying unlawful acts of intimidation and violence, evident in the strikes in recent years in South Africa. Before calling a strike or lock-out, a trade union or employers' organisation would have to conduct a ballot of its members entitled to participate in the industrial action.¹³²³ As a consequence the strike or lock-out will be protected if a majority of those who vote in the ballot vote in favour of industrial action.¹³²⁴

The 1956-LRA contained balloting requirements but these were not re-enacted in the 1995-LRA.¹³²⁵ A principle reason for the exclusion was that the balloting requirements gave rise to "technical disputes over compliance and there was extensive litigation over this issue".¹³²⁶ The issue could be dealt with by providing that a certificate of compliance issued by the CCMA, a bargaining council or an accredited private agency which will serve as proof that a ballot has been staged in compliance with the statutory requirements.

¹³²³ Memorandum of Objects of the *Labour Relations Amendment Bill*, 2012.

¹³²⁴ Memorandum of Objects of the *Labour Relations Amendment Bill*, 2012.

¹³²⁵ Memorandum of Objects of the *Labour Relations Amendment Bill*, 2012.

¹³²⁶ Memorandum of Objects of the *Labour Relations Amendment Bill*, 2012.

Currently legislation does not require trade unions to conduct strike ballots before notice is given of protected strike action.¹³²⁷ Benjamin points out that many unions “do retain balloting requirements in their constitutions but a failure to comply with these is not a basis for interdicting strike action”.¹³²⁸ Section 67(7) of the in this regard provides that

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*.

Balloting requirements were removed from legislation in 1995.¹³²⁹ There was concern that they provided “fertile soil for employers to interdict strikes and to justify dismissal of

¹³²⁷ S 95(5)(o), (p) and (q) of the LRA provides that the constitution of any registered trade union, *inter alia* must (i) establish the circumstances and manner in which a ballot must be conducted; (ii) provide that the trade union, before calling a strike, must conduct a ballot of those of its members in respect of whom it intends to call the strike; and (iii) provide that members of the trade union may not be disciplined or have their membership terminated for failure or refusal to participate in a strike if no ballot was held about the strike; or a ballot was held but a majority of the members who voted did not vote in favour of the strike. See also *KwaZulu Natal Furniture Manufacturers' Association v National Union of Furniture & Allied Workers of South Africa* 1996 8 BLLR 964 (N) and *National Union of Metalworkers of SA v Jumbo Products CC* 1991 12 ILJ 1048 (IC) with reference to strike ballots and the guidelines required for strike ballots. Rycroft points out that the provisions in s 95(5)(o), (p) and (q) of the LRA aim to regulate the content of the trade union’s constitution which will have the effect that if the constitution does not comply with the provisions the trade union may be refused registration but if a constitution does contain what the LRA says it must, and it therefore constitutes non-compliance with the constitution, for example, a strike ballot is not held as stipulated “then it is entirely up to the union to enforce its constitution” (Rycroft 2015 ILJ 9). The following options are then available to trade union members in such an instance: “The only persuasive measure is that trade union members who refuse to go on strike where no ballot is conducted (or an inconclusive ballot is held) may not be disciplined or lose their membership. Trade union members are however entitled to apply to the LC for an interdict: s 158(1)(e) of the LRA empowers a trade union member to go to the court about alleged non-compliance by the union with its constitution. In addition a trade union member can seek compensation from the union for wrongful advice (eg the proposed strike is protected when it is not) or failing to intervene in illegal action or acting outside the mandate” (Rycroft 2015 ILJ 9).

¹³²⁸ Benjamin 2014 ILJ 1.

¹³²⁹ Rycroft points the following out regarding strike ballots: “As it turned out, it was almost impossible to comply with each and every one of these guidelines, giving employers further opportunities to challenge the legality of a strike. For this reason these guidelines were criticised and led to the removal of the requirement for a strike ballot in the LRA of 1995. Whether or not a ballot is conducted has no bearing on the legality of the strike and the protection afforded to strikers. That does not however mean that the LRA does not anticipate that a strike ballot should still be used to test support for a strike” (Rycroft 2015 ILJ 8).

strikers in strikes that are technically irregular but otherwise functional to collective bargaining".¹³³⁰ Nevertheless the rise in unprotected strikes is a problem that the legislature is trying to address (regard the various versions of the LRA amendments prior to the 2014-*Amendment Act*). However, the problem goes deeper than labour issues: workers seem to use the right to strike as a tool to "fight injustices of inequality".¹³³¹

An amendment to section 65¹³³² of the LRA eliminates the "anomalous distinction between disputes that can be adjudicated under the LRA in respect of which industrial action is currently restricted and those under other employment laws in respect of which there is no equivalent restriction".¹³³³ Ngcukaitobi argues that the consequences of the strike law amendments are profound and that two concerns emerge, as a consequence the Labour Court being granted the power to suspend a strike (or picket) in appropriate circumstances and, also, to suspend a lock-out or suspend an employer from engaging in replacement labour during a strike or lock-out.¹³³⁴ The first concern is "whether they will meet their stated objects of reducing the incidence of strike violence"; the second is "whether they are sufficiently tailor-made to address the true underlying socio-economic realities that lie behind strike violence".¹³³⁵ It appears that neither of these objects will be met.¹³³⁶

The following proposal is also made with reference to strike ballots and the commencement of strikes:¹³³⁷

¹³³⁰ Von Holdt 2010 *Transformation* 135. See also Benjamin 2014 *ILJ* 11.

¹³³¹ Ngcukaitobi 2013 *ILJ* 843.

¹³³² S 7 of the 2014-*Amendment Act* amends s 65 of the principal Act [LRA] is hereby amended—
 (a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:
 "(c) the issue in dispute [is] is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law ;"; and
 (b) by the substitution in subsection (3) for paragraph (b) of the following paragraph:
 "(b) any determination made in terms of [the *Wage Act*] Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in dispute , during the first year of that determination."

¹³³³ Memorandum of Objects of the *Labour Relations Amendment Bill*, 2012.

¹³³⁴ Memorandum of Objects of the *Labour Relations Amendment Bill*, 2012.

¹³³⁵ Ngcukaitobi 2013 *ILJ* 845.

¹³³⁶ Ngcukaitobi 2013 *ILJ* 845.

¹³³⁷ Rycroft 2015 *ILJ* 18-19.

Brand seeks to bring greater focus to the period prior to the commencement of a strike. He does this in two ways. Firstly he proposes that the notice period for a strike should be increased to 14 days, creating a longer period for conciliation. It is nonsensical to oppose this pre-emptive step, but it is important to be aware of a potential problem of this proposal, namely that employees often want to exert pressure to test whether the final offer is the best offer. Levy argues that 'until sufficient time has passed for the parties to actively have a mindset which seeks settlement, then conciliation is unlikely to succeed'. Levy also suggests that conciliation has a greater chance of success once a strike has been in progress for some time; pre-strike conciliation is of limited value if the parties retain a belief that they can achieve more through a strike than the compromise in conciliation.

This argument accords with writings about international conflict resolution where there is a considerable literature on the concept of 'ripeness' to settle, meaning conflict has to be ripe if it is to be feasible for resolution. Ripeness refers to a particular moment in the course of a dispute when circumstances are most conducive to conflict management by an outside actor. Commentators have identified four prerequisites of ripeness: (a) a shared perception of the desirability of a compromise; (b) the ability of leaders to reach a desirable agreement; (c) the agreement must be based on a sufficiently 'rich' compromise in order to allow leaders on both sides to persuade their constituencies; and (d) disputants must agree on an acceptable procedure to deal further with their conflict. It has been argued that it might be more useful to talk less of ripeness and more of the willingness of parties.

This idea of ripeness to settle as a pre-requisite to a successful mediation is, of course, not happy news for mediators in the tense days before a strike. It suggests that the strike must hurt both the strikers and the employer before they will settle, or to put it another way, settlement is only possible when strikers no longer see that the strike will yield a better settlement than one achievable through mediation.

Brand's second suggestion to focus the attention of the parties before the strike begins is the introduction of a right to a secret strike ballot within the 14 days' notice period. Adherence to this requirement can be rewarded with strike protection under the following circumstances: if (a) the ballot is called by any one of the social partners in a workplace; (b) the ballot is conducted by the CCMA or a suitably accredited independent body; (c) the ballot is conducted among the categories of workers who wish to participate in a strike in a workplace; (d) the quorum for the ballot is 50% plus one of those workers who wish to participate in the strike; (e) 50% plus one of those workers who vote, vote in favour of the strike; and (f) the ballot is conducted within the 14-day notice period before a strike, then the ballot will be deemed to be valid for the purposes of any urgent interim court relief sought by any party. A further ballot may be called after 30 days from the date of a previous ballot.¹³³⁸

It was argued (at the stage when a balloting requirement was included) that even if the Bill, if passed into law, does not guarantee an end to unprotected violent strikes: all the proposed ballot requirement does is add additional administrative hurdles to the

¹³³⁸ Rycroft 2015 *ILJ* 18-19.

attainment of protected strike action.¹³³⁹ The proposed ballot requirement seemed to be viewed as a limitation on the power of trade unions, “and generally, an encumbrance to workers’ constitutionally entrenched right to strike”, and to prejudice trade union attempts to exercise the right to strike.¹³⁴⁰ However, although strike balloting was on the agenda prior to the introduction of the 2014-*Amendment Act*, it is unfortunate the Act is silent on the issue.

5.4 Conclusion

In chapter two the different worlds of corporate and labour law were looked at in order to find answers that would achieve synergy between the different functions of labour law and the models and theories in corporate law. This task was challenging as the basic fundamental building blocks of the two disciplines are quite unique and, in some instances, incompatible. A function of labour law is to provide employees with a form of decent work (based on the value or ideal of social justice though inequality remains a problem). In chapter three the role of employees in corporations was looked at, as well as the responsibilities of corporations towards employees: employees are important stakeholders in corporations. In chapter four the different forms and facets of employee participation and voice were examined, which produced the exploration of collective bargaining as a primary means of maintaining and improving employment rewards and conditions in chapter five.

Collective bargaining, as the primary means of achieving the improvement of terms and conditions and as a means on negotiating with employers, has proven to have its limits. Collective bargaining is different from consultation (see chapter two and four above as well as chapter six below). The right to strike and freedom of association and organisation form integral parts of the collective bargaining framework: collective bargaining is akin to

¹³³⁹ Ngcukaitobi 2013 *ILJ* 849-850.

¹³⁴⁰ Ngcukaitobi 2013 *ILJ* 845. See for more detail Ngcukaitobi 2013 *ILJ* 851 regarding concerns with balloting.

negotiation and infers a compromise or agreement on the part of the parties, whereas consultation means to seek counsel or information from the other party.

South-African labour relations are very adversarial, so collective bargaining proves to be problematic: particularly so in the case of workplace forums (see chapter six below), which are very dependent on representative trade unions for their establishment. The use by employees of the right to strike to force employers to give in to their demands is problematic, especially when strikes are unprotected, violent or continue for long periods of time. The sacrifices that employees make in such cases add to the already existing burden and reality of poverty and unemployment in South Africa. Workers, in such instances, opt for a “no work no pay” formula and for the time span of the strike will not receive any wages.

The conflict between shareholders rights, including a return on their investments, and workers rights to decent work and decent remuneration is clear. Negotiations that are based on short-term monetary benefit, without regard to sustainability add to the current unhappy state of affairs. That non-work related issues (linked to the socio-economic conditions of workers) are added to the going list of problems that spill over into work-related collective bargaining and negotiation is a development that requires careful consideration: the system is broken and will have to be fixed.

Strike balloting could provide a solution, especially in the case of the interests of trade unions and their members not being the same. That strikes carry on for long periods of time and lose their purpose is becoming a characteristic of the current state of collective bargaining in South Africa. Violent behaviour, and sometimes lawlessness, that is associated with some strikes add to the existing problem. It is evident that responsible behaviour on the part of trade unions is called for; if there is rivalry between trade unions. That the LRA favours majoritarianism adds to the existing problem of rivalry.

The members of majority trade unions stand to lose a great deal. Minority trade unions want a greater voice in organisations and want access to the same rights as majority representative trade unions. The 2014-*Amendment Act* provides some answers in that minority trade unions can acquire organisational rights, which, ordinarily, would have been reserved to majority unions. The 2014-*Amendment Act* prevents a situation in which a majority representative trade union and employers reach collective agreements which set thresholds in order to acquire organisational rights and make it difficult for other unions to meet the “sufficiently representativity” threshold.

The dispute resolution structures created by labour legislation are undermined by trade unions and their members embarking on unprotected strikes or wild cat strikes that have little or nothing to do with the employer: an unfortunate state of affairs.

On the positive side, collective bargaining has its benefits: it promotes democracy in labour relations, which previously did not exist. It grants employees with freedoms they did not have before; it grants employees access to the bargaining table, which previously they did not have; it grants them economic power they previously did not have.

With freedom comes responsibility. Collective bargaining and the accompanying rights, such as the right to strike, freedom of association, as well as freedom of organisation, are central elements that enable industrial and economic democracy, as well as access to the free market. These rights are enshrined in both the LRA and section 23 of the *Constitution*. Therefore, collective representatives should act with great care when they act and speak on behalf of workers. They should respect the rights of workers (as is expected of employers); they should bring fairness to the bargaining table and should act in good faith (as is expected of employers). The right to strike should be used as a last resort and should be used wisely. It should be used not to cause harm to employers or to force the employers hand at the negotiating table. It is suggested, in order to enable greater participation and voice, that collective bargaining should evolve and adapt in order to accommodate the changes and challenges of the labour market in a global world.

Issues that are not the concern of employers should be removed from the bargaining table and should be addressed at the right forums, for example, service delivery issues should be taken up with local authorities and government and not the employer. In chapter three and four, it was pointed out that employers have great influence and should attempt to assist their workers with regard to issues beyond the organisation or the workplace.

If corporations should act in a socially responsible manner, the same can be expected of trade union leaders. Trust, or the lack of it, is a fundamental problem in South Africa and is one of the reasons why collective bargaining has constraints and limits and is adversarial in nature. In this context it must be remembered that the LRA sets out not only to promote “*labour peace*” but also “*orderly collective bargaining*” and “*the effective resolution of labour disputes*”. What has been noted above regarding the conduct of employees during strikes, violent strikes, inter-union rivalry and so forth go against the purpose of the LRA and its aims.

It is submitted, although collective bargaining (in its current format in South Africa) continues to fulfil an important avenue for workers to make their demands known, it is not a very effective participation institution. However, it is possible (as indicated in chapter six and seven below), even if an effective workplace forum system is not a viable option, that collective bargaining can be restricted to the domain of distributive issues, and non-distributive issues be left to the social and ethics committee (see chapter three above) or to specialised committees such as health and safety, employment equity, and so forth (see chapter six and seven below).

Chapter six addresses the issues regarding workplace forums and why workplace forums have failed to be successful in South Africa.

CHAPTER 6 – CO-DETERMINATION IN SOUTH AFRICA

6.1 General

Workplace forums as they are currently envisaged in the LRA are a dead duck. In the light of the decline in firm and plant-level bargaining a decision needs to be made about the appropriate vehicle through which engagement can take place at this level, particularly with a view to supplementing centralised bargaining. This endeavour will have to deal with the EEA and SDA, because the effect of the employment equity and skills development committees set up in terms of these statutes has been to divorce grading and training issues from the bargaining agenda. These issues are however critical if one wants to link skills to rewards.¹³⁴¹

The idea underlying the introduction of workplace forums, specifically, was to deal with productive issues by consultation and joint decision-making, and which did not fall within the scope of collective bargaining. Collective bargaining primarily, is concerned with issues such as improvements to terms and conditions, higher wages and so forth. Collective bargaining and its associated freedoms and rights focus on the use of power and are a counter to the managerial prerogative of the employer. Employees, as part of the collective process, can embark on strike action in order to force an employer to give in to their demands. Collective bargaining, by its nature, is adversarial. To counter this characteristic of collective bargaining the legislator introduced workplace forums as a complement to the collective bargaining system:¹³⁴² it grants workers participatory decision-making power and a voice, and deals with production issues at a workplace level. Workplace forums have been introduced by the LRA because South African enterprises “have for the most part been characterised by the lack of proper-in-house consultation and joint decision-making powers and competencies for employees”.¹³⁴³

¹³⁴¹ Godfrey, Theron and Visser “The State of Collective Bargaining” 99.

¹³⁴² See chapter 5 above where a workplace forum is identified as a model of participatory structures adjunct to collective bargaining.

¹³⁴³ Olivier “Inchoate Regulation” 451.

Collective bargaining deals with a wide variety of disputes (see chapter five above), which fall within the ambit of “matters of mutual interest”. These matters of mutual interest are not defined, and is broad enough to include disputes of interest or disputes of right:¹³⁴⁴ *inter alia*, they include issues relating to the terms and conditions of employment such as employee remuneration, service benefits and compensation. Disputes concerning mutual interests arise out of issues such as higher wages, improved conditions of employment or a change to an existing collective agreement.¹³⁴⁵

In the past five years South Africa has been plagued by violent and unprotected strikes that extend beyond the workplace and the ambit of collective bargaining. This situation raises the question whether South Africa is ready to find a solution to dealing with non-wage issues, service delivery and other production issues, which, clearly, are not suited to collective bargaining. This chapter explores the position regarding workplace forums in South Africa and whether it is time to reconsider workplace forums (in some amended form) as a viable option for employee participation in decision-making.

The next section addresses the purpose, rationale and establishment of workplace forums in South Africa and explores workplace forums as a viable option for co-determination.¹³⁴⁶

6.2 Workplace Forums

6.2.1 Purpose and rationale for workplace forums

Section 1(d)(iii) of the LRA sets the promotion of employee participation in workplace decision-making as a primary object. The LRA introduced workplace forums as a means of employee participation,¹³⁴⁷ and is part of a series of progressive labour law reforms, of

¹³⁴⁴ See chapter 5 above for a detailed discussion on “matters of mutual interest”.

¹³⁴⁵ Davis and Le Roux 2012 *Acta Juridica* 317. See chapter 5 above for a detailed discussion on “matters of mutual interest”.

¹³⁴⁶ See also Patel 1998 *LDD* 123 in this regard.

¹³⁴⁷ See Van der Walt 2008 *SA J Bus Man* 45-51 in this regard.

which the LRA forms a part.¹³⁴⁸

In European countries, such as Austria, Belgium, Germany and the Netherlands, employee participation mainly takes place in the form of works councils.¹³⁴⁹ Workplace forums are intended to create a “second channel” of industrial relations¹³⁵⁰ or representation:¹³⁵¹ to act, not as an alternative to collective bargaining, but rather as a supplement to it. The introduction of workplace forums by the LRA was regarded as “the most important innovation”.¹³⁵² One of the aims of the provision of workplace forums was to grant employees a voice in the workplace with regard to the “production issues”.¹³⁵³ The need for proper consultation and joint decision-making on “non-distributive issues” (the so-called production issues) affecting the functioning of the enterprise between employers and employees in-house, has long been recognised by both employers and workers.¹³⁵⁴ The voice provided to employees by the LRA relates to decisions that “affect them in their daily work activities”, as well as providing an alternative alongside the existing “conflict-ridden” labour relations model in South Africa.¹³⁵⁵

As wage matters, which typically deal with terms and conditions of employment, “were seen as the essential subject matter of collective bargaining between employers and trade unions, preferably at sectoral level”,¹³⁵⁶ workplace forums are designed to deal largely with “non-wage” issues such as changes in the organisation of work, restructuring, the introduction of new technologies and work methods, health and safety at work. If viewed holistically within the national context, including the LRA, “the workplace forum promoted

¹³⁴⁸ Slabbert *et al Managing Employment Relations* 5-253.

¹³⁴⁹ The position in Germany and the EU will be discussed in chapter 7 below. See also Barchiesi 1998 *Afr Soc Rev* 47-75 for a comparison between the German system of co-determination and the South African system.

¹³⁵⁰ Van Niekerk 1995 *CLL* 32.

¹³⁵¹ Mtayi 1997 *JBL* 98.

¹³⁵² Olivier 1996 *ILJ* 803.

¹³⁵³ Slabbert *et al Managing Employment Relations* 5-25 as well as Steadman 2004 *ILJ* 1171.

¹³⁵⁴ Slabbert *et al Managing Employment Relations* 5-253. See also Manamela 2002 *SA Merc LJ* 732 with regard to distributive and co-operative issues. The struggle over wages and working conditions exists versus the prevailing reality regarding actual production figures.

¹³⁵⁵ Slabbert *et al Managing Employment Relations* 5-253.

¹³⁵⁶ Du Toit *et al Labour Relations Law* (2006) 343 and (2015) 389.

the narrowest form of dialogue between labour and capital, firstly, at the level of the workplace".¹³⁵⁷ In turn, "this underpinned collective bargaining at the sectoral level and social dialogue at national or regional level, conducted primarily through the establishment of the National Economic Development and Labour Council (NEDLAC)".¹³⁵⁸ Von Holdt questions the separation of distributive and co-operative issues as follows:

The union will engage directly in collective bargaining over wages and conditions, either through the shopstewards in the workplace or in a centralised bargaining forum. Employee representatives, on the other hand, will engage in consultation and joint decision-making on production and human resources with management via the workplace forums. This separation is based on the assumption that collective bargaining relations are conflictual, whereas production and human resource issues should be dealt with co-operatively. At a theoretical level this assumption is questionable. Workers and managers often have sharply opposing interests on production issues – health and safety, training, production targets, supervision and staffing levels. These issues impact on costs and profits. This means conflict. Only through a combination of organisational strength and legal rights can workers compel managers to take their views into account. The separation of collective bargaining (conflict) and production (co-operation) is a management ploy to weaken union involvement in production.¹³⁵⁹

The reasoning behind the separation between distributive and co-operative issues (i.e. "the assumption that collective bargaining relations are conflictual, whereas production and human resource issues should be dealt with co-operatively"), Von Holdt declares is based on a questionable assumption (at a theoretical level) based on the fact that workers and managers often have opposing interests on production issues, and in turn, these impact on costs and profits and, ultimately, bring about conflict.

Although, generally, a characteristic of adversarial collective bargaining in South Africa, it need not be the case. Although workers and employers have different agendas regarding production issues, co-operation between them will mandate, for example, workers need to adhere to health and safety requirements, not only as a legal requirement and from a liability perspective, but because the whole operation is in jeopardy if health and safety

¹³⁵⁷ Davis and Le Roux 2012 *Acta Juridica* 318.

¹³⁵⁸ Davis and Le Roux 2012 *Acta Juridica* 318.

¹³⁵⁹ Von Holdt 1995 *SA Lab Bull* 60.

requirements are not adhered to. The employer and the union may have different ideas in this regard it is an important issue and requires co-operation. Also, it might not be possible to agree on training (including the type of personnel that qualifies for training in a specific cycle): the parties may have conflicting views, an agreement must be reached on the categories of employees that will be trained in a specific cycle. If we look at production targets, for example, the employer may have certain targets in mind and the trade union agrees to meet these targets subject to additional remuneration for overtime and so forth: regardless of conflicting views the parties will have to co-operate. In this instance it would benefit the organisation as a whole (also the workers) if the company is more profitable, which may translate into pay rises, the improvement of benefits for workers and dividends for shareholders and more money available for expansion.

It is submitted that conflict is not necessarily a bad thing: differing viewpoints compel managers to take the views of workers into account, a practice which not only strengthens the organisational and legal rights of workers but, ultimately, benefits the organisation as a whole, because co-operative management leads to more effective and efficient dispute resolution. Furthermore, it is submitted that when distributive and co-operative issues are separated, generally, it results in a more efficient and effective collective bargaining process, as the bargaining issues are limited to wage issues. The non-wage issues are dealt with at workplace forum level. Thus, the model should not be seen as a ploy of management to weaken union involvement in production, but rather as extending the footprint of workers into decision-making and granting them a greater voice with regard to issues that directly or indirectly affect them in the workplace.

Even before the enactment of the LRA there was strong support for the basic premise of the workplace forum proposal. Summers, for example, articulated that he do not believe that "a society can be democratic, an economy can prosper and workers improve their life if management and employees see each other as adversaries":¹³⁶⁰ inevitably, they compete for the returns from the enterprise, but they have "a common interest in increasing those

¹³⁶⁰ Summers 1995 *ILJ* 809.

returns".¹³⁶¹ Cooperation in the workplace is essential because it not only makes work safer and more satisfying, but also makes it more productive. Summers therefore submits that a collective bargaining system "must be construed to encourage that cooperation".¹³⁶² Steadman is of the view that "effective participation will only take place when the conditions are optimum, ie where a mature relationship exists between the parties or where they both recognize the need to engage meaningfully".¹³⁶³ In addition, she identifies as a requirement a well-established collective bargaining system.¹³⁶⁴ In 1995, Van Niekerk (now a judge of the Labour Court) highlighted the following with regard to the workplace and the danger of "mindless" adversarialism:

Workplace forums represent a bold experiment in employee participation in decision-making. Whether the proposal is both bold and misguided remains to be seen. It has been argued that the struggle to repair the [S]outh African economy will be won or lost in the workplace. The acid test for the new Act is its capacity to contribute to that process by facilitating the upgrading of skills, economic growth and the creation of jobs. What the Act can do is construct a framework within which confrontation can yield to consensus seeking. But the Act can never compel consensus, nor can it create co-operation in the absence of either the will or the capacity of the parties concerned to recognise the destructive force of mindless adversarialism.¹³⁶⁵

The Explanatory Memorandum to the Labour Relations Bill, 1995,¹³⁶⁶ motivated the creation of workplace forums as designed to facilitate the shift from adversarial collective bargaining on all matters to joint problem-solving and participation relating to certain aspects in the workplace. *The Exploratory Memorandum* further states:

In creating a structure for ongoing dialogue between management and workers, statutory recognition is given to the realisation that unless workers and managers work together more effectively they will fail adequately to improve productivity and living standards. Workplace

¹³⁶¹ Summers 1995 *ILJ* 809.

¹³⁶² Summers 1995 *ILJ* 809.

¹³⁶³ Steadman 2004 *ILJ* 1193.

¹³⁶⁴ Steadman 2004 *ILJ* 1193.

¹³⁶⁵ Van Niekerk 1995 *CLL* 39.

¹³⁶⁶ Explanatory Memorandum 1995 *ILJ* 310.

forums are designed to perform functions that collective bargaining cannot easily achieve: the joint solution of problems and the resolution of conflicts over production.¹³⁶⁷

Thus, two assumptions underlie the LRA's provisions on workplace forums: in order for South Africa to respond to the challenges brought about by globalisation, productivity levels should be improved, which can only be achieved if a more cooperative relationship exists between labour and management.¹³⁶⁸ The issues (indicated above) that will contribute to "increased productivity" are unsuited to collective bargaining.¹³⁶⁹ It does not mean that conflict between management and workers will be eliminated completely but it ensures that conflictual relations will be removed from the organisation of production.¹³⁷⁰ *The Exploratory Memorandum* claims that the purpose of workplace forums is "not to undermine collective bargaining but to supplement it", which will be achieved by "relieving collective bargaining of functions to which it is not well suited".¹³⁷¹ Therefore, the LRA envisages a "clear and strict institutional separation" between workplace forums and collective bargaining in order to "to keep distributive bargaining and cooperative relations apart, so as to allow the latter an opportunity to develop".¹³⁷²

It is evident from the RDP¹³⁷³ that worker participation should be facilitated in decision-making. The inclusive approach¹³⁷⁴ is echoed in *King II* and *III*, which recognise different internal and external stakeholders, including employees and trade unions. These reports demonstrate managers and directors of companies no longer can avoid workplace partnerships,¹³⁷⁵ to include "participation of stakeholders, not only on *peripheral issues*, but also on *key strategic issues*".¹³⁷⁶

¹³⁶⁷ Explanatory Memorandum 1995 *ILJ* 310. See also Godfrey, Hirschsohn and Maree 1998 *LDD* 86.

¹³⁶⁸ Klerck 1999 *Transformation* 14.

¹³⁶⁹ Klerck 1999 *Transformation* 14.

¹³⁷⁰ Klerck 1999 *Transformation* 14.

¹³⁷¹ Explanatory Memorandum 1995 *ILJ* 315. See also Klerck 1999 *Transformation* 14.

¹³⁷² Explanatory Memorandum 1995 *ILJ* 316. See also Klerck 1999 *Transformation* 14.

¹³⁷³ See chapters 2 and 4 above for a discussion on the RDP.

¹³⁷⁴ See chapters 2 and 3 above for a discussion on the inclusive approach.

¹³⁷⁵ Olivier "Inchoate Regulation" 451.

¹³⁷⁶ Olivier "Inchoate Regulation" 451. My emphasis.

Trade unions (as indicated) can be regarded as internal stakeholders; workplace forums can be added to the list.¹³⁷⁷ However, trade unions differ from workplace forums: as illustrated as follows:

Workplace forums differ from trade unions. They are 'in-house' institutions operating within a particular company or division. Trade unions generally draw their membership from the staffs of a number of employers. The membership of workplace forums is confined to employees of the particular employer, excluding managerial employees.¹³⁷⁸

In South Africa, historically, trade unions have been hostile to forms of workplace consultation because they believe it may result in "co-option by management and the blunting of class struggle".¹³⁷⁹ On the other hand, the LRA seeks to encourage "non-adversarial consultation" on issues such as productivity and workplace grievances by establishing workplace forums.¹³⁸⁰ this objective is evident in that it promotes joint-problem-solving by introducing a statutory forum for both consultation and joint decision-making to "augment" collective bargaining at workplace level.¹³⁸¹

Klerck points out that the provisions on workplace forums mirror the logic underlying lean production¹³⁸² and flexible specialisation, and include issues such as securing employee commitment through participation, providing information and consultation arrangements, tapping the reservoir of knowledge about work processes possessed by employees, and an emphasis on the role of employee cooperation and harmonious labour relations in

¹³⁷⁷ Olivier "Inchoate Regulation" 451.

¹³⁷⁸ Grogan *Workplace Law* 330.

¹³⁷⁹ Hepple 2012 *SALJ* 265.

¹³⁸⁰ Hepple 2012 *SALJ* 265.

¹³⁸¹ See also Du Toit *et al Labour Relations Law* (2006) 31 in this regard.

¹³⁸² Klerck points out the following with regard to "lean production": "The 'flexible' or 'lean' firm is said to be characterised by an ability to adapt rapidly to changes in consumer demand. The alleged shift from economies of scale (mass production) to economies of scope (lean production) has necessitated a greater emphasis on employee cooperation, Workplace forums, employee participation and lean production multi-skilling, team work, and a layering of the managerial hierarchy (see Womack et al 1990). The establishment of quality circles, just-in-time inventories, semi-autonomous work groups etc, are presented as a move away from alienated, deskilled employment towards new forms of participation and high trust relations. In fact, social integration, workplace harmony and equilibrium are central components in the account of a shift towards more flexible forms of employment" (Klerck 1999 *Transformation* 4-5). See also chapter 4 above regarding team work, quality circles etc.

improving quality and efficiency.¹³⁸³ It is clear that all of this can be achieved by using the existing legal framework.

It can be argued that a voice and participation in decision-making provide workers with a more active role and a greater input: employees can provide more information on a production issue if the employer consults with them and improvement in the information flow takes place. Workplace forums facilitate this information flow, because they ensure that employees are more committed to participation: emphasis is on the role of employee cooperation and harmonious labour relations, which, ultimately, will improve quality and efficiency in the organisation (see for example the general functions in section 79 as well as those regarding consultation and joint decision-making in sections 84 and 86 of the LRA below).

¹³⁸³ Klerck 1999 *Transformation* 6. See Okharedia 2007 *Convergence* 86-89 with regard to efficiency of workplace forums in South Africa. Okharedia examines whether efficiency can be achieved through workplace forums by looking at the *Marxian, Scientific Management and Human Relations Approaches*: (i) *The Marxian Approach* is based on the works of Karl Marx who was of the opinion that "the primary element in capitalist relations is the polarity between the producers of surplus value (employees) and those who appropriate surplus value (employers)" and thus the commodification of labour in the workplace creates "an antagonistic relationship between the producers(employees) and non-producers (employers). Employees are aware of the surplus value (excess profit) from their work and that only the employer enjoys that profit and thus there is no way that they can be motivated to increase their efficiency. According to Marx the surplus profit is regarded as stolen property by the which belongs to the employees (Okharedia 2007 *Convergence* 86) Okharedia is of the view that "the establishment of a workplace forum will not increase the efficiency of the employee, except where such a forum is concerned with how to share or return surplus profit to the employees" and thus "when mutual benefits exist between the employer and the employee that the workplace forum will be able to achieve its goals and objectives" (Okharedia 2007 *Convergence* 86). (ii) *The Scientific Management Approach* is based on how to increase productivity and is of the view that the main responsibility to achieve efficiency falls on the shoulders of management. A radical separation between planning and the performance of work is required based on the premise that workers may not be left alone to solve problems there are confronted with in the work environment and that the responsibility of training workers to perform their tasks in the best way falls on managers Okharedia 2007 *Convergence* 87). (iii) *The Human Relations Approach* focuses on the "common patterns of behaviour, values and beliefs which emerge through the interaction of individuals working together" and also "attempts an analytical distinction between the formal and the informal aspects of the organisation" (Okharedia 2007 *Convergence* 87). Okharedia sums the dilemma of human relations scholars up as follows: "Human relations scholars have a utopian view of internal democracy and participation. When advising employee participation at the organisational level, they are immediately confronted with the dilemma that they either propose 'pseudocracy', where employees are given the opportunity to participate only in decisions which do not hurt management; or they propose real participation, which implies that the manager should cede part of his power to his employees. Of course, no manager, except the eccentric philanthropist, will sacrifice his own interests for altruistic purposes" Okharedia 2007 *Convergence* 88).

Olivier states the idea of corporatism in the notion of employee participation seeks to provide an alternative or a supplement to the “conflict relationship which has become so much part and parcel” of South African employment relations.¹³⁸⁴ Corporatism works, in principle, on a presupposition, which is sometimes vehemently contested, namely, that clear a distinction should be drawn between collective bargaining and workplace forum activity.¹³⁸⁵ Two consequences flow from this presupposition: (i) production issues for which participatory structures are ideally suited should be institutionally separated from distributive issues meant for collective bargaining;¹³⁸⁶ and (ii) the institutional separation implies structural separation, which means that “the adversarial and co-operative structures should ideally operate at different levels, in order to avoid unnecessary conflict and competition from arising”.¹³⁸⁷ In order for the system to work, collective bargaining must be restricted to central level structures, whereas participation at plant level deals with day-to-day workplace issues and is not subjected to “the antagonisms generated by bargaining”.¹³⁸⁸

6.2.2 Establishment of workplace forums

Workplace forums grant significant new rights to employees and also to trade unions. The LRA provides for statutory protection to the participation of employees in workplace forums. Sections 79 and 82 of the LRA provide that all employees in the workplace, and not just union members, elect workplace forums and the workplace forum is charged with representing the entire workforce.¹³⁸⁹ Workplace forums can be established in any

¹³⁸⁴ Slabbert *et al Managing Employment Relations* 5-147.

¹³⁸⁵ Slabbert *et al Managing Employment Relations* 5-147.

¹³⁸⁶ See also Smith 2000 *Ga J Int'l & Comp L* 615.

¹³⁸⁷ Slabbert *et al Managing Employment Relations* 5-147.

¹³⁸⁸ Summers 1995 *ILJ* 807; Slabbert *et al Managing Employment Relations* 5-147.

¹³⁸⁹ See s 79 and 82 of the LRA as well as Du Toit *et al Labour Relations Law* (2006) 31 in this regard. See also Delpont 1995 *De Jure* 416.

workplace¹³⁹⁰ where the employer employs 100 or more employees, and a trade on its own is a majority representative union(s) or two or more registered trade unions acting together represent the majority of employees employed by the employer at the workplace.¹³⁹¹ The application for establishment of a workplace forum can be made to the CCMA.¹³⁹² A representative trade union that is recognised in terms of a collective agreement by an employer for purposes of collective bargaining in respect of all employees

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The notion of “workplace” is crucial to the establishment of workplace forums and as the LRA suggests a workplace is greater than a place of work in one geographic location (Slabbert *et al Managing Employment Relations* 5-145; Steadman 2004 *ILJ* 1172). A workplace in relation to the public service for purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, as the case may be; or for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994), or any party of the public service that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace (s 213 of the LRA). A workplace in all other instances means the place or places where the employees of an employer work. If an employer carries or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation (s 213 of the LRA). It appears that the first sentence of the definition which refers to the place or places where the employees of the employer work is seen “as determinative” and separate employer workplaces “will only be recognised where the employer is conducting *truly independent operations*” (Slabbert *et al Managing Employment Relations* 5-145-5-146. Original emphasis). See also with regard to what constitutes a workplace the following case law: *SACCAWU v Medlife* (CCMA award of 7 May 1997); *Speciality Stores Ltd v SACCAWU* [1997] BLLR 1099 (LC); *Oil Chemical and General Workers Union v Total SA* 1999 *ILJ* 2176 (CCMA); *SACCAWU v The Hub* 1999 *ILJ* 479 (CCMA) and *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co Ltd v Association of Mineworkers & Construction Union* 2014 35 *ILJ* 1243 (LC). See also the newly added section 21(8)(b)(v) of the LRA as amended by the *Labour Relations Amendment Act* 6 of 2014 in this context: “the composition of the work-force in the *workplace* taking into account the extent to which there are *employees* assigned to work by temporary employment services, *employees* employed on fixed term contracts, part-time *employees* or *employees* in other categories of non-standard employment ...”.

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S 80(1) of the LRA. Hepple “Comparing Employee Involvement” 89 with reference to the role of trade unions in the establishment of workplace forums points out the following differences between the South African workplace forum system and German works council system: “In Germany, while unions do not have an exclusive right, they enjoy a number of rights in respect to the election process that give them a significant role in the establishment of the works council. As is well known, the German Unions have to a large extent succeeded in ‘capturing’ the works councils. At first sight, the South African unions have de jure a similar role and powers as German unions have de facto in relation to works councils. But appearances are deceptive. The South African unions suffer from internal divisions, they do not have independent resources for training and expert assistance, and above all, they lack a coherent strategy in relation to workplace forums. This lack of strategy is partly ideological: the fear that the workplace forums actually functioning in South Africa is extremely limited”. See also chapter 7 below for a detailed discussion on German works councils.

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S 80(2) of the LRA.

in a workplace, may also apply to the CCMA for the establishment of a workplace forum.¹³⁹³

Workplace forums can take four forms:¹³⁹⁴

- (i) a bargained workplace forum based on a collective agreement which was entered into between the representative trade union and the employer;¹³⁹⁵
- (ii) a workplace forum with a bargained constitution;¹³⁹⁶
- (iii) a workplace forum constitution by a commissioner of the CCMA;¹³⁹⁷ and
- (iv) a trade union based workplace forum.¹³⁹⁸

The employer is not a part of such a forum:

[u]nlike some of its counterparts that the statutory system does not provide for the employer to be part of or represented on the forum: the forum is rather seen as a body representing employee interests with which the employer has to engage before certain measures can be implemented.¹³⁹⁹

Section 79 in Chapter V of the LRA sets out the general functions of workplace forums as follows:¹⁴⁰⁰

- i) to seek to promote the interests of *all employees*¹⁴⁰¹ in the workplace (whether or not they are union members);
- ii) to enhance efficiency in the workplace;
- iii) to be consulted by the employer with a view to reach consensus on the matters listed in section 84; and

¹³⁹³ S 81(1) of the LRA.

¹³⁹⁴ Steadman 2004 *ILJ* 1172.

¹³⁹⁵ S 80(7) of the LRA.

¹³⁹⁶ S 80(9) of the LRA.

¹³⁹⁷ S 80(9) of the LRA.

¹³⁹⁸ S 80(10) of the LRA.

¹³⁹⁹ Slabbert *et al Managing Employment Relations* 5-145.

¹⁴⁰⁰ See also Du Toit 1997 *LDD* 39-67 for more detail on the establishment of workplace forums and their powers and functions as well as Wood and Mahabir 2001 *IRJ* 230-243 for a general overview of the history and background of workplace forums.

¹⁴⁰¹ My emphasis.

- iv) to participate in joint decision-making about the matters referred to in section 86.

From a reading of section 79 it clearly applies to *all employees* and not only to members of unions. Senior managerial employees,¹⁴⁰² specifically, are excluded. In the case of a trade union based workplace forum the representative union will have decision-making powers in order to decide who will represent employees in the workplace forum.¹⁴⁰³ In most cases it will be shop stewards. Employees who are not members of the representative trade union¹⁴⁰⁴ will not be able to elect representatives other than shop stewards.¹⁴⁰⁵

6.2.3 Workplace forums functions and powers

The LRA has foreseen three forms of participation rights by workplace forums which are exercisable against the employer, namely consultation, joint decision-making and information-sharing.¹⁴⁰⁶ Although these participation rights are limited to certain issues it is clear that they constitute an infringement on the managerial prerogative of the employer.¹⁴⁰⁷ Du Toit is of the view that a fundamental challenge in South Africa is to develop “bargaining” structures, which “will be appropriate to decentralized employment relations” and may include “a wide range of methods of participation including consultation rights”.¹⁴⁰⁸

¹⁴⁰² S 78(a) of the LRA provides that an employee means any person who is employed in a *workplace*, except a senior managerial *employee* whose contract of employment or status confers the authority to represent the employer in dealings with the workplace forum or determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace.

¹⁴⁰³ See s 81 and 82(1)(j))i) and (ii) of the LRA.

¹⁴⁰⁴ A representative trade union means a registered *trade union*, or more registered *trade unions* acting jointly, that have as members the majority of the *employees* employed by an employer in a workplace (s 78 of the LRA).

¹⁴⁰⁵ See also Steadman 2004 *ILJ* 1171 in this regard.

¹⁴⁰⁶ Olivier “Inchoate Regulation” 453; Slabbert *et al Managing Employment Relations* 5-148-5-149.

¹⁴⁰⁷ Slabbert *et al Managing Employment Relations* 5-149. See also chapters 2 and 4 above for a detailed discussion on the managerial prerogative.

¹⁴⁰⁸ Du Toit 2007 *ILJ* 1426.

6.2.3.1 Consultation

Currently, consultation is required on the matters listed in section 84, whereas joint decision-making is required for matters listed in section 86. Consultation requires the employer “to do more than notify the forum of any proposal and in good faith to consider any suggestions it may make”.¹⁴⁰⁹ Du Toit points out consultation and joint decision-making are not the same as collective bargaining but there are distinct points of connection between them: both processes involve discussion between employers and employees “on a collective basis over employment related issues” and for the employer “accustomed to dealing with employees in an autocratic or paternalistic way, as well as for workers, crossing one threshold may assist in crossing the other”.¹⁴¹⁰

Section 85(1) requires, before an employer implements a proposal on any of the topics in section 84(1), the employer “must consult the workplace forum and attempt to reach consensus with it”. Extensive inroad into management’s prerogative is made because the employer must obtain more than the opinion of the employee representatives on the issues.¹⁴¹¹ It seems that “consultation” means “negotiation”, because there must be an attempt by the employer to reach consensus.¹⁴¹² The employer must allow the workplace forum to make representations and advance alternative proposals and if the employer disagrees, it must state reasons for its disagreement.¹⁴¹³

The definition of consultation in section 85(1) of the LRA is a departure from international practice where the employer, generally, after hearing the workplace forum’s views will decide; rather it is “akin to good faith bargaining”.¹⁴¹⁴ This could have the effect of prolonging the consultation process and force the employer into various procedures before

¹⁴⁰⁹ Grogan *Workplace Law* 332.

¹⁴¹⁰ Du Toit 1995 *ILJ* 803.

¹⁴¹¹ Slabbert *et al Managing Employment Relations* 5-259.

¹⁴¹² Steadman 2004 *ILJ* 1174.

¹⁴¹³ S 85(2) and (3) of the LRA.

¹⁴¹⁴ Steadman 2004 *ILJ* 1173.

acting.¹⁴¹⁵ Section 85(4) of the LRA provides, if the employer and the workplace forum cannot reach consensus, the employer must invoke any agreed procedure to resolve any differences before implementing the proposal. The implication of this “agreed deadlock-breaking mechanism”, in principle, is that it remains possible to embark upon industrial action; unless the agreed procedure provides otherwise.¹⁴¹⁶

This position appears not only to be unusual feature of consultation provided by the LRA,¹⁴¹⁷ but, also, is regarded as unfortunate,¹⁴¹⁸ based on the fact that it is the “very essence of cooperative systems that parties should not be allowed to use their economic weapons when agreement cannot be reached, but rather to make use of appropriate alternative dispute resolution mechanisms”.¹⁴¹⁹ Immense strain is put on the cooperative relationship, which could ruin the cooperative endeavour from the outset, since adversarial elements are brought into the relationship if the use of economic power is allowed.¹⁴²⁰

An employer must consult on the following matters:¹⁴²¹

- (i) restructuring of the workplace (including the introduction of new technology and work methods);
- (ii) changes in the organisation of work;
- (iii) export promotion;
- (iv) job grading;
- (v) education and training;
- (vi) product development plans;
- (vii) partial or total plant closures;
- (viii) mergers and transfers of ownership in so far as they have an impact on the employees;

¹⁴¹⁵ Steadman 2004 *ILJ* 1173.

¹⁴¹⁶ Slabbert *et al Managing Employment Relations* 5-259.

¹⁴¹⁷ Steadman 2004 *ILJ* 1173.

¹⁴¹⁸ Olivier 1996 *ILJ* 813.

¹⁴¹⁹ Olivier 1996 *ILJ* 813.

¹⁴²⁰ Olivier 1996 *ILJ* 813.

¹⁴²¹ S 84(1) of the LRA.

- (ix) the dismissal of employees for reasons based on operational requirements;
- (x) exemptions from any collective agreement or any law; and
- (xi) criteria for merit increases or the payment of discretionary bonuses.

The above list can be extended. A bargaining council confer on a workplace forum the right to be consulted about additional matters that fall within the registered scope of the bargaining council.¹⁴²² A representative trade union and an employer may also conclude a collective agreement conferring on a workplace forum the right to be consulted about any additional matters¹⁴²³ and any law may confer on a workplace forum the right to be consulted about additional matters.¹⁴²⁴ An agreement can be reached that the workplace forum can also exercise health and safety functions.¹⁴²⁵ The issues for consultation, therefore, may be said to broadly cover many matters of mutual interest.¹⁴²⁶

It has been said that “consultation”, in effect, “represents an extension of collective bargaining to the level of the workplace”.¹⁴²⁷ Grogan points out that the LRA prescribes that an employer shall consult a forum “with a view to reaching consensus” which “seems to come very close to what is normally understood to be collective bargaining”.¹⁴²⁸ He adds that “[a]ny premature implementation of a proposal under consultation may be reversed by the appointed arbitrator of the CCMA”.¹⁴²⁹ As indicated above, this ruling holds certain risks for a successful cooperative model.

¹⁴²² S 84(2) of the LRA.

¹⁴²³ S 84(3) of the LRA.

¹⁴²⁴ S 84(4) of the LRA.

¹⁴²⁵ S 84(5) of the LRA.

¹⁴²⁶ See chapter 5 above.

¹⁴²⁷ Anstey *Employee Participation* 164.

¹⁴²⁸ Grogan *Workplace Law* 333.

¹⁴²⁹ Grogan *Workplace Law* 333.

6.2.3.2 *Joint decision-making*

The employer must enter into joint decision-making once the workplace forum is established.¹⁴³⁰ Joint decision-making places serious limitations on the managerial prerogative of the employer: the employer is compelled to obtain concurrence with the workplace forum on certain matters that are subject to joint decision-making.¹⁴³¹ Joint decision-making requires the employer to consult with the workplace forum *and* reach consensus.¹⁴³² Joint decision-making fundamentally breaks with “unilateralism and hierarchical decision-making” in the workplace, because workers can prevent management from deciding on a particular issue unless the consent of the workplace forum has been obtained.¹⁴³³ In these instances, a proposal may not be implemented without the forum’s consent.¹⁴³⁴

The following matters require joint decision-making:

- (i) disciplinary codes and procedures,
- (ii) measures designed to protect and advance persons disadvantaged by unfair discrimination,
- (iii) rules for the proper regulation of the workplace other than work-related conduct and
- (iv) changes to rules of employer-controlled social benefit schemes by the employer or employer-representatives on the trusts or boards governing such schemes are included as topics for joint decision-making.¹⁴³⁵

A collective agreement can be concluded between a representative trade union and an employer conferring on the workplace forum the right to joint decision-making on additional matters or removing any matter in section 86(1) from the list of matters

¹⁴³⁰ S 86(1) of the LRA.

¹⁴³¹ Slabbert *et al Managing Employment Relations* 5-149. See also Satgar 1997 *LDD* 45.

¹⁴³² S 86(1) of the LRA.

¹⁴³³ Slabbert *et al Managing Employment Relations* 5-149. See also Satgar 1997 *LDD* 45.

¹⁴³⁴ S 86(1) of the LRA.

¹⁴³⁵ S 86(1) of the LRA.

requiring joint decision-making.¹⁴³⁶ Any other law may also confer the right to participate in joint decision-making matters on the workplace forum.¹⁴³⁷

If the employer and the workplace forum cannot reach consensus, the employer must refer the dispute to arbitration in accordance with an agreed procedure or, if there is no agreed procedure, refer the dispute to the CCMA.¹⁴³⁸ The employer must satisfy the CCMA that a copy of the referral has been served on the chairperson of the workplace forum. The CCMA must attempt to resolve the dispute through conciliation and, if it remains unresolved, the employer may request that the dispute be resolved through arbitration.¹⁴³⁹

In the case of section 86-matters the employer may not unilaterally implement a proposal. The right to strike over such issues does not exist¹⁴⁴⁰ and the parties are subject to alternative dispute resolution processes to settle a dispute concerning matters regarding joint decision-making.¹⁴⁴¹ However, the LRA does not exclude the possibility that employees may embark on strike action if no agreement can be reached on a matter that is the subject of consultation.¹⁴⁴² This situation is unfortunate, "as it is the very essence of co-operative systems that parties should not be allowed to use their economic weapons when agreement cannot be reached, but rather to make use of appropriate alternative dispute resolution mechanisms".¹⁴⁴³ To act to the contrary "would put immense strain on

¹⁴³⁶ S 86(2) of the LRA.

¹⁴³⁷ S 86(3) of the LRA.

¹⁴³⁸ S 86(4) of the LRA.

¹⁴³⁹ S 86(5)-(8) of the LRA.

¹⁴⁴⁰ Steadman 2004 *ILJ* 1174.

¹⁴⁴¹ Slabbert *et al Managing Employment Relations* 5-266.

¹⁴⁴² Hepple "Comparing Employee Involvement" 90 points the following differences out regarding consultation and strikes in South Africa with reference to works councils and the German system: "The workplace forums have consultation rights in respect of various matters. Although the employer must 'attempt to reach consensus' with the forum, if the parties are unable to agree, the employer may withdraw the proposal or implement it unilaterally. Unlike the case of the German works council, industrial action is possible after the consultation process has failed. This is an implicit acknowledgement that the South African model, unlike the German one, is not in fact based on 'social partnership'. At a deeper level, the retention of the right to strike reflects a serious doubt as to whether the distinction between distributive issues (reserved for bargaining and strikes) and non-distributive ones (for workplace forums) can be realistically maintained." See also chapter 7 below for a detailed discussion on German works councils.

¹⁴⁴³ Slabbert *et al Managing Employment Relations* 5-266.

the co-operative nature of the relationship, could ruin the whole endeavour, and could introduce adversarial elements into the relationship".¹⁴⁴⁴ In this context the fundamental difference between consultation as found in section 84 of the LRA and joint decision-making as found in section 86(1) of the LRA is well described as follows:

This provides that, unless it is agreed otherwise, the employer must consult *and reach consensus with the workplace forum before implementing any proposal* on the reserved list. However, the final result of a deadlock over these issues may be much the same as a deadlock in mandatory consultation. The deadlock breaking mechanism set out in s 86 makes this clear. It provides that if the employer does not reach consensus with the workplace forum on any issue reserved for mandatory joint decision-making, the employer may refer the dispute to arbitration in terms of any agreed procedure or, if there is no agreed procedure, to the CCMA for conciliation and, if necessary, arbitration. So an arbitrator or CCMA commissioner has the final say in both cases.¹⁴⁴⁵

6.2.3.3 Information-sharing

Coupled with the rights to consultation and joint decision-making is the right to disclosure of information.¹⁴⁴⁶ The information must be relevant, that is, information which allows the workplace forum to engage in consultation and/or joint decision-making.¹⁴⁴⁷ No reciprocal obligation exists to disclose information: only employers are obliged to disclose information, no obligation rests upon the workplace forum.¹⁴⁴⁸ If information is confidential, the employer must notify the workplace forum in writing that the information disclosed is confidential.¹⁴⁴⁹ A dispute must be referred to the CCMA for conciliation if a

¹⁴⁴⁴ Slabbert *et al Managing Employment Relations* 5-266.

¹⁴⁴⁵ Grogan *Collective Labour Law* 104-105. Original emphasis.

¹⁴⁴⁶ S 89(1) of the LRA. See chapter 4 above with regard to the type of information (s 14 and 16 of the LRA) that must be disclosed to the bargaining party as well as the discussion in chapter 3 regarding the *Companies Act*.

¹⁴⁴⁷ See *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1994 ILJ 1247 (A); *Public Servants Association obo Strydom v Department of Housing & Local Government* 1997 18 ILJ 1127 (CCMA); *Geerdts v Multichoice Africa* 1998 3 LLD 446 (LAC); *Rand Water Staff Association obo Snyman v Rand Water* 2001 22 ILJ 1461 with regard to the type of information that may and may not be disclosed.

¹⁴⁴⁸ Steadman 2004 ILJ 1173.

¹⁴⁴⁹ S 89(2A) of the LRA.

dispute exists with regard to the disclosure of information, and should the dispute be unresolved any party may request for it to be referred to arbitration.¹⁴⁵⁰

The commissioner has the power to decide whether the information is relevant. If the commissioner so decides and if it is information regarding an employee's private personal information or the employer's confidential information, then the commissioner must "balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of the workplace forum to engage effectively in consultation and joint decision-making".¹⁴⁵¹ If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of information on terms designed to limit the harm likely to be caused to the employee or the employer.¹⁴⁵²

When the commissioner makes an order in terms of section 89(9) of the LRA, the commissioner must take into account any breach of confidentiality in respect of the information being disclosed and the commissioner has the power to refuse to order the disclosure of requested information and any other confidential information that might otherwise be disclosed for a period specified in the arbitration award.¹⁴⁵³ Section 91 of LRA further provides that if the commissioner finds in a dispute (about an allegation of breach of confidentiality) that such breach has occurred, the commissioner may order the withdrawal of the right to disclosure of information in that workplace for a period specified in the arbitration award. The regulation therefore penalises the misuse of confidential information *ex post facto*.

¹⁴⁵⁰ S 89(3)-(6) of the LRA.

¹⁴⁵¹ S 89(7)-(8) of the LRA.

¹⁴⁵² S 89(9) of the LRA.

¹⁴⁵³ S 89(10) of the LRA.

6.2.3.4 Consultation, joint decision-making and the Companies Act

Du Toit *et al* points out that the duty of joint decision-making and, arguably, that of consultation, may limit the constitutional right to property. However, such a limitation falls within the scope permitted by the *Constitution*.¹⁴⁵⁴ With reference to the German Co-Determination Act and the decision of the German constitutional court in 1979,¹⁴⁵⁵ Du Toit *et al* further point out that the act, which requires equal representation for employees on supervisory boards of larger companies, “did not violate the guarantee of private ownership of the means of production in the German constitution”.¹⁴⁵⁶ The German court found that “the right to use property” must be construed in a social context.¹⁴⁵⁷ It is submitted that a “similar construction is implicit in South Africa’s Constitution”.¹⁴⁵⁸ Du Toit *et al* point out (with reference to the company law dispensation under the *Companies Act* 61 of 1973) that a tension exists between the requirements of Chapter V of the LRA and certain rules of company law. Du Toit *et al* illustrate this dilemma as follows:

The common law places a duty on company directors to act in the best interests of the company and refrain from exercising their powers in the interests of any other persons. Sections 84, 85 and 86 of the LRA, however, require employers to seek consensus with the workplace forums on matters subject to consultation and joint decision-making. Where the duties of the employer are performed by directors, it follows that they must be prepared to compromise shareholders’ interests in order to comply with chapter V. To that extent statute prevails over common law, directors’ engagement in consultation and joint decision-making is implicitly authorised by the LRA. It is conceivable, however, that shareholders may in some cases challenge the outcome as being detrimental to their interests.¹⁴⁵⁹

¹⁴⁵⁴ Du Toit *et al Labour Relations Law* (2006) 344.

¹⁴⁵⁵ See chapter 7 above for a detailed discussion on co-determination in Germany.

¹⁴⁵⁶ Du Toit *et al Labour Relations Law* (2006) 344-345.

¹⁴⁵⁷ Du Toit *et al Labour Relations Law* (2006) 345.

¹⁴⁵⁸ Du Toit *et al Labour Relations Law* (2006) 345.

¹⁴⁵⁹ Du Toit *et al Labour Relations Law* (2006) 345.

The dilemma illustrated above exists in the new company law dispensation as well.¹⁴⁶⁰ The 2008-*Companies Act* contains provisions dealing with directors' general duties that are comparable to the common-law duties of directors and, in essence, creates a semi- or *quasi*-codification of their common-law duties.¹⁴⁶¹ Directors should promote the interests of shareholders as well as embrace wider responsibilities: the process should be complementary, not contradictory. The legislature follows the enlightened shareholder approach in which the interests of shareholders remain central, but other stakeholders' interests must be taken into account.¹⁴⁶² The 2008-*Companies Act* is interpreted to be inclusive of other interests and thus enhances a pluralist approach.¹⁴⁶³ The legitimate interests and expectations of various stakeholders taken into account in the decision-making process requires a balancing act to be achieved by the board of directors.¹⁴⁶⁴ Therefore, companies must also consider and comply with employee/labour legislation, amongst other things, that deals with health and safety at work, equal opportunities, and so forth.

A closer look at the 2008-*Companies Act*¹⁴⁶⁵ reveals that new rights are created by the 2008-*Companies Act* with regards to employee participation. Trade unions or, if there is no trade union in place, the employees themselves, are regarded as affected persons and, for example, may initiate business-rescue proceedings.¹⁴⁶⁶ Trade unions also now gain access to the company's financial statements for purposes of initiating a business-rescue

¹⁴⁶⁰ In context of the 2008-*Companies Act* Du Toit *et al* points the following out: "In itself, mere compliance with a requirement of the LRA or any other statute cannot amount to breach of a director's duties in terms of the Companies Act. It is, however, open to interpretation how far 'compliance' permits directors to compromise shareholders' interests and it is conceivable that shareholders may challenge a negotiated compromise with a workplace forum as being in breach of the duty owed to the, by the directors" (Du Toit *et al Labour Relations Law* (2015) 391).

¹⁴⁶¹ See the discussion on duties of directors in detail in chapter 2 and 3 above.

¹⁴⁶² See the discussion on duties of directors in detail in chapter 2 and 3 above.

¹⁴⁶³ See the discussion on duties of directors in detail in chapter 2 and 3 above.

¹⁴⁶⁴ See the discussion on duties of directors in detail in chapter 2 and 3 above.

¹⁴⁶⁵ See chapter 3 above for a discussion on the *Companies Act*.

¹⁴⁶⁶ See for example s 128(1)(a), 129 and 131 of the 2008-*Companies Act*. See the discussion of duties of directors in detail in chapter 2 and 3 above.

process.¹⁴⁶⁷ It must be noted, however, that the 1973-*Companies Act* also placed restrictions on the decision-making powers of directors.¹⁴⁶⁸ Section 228 of the 1973-*Companies Act*, for example, provided that directors may not dispose of the whole or substantially the whole of the undertaking of the company or its assets without the approval of the members in general meeting.¹⁴⁶⁹ Section 112 of the 2008-*Companies Act* (in a similar vein to section 228 of the 1973-*Companies Act*) provides that a company may not dispose of all or the greater part of its assets or undertaking unless (a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115, and (b) the company has satisfied all other requirements in section 115, to the extent those requirements are applicable to such a disposal. Section 112(4) of the 2008-*Companies Act* further provides that “[a]ny part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner”. Section 115 of the 2008-*Companies Act* provides despite section 65, any contrary provision of the company’s MOI or any board resolution or resolution of security holders, that a company may not dispose of, or give effect to an agreement or series of agreements to dispose of all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme or arrangement *unless* the disposal has been approved in terms of section 115 by means of shareholder approval.

Reading section 112(2) together with section 115(1) reveals, unless the transaction receives the requisite shareholder approval, the company may not dispose of or give effect to an agreement to dispose of all or the greater part of its assets.¹⁴⁷⁰ The provisions contained in section 112 of the 2008-*Companies Act* (similar to that of section 228 of the 1973-*Companies Act*) place directors under a duty to seek consensus with a workplace forum over these matters, which could lead to difficulties deciding whether terms

¹⁴⁶⁷ S 31(3) of the 2008-*Companies Act*. See in detail in chapter 2 and 3 above for a discussion of new rights created by the 2008-*Companies Act*.

¹⁴⁶⁸ Du Toit *et al Labour Relations Law* (2006) 345.

¹⁴⁶⁹ Du Toit *et al Labour Relations Law* (2006) 345.

¹⁴⁷⁰ Cassim *et al Contemporary Company Law* 719.

acceptable to the workplace forum, indeed, are acceptable to the shareholders and *vice versa*.¹⁴⁷¹

In terms of section 84 of the LRA issues that a workplace forum must be consulted on are where mergers and transfers of ownership in so far as they have an impact on the employees. A closer look at the section on business-rescue provisions in the 2008-*Companies Act* regarding affected persons provides guidance: an affected person includes any registered trade union representing employees of the company and, if there is no such trade union representing employees, the employees themselves or their representatives.¹⁴⁷² A workplace forum therefore falls within the definition of an “affected person” as they represent *all employees’ not just trade union members*.¹⁴⁷³ The consequence thus attached to section 112 of the 2008-*Companies Act* that directors are bound by the decision of the shareholders could frustrate the objectives of the LRA and “create a dilemma that may ultimately have constitutional implications”.¹⁴⁷⁴ In terms of section 84 of the LRA, a consensus reached at/with the workplace forum is binding on the employer. If such a consensus-seeking exercise were not binding, it would be to disregard the spirit of the LRA and would make such a provision senseless.

In addition to the provision in section 84 of the LRA, section 23 of the LRA provides that employers and employees or their trade unions are entitled to enter into binding collective agreements. It is possible that trade unions or a workplace forum, as a precautionary measure, may insist on entering into a collective agreement on issues which they have reached consensus on.¹⁴⁷⁵ It is submitted, if a workplace forum’s consultation or joint-decision-making is regarded as a complementary process to collective bargaining, it would make no sense to limit their functions and powers to enter into collective agreements in terms of sections 84 and 86. These issues would be removed from the collective

¹⁴⁷¹ See also Du Toit *et al Labour Relations Law* (2006) 345 and (2015) 391 in this regard.

¹⁴⁷² S 128(1)(a) of the *Companies Act*.

¹⁴⁷³ My emphasis.

¹⁴⁷⁴ Du Toit *et al Labour Relations Law* (2006) 345 and (2015) 391.

¹⁴⁷⁵ Du Toit *et al Labour Relations Law* (2006) 345.

bargaining table, and, therefore, would not be competing collective agreements in one workplace (i.e. contrary agreements concluded with the workplace forum and trade union(s) respectively). Another possibility is that a consensus arrived at with a workplace forum “may create contractual obligations between an employer and members of the workplace forum, either in their personal capacities or as agents of other employees”.¹⁴⁷⁶ As mentioned earlier, workplace forums can take four forms,¹⁴⁷⁷ which give them the proper mandate and legitimacy to enter into ordinary contractual as well as collective agreements. Although workplace forums obtain the power to enter into “collective agreements”, these collective agreements are not statutory collective agreements and, therefore, section 23 of the LRA, for example, is not applicable to such an agreement between employer and workplace forum.

6.2.4 Problems and concerns regarding workplace forums

Workplace forums as a model for employee participation remain unpopular¹⁴⁷⁸ and largely unsuccessful. Olivier, for example, notes that unlike the position in some European countries such as the Netherlands and Germany, that the LRA “lacks a provision to the effect that workplace forums may initiate consultation or joint decision making in respect of a particular matter”.¹⁴⁷⁹ In South Africa the employer remains the initiator, depriving the workplace forum of the ability to be proactive.

Collective bargaining is the primary means of negotiating with employers in that it still is largely concerned with settling the terms and conditions of employment and the resolution of disputes between employers and employees. The idea of the drafters of the 1995-LRA

¹⁴⁷⁶ Du Toit *et al Labour Relations Law* (2006) 345.

¹⁴⁷⁷ These forms are (i) a bargained workplace forum based on a collective agreement which was entered into between the representative trade union and the employer; (ii) a workplace forum with a bargained constitution; (iii) a workplace forum constitution by a commissioner of the CCMA; and (iv) a trade union based workplace forum. See discussion above.

¹⁴⁷⁸ Du Toit *et al Labour Relations Law* (2006) 45 and (2015) 53.

¹⁴⁷⁹ Olivier 1996 *ILJ* 805.

(novel as it seems to be) was to depart from the tradition of collective bargaining between trade unions and employers and, instead, to provide for “more co-operative interaction between management and labour alongside collective bargaining” in order to allow non-wage issues “that previously fell within the scope of managerial prerogative” to be dealt with through consultation and joint-decision-making.¹⁴⁸⁰ Regrettably, after almost 20 years, the LRA, *prima facie* has not succeeded in giving effect to this object and goal. Du Toit adds that the challenge largely has been obscured by the controversy surrounding the provisions for the establishment of workplace forms in chapter V of the LRA and that workplace forums, originally, were presented as serving an unfortunate purpose:

... that of facilitating ‘major restructuring of the economy by promoting a shift from ‘adversarial collective bargaining on all matters to joint problem-solving and participation on certain [production-related] subjects’. This would be done by creating a ‘second channel’ of industrial relations, partly modelled on the works councils of Germany and the Netherlands. The message thus sent to unions was ominous: restructuring and job losses that unions would fight tooth and nail in the bargaining arena were expected to find greater acceptance if negotiated with ‘non-adversarial’ workplace forums. Not even the fact that the LRA ultimately gave unions all but absolute control over workplace forums could disarm unions’ suspicions or dispel the belief that workplace forums, however constituted, would inevitably serve as cats’ paws for employers and sow divisions among workers.¹⁴⁸¹

The quotation makes clear that the move away from adversarialism was unsuccessful, as trade unions did not relinquish their control over production-related issues, such as restructuring. Trade unions, *de facto*, have prevented workplace forums from being set up, by exercising their veto power or by not initiating the process for the establishment of a workplace forum. If the provisions of the LRA are compared to those of the EEA, it is clear from the EEA that the obligation to consult on employment equity “does not affect the obligation to consult and reach ‘consensus’ with a workplace forum, where one exists”:¹⁴⁸² unlike the LRA, the EEA does not define the content of the duty to consult. The meaning of “consultation” under the LRA is:

- (i) putting a proposal rather than completed decisions to employee representatives;

¹⁴⁸⁰ Du Toit *et al Labour Relations Law* (2006) 341 and (2015) 387.

¹⁴⁸¹ Du Toit 2007 *ILJ* 1426.

¹⁴⁸² Hepple 2012 *SALJ* 265-266.

- (ii) disclosing all relevant information;
- (iii) allowing representatives to respond to these proposals; and
- (iv) responding to alternative proposals and, if not acceptable to the employer, explaining its reasons for the rejection thereof.¹⁴⁸³

The EEA's Code of Good Practice recommends a more informal approach, which includes the opportunity to meet and report back, a reasonable opportunity to meet employers and to request, receive and consider information. The Code suggests that a workplace forum or consultative forum representing both designated and non-designated employees should either be utilised or established.¹⁴⁸⁴ However, there is no reliable data which shows the extent to which employment equity issues are discussed by the (few) workplace forums that exist.¹⁴⁸⁵ Benjamin points the following out with regard to difficulties with the current regulation of workplace forums:

The LRA's vision was that workplace forums would serve as a vehicle for developing long-term cooperative dialogue between employers and trade unions, thereby reducing the level of adversarialism in collective bargaining. This has not materialized: trade unions have rejected the workplace forum route and distributive collective bargaining remains the primary mode of interaction. However, one commentator has suggested that the combination of high expectations and extreme inequality has inevitably caused the focus on distributive bargaining, which holds out the prospects of short-term gains.¹⁴⁸⁶

As noted earlier, the focus of workplace forums is non-distributive issues that include restructuring of the workplace (including the introduction of new technology and work methods), changes in the organisation of work, education and training, the dismissal of employees for reasons based on operational requirements, and so forth. Whereas collective bargaining is concerned with issues regarding the terms and conditions of employment and matters of mutual interest, which include dispute resolution regarding

¹⁴⁸³ Hepple 2012 *SALJ* 266.

¹⁴⁸⁴ Hepple 2012 *SALJ* 266.

¹⁴⁸⁵ Hepple 2012 *SALJ* 266.

¹⁴⁸⁶ Benjamin 2014 *ILJ* 5-6.

issues such as improved conditions of employment, higher wages or changes to existing collective agreements.¹⁴⁸⁷

These concerns with regard to workplace forums, however, are not unique to South Africa. In Italy and France, trade unions have a priority right to monitor candidates for election to works councils and thus retain control over the process of selection and ensure a direct link with the trade union. In Sweden, trade unions retain the sole power within structures in the workplace.¹⁴⁸⁸

In South Africa the reason for the non-establishment of workplace forums is the Congress of South African Trade Unions' (COSATU's) continuing opposition.¹⁴⁸⁹ COSATU is of the view that workplace forums undermine or clash with shop steward committees and, therefore, weaken the trade union organisation.¹⁴⁹⁰ Trade unions mistrust the workplace forum system in the sense that they feel that it might have an impact on their power in the workplace.¹⁴⁹¹ thus they fear that that consultation will leave power in the hands of the employer.¹⁴⁹² If trade unions with an existing and strong base in the workplace leave matters to the workplace forum (so the argument goes) the employer will be in the driving seat, because, for matters listed in section 84 it is required that an employer must attempt to reach consensus and no agreement, therefore, is necessary.

¹⁴⁸⁷ See also Davis and Le Roux 2012 *Acta Juridica* 317-318.

¹⁴⁸⁸ Finnemore *Labour Relations* 255.

¹⁴⁸⁹ See COSATU'S view already in 1997 regarding the establishment of workplace forums: "The new LRA makes provision for workplace forums, triggered by majority unions, as vehicles for workplace democracy. While it is significant that this legislation institutionalises workers' rights to workplace democracy, workplace forums as outlined in the legislation hold many dangers for unions (and employers). We strongly support the argument that workplace forums should be *union-based* rather than independently elected. In other words, the powers of information, consultation and joint decision-making should be conferred directly on the shopstewards [sic] committee; alternatively, the shopsteward committee should nominate members to the workplace forum. Otherwise there is a danger that the workplace forum will either become a substitute for the shopsteward committee, or will be a very weak consultative forum. A workplace forum independent from union structures will be a recipe for division" (COSATU 1997 <http://www.cosatu.org.za>).

¹⁴⁹⁰ Du Toit *et al Labour Relations Law* (2006) 45 and (2015) 54.

¹⁴⁹¹ Steadman 2004 *ILJ* 1189.

¹⁴⁹² Finnemore *Labour Relations* 255.

However, trade unions were not alone, as concerns were also voiced by the management representatives who were of the view “that the drafters had adopted a method of enforcement rather than enablement, and that the principles of voluntarism had been ignored”.¹⁴⁹³ Further, the model was perceived as introducing “far-reaching new rights for employees going to the heart of business effectiveness and efficiency while there was no corresponding protection for employers against the abuse and misuse of these rights by employees”.¹⁴⁹⁴

Olivier contends that the LRA failed to reconcile the tension between “workplace unionism/collective bargaining and the workplace activity”, and also failed to meet the “need to democratise the workplace and the need to increase efficiency and productivity”.¹⁴⁹⁵ Brassey suggests that workplace forums is “the result of a misshapen beast that no one seems keen to ride”.¹⁴⁹⁶ It has become apparent that the introduction of the workplace forums was met with distrust on the part of both labour and capital: as labour thought the process of collective bargaining will be compromised and capital was concerned that the managerial prerogative would be undermined in the workplace forum.¹⁴⁹⁷ The system ultimately put forward was one in which the powers of workplace forums were diluted: safeguards were built in to ensure that they operated in favour of the trade union movement.¹⁴⁹⁸ The perceived trade-off appears to be quite unsuccessful as the position regarding workplace forums and their legitimacy is regarded as neither fowl nor fish.

The biggest flaw, as illustrated by commentators, is that trade unions, normally, negotiate with employers on matters listed in sections 84 and 86, but now the negotiation could fall to the workplace forum, in which the employer must attempt to reach consensus or is subject to joint decision-making (rather than bargain and reach agreement). Hepple points

¹⁴⁹³ Steadman 2004 *ILJ* 1175.

¹⁴⁹⁴ Steadman 2004 *ILJ* 1175.

¹⁴⁹⁵ Olivier 1996 *ILJ* 807.

¹⁴⁹⁶ Brassey *et al* *Commentary on the Labour Relations Act* A5-1.

¹⁴⁹⁷ Davis and Le Roux 2012 *Acta Juridica* 319.

¹⁴⁹⁸ Davis and Le Roux 2012 *Acta Juridica* 319.

out that the number of matters required for joint decision-making is extremely limited compared to the extensive powers a German works council has regarding co-determination.¹⁴⁹⁹ The list of co-decision matters can be extended by means of collective agreements, but no evidence exists that employers are willing to agree to these extensions.¹⁵⁰⁰

Other peculiar aspects, in order to establish a workplace forum, include that there must be more than 100 employees in the workplace and that any representative trade union¹⁵⁰¹ may apply to the Commission for Conciliation, Mediation and Arbitration (CCMA) for the establishment of a workplace forum.¹⁵⁰²

First, this aspect excludes many workplaces due to the size requirement. Second, the dominant role of trade unions severely threatens the aim of the LRA, that of promoting employee participation.¹⁵⁰³ Olivier is of the view that the fact that only majority trade unions (or trade unions who together represent the majority of employees) may apply for the establishment of a workplace forum is “an extraordinary requirement given the realities of the South African scenario”, and that the relatively modest level of union membership makes it “wholly inappropriate to require that majority unions should serve as the compulsory trigger for the establishment of a forum”.¹⁵⁰⁴

The dependency on majority trade unions to initiate a workplace forum disempowers non-unionised employees because most members of the workplace forum will come from the trade union: which serves the interests of majority unions and their members and threatens the promotion of the needs of all employees.¹⁵⁰⁵ Brassey adds that the provision

¹⁴⁹⁹ Hepple “Comparing Employee Involvement” 90.

¹⁵⁰⁰ Hepple “Comparing Employee Involvement” 90.

¹⁵⁰¹ A representative trade union means “a registered trade union or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace” (s 78(b) of the LRA).

¹⁵⁰² S 80 of the LRA.

¹⁵⁰³ Van der Walt 2008 *SA J Bus Man* 47.

¹⁵⁰⁴ Olivier 1996 *ILJ* 810.

¹⁵⁰⁵ Olivier 1996 *ILJ* 811.

in the LRA for workplace forums, which was included in the hope that negotiations might take place “to enlarge the corporate cake before dividing it up (so-called integrative bargaining)”, was unfortunately, also is subject to a majoritarian override “that has served to make a complete dead letter of the elaborate set of provisions”.¹⁵⁰⁶

By 2000 workplace forums were not being established at the rate it had been envisaged so it was proposed that amendments be made to the requirements for the establishment of a workplace forum.¹⁵⁰⁷ Although the reasoning behind workplace forums was to move away from adversarial behaviour¹⁵⁰⁸ and promote employee participation, only a limited number of workplace forums have been established. An attempt to develop a more flexible approach was proposed in the 2000 version of the *Labour Relations Amendment Bill*¹⁵⁰⁹ (which proposed amendments to section 78 and 80 of the LRA)¹⁵¹⁰ making the formation and functioning of workplace forums less dependant on majority unions and ensuring that many more workplaces potentially could benefit from the establishment of workplace forums. One proposal was that a workplace forum could be established in a workplace of fewer than 100 employees.¹⁵¹¹ Another was that a registered trade union could apply to establish a workplace forum where the majority of employees in the workplace are not trade union members. This establishment could be successful only if non-union members

¹⁵⁰⁶ Brassey 2013 *ILJ* 833.

¹⁵⁰⁷ In practice very few work councils were established (Webster and Macun 1998 *LDD* 65). Bendix reported that “the experience is that works councils are soon overtaken by trade unions and, even where this does not happen, conflict arises between the plant-level union and the works committee/council” (Bendix *Industrial Relations* 428). By February 2001 apparently only 18 workplace forums were registered of which only six were still functioning (see in this regard Steadman 2004 *ILJ* 1185 as well as Slabbert *et al Managing Employment Relations* 5-254). By October 2009, a total of 106 applications for the establishment of workplace forums had been lodged of which only 32 were trade-union based. In the period from October 2009 to March 2011 a further 14 workplace forums seems to have been established which brings the total of established workplace forums to 56 (Du Toit *et al Labour Relations Law* 53). The most recent statistics that could be found on the establishment of workplace forums are as follows: In 2007, 67 applications for the establishment of workplace forums were submitted and by December 2011 fewer than 5 per cent of eligible workplaces have managed to establish workplace forums (Lawrence *Employer and Collective Worker Action* 313).

¹⁵⁰⁸ Van der Walt 2008 *SA J Bus Man* 46.

¹⁵⁰⁹ LRA Amendment Bill 2000.

¹⁵¹⁰ Olivier “Inchoate Regulation” 455. Olivier points out that “[u]nfortunately, the opportunity to relax the unnecessarily stringent requirement was missed, as it was eventually decided to drop the proposed amendment” (Olivier “Inchoate Regulation” 455).

¹⁵¹¹ Steadman 2004 *ILJ* 1175.

and a majority of employees as a whole support the application.¹⁵¹² A third proposal was that the majority of employees, where no registered trade union was present in the workplace, could apply to establish a workplace forum.¹⁵¹³

These proposals were intended to enhance the opportunity for unionised, as well as non-unionised, employees to establish workplace forums, unfortunately, they were not adopted. The speculation is that the unions felt they would undermine the efforts of unions to organise if a workplace forum could be established by a majority of employees where there is no registered trade union in the workplace¹⁵¹⁴ or where a registered trade union can apply for the establishment of a workplace forum where the majority of employees are non-union members and with the support of a majority of employees.¹⁵¹⁵

Another possible reason for non-acceptance of the proposals is that employers were concerned about the over-regulation of small business - especially the fact that a workplace forum, in terms of these proposals, could be established in workplaces with fewer than 100 employees.¹⁵¹⁶

It appears the amendments also failed to address the following issues:¹⁵¹⁷

- (i) the preference afforded to majority unions;
- (ii) the enforceability and status of workplace agreements;

¹⁵¹² Steadman 2004 *ILJ* 1175.

¹⁵¹³ Steadman 2004 *ILJ* 1175.

¹⁵¹⁴ Steadman 2004 *ILJ* 1175.

¹⁵¹⁵ Steadman 2004 *ILJ* 1176.

¹⁵¹⁶ Steadman 2004 *ILJ* 1176. It is ironic that small and medium-sized undertakings are exempted from the workplace forum system as envisaged by the *LRA* and can therefore not be introduced where they are most needed. Du Toit argues that "[t]he real problem, therefore, is not collective bargaining per se but rather the fact that most employer organizations represented on most councils are dominated by major employers who are able to agree to terms that might be unaffordable to small and struggling enterprises. An appropriate system would need to take account of actual differences among employers" (Du Toit 1993 *ILJ* 578).

¹⁵¹⁷ Slabbert *et al Managing Employment Relations* 5-155.

- (iii) the overlapping functions that existed between trade unions and workplace forums (including the matters identified for consultation and joint-decision making in terms of section 84 and 86 of the LRA); and
- (iv) “the lack of a right to initiate” consultation and decision-making.

The reluctance of trade unions to establish workplace forums may be because of past experience, their role in collective bargaining and the diffusion of powers.¹⁵¹⁸ In the absence of a duty to bargain, trade unions also that workplace forums may erode the existing collective bargaining structures.¹⁵¹⁹ The matters listed in section 86 are limited to operational issues and not to strategic issues. Consequently, though the workplace forum and the employer have joint decision-making power, potentially it is limited to the matters expressly listed in section 86.

Trade unions were not alone in their concerns about the establishment of workplace forums. Management representatives (as pointed out earlier) raised their own concerns: they argued, although the LRA provided some protection against the disclosure of confidential information, that the protection is inadequate and that “no recourse was provided for in the case of ‘other abuses’”.¹⁵²⁰ Employers were also concerned about disputes automatically becoming disputes of right, the possibility that employees would be incapable of understanding the issues raised in the workplace forums, and the ability and readiness of trade unions to participate effectively themselves through the use of shop steward representatives in the workplace forums.¹⁵²¹

Steadman refers to the extensive research conducted by Du Toit *et al*,¹⁵²² as well as other researchers, on workplace forums. The fear of the unknown is noted by Du Toit *et al* as one of the negative reactions to workplace forums: both labour and management were

¹⁵¹⁸ Du Toit 2000 *ILJ* 1564.

¹⁵¹⁹ Steadman 2004 *ILJ* 1191.

¹⁵²⁰ Steadman 2004 *ILJ* 1175.

¹⁵²¹ Steadman 2004 *ILJ* 1175-1176.

¹⁵²² Du Toit *et al* “Workplace Forums”.

(and still are) uncertain as to how workplace forums will perform with regard to certain issues.¹⁵²³ According to Steadman, these issues include the democratisation of firms, empowerment, the improvement of industrial relations, the enhancement of economic performance, the definition of workplace, the representation of non-unionised employees, disclosure of information, the relationship with collective bargaining structures, how deadlocks will be resolved, and so forth.¹⁵²⁴ Other inconsistencies between the strategy of the LRA and significant policy objectives, include the following:¹⁵²⁵

- (i) the fact that relatively modest levels of trade union membership makes it “wholly inappropriate to require that majority unions should serve as the compulsory trigger for the establishment of a forum”;¹⁵²⁶
- (ii) the dependency on majority trade unions to initiate workplace forums disempowers non-unionised employees with the result that workplace forums may serve only the interest of the majority unions and their members and not that of all employees;¹⁵²⁷
- (iii) subordinating workplace forums to collective bargaining instead of developing a parallel structure and moving labour relations beyond adversarial relationships and thus making representative trade unions the “sole gateway to democracy”;¹⁵²⁸ and
- (iv) the question whether it must be left to individual unions whether or not to create workplace forums if a second channel of management-labour interaction is in fact necessary for the national economy to grow.¹⁵²⁹

6.3 Necessary shift from adversarialism to participation

In light of the above discussion a shift from adversarialism to co-determination comes into focus:

¹⁵²³ Steadman 2004 *ILJ* 1176.

¹⁵²⁴ Steadman 2004 *ILJ* 1176.

¹⁵²⁵ Steadman 2004 *ILJ* 1176.

¹⁵²⁶ Olivier 1996 *ILJ* 809.

¹⁵²⁷ Olivier 1996 *ILJ* 810.

¹⁵²⁸ Van Niekerk 1995 *CLL* 32.

¹⁵²⁹ Du Toit *et al* “Workplace Forums” 9.

A final issue to consider is the possible development of the collective bargaining framework itself. Although this may seem to have less to do with how strike law might evolve, it has the potential to impact radically on how employers and workers relate to each other and may mitigate some of the worst problems associated with strikes in South Africa. The cost to workers, employers and the broader community of often protracted and violent strikes, it is suggested, calls for a rethink by employers and unions of the practicality of determining all issues by way of collective bargaining. As Thompson reminds us, our labour relations regime also provides for the establishment of institutions that promote social dialogue and joint decision-making. One such institution is the workplace forum which, on the face of it, provides an opportunity for unions to exercise far greater influence over production matters and encroach on areas which have historically been regarded as falling within managerial discretion, but are often highly contentious. Collective bargaining, Thompson argues, 'turns on convulsive power; forums on something more subtle: continuous influence. Unions have hit the wall with the power option. It is time for all to investigate seriously the potential of the other channel.' The rationale is that a shift away from focusing simply on the distributive aspect of the employment relationship to one which starts engaging with issues related to production and work organisation could ultimately lead to improvements, the benefits of which, Thompson says, 'can be shared in later bargaining' – and, perhaps, under conditions less fraught with frustration, anger and mistrust than at present.¹⁵³⁰

In order to move away from adversarialism Davis and Le Roux suggest an alternative "mutual gains" model which seeks to promote productive bargaining based upon the following:¹⁵³¹

- a careful appreciation and evaluation of both bargaining parties interests and needs, "not on the dogged advancement of pre-set negotiating positions";
- a high level of exchange of information should take place;
- "attempts to expand the pie over the next bargaining cycle before cutting it";
- exploring creative ways that will promote shared- and reconcile different or conflicting interests;
- problem solving; and
- realising that procedures matter.

The model seeks to identify and acknowledge that both parties are legitimate stakeholders rather than class enemies: principles such as freedom of association, exhaustion of dispute resolutions, industrial democracy and non-violent action may be viewed "as central to

¹⁵³⁰ Du Toit and Ronnie 2012 *Acta Juridica* 208.

¹⁵³¹ Davis and Le Roux 2012 *Acta Juridica* 320-321.

maximizing the interests of both sides”.¹⁵³² This approach will not resolve conflicts inherent to the relationship between labour and capital, however, “the goal of legal rules which operate in a society based upon the kind of social democratic constitution which governs South Africa should, as much as possible, be to avoid these destructive consequences”.¹⁵³³ It was recommended in chapter three above that a legal framework be created by “marrying” the issues of the social and ethics committee (in terms of the *Companies Act*) with those of the workplace forum with regard to consultation and joint decision-making reflected in sections 84 and 86 of the LRA. Currently employees are not members of the social and ethics committees and changing the situation will require amendment of the existing corporate and labour law frameworks.

It is suggested that further quantitative research is required to assess whether workplace forums (in whatever shape or form) would provide the means by which the labour relations environment could transcend its existing state: in other words, the conflictual relationship in workplaces where workplace forums are adopted, as discussed, should be monitored over time. As Du Toit and Ronnie state, although “adversarialism can never be eliminated, collective labour relations can be regulated to avoid dysfunctional conflict that may ultimately undermine the position of organised labour and further promote the individualisation of employment”.¹⁵³⁴

Davis and Le Roux, in a similar vein, argue that the inherent adversarial nature of labour relations in South Africa may be attributed as playing a significant role in the spectacular failure of workplace forums.¹⁵³⁵ Davis and Le Roux sum up these challenges by stating that the “idea of a collaborative or consensual path to greater competitiveness and social equality is not only unrealistic, but also completely divorced from the realities of workplace relations in contemporary South Africa”.¹⁵³⁶ Thus, a “more likely scenario is the uneasy

¹⁵³² Davis and Le Roux 2012 *Acta Juridica* 321.

¹⁵³³ Davis and Le Roux 2012 *Acta Juridica* 321.

¹⁵³⁴ Du Toit and Ronnie 2012 *Acta Juridica* 217.

¹⁵³⁵ Davis and Le Roux 2012 *Acta Juridica* 319.

¹⁵³⁶ Davis and Le Roux 2012 *Acta Juridica* 319 where they refer to Klerck 1999 *Transformation* 29.

coexistence of adversarialism and cooperation; ie, adversarial participation and antagonistic cooperation".¹⁵³⁷ It is clear that adversarialism, which has dominated South Africa during "the apartheid" and beyond, can be attributed as making co-determination (which ever form it takes on) very difficult, or even impossible, in the foreseeable future.¹⁵³⁸

6.4 Conclusion

Companies are faced with the reality of recognising employees as stakeholders in the company and shareholders can no longer be considered the only stakeholder. Companies must consider social and economic factors when they conduct business in a community, as well as the advancement of human rights. The 2008-*Companies Act* grants additional rights to employees and is a step in the right direction. In reality, a voice and participation in companies is limited to those issues that either the 2008-*Companies* or the LRA (in the consultation and joint-decision-making provisions pertaining to workplace forums) provides for. Access to information is limited to information that is regarded as being reasonable and, for example, in the case of business rescue proceedings, includes access to the financial statements of the company.

In South Africa, in reality, employees do not have an active voice in all aspects of the management and operation of companies and real participation is limited. Adversarialism is still central to the resolution of disputes. The fact that the current system for workplace forums is a failure and did not realise the original idea of being a second (cooperative) channel of industrial relations adds to the existing challenges in South Africa. The workplace forum system is largely based on union approval, and the issues it deals with are limited to consultation and joint decision-making. These facts add to the unpopularity of such a system.

¹⁵³⁷ Davis and Le Roux 2012 *Acta Juridica* 319 where they refer to Klerck 1999 *Transformation* 29.

¹⁵³⁸ Davis and Le Roux 2012 *Acta Juridica* 319.

Another factor that plays a role in why workplace councils are unsuccessful is that collective bargaining reaches into the realm of issues that are supposed to be covered by workplace forums, which is problematic as the two systems, arguably, were intended to complement each other and not that one system should be favoured over the other. Calls have been made for a mutual gains model to facilitate a move away from (or at least move towards) the achievement of some form of co-existence between adversarialism and co-determination. An appropriate vehicle to facilitate co-existence must be identified or created, even if it is by extending worker “voice” on the social and ethics committee or by amending the LRA’s current provisions regarding the clear separation of powers of workplace forums and those of trade unions in the collective bargaining realm. If need be, the way in which collective bargaining is facilitated could be changed so that it is based more on principles of participation and less on adversarialism. It is also possible to achieve greater participation, for example, by establishing specialised committees, such as employment equity committees, skills development committees or health and safety committees. These committees would deal with specific issues and remove those issues from the bargaining table (see also chapter seven below).

Chapter seven undertakes a study into supra-national, international and foreign law on co-determination and participation on board structures and in workplaces by examining the legislative frameworks in Germany and the European Union. This analysis and evaluation will shed light on possible lessons to be learnt regarding employee participation and “voice” in companies in South Africa. It will also provide the basis for drawing conclusions regarding the development of an alternative model for South Africa. The ideal environment for a system of co-determination is considered in chapter eight below.

CHAPTER 7 – SUPERVISORY (MANAGEMENT) AND SOCIAL CO-DETERMINATION IN GERMANY AND THE EUROPEAN UNION

7.1 General

The German example is used for comparative purposes in the thesis: German industrial relations and corporate model illustrate employee incorporation in the realm of labour law and corporate law. The German model is regarded as the “first and most highly developed” model of worker participation.¹⁵³⁹ A “dual channel” representation system exists: first, employees are active on supervisory boards and second, trade unions play an active role, in the context not only of works councils but also in collective bargaining.

The German model is especially important to the situation in South Africa: the (unsuccessful) system of workplace forums is based on the German works council model. Germany is used as an example of how a country can turn itself around in times of difficulty and yet provide workers with an active and valuable role in society as well as protection. Germany is important in the context of the role it plays in the European Union (EU). Weiss has a good argument as to why the German model of participation is relevant in the context of the worldwide economic crisis and for its position in Europe (and South Africa):

A good illustration of the success of such participation schemes may be the way the present economic crisis has been managed in Germany. Germany, as is well known, has a highly developed system of employee involvement in management’s decision making, not only via works councils but also via employees’ representatives in company boards. Based on the participation of employees’ representatives, Germany has succeeded to manage the crisis without significant loss of jobs and without serious conflicts between the two sides of industry. In full agreement of both sides short-time work schemes were introduced to prevent lay offs, to mention only the most important instrument. At least partially the gain of free time was used for further training of the employees. Thereby, the companies after the crisis can count on their skilled workforce. Unilateral decision making by management never would have succeeded in introducing quietly and without conflict such mechanisms which

¹⁵³⁹ Biasi 2014 *IJLLI* 461.

after all for the employees meant a reduction in income (in spite of State subsidies). The joint crisis management has helped to rebuild trust and confidence in management which was seriously endangered by the crisis.¹⁵⁴⁰

Elsewhere, the role of participation in Germany in the context of the present crisis has been explained as follows:

GERMANY IS THE WORLD'S SECOND BIGGEST EXPORTER OF GOODS.¹⁵⁴¹ One of the few products made in Germany that has *not* been exported successfully is the German system of codetermination at company level (*Unternehmensmitbestimmung*), with representatives of employees sitting on company supervisory boards. In contrast to employee representation via works councils at establishment level (*betriebliche Mitbestimmung*), which is found in many European countries in various forms and which has also played a role as a template in the formulation of EU legislation on worker involvement, Germany has not been able to convince its neighbors or the EU to adopt its system of (quasi) parity board-level representation (although this parity reflects the desire of German employers *not* to seek harmonization to a high level) ...

Despite the German system's lack of attractiveness to other countries, codetermination at company level has held up moderately well inside Germany...¹⁵⁴²

The purposes of this chapter are to compare the systems of supervisory (management) and social co-determination in Germany and the EU, with specific reference to one-tier and two-tier board structures; as well as to examine how Member States of the Union are affected by rules pertaining to corporate law and labour law, with specific reference to the various directives that are in place, as well as collective bargaining and industrial action.

7.2 Comparative company law perspectives

7.2.1 Board structures: unitary and two-tier boards

Generally, there are two types of board structure: a unitary-system (one-tier board structure) and a two-tier system (dual board structure). The unitary board structure is

¹⁵⁴⁰ Weiss "Re-inventing Labour Law" 51.

¹⁵⁴¹ Capital letters in original text.

¹⁵⁴² Addison and Schnabel 2011 *Industrial Relations* 354-355.

used in South Africa, Canada, Australia, New Zealand, USA and the UK; the two-tier system is used in European states, such as Germany, the Netherlands, Austria, Denmark, Sweden and Finland.¹⁵⁴³ Nowadays, it is difficult to draw an exact distinction between the unitary and two-tiered board structures¹⁵⁴⁴ as many developed countries have moved away from the “traditional unitary board” structure in large public corporations to one that has some of the characteristics of the “traditional two-tier” board structure.¹⁵⁴⁵

The traditional unitary board structure consists of a board of directors and managing directors: the board of directors oversees and guides the managing directors who are responsible for the day-to-day affairs of the company. In a traditional unitary board structure the board of directors’ and managers’ functions overlap, resulting in the chairperson of the board being a manager and thus supervising himself.¹⁵⁴⁶

In South Africa the unitary board structure is followed but the board of directors consists not only of executive directors but also non-executive directors.¹⁵⁴⁷ The board of directors oversees and monitors the managers who are responsible for conducting the day-to-day business of the company. Section 66(2) of the *Companies Act* provides that the board of a company, in the case of a private company, or a personal liability company, must comprise of at least one director; or, in the case of a public company, or a non-profit company, must comprise at least three directors. This is in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its Memorandum of Incorporation, to appoint an audit committee, or a social and ethics committee as contemplated in section 72(4) of the *Companies Act*. The board of directors should comprise a majority of non-executive directors, who should be independent.¹⁵⁴⁸

¹⁵⁴³ See also Du Plessis *et al German Corporate Governance* 8; Jungmann 2006 *ECFR* 427.

¹⁵⁴⁴ See Du Plessis *et al German Corporate Governance* 8; Du Plessis, Hargovan and Bagaric *al Principles* 83; Jungmann 2006 *ECFR* 427; Fauver and Fuerst *JFE* 675; Jackson 2005 *Industrielle Beziehungen* 4; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 306 and Molano-León 2011 *Vniversitas* 567-575 for a detailed discussion on the one-tier and two-tier board structures.

¹⁵⁴⁵ See Du Plessis, Hargovan and Bagaric *Principles* 83 as well as Esser 2007 *THRHR* 415 in this regard.

¹⁵⁴⁶ Esser *Recognition of Various Stakeholder Interests* 240.

¹⁵⁴⁷ For a distinction between executive and non-executive directors see chapter 3 above.

¹⁵⁴⁸ Institute of directors King Report III discussed in chapter 3 above regarding non-executive directors.

Recently there have been several moves (on the international front) not only to have objective checks on management of the board but to bring greater independence to the board¹⁵⁴⁹ by promoting a majority of non-executive independent directors onto the board.¹⁵⁵⁰

The traditional two-tier board structure can be found in many developed countries, typically in Germany.¹⁵⁵¹ A two-tier board system is best-suited to facilitate employee participation in decision-making: it helps to manage the information flow and improve board efficiency.¹⁵⁵² The supervisory board oversees the management board. Worker representatives are elected onto the supervisory board. The management board is responsible for the day-to-day management of the company. The differences between unitary and two-tier boards in different jurisdictions can be summarised as follows:

In general, Anglo-Saxon countries such as the US, the UK and Canada have adopted variants of the one-tier board model. In this model, executive directors and non-executive directors operate together in one organizational layer (the so-called one-tier board). Some one-tier boards are dominated by a majority of executive directors while others are composed of a majority of non-executive directors. In addition, one-tier boards can have a board leadership structure that separates the CEO and chair positions of the board. One-tier boards can also operate with a board leadership structure that combines the roles of the CEO and the chairman. This is called CEO-duality. One-tier boards also often make use of board committees like audit, remuneration and nomination committees. Continental European countries such as Germany, Finland and the Netherlands have adopted variants of the two-tier board model. In this model, an additional organizational layer has been designed to separate the executive function of the board from its monitoring function. The supervisory board (the upper layer) is entirely composed of non-executive supervisory directors who may represent labor, the government and/or institutional investors. The management board (the lower layer) is usually composed of executive managing directors. It is generally not accepted by corporation laws that corporate statutes foresee in the possibility that directors combine the CEO and chairman roles in two-tier boards. Because the CEO has no seat in the supervisory board, its board leadership structure is formally independent from the executive function of the board. This is particularly the case in two-tier boards in the Netherlands and

¹⁵⁴⁹ See Du Plessis, Hargovan and Bagaric *Principles* 85.

¹⁵⁵⁰ See Du Plessis, Hargovan and Bagaric *Principles* 85.

¹⁵⁵¹ Du Plessis 1996 *TSAR* 21; Du Plessis 2003 *Deak L Rev* 381; Esser 2007 *THRHR* 415; Mintz 2006 *Corporate Ownership & Control* 33.

¹⁵⁵² Mintz 2006 *Corporate Ownership & Control* 33.

Germany. In variants of the two-tier board model in these countries, executive managing directors are not entitled to have a position in the supervisory board of the corporation.¹⁵⁵³

In a unitary board structure the two main organs of governance are the general meeting, which is a meeting of the shareholders, and the board of directors which is the managing body. The board of directors in a unitary board structure acts as the agent of the company and performs certain acts of management. The board of directors consists of executive (who are engaged in the daily management of the company) and non-executive directors (who fulfil a supervisory role within the board of directors of the company).¹⁵⁵⁴ The directors are appointed and removed by the general meeting. The board of directors acts internally with the general meeting as organs of the company and externally as agents of the company with third parties.¹⁵⁵⁵

In a two-tier board structure, on the other hand, the management board conducts the day-to-day affairs of the company, whereas the supervisory board is responsible for overseeing the activities of the management board.¹⁵⁵⁶ The management board is responsible for daily management; the separate supervisory board is responsible for monitoring and advising of the management board as well as the appointment and removal of management board members.¹⁵⁵⁷ According to Du Plessis *et al* the supervisory board, metaphorically speaking, “serves as a ‘sparring partner’ of the management board, as it is – besides its advisory function – supposed to act as a counterbalance”.¹⁵⁵⁸ The German management board and the German supervisory boards will be dealt with in detail in par 7.2.2 below.

¹⁵⁵³ Maassen *An International Comparison of Corporate Governance Models* 15. See also Sadowski, Junkes and Lindenthalt 2000 *Comp Lab L & Pol'y J* 33-66 for a discussion on the two board structures.

¹⁵⁵⁴ See Du Plessis, Hargovan and Bagaric *Principles* 83-86 and 109-110.

¹⁵⁵⁵ Delport 1995 *De Jure* 414; Esser 2007 *THRHR* 415.

¹⁵⁵⁶ See Du Plessis, Hargovan and Bagaric *Principles* 85; Esser 2007 *THRHR* 415-416; Bezemer *et al* 2014 *Corporate Governance* 15-31.

¹⁵⁵⁷ See Du Plessis *et al German Corporate Governance* 9; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 306; Weiss and Schmidt *Labour Law and Industrial Relations* 248-249.

¹⁵⁵⁸ See Du Plessis *et al German Corporate Governance* 9.

Both board systems have inherent strengths and weaknesses. These strengths and weakness can be summarised as follows:

... While the one-tier system allows a flexible division of scopes of duties within the board and helps to put in place a common responsibility of executive and non-executive directors, the neutrality of supervisors can be questioned since the monitoring, appointment and removal processes have overtones of some kind of self-control and dubious self-organisation. Thus, it can be asked if the representation of shareholders' interests is really guaranteed. But the joint responsibility of executive and non-executive directors ensures that the necessary information will be available to all members of the one-tier board, and this is seen as another advantage. In contrast to that, a high degree of neutrality and a clear division of the respective duties of the two organs can be ascribed to the two-tier board system, which is based on the idea of a separate management board and a supervisory board. But the two-tier system might suffer from rigidity and a rather remote form [of] control. In addition to that, the supervisory board is also often dependent on the management board, especially as far as acquiring relevant and updated information is concerned. Nevertheless, the kind of information typically provided by the management board to the supervisory board is also present in the one-tier system since there is a natural tendency to build an inner and outer circle of board members, in which the outer circle members are rather passive. These outer circle members have to face the same problems concerning their supervisory mandate as supervisory board members in a two-tier board system.¹⁵⁵⁹

Although these are the opposite ends of possible corporate structures, hybrid forms, like the *Societas Europaea* (SE), also exist, which empower the shareholders' meeting to opt for a one-tier or two-tier system.¹⁵⁶⁰ This hybrid form will be addressed in 7.2.4 below.

7.2.2 The two-tier board structure in Germany

7.2.2.1 General

German business or enterprise law¹⁵⁶¹ has a distinct feature: a particular relationship and synthesis exists between corporations law and labour law.¹⁵⁶² The double board system in

¹⁵⁵⁹ See Du Plessis *et al German Corporate Governance* 9-10.

¹⁵⁶⁰ See Du Plessis *et al German Corporate Governance* 10.

¹⁵⁶¹ German business or enterprise law employs a unique system of classifying enterprises in that it makes provision for the sole proprietor, partnerships (unlimited "*offene Handelsgesellschaft*" or limited "*Kommanditgesellschaft*") and companies or corporations (Du Plessis *et al German Corporate Governance* 4).

¹⁵⁶² See Du Plessis *et al German Corporate Governance* 1.

Germany is applicable to all public corporations and limited partnerships with shares, as well as to registered co-operatives and private companies.¹⁵⁶³ The latter two kinds of undertakings must have more than 2000 employees. The double board system becomes compulsory when these requirements are met. The German mandatory two-tier board system, however, is not without criticism: it has been said to be inferior to the British one-tier board system with executive and non-executive directors in a single board.¹⁵⁶⁴ The two-tier system has not been abolished under the new *German Corporate Governance Code* adopted in February 2002 (as amended in 2014).¹⁵⁶⁵ The impact of this code will be discussed in 7.2.2.4 below.

Two of the most fundamental and distinctive aspects of German law relating to public corporations (*Aktienrecht*) can be identified: the German two-tier board system and the German system of supervisory co-determination (*Mitbestimmung*).¹⁵⁶⁶ With regard to companies or corporations, the *Aktiengesellschaft* (AG)¹⁵⁶⁷ is the most important type of company or corporation from a corporate governance point of view and also the focus of

¹⁵⁶³ The German Commercial Code of 1861 (*Allgemeines Deutsches Handelsgesetzbuch*) introduced the double board function of the management and supervisory board. See also Wooldridge 2012 *The Company Lawyer* 152 in this regard.

¹⁵⁶⁴ Jungmann 2006 *ECFR* 433.

¹⁵⁶⁵ Du Plessis, Hargovan and Bagaric *Principles* 342 points out that the German two-tier system has been criticised for: "the ineffectiveness of supervisory boards generally; the practical difficulty in distinguishing between management; and supervisory functions of the management board and supervisory board respectively; the practical difficulties associated with the relationship between the supervisory and management boards; the defects in the composition of supervisory boards; and in particular, employee participation at supervisory board level." They add that many of these original criticisms have been addressed pertinently since the mid 1990s.

¹⁵⁶⁶ *Mitbestimmung* used in context of this thesis refers to codetermination of employees. See also Fauver and Fuerst 2006 *JFE* 675; Weiss "Germany" 114; Du Plessis 2003 *Deak L Rev* 381. See also Wooldridge 2005 *Amicus Curiae* 17 in this regard.

¹⁵⁶⁷ Du Plessis *et al* explain the context of the use of *Aktiengesellschaft* (AG) as follows: "As far as English terminology is concerned, the word *Aktiengesellschaft* (AG) is often translated as 'joint stock corporation'. The use of the term 'joint stock company/corporation' or 'joint-stock company/corporation' was common when the various Joint Stock Companies Acts were passed in the 1800s in England, but the term was used long before that. This is also reflected in the titles of some of the leading textbooks of the 1800s. However, nowadays in the US, the UK and other Anglo-American jurisdictions, the trend is to refer to companies or corporations comparable to the *Aktiengesellschaft* (AG) simply as 'public companies or corporations'; 'publicly-traded companies or corporations'; 'public companies or corporations limited by shares'; or 'public limited companies or corporations'. The identifiable abbreviations for these companies or corporations are 'Ltd' (Limited) or 'plc' (public limited company)" (Du Plessis *et al German Corporate Governance* 5). See also Du Plessis 2003 *Deak L Rev* 381.

this section. The public corporation¹⁵⁶⁸ (*Aktiengesellschaft (AG)*)¹⁵⁶⁹ in Germany has three organs, namely, a supervisory board¹⁵⁷⁰ (*der Aufsichtsrat*), a managing board (*der Vorstand*) and the general meeting (*die Hauptversammlung*).¹⁵⁷¹ A unique interrelationship exists between the general meeting, the supervisory board and the management board.¹⁵⁷²

¹⁵⁶⁸ Public companies or corporations are distinguished from so-called private or proprietary companies. In Germany it is the *Gesellschaft mit beschränkter Haftung (GmbH)* that is comparable to the private or proprietary company which is identifiable with companies in the UK and several other Anglo-American jurisdictions (including South Africa) where the abbreviation is '(Pty) Ltd' ((Proprietary) Limited. Some similarities also exist between the *GmbH* and the "close corporations" that are found in South Africa (Du Plessis *et al German Corporate Governance* 4). A *GmbH* in Germany has two organs, namely, a management organ (comparable to the management board in the *AG*) and the organ of the corporators (comparable to the general meeting in the *AG*). The management organ is similar to the public corporation's managing board and the organ for the corporators is similar to the general meeting of the public corporation (Du Plessis 1996 *TSAR* 21; Du Plessis *et al German Corporate Governance* 55).

¹⁵⁶⁹ The basic act regulating public companies in Germany is the German Act on Public Limited Companies of 1965 (*Aktiengesetz*, 1965 (*AktG*)) whereas, for limited liability companies, it is the German Act regarding Companies with Limited Liability of 1892 (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)* (1892)).

¹⁵⁷⁰ In the case of the *GmbH* the supervisory board is required in only two instances: (i) where a company has more than 500 employees or (ii) where the company is involved in the metal, steel or coal industries (Du Plessis 1981 *THRHR* 388).

¹⁵⁷¹ Du Plessis 1981 *THRHR* 387; Du Plessis 1996 *TSAR* 21; Fauver and Fuerst 2006 *JFE* 675; Esser 2007 *THRHR* 415-416; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 306.

¹⁵⁷² The general meeting is the organ where members or shareholders can enforce their rights (in so far as the *AktG* does not provide otherwise) (see s 118(1) *AktG*). One of the responsibilities of the general meeting is the appointment of members of the supervisory board in so far as other statutory provisions under codetermination legislation do not prescribe the appointment of these members by the employees (see s 101(1) *AktG* in this regard). S 101(2) *AktG* provides that the articles of incorporation (*Satzung*) can provide for special arrangements regarding the appointment of the members by the general meeting. These members of the supervisory board appointed by the general meeting are referred to as the so-called shareholder representatives or representatives of capital (see also Du Plessis *et al German Corporate Governance* 57-58 in this regard). S 100(4) *AktG* also makes provision for the articles of incorporation to prescribe specific requirements or qualifications for the members of the supervisory board appointed by the general meeting. Du Plessis *et al German Corporate Governance* 57 points out that "[t]he practical consequence of these provisions [in s 101(1) *AktG*] is that the number of members of the supervisory board to be appointed by the general meeting will vary according to the size of the corporation, according to the specific sphere of business the corporation is involved in, and also, to a certain extent, according to the provisions in the articles of incorporation (*Satzung*)". In corporations where employee participation is not made compulsory, the general meeting may appoint all the members of the supervisory board. The management board may request the general meeting to decide on matters concerning management (s 76(1) and 121(2) *AktG*) or may refer specific matters to the general meeting (s 111(4) 3 and 119(2) *AktG*). The general meeting may thus play a meaningful role in these instances (Du Plessis *et al German Corporate Governance* 56). Du Plessis *et al German Corporate Governance* 57, however, points out, "[i]n spite of the general meeting's pivotal role as one of the company's organs, the number of shareholders attending general meetings has decreased steadily over the years and empirical research also indicated that over time the general meeting has lost its relevance. This is primarily due to the fact that corporations need to inform the markets on a continuing basis of significant business developments. Furthermore, the general meeting is primarily a forum where large shareholders and interest groups protect their own interests".

Attention, primarily, will be on *AGs*, since the interrelationship between the various organs can best be illustrated in these corporations through the extensive statutory provisions contained in the German Act on Public Limited Companies of 1965 (*Aktiengesetz*, 1965 (*AktG*)).¹⁵⁷³ The supervisory board and the management board are the most important company organs from an employee participation perspective: the discussion below will focus on these two organs.¹⁵⁷⁴

7.2.2.2 *The management board*

Every public company in Germany must have a management board¹⁵⁷⁵ that is responsible for management¹⁵⁷⁶ and the representation of the company.¹⁵⁷⁷ This requirement underwrites the principle that the management board and supervisory board must be separated. Section 76(2) *AktG* provides that the management board may consist of one or more persons. If a company has a share capital of more than three million euros the management board must consist of at least two persons, unless the articles of incorporation provide differently, then it shall comprise a single person.¹⁵⁷⁸ Section 76(2)(3) *AktG* further provides that the appointment of the “*Arbeitsdirektor*” (the “personnel director”, who represents employees) cannot be prevented by the corporation.

¹⁵⁷³ See Du Plessis *et al German Corporate Governance* 55-56.

¹⁵⁷⁴ Co-determination legislation also makes a supervisory board compulsory for some larger *GmbHs* (see discussion in 7.2.2.3 below).

¹⁵⁷⁵ S 33, 36(1) and 37(4) *AktG*.

¹⁵⁷⁶ According to s 76(1) *AktG* The management board is responsible for the management (*Leitung*) of the company. S 111(4) *AktG* stipulate that managerial responsibilities may not be conferred on the supervisory board, however, the supervisory board may provide for some types of contracts to be entered into only with the consent of the supervisory board. If the supervisory board, in the latter instance, refuses its consent, the general meeting may override its decision. Managerial responsibilities (*Massnahmen der Geschäftsführung*) may in principle not be conferred upon the supervisory board. The word *Leitung* is used by s 76(1) *AktG* but not defined and appears to be narrower than that of conduct of affairs (*Geschäftsführung*) used in s 77 (and elsewhere) in the *AktG* (see in this regard Wooldridge 2005 *Amicus Curiae* 18).

¹⁵⁷⁷ S 76(1) and 78(1) *AktG*. See also Du Plessis *et al German Corporate Governance* 60 and Wooldridge 2012 *The Company Lawyer* 152 in this regard.

¹⁵⁷⁸ S 76(2)(2) *AktG*. See also Du Plessis *et al German Corporate Governance* 55; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 306 and Wooldridge 2012 *The Company Lawyer* 152 in this regard.

The “personnel director” is responsible for matters relating to labour relations if so required by co-determination legislation.¹⁵⁷⁹ It implies that there will, at least, be two members of the management board in instances where the corporation is compelled to appoint a personnel director.

The appointment of the personnel director may take place in accordance with the Co-determination Act 1976 (*Mitbestimmungsgesetz*) which applies to public and private companies, limited partnerships with shares, and registered co-operatives having more than 2000 employees, or in accordance with section 12 of *Montan-Mitbestimmungsgesetz* which governs employee participation in the coal, iron or steel industries.¹⁵⁸⁰ The personnel director cannot be appointed or removed if the majority of the persons appointed to the supervisory board in accordance with section 6 or 12 of *Montan-Mitbestimmungsgesetz* oppose such an appointment or removal. At least two employees must work in a branch of such an undertaking.

Two conditions apply to the appointment of members of the management board: (i) they must be natural persons with full legal capacity and (ii) no person can be a member of the management board and the supervisory board simultaneously.¹⁵⁸¹

7.2.2.3 *Supervisory co-determination*

7.2.2.3.1 General

Co-determination by employees at supervisory board level¹⁵⁸² has a long history in Germany. Before commencing a survey of the intricacies of the German system of co-

¹⁵⁷⁹ See in this regard also Du Plessis *et al German Corporate Governance* 55; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 308 and Wooldridge 2012 *The Company Lawyer* 152.

¹⁵⁸⁰ See in this regard also Wooldridge 2012 *The Company Lawyer* 152.

¹⁵⁸¹ S 76(3) and 105(1) *AktG*.

¹⁵⁸² Board-level representation of employees “may be defined in terms of rights to attend and participate in boardroom decisions as full or consultative members” and can be considered “an institutionalized ‘national’ characteristic to the extent that such rights are guaranteed by law or through tri-partite and other collective agreements” (Jackson 2005 *Industrielle Beziehungen* 3).

determination at supervisory board level, the historical development of employee representation in Germany is succinctly summed up by Weiss and Schmidt as follows:¹⁵⁸³

... participation and democratization of all areas of society became the key words of the labour movement around the turn of the 19th to the 20th century. Workers' representation by works councils was only considered as a first step towards this goal. Democratization of the economy as a whole was the model developed by the labour movement in the Weimar era. According to this model, employee participation at all levels of decision making (enterprise, region and state) would have to be established. This model, however, remained a programme during the Weimar era.¹⁵⁸⁴

... Employee representation on the supervisory board is understood to be one further step towards this goal to change the power structure in the economic field. The first successes in realizing this programme were reached in the mining and the iron and steel industries. After the Second World War the enterprises in these areas of industry faced the danger of being totally dismembered by the Allied Forces. In order to fight this danger these industries sought the support of the unions. Since the unions had not been affiliated to the Nazi regime, they had an important voice in this context. In order to obtain the support of trade unions the responsible persons of these industries offered equal representation of employees on the supervisory boards of the respective companies in exchange. Thus, a model was established which, after heated controversy, was confirmed by the legislator in 1951 when the Act on Co-determination by Employees on the Supervisory Boards and Management Boards of Undertakings of the Mining and the Iron and Steel Manufacturing Industries (*Montan-Mitbestimmungsgesetz* – Montan-MitbestG) was passed. This historical development explains why, until today, the situation in the mining and iron and steel industries differs from that in all other German industries.

... In 1952 the political circumstances had already changed: the danger of dismemberment had been banned. This is why the 1952 BetrVG, which has been replaced by the Act on One-Third Participation (*Drittelbeteiligungsgesetz* - DrittelbG) in 2004, introduced a model of employee representation on the supervisory board which remained far below the level of

¹⁵⁸³ Weiss and Schmidt *Labour Law and Industrial Relations* 248.

¹⁵⁸⁴ On February 15, 1922, worker representatives were granted access to the works councils of German public companies. Co-determination at supervisory level was introduced. The system of works councils and employee representation in the supervisory boards of German public companies, however, was abolished by National Socialist regime in 1934 (Wooldridge 2011 *Amicus Curiae* 31). The statutory history of supervisory co-determination by employees dates back to 1922 when the amendment to the *Betriebsrätegesetz* 1920 was made. This system, as indicated earlier, was only in place from 1922 to 1934 (See Du Plessis *et al German Corporate Governance* 154). The 1922-Amendment Act of the Works Councils Act of 1920 (see discussion above) applied to public limited companies (*Aktiengesellschaften: AGs*), companies with one or more general partners but limited by shares (*Kommanditgesellschaften auf Aktien: KGaAs*), private companies (*Gesellschaften mit beschränkter Haftung: GmbHs*), registered cooperatives (*eingetragene Genossenschaften*), mutual insurance companies (*Versicherungsvereine auf Gegenseitigkeit*), and special mining companies (*Berggesellschaften*). Du Plessis *et al German Corporate Governance* 154 points out that all important German companies were forced to adopt this form of supervisory codetermination by employees between 1922 and 1934.

representation reached in the mining and the iron and steel industries. In the following years the unions made great efforts to extend the 1951 model in the mining and the iron and steel industries to all areas of industry. Finally, in 1976 a compromise was reached. The Act on Co-Determination by Employees (*Mitbestimmungsgesetz* - MitbestG) introduced a third model which has to be understood as an attempt to close the gap between the two previous models. This explains why there are still three different models today.

Du Plessis *et al* acknowledge that different forms of co-determination in Germany are distinguished by employing terms like “management co-determination”¹⁵⁸⁵ or “social co-determination”. This is explained as follows:

Employee participation at supervisory board level is then equated with ‘management codetermination’, whilst employee participation at shop-floor level, through works councils, safety committees, productivity committees, job classification committees and so on are classified as forms of ‘social codetermination’.¹⁵⁸⁶

The system of electing employee representatives is complicated: the number of employees appointed to the supervisory board not only varies from industry to industry but also depends on the size of the corporation. Although this is the case, basically there are two systems: on certain supervisory boards one-third of the board is made up of employees, on other supervisory boards half of the membership consists of employees.¹⁵⁸⁷ The latter system is sometimes called “parity co-determination” by employees, in that “shareholders and employees can appoint an equal number of representatives to the supervisory board”.¹⁵⁸⁸ The second system is so-called “quasi-parity co-determination”, which can be found in certain industries and refers to the arrangement whereby “shareholders and employees can appoint an equal number of representatives on the supervisory board, but the right to appoint the chair belongs to the shareholders – thus tilting the power balance

¹⁵⁸⁵ The term “supervisory co-determination” rather than “management co-determination” is preferred to denote employee participation at supervisory board level in the typical German two-tier board system (Du Plessis *et al German Corporate Governance* 151).

¹⁵⁸⁶ Du Plessis *et al German Corporate Governance* 151.

¹⁵⁸⁷ Du Plessis, Hargovan and Bagaric *Principles* 349.

¹⁵⁸⁸ Du Plessis, Hargovan and Bagaric *Principles* 349; Addison and Schnabel 2011 *Industrial Relations* 356-357.

slightly in favour of shareholder representatives”.¹⁵⁸⁹

The following sections address the role of the supervisory board, as well as three models of “supervisory co-determination” that can be found in Germany (the model of the Mining, Iron and Steel Industry, the model of the One-Third Participation Act and the model of the 1976 Co-Determination Act).¹⁵⁹⁰ “Social co-determination” will be discussed in 7.3.2 below.

7.2.2.3.2 The Role of the Supervisory Board

As indicated earlier the supervisory board is one of the company organs found in German corporate law. A supervisory board is required in the case of registered cooperative societies (*eingetragene Genossenschaften*) and public companies (*Aktiengesellschaften*).¹⁵⁹¹ In the case of private limited companies (*Gesellschaften mit beschränkter Haftung*) it is compulsory only if certain pre-conditions apply, in all other cases it is optional.¹⁵⁹² The two main functions/tasks of the supervisory board are to elect or appoint members to the management board and supervise or monitor the activities of the management board.¹⁵⁹³ The supervisory board also represents the corporation in all affairs concerning the management board. This will be the case if court action is initiated against the board members. The supervisory board also must approve the annual accounts

¹⁵⁸⁹ Du Plessis, Hargovan and Bagaric *Principles* 349-350. See also Wooldridge 2005 *Amicus Curiae* 21 and Addison and Schnabel 2011 *Industrial Relations* 356-357 regarding parity and quasi-parity.

¹⁵⁹⁰ See also Weiss “Germany” 107; Balsmeier, Bermig and Dilger 2013 *Journal of Economic Behavior & Organization* 54; Addison and Schnabel 2011 *Industrial Relations* 356-361; Goergen, Manjon and Renneboog 2008 *Int Rev Law and Econ* 184 for a discussion of these models.

¹⁵⁹¹ See 7.2.2.1 above for a discussion on the different enterprise forms in Germany. See also Weiss and Schmidt *Labour Law and Industrial Relations* 249 in this regard. See also Du Plessis *et al German Corporate Governance* 93-96 for detailed discussion on appointment requirements of the supervisory board.

¹⁵⁹² See 7.2.2.1 above for a discussion on the different enterprise forms in Germany. See also Weiss and Schmidt *Labour Law and Industrial Relations* 249 in this regard. See also Du Plessis *et al German Corporate Governance* 93-96 for detailed discussion on appointment requirements of the supervisory board.

¹⁵⁹³ See Weiss and Schmidt *Labour Law and Industrial Relations* 249 as well as Jungmann 2006 *ECFR* 432 in this regard.

and can intervene in cases where the company's interests are seriously affected, as well as fulfil some "soft functions", like networking with stakeholders.¹⁵⁹⁴

As mentioned earlier, the supervisory board can appoint and remove members of the management board, thus supervision remains the core function of the supervisory board.¹⁵⁹⁵ The primary responsibilities of the supervisory board¹⁵⁹⁶ should be to appoint and dismiss members of the management board, determine management remuneration, review and approve the compliance report, review and approve accounting principles and financial statements, work with the external auditors on matters relating to the financial reports and establish committees as needed to carry out these and other responsibilities including the remuneration committee, audit committee, nominating committee and employee development and retirement committee.¹⁵⁹⁷

According to Weiss and Schmidt,¹⁵⁹⁸ the supervisory board system of employee representation however does not mean participation in management: the responsibility of the business management of the company still lies solely with the management board. Employees are usually inactive on supervisory boards and therefore have limited impact on decisions reached by the board.¹⁵⁹⁹ Weiss and Schmidt stress that the practical importance of employee representation on the supervisory board can be understood only when due cognisance is taken of the representation of employee interests on works councils:¹⁶⁰⁰ in almost all cases, members of the works councils are also employee representatives on the supervisory board.¹⁶⁰¹

¹⁵⁹⁴ See Jungmann 2006 *ECFR* 432 in this regard.

¹⁵⁹⁵ See Jungmann 2006 *ECFR* 432 in this regard.

¹⁵⁹⁶ Laagland and Zaal "Employee Board-level Representation" 286. See also Eulerich and Stiglbauer "Supervisory Boards" 1.

¹⁵⁹⁷ Mintz 2006 *Corporate Ownership & Control* 33-34.

¹⁵⁹⁸ Weiss and Schmidt *Labour Law and Industrial Relations* 249-252.

¹⁵⁹⁹ Esser 2007 *THRHR* 418 where she refers to Thomas 1996 *Thulane LR* 1827 who refers to an article by Hansamann.

¹⁶⁰⁰ See discussion under 7.3.2 below.

¹⁶⁰¹ Weiss and Schmidt *Labour Law and Industrial Relations* 249-252.

It appears (at least in principle) that “there is a clear separation between the tasks and responsibilities of the two boards”, however, case law in the last few years has shown that “the monitoring task of the supervisory board has become more and more permanent and future-oriented, as the intended business policy has also to be controlled by the supervisory board”.¹⁶⁰² Weiss and Schmidt¹⁶⁰³ add that only in the case of the iron and steel industry does employee representation extend to the management board because the members of the management board, in this context, are responsible for personnel and social matters. The so-called “employee director” (“personnel director”) cannot be appointed if a majority decision on the supervisory board cannot be obtained.¹⁶⁰⁴ The legal and functional powers of the supervisory board differ depending on whether it is a public limited company or whether it is a private limited company.¹⁶⁰⁵ The supervisory board of a public limited company is stronger, compared to that of a private company.¹⁶⁰⁶

7.2.2.3.3 The Model of the Mining, Iron and Steel Industry

The model in the mining, iron and steel industry is based on equal representation by shareholders and employees,¹⁶⁰⁷ or “parity employee representation”, or “parity co-determination” at supervisory level.¹⁶⁰⁸ The position of chairperson of the supervisory board is reserved for the so-called “neutral person”,¹⁶⁰⁹ who is elected by majority vote of both the employee representatives and shareholder representatives.¹⁶¹⁰

The Mining, Iron and Steel Industry Codetermination Act of 1951 (*Montan-*

¹⁶⁰² See Jungmann 2006 *ECFR* 433 in this regard.

¹⁶⁰³ Weiss and Schmidt *Labour Law and Industrial Relations* 249-252.

¹⁶⁰⁴ Weiss and Schmidt *Labour Law and Industrial Relations* 251.

¹⁶⁰⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 249.

¹⁶⁰⁶ Weiss and Schmidt *Labour Law and Industrial Relations* 249.

¹⁶⁰⁷ Weiss “Germany” 114; Weiss and Schmidt *Labour Law and Industrial Relations* 250.

¹⁶⁰⁸ Du Plessis *et al German Corporate Governance* 155; Wooldridge 2005 *Amicus Curiae* 21. Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 307 refers to this model as “almost parity”.

¹⁶⁰⁹ See s 8 *Montan-MitbestG* that provides that that a “neutral person” is appointed by the shareholders meeting upon the recommendation of the supervisory board. The *Montan-MitbestG* ensures (by way of complicates provisions) that such a “neutral person” also enjoys the confidence of the representatives of the employees (see also Du Plessis *et al German Corporate Governance* 156).

¹⁶¹⁰ Weiss and Schmidt *Labour Law and Industrial Relations* 250; Waas “Employee Representation” 86.

Mitbestimmungsgesetz - *Montan-MitbestG* (1951)) system of parity employee representation, or parity codetermination, at supervisory board level (as indicated earlier) was made compulsory for all industries involved in the mining, iron, coal and steel industry and it affects undertakings whose principal objects are the provision of coal and iron ore, the preparation, carbonisation, compression and alteration of such products, or the production of iron and steel.¹⁶¹¹ The *Montan-Mitbestimmungsgesetz* distinguishes between three categories of companies:

- (i) companies with a stated share capital up to 10 million Euros;¹⁶¹²
- (ii) companies with a stated share capital between 10 and 25 million Euros;¹⁶¹³ and
- (iii) companies with a stated share capital of more than 25 million Euros.¹⁶¹⁴

¹⁶¹¹ See Laagland and Zaal "Employee Board-level Representation" 286; Waas "Employee Representation" 85; Wooldridge 2011 *Amicus Curiae* 31 Weiss and Schmidt *Labour Law and Industrial Relations* 249; Du Plessis *et al German Corporate Governance* 155; Wooldridge 2005 *Amicus Curiae* 17; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 308 as well as Du Plessis 1981 *THRHR* 389 in this regard.

¹⁶¹² Their supervisory boards, as a rule, must consist of 11 members. Five are representatives of the shareholders, to be elected in shareholder meetings and five are representatives of the employees, elected by the employees. The final member has to be a "neutral person", who serves as the chairperson of the board (s 4 *Montan-MitbestG*). See also Weiss and Schmidt *Labour Law and Industrial Relations* 250; Du Plessis *et al German Corporate Governance* 156; Wooldridge 2005 *Amicus Curiae* 21; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 308 as well as Du Plessis 1981 *THRHR* 389 in this regard.

¹⁶¹³ Their supervisory board may be composed of 11 members in the same way described above with regards to companies with a share capital of up to 10 million Euros. These companies, however, may determine in their articles of incorporation (*Satzung*) that their supervisory boards shall have 15 members of which seven are representatives of the shareholders to be elected in shareholder meetings and seven are representatives of the employees, elected by the employees. The final member has to be a "neutral person", who serves as the chairperson of the board (s 9(1) *Montan-MitbestG*). See also Weiss and Schmidt *Labour Law and Industrial Relations* 250; Du Plessis *et al German Corporate Governance* 156 as well as Wooldridge 2005 *Amicus Curiae* 21; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 308 in this regard.

¹⁶¹⁴ Their supervisory boards may also be composed of 11 members as mentioned above with regards to companies with a share capital of up to 10 million Euros. Their articles of incorporation may also provide that their supervisory boards shall have 21 members. Ten of these members are representatives of the shareholders to be elected in shareholder meetings and ten are representatives of the employees, elected by the employees. The final member must be a "neutral person" who serves as the chairperson of the board (s 9(1) *Montan-MitbestG*). See also Weiss and Schmidt *Labour Law and Industrial Relations* 250; Du Plessis *et al German Corporate Governance* 156 as well as Wooldridge 2005 *Amicus Curiae* 21 in this regard.

7.2.2.3.4 The Model of the One-Third Participation Act

(a) The Works Council Constitution Act of 1952

The Works Council Constitution Act of 1952 (*Betriebsverfassungsgesetz (BetrVG (1952))*)¹⁶¹⁵ introduced (24 years before the *MitbestG* (1976)) another system of employee participation on the supervisory boards.¹⁶¹⁶ The *BetrVG* applied to *AGs* and *GmbHs* with more than 500 employees.¹⁶¹⁷ Employee representatives occupy one-third of the seats, and representatives of the shareholders elected at shareholder' meetings fill the other two-thirds.¹⁶¹⁸

The *MitbestG* introduced quasi-parity codetermination for all companies with more than 2,000 employees.¹⁶¹⁹ Between 1952 and 1976, the *BetrVG* (1952) (which has been replaced by the *Drittelbeteiligungsgesetz* 2004, see section (b) below) applied to all companies.¹⁶²⁰ The "purview of application" of the *BetrVG* was reduced with the entry into effect of the *MitbestG* in 1976: its provisions thereafter affected only companies with

¹⁶¹⁵ Weiss "Germany" 107. Du Plessis *et al German Corporate Governance* 159 points out that before the *BetrVG*, that it was mandatory only for public limited companies (*Aktiengesellschaften (AGs)*) to have supervisory boards. This was in accordance with the German Act on Public Limited Companies of 1965 (*Aktiengesetz, 1965 (AktG)*). This requirement, however, did not apply with regard to Companies with Limited Liability of 1892 (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG (1892))*). Since the introduction of the *BetrVG GmbHs* with more than 500 employees were compelled to have employee representatives on their supervisory boards. It thus became compulsory for these private companies to form such supervisory boards (Du Plessis *et al German Corporate Governance* 159).

¹⁶¹⁶ Du Plessis *et al German Corporate Governance* 159; Weiss and Schmidt *Labour Law and Industrial Relations* 252; Du Plessis 1981 *THRHR* 390.

¹⁶¹⁷ Du Plessis *et al German Corporate Governance* 159; Weiss and Schmidt *Labour Law and Industrial Relations* 253; Du Plessis 1981 *THRHR* 390; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310.

¹⁶¹⁸ Du Plessis *et al German Corporate Governance* 159; Du Plessis 1981 *THRHR* 390; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310.

¹⁶¹⁹ Du Plessis *et al German Corporate Governance* 159; Du Plessis 1981 *THRHR* 390; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310.

¹⁶²⁰ Du Plessis *et al German Corporate Governance* 159; Weiss and Schmidt *Labour Law and Industrial Relations* 253; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310; Waas "Employee Representation" 86 as well as Laagland and Zaal "Employee Board-level Representation" 286

between 500 and 2,000 employees.¹⁶²¹ The *Drittelbeteiligungsgesetz* applies to companies with more than 500 employees, as well to both public limited and private companies with more than 2,000 employees.¹⁶²²

(b) The One-Third Participation Act of 2004

In 2004, the One-Third Participation Act (*Drittelbeteiligungsgesetz*, (*DrittelbG*)) replaced *BetrVG* with similar, but simplified, rules.¹⁶²³ This form of co-determination is the “least far-reaching”.¹⁶²⁴ The specific legal forms of the company are relevant: whether the company is structured as a public limited company, private limited company, incorporated as cost-book companies under mining law, co-operatives or mutual insurance companies.¹⁶²⁵ The legal and factual status (with the exception of public limited companies) decide whether or not these enterprises have established a supervisory board.¹⁶²⁶ The *DrittelbG* provides that one-third of the supervisory board must be employee representatives.¹⁶²⁷

The rules of company law determine the size of the supervisory boards.¹⁶²⁸ If the company bylaws do not make provision for a higher number of members of the supervisory board then the supervisory board consists of three members.¹⁶²⁹ The condition is that the number of members must be divisible by three and the maximum number of supervisory

¹⁶²¹ Du Plessis *et al German Corporate Governance* 159.

¹⁶²² Du Plessis *et al German Corporate Governance* 159; Weiss and Schmidt *Labour Law and Industrial Relations* 253; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310; Waas “Employee Representation” 86 as well as Laagland and Zaal “Employee Board-level Representation” 286.

¹⁶²³ Du Plessis *et al German Corporate Governance* 160; Weiss and Schmidt *Labour Law and Industrial Relations* 252; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310; Waas “Employee Representation” 85 as well as Laagland and Zaal “Employee Board-level Representation” 286.

¹⁶²⁴ Waas “Employee Representation” 85.

¹⁶²⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 253; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310.

¹⁶²⁶ Weiss and Schmidt *Labour Law and Industrial Relations* 253; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310.

¹⁶²⁷ S 4 *DrittelbG*.

¹⁶²⁸ Weiss and Schmidt *Labour Law and Industrial Relations* 253; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310.

¹⁶²⁹ Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310.

board members depends on the company capital.¹⁶³⁰ Du Plessis *et al* point out, due to the fact that the majority of the seats on the supervisory boards of these corporations are held by the representatives of the shareholders, that “there is clearly no parity-codetermination in these corporations”.¹⁶³¹ Du Plessis *et al* add that because the number of seats on the supervisory boards of these companies (with between 500 and 2,000 employees) vary considerably, the actual number of seats held by employee representatives on the supervisory boards of these companies is difficult to calculate.¹⁶³²

7.2.2.3.5 The Model of the 1976 Co-Determination Act

The Codetermination Act of 1976 (*Mitbestimmungsgesetz*, 1976 (*MitbestG* (1976))) covers co-determination on supervisory boards outside the mining, coal, iron and steel industries.¹⁶³³ The *MitbestG* is applicable to enterprises of a specific size and constituted as specific type of legal persons.¹⁶³⁴ The *MitbestG* is applicable to all public limited companies (*Aktiengesellschaften: AGs*), private companies (*Gesellschaften mit beschränkter Haftung (GmbHs)*), companies with one or more general partners but limited by shares (*Kommanditgesellschaften auf Aktien: KGaAs*), and cooperatives (*Genossenschaften*) provided that they have more than 2,000 employees.¹⁶³⁵

¹⁶³⁰ Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310. If the company capital is ≤ 1.5 million Euros then the maximum supervisory board members is nine; if the company capital is > 1.5 million Euros then the maximum supervisory board members is 15 and if the company capital is > 10 million Euros then the maximum supervisory board members is 21 (Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310).

¹⁶³¹ Du Plessis *et al German Corporate Governance* 160.

¹⁶³² Du Plessis *et al German Corporate Governance* 160.

¹⁶³³ See Laagland and Zaal “Employee Board-level Representation” 286; Waas “Employee Representation” 86; Wooldridge 2011 *Amicus Curiae* 31; Weiss and Schmidt *Labour Law and Industrial Relations* 253; Wooldridge 2005 *Amicus Curiae* 17 as well as Du Plessis 1981 *THRHR* 390-391 in this regard.

¹⁶³⁴ See Laagland and Zaal “Employee Board-level Representation” 286; Waas “Employee Representation” 86; Wooldridge 2011 *Amicus Curiae* 31 Weiss and Schmidt *Labour Law and Industrial Relations* 253; Wooldridge 2005 *Amicus Curiae* 17 as well as Du Plessis 1981 *THRHR* 390-391 in this regard.

¹⁶³⁵ Waas “Employee Representation” 86 as well as Laagland and Zaal “Employee Board-level Representation” 286; Weiss and Schmidt *Labour Law and Industrial Relations* 253; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 308-309; Du Plessis *et al German Corporate Governance* 157; Wooldridge 2011 *Amicus Curiae* 31; Du Plessis 1981 *THRHR* 390 in this regard.

The *MitbestG* (according to Du Plessis *et al*) therefore “has the widest general application across German industry and commerce”.¹⁶³⁶ Half of the supervisory board consists of representatives of the shareholders and half of representatives of the employees.¹⁶³⁷ Section 27 *MitbestG* provides that the chairperson and vice-chairperson are appointed by a two-thirds majority vote of the supervisory board.¹⁶³⁸ If a two-thirds majority is not attained, then the representatives of the shareholders elect the chairperson and the employee representatives have the right to appoint the vice-chairperson.¹⁶³⁹ It is common for the chairperson to be a shareholder representative.¹⁶⁴⁰ The chairperson of the supervisory board was given a casting vote in 1976, “after considerable political deliberation on the issue”, which has “tilted the power balance on the supervisory board slightly towards the shareholders, evoking considerable opposition both from the corporate side and from labour organisations”.¹⁶⁴¹

Contrary to the model in the mining, iron and steel industries there is no neutral person.¹⁶⁴² Section 29(1) *MitbestG* provides that a majority of votes must be cast for resolutions of the supervisory board unless provided otherwise by the Act. In the case of a deadlock (a tie) a second ballot should take place. If the second ballot results in a tie, then

¹⁶³⁶ Du Plessis *et al German Corporate Governance* 160.

¹⁶³⁷ Waas “Employee Representation” 86 as well as Laagland and Zaal “Employee Board-level Representation” 286; Weiss and Schmidt *Labour Law and Industrial Relations* 254; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 309; Du Plessis *et al German Corporate Governance* 157 in this regard. The size of the supervisory board is determined as follows: in enterprises with ≤10,000 employees there must be 12 supervisory board members, in enterprises with >10,000 - 20,000 employees there must be 16 members and in enterprises with >20,000 employees there must be 20 members (see Weiss and Schmidt *Labour Law and Industrial Relations* 254; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 309 and Du Plessis 1981 *THRHR* 390).

¹⁶³⁸ Waas “Employee Representation” 86; Weiss and Schmidt *Labour Law and Industrial Relations* 255; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 309 and Wooldridge 2005 *Amicus Curiae* 21.

¹⁶³⁹ Waas “Employee Representation” 86; Weiss and Schmidt *Labour Law and Industrial Relations* 255; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 309; Du Plessis *et al German Corporate Governance* 157.

¹⁶⁴⁰ Waas “Employee Representation” 86; Weiss and Schmidt *Labour Law and Industrial Relations* 255 and Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 309.

¹⁶⁴¹ Du Plessis *et al German Corporate Governance* 158.

¹⁶⁴² Weiss and Schmidt *Labour Law and Industrial Relations* 253.

the chairperson shall have two votes.¹⁶⁴³

Similar to the co-determination model of *Montan-MitbestG* the “employee director” is entrusted with personnel and the social affairs of the company.¹⁶⁴⁴ Such an employee director must be appointed under section 33 *MitbestG* 1976, but, unlike the employee director under *Montan-MitbestG*, the employee representatives do not have a right of veto.¹⁶⁴⁵

7.2.2.4 The German Corporate Governance Code

Earlier in the thesis¹⁶⁴⁶ it was already pointed out that the phrase “corporate governance” has been defined in a number of ways,¹⁶⁴⁷ and that no precise meaning can be attached to it. Wooldridge and Pannier point out that corporate governance “is perhaps best understood, in the words of the *Cadbury Committee* which reported on the Financial Aspects of Corporate Governance in 1992 as meaning ‘the system by which companies are directed and controlled’”.¹⁶⁴⁸ They add, in addition “to the substantive legal rules governing such matters as board structure, directors’ powers and duties, the general meeting, minority rights, and employee participation (where applicable); new norms and practices

¹⁶⁴³ S 29(2) *MitbestG*. Waas “Employee Representation” 86; Weiss and Schmidt *Labour Law and Industrial Relations* 253; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 309. The Federal Constitutional Court (*Bundesverfassungsgericht: BVerfG*) was asked on the initiative and petition by some well-known German companies, to examine the constitutionality of *MitbestG* 1976 (Waas “Employee Representation” 86-87; Weiss and Schmidt *Labour Law and Industrial Relations* 255; Du Plessis *et al German Corporate Governance* 158). The Court held that the provisions of the *MitbestG* which was not unconstitutional and did not violate their constitutional guaranteed right of property in Article 14 of the Basic Law (*Grundgesetz*) (Waas “Employee Representation” 86-87; Weiss and Schmidt *Labour Law and Industrial Relations* 255; Du Plessis *et al German Corporate Governance* 158). Du Plessis *et al et al German Corporate Governance* 158 points out that as “it is clear that for these types of corporations the power balance is in favour of the shareholder representatives, commentators refer to this form of codetermination as ‘quasi-parity codetermination’ rather than ‘parity codetermination’.”

¹⁶⁴⁴ Weiss and Schmidt *Labour Law and Industrial Relations* 254; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 310.

¹⁶⁴⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 254; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 311.

¹⁶⁴⁶ See chapters 2 and 3 above.

¹⁶⁴⁷ Wooldridge and Pannier 2005 *EBLR* 225.

¹⁶⁴⁸ Wooldridge and Pannier 2005 *EBLR* 225.

governing corporate governance came into being in many European jurisdictions as well as on international level".¹⁶⁴⁹

The *German Corporate Governance Code* (as indicated above) was adopted in February 2002.¹⁶⁵⁰ The Code is amended on an annual basis, and was amended again in 2014. The current version of the Code is dated 24 June 2014. The introduction of a code of good corporate governance practices has been seen in Germany in the context of the broader definition of corporate governance and has been approached realistically: the stakeholder debate no longer could be ignored, as the view that corporate governance amounts to more than a mere creation of legal structures for decision-making and supervising the corporation.¹⁶⁵¹

The peculiarities of the German corporations law, particularly pertaining to the German Corporations Act (*Aktiengesetz (AktG)*) regarding the German two-tier board meant "no international code would fit the German situation perfectly."¹⁶⁵² In the European context the differences between the *OECD Principles of Good Corporate Governance* and the *UK Combined Code* complicate matters¹⁶⁵³ and illustrate that no international code is a fit for Germany.

The code provides for "essential statutory regulations" dealing with the management and supervision of German listed companies.¹⁶⁵⁴ It contains internationally and nationally recognised standards pertaining to good and responsible governance and aims to make the German Corporate Governance system transparent and understandable.¹⁶⁵⁵ The

¹⁶⁴⁹ Wooldridge and Pannier 2005 *EBLR* 225.

¹⁶⁵⁰ The German corporate governance code was is the result of a government commission, *Deutscher Corporate Governance Kodex*. The commission was set up on the recommendation of the *Baums-Kommission*. The *Baums-Kommission* suggested changes of substantive law which later have been implemented by the Transparency and Disclosure Act of 2002 (see Wooldridge and Pannier 2005 *EBLR* 225 in this regard.)

¹⁶⁵¹ Du Plessis, Hargovan and Bagaric *Principles* 345.

¹⁶⁵² Du Plessis, Hargovan and Bagaric *Principles* 345.

¹⁶⁵³ Du Plessis, Hargovan and Bagaric *Principles* 345.

¹⁶⁵⁴ German Corporate Governance Code 2014 <http://www.dcgk.de>.

¹⁶⁵⁵ German Corporate Governance Code 2014 <http://www.dcgk.de>.

foreword of the Code explains that two types of provisions/recommendations are identified by the use of the words "shall" (*soll*) and "should" (*sollte*).¹⁶⁵⁶ These recommendations are explained as follows:

The recommendations of the Code are marked in the text by use of the word "shall". Companies can deviate from them, but are then obliged to disclose this annually and to justify the deviations (comply or explain). This enables companies to reflect sector and enterprise-specific requirements. A well justified deviation from a Code recommendation may be in the interest of good corporate governance. Thus, the Code contributes to more flexibility and more self-regulation in the German corporate constitution. Furthermore, the Code contains suggestions which can be deviated from without disclosure; for this the Code uses the term "should". The remaining passages of the Code not marked by these terms contain descriptions of legal regulations and explanations.¹⁶⁵⁷

Part 3 of the Code particularly deals with the cooperation between management and the supervisory boards. The Code, for example, provides that good corporate governance requires open discussion between management and the supervisory boards, as well as among their respective members, and that the "comprehensive observance of confidentiality is of paramount importance for this".¹⁶⁵⁸ In supervisory boards with co-determination, shareholder and employee representatives can prepare supervisory board meetings separately, possibly meeting with members of the management board, and, if necessary, the supervisory board shall meet without the management board.¹⁶⁵⁹

Du Plessis *et al*/ point out the following criticisms, challenges and developments regarding German co-determination:

Recently, employee participation at supervisory board level has come under severe criticism, Moreover, other legal scholars and managers experienced in co-determination matters have published many comments during the past few years that point to several shortcomings of parity co-determination.

¹⁶⁵⁶ German Corporate Governance Code 2014 <http://www.dcgk.de>. See also Wooldridge and Pannier 2005 *EBLR* 226 and Du Plessis, Hargovan and Bagaric *Principles* 347 in this regard.

¹⁶⁵⁷ German Corporate Governance Code 2014 <http://www.dcgk.de>.

¹⁶⁵⁸ German Corporate Governance Code 2014 <http://www.dcgk.de>.

¹⁶⁵⁹ German Corporate Governance Code 2014 <http://www.dcgk.de>.

Despite these shortcomings, members of management and shareholder representatives have been reluctant to openly challenge the legitimacy and usefulness of parity co-determination during recent decades, seeking to avoid confrontations with the powerful German trade unions – confrontations that could also have provoked strikes. Further, for fear of losing general elections at the level of either of federal German unions or of the important federal industrial states, most of the political parties have not lent any support to modifications, not even moderate ones. The German system of co-determination was therefore characterised as a matter of taboo or as a 'dinosaur model'. It is only during the past few years that some voices from management and political parties have been willing in this respect, to call a 'spade a spade' ...

It is interesting to note that the German Corporate Governance Code reinforced and modernised the two-tier board system, and will probably ensure that it will remain the board system for public corporations in Germany for the foreseeable future. The most controversial aspect of the German two-tier board system is still employee participation at supervisory level. This is something that will have to be debated in Germany, especially after several recent decisions of the European Court, and the scepticism that exists about employee participation in practice. Employee participation at supervisory board level has the potential, once again, to become one of the most challenging political issues in Germany in the near future.¹⁶⁶⁰

The next section specifically addresses co-determination in the European Union, as well the intricacies of the European Company (*Societas Europaea*) and the options available to member states regarding one-tier or two-tier board structures.

7.2.3 European Co-determination

7.2.3.1 Overview

In addition to the three models of employee representation recognised in Germany (as discussed above), the European Union (EU) implemented the *Societas Europaea* (SE); "a transnational, pan-European form for company law"¹⁶⁶¹ specifically dealing with employee representation in the European Society and the European Cooperative Society (SCE).¹⁶⁶² The Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2001] O.J. L 294/1 ("the SE Regulation") introduced the

¹⁶⁶⁰ Du Plessis, Hargovan and Bagaric *Principles* 350-351.

¹⁶⁶¹ Kirchner "A Third Way" 1.

¹⁶⁶² Kirchner "A Third Way" 1; Bouloukos 2007 *EBLR* 535; Weiss and Schmidt *Labour Law and Industrial Relations* 260.

latter.¹⁶⁶³

For more than a decade, German corporate governance has been impacted considerably by developments originating from the European Union.¹⁶⁶⁴ Initially the goal for SE “was to offer companies a complete set of European company law rules to facilitate their operations across the region”, but, due to different attitudes regarding employee involvement on company boards, the structure of boards, and taxation, it became an impossible task for Member States to reach agreement on a single standard.¹⁶⁶⁵ The European Member States reached agreement, which is a compromise, on a framework structure.¹⁶⁶⁶ This framework harmonised only minimal amounts of company law, which meant that the rest was left to national law, and “assigned the level of employee representation to a complicated, supplementary negotiation process”.¹⁶⁶⁷ It has been said that “[n]o subject in company law has required more efforts, involved more man-hours and received more attention than the statute for a European Company”.¹⁶⁶⁸

The SE company can come into existence in the following instances:¹⁶⁶⁹

- (1) where a merger takes place between several companies and at least two of these companies are covered by the law of two different Member States;

¹⁶⁶³ Regulation (EC) No 2157/2001 of 8 October 2001 became operational on 8 October 2004. Article 1(4) provides as follows: “Employee involvement in an SE shall be governed by the provisions of Directive 2001/86/EC.” The Council Directive 2001/86/EC of 8 October 2001 supplements the Statute for the SE specifically with regard to the involvement of employees (“SE Employees’ Directive”). This SE Employees’ Directive was passed on the same day and addresses all Member States of the EU. It came into effect on 10 November 2001. Germany implemented the SE Regulation as well as the SE Employees’ Directive on 22 December 2004. This was done by passing the following two pieces of legislation: *Gesetz zur Einführung der Europäischen Gesellschaft (SEEG)* and *Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft —SE-Beteiligungsgesetz (SEBG)*. The former deals with the SE whereas the latter deals dealing with co-determination. The BGBl. 2004 I 3675 contains two Articles: in Art 1 the *SEEG* is promulgated whereas in Art 2 the *SEBG* is contained. These provisions became law on 29 December 2004 (see Art s 9 of the *SEBG* as well as Du Plessis, Hargovan and Bagaric *Principles* 230).

¹⁶⁶⁴ Du Plessis *et al et al German Corporate Governance* 198.

¹⁶⁶⁵ Kirchner “A Third Way” 1.

¹⁶⁶⁶ Kirchner “A Third Way” 1.

¹⁶⁶⁷ Kirchner “A Third Way” 1.

¹⁶⁶⁸ See Bouloukos 2007 *EBLR* 535 where he refers to Wymeersch E, *Company law in Europe and European Company Law* (1st European Jurists Forum, Nomos Verlagsgesellschaft, Nürnberg, 2001) 85.

¹⁶⁶⁹ See in this regard Weiss 2010 *IJCLIR* 10-11 as well as Weiss 2007 *Comp Lab L & Pol’y* J 483.

- (2) where a holding company is created by several companies if at least two companies are covered by the law of different member states;
- (3) where a joint subsidiary is created by several companies if the respective companies have their headquarters and their seat within the European Community and if at least two of these companies are covered by the law of different Member States or if a company at least for two years has a subsidiary in a different Member State covered by the law of that State;
- (4) where an existing company is transformed into a European Company, if this company for at least two years has a subsidiary in a different Member State. In case of transformation the Member States are entitled to permit the transformation only if the body in which the workers are represented agrees either unanimously or by a qualified majority. It is also not possible to transfer the company's seat to another member state in the course of the transformation.

Initially the implementation of the SE proved to be difficult but the SE has become a success story, which will be dealt with later.

7.2.3.2 *The SE: the tale of two board structures*

The European legislator took the approach of creating a mixed or hybrid system when it created the SE.¹⁶⁷⁰ Two organisational alternatives are available, namely, one-tier or two-tier systems.¹⁶⁷¹ Somehow, the one- and two-tier board structures “had to be reconciled with each other”.¹⁶⁷² According to Article 38 of the Council Regulation (EC) No. 2157/2001 of October 8, 2001 on the Statute for a European company (SE), a SE shall be comprised

¹⁶⁷⁰ See in this regard Du Plessis *et al German Corporate Governance* 10; Du Plessis, Hargovan and Bagaric *Principles* 83; Jungmann 2006 *ECFR* 427; Laagland and Zaal “Employee Board-level Representation” 107.

¹⁶⁷¹ See in this regard Weiss 2010 *IJCLIR* 11 as well as Weiss 2007 *Comp Lab L & Pol'y J* 483.

¹⁶⁷² See in this regard Du Plessis *et al German Corporate Governance* 10.

of "either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system)".¹⁶⁷³

The SE company, thus, can be set-up either in accordance with a one-or two-tier structure, the choice depends on the statutes the SEs adopted.¹⁶⁷⁴ Under a two-tier board structure, Article 40(3) of the SE Regulation provides as follows:

The number of members of the supervisory organ or the rules for determining it shall be laid down in the statutes" of the SEs. Article 43(2) of the SE Regulation lay down a similar rule for a one-tier board system. 1675 From this it is clear that the SE Regulation "respects the wide diversity between the laws of the Member States."¹⁶⁷⁶

Employee involvement is to be promoted regardless of the structure chosen.¹⁶⁷⁷

7.2.3.3 *The SE Employees' Directive*

The primary aim of the SE Employees' Directive¹⁶⁷⁸ is to ensure that the different employee participation or co-determination models of the different Member States are protected.¹⁶⁷⁹

"Participation" means

the influence of the body representative of the employees and/or the employees' representatives in the affairs of the company by way of: (i) The right to elect or appoint some of the members of the company's supervisory or administrative organ, or (ii) The right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.¹⁶⁸⁰

¹⁶⁷³ Jungmann 2006 *ECFR* 427.

¹⁶⁷⁴ See in this regard Du Plessis *et al German Corporate Governance* 231.

¹⁶⁷⁵ See in this regard Du Plessis *et al German Corporate Governance* 231.

¹⁶⁷⁶ See in this regard Du Plessis *et al German Corporate Governance* 231; Lederer 2006 *EBLR* 1578.

¹⁶⁷⁷ Laagland and Zaal "Employee Board-level Representation" 107; Davies 2003 *ILJ (UK)* 79.

¹⁶⁷⁸ See Article 2(k) of SE Employees' Directive regarding employee participation on the one-tier and two-tier boards.

¹⁶⁷⁹ See in this regard Du Plessis *et al German Corporate Governance* 232.

¹⁶⁸⁰ Article 2(k) of SE Employees' Directive.

The German co-determination model is followed by the SE Employees' Directive.¹⁶⁸¹ Weiss has pointed out the following regarding the SE Employees' Directive:

the Directive can be understood as a stimulus for the reopening of an intensive debate on corporate governance in the European context where all the well-known concepts are to be reconsidered and rebalanced: Stakeholders' value versus shareholders' value, industrial peace versus industrial conflict, cooperation versus adversarial patterns. In essence this Directive could provoke a new debate on the specific European culture of industrial relations.¹⁶⁸²

One commentator observes that "worker participation" has been the main obstacle for three decades to the progress of the European Company Statute and the SE Employees' Directive.¹⁶⁸³ The preamble to the SE Employees' Directive spells out its purpose:

to promote the social objectives of the Community by providing special provisions on employee involvement aimed at ensuring that creation of an SE will not cause the disappearance or reduction of practices of employee involvement existing within the companies participating in the SE's establishment.¹⁶⁸⁴

The SE Employees' Directive (mentioned earlier) "enhances the freedom of the SEs to choose the individual shapes of their codetermination systems".¹⁶⁸⁵ Two main aims of the SE Employees' Directive with regard to employee participation are reflected, "*inter alia* in the 'before and after' principle,¹⁶⁸⁶ which prevents the evasion of national laws on employee involvement, and in the partial exemption of the SE from national laws which ensures that national regimes on employee participation are not exported".¹⁶⁸⁷ The SE Employees' Directive does not introduce a uniform set of rules applicable to every SE and thus respects the "high diversity of national rules on employee involvement".¹⁶⁸⁸

¹⁶⁸¹ See in this regard Du Plessis *et al German Corporate Governance* 232.

¹⁶⁸² Weiss "Workers' Involvement" 78.

¹⁶⁸³ Villiers 2006 *IJCLIR* 186.

¹⁶⁸⁴ Preamble of the SE Employees' Directive par 3.

¹⁶⁸⁵ See in this regard Du Plessis *et al German Corporate Governance* 233.

¹⁶⁸⁶ Storm 2006 *European Company Law* 135 points out that the so-called "before and after" principle refers to the situation where "employee rights in force before the establishment of an SE should provide the basis for employee rights of involvement in that SE after it has been formed."

¹⁶⁸⁷ Sagan 2010 *EBLR* 17.

¹⁶⁸⁸ 5th recital; Sagan 2010 *EBLR* 17.

The drafters of the SE instruments were aware that companies might bypass the provisions on employee participation¹⁶⁸⁹ and introduced Article 11 SE Employees' Directive:

Member States shall take appropriate measures in conformity with Community law with a view to preventing the misuse of an SE for the purpose of depriving employees of rights to employee involvement or withholding such rights.

Strong and Sagan point out this provision reveals a lacuna:¹⁶⁹⁰

it is limited to the stage of formation of the SE. What happens thereafter is not covered by either the Directive or the Regulation. The only indication that the drafters have thought about this problem is to be found in Recital 18 of the Preamble to the SE Directive...¹⁶⁹¹

Recital 18's last sentence reads as follows:

Consequently, [the 'before and after' principle] should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes.¹⁶⁹²

Article 3(1) of the SE Employees' Directive obliges the administrative organ in a two-tier system and the management in a one-tier system to take steps to open negotiations with the employee representatives of the company on arrangements for the involvement of employees in the SE. This should be undertaken as soon as possible after the plan for an SE is published. Article 3(2) of the SE Employees' Directive requires the creation of a Special Negotiating Body from employees of the participating companies to be elected or appointed in proportion to the number of employees employed in each Member State by the participating companies as well as by their concerned subsidiaries or establishments. Article 3(3) provides that arrangements for the involvement of employees within the SE, by

¹⁶⁸⁹ Storm 2006 *European Company Law* 135; Sagan 2010 *EBLR* 20.

¹⁶⁹⁰ Storm 2006 *European Company Law* 135; Sagan 2010 *EBLR* 20.

¹⁶⁹¹ Storm 2006 *European Company Law* 135.

¹⁶⁹² See also Storm 2006 *European Company Law* 135; Sagan 2010 *EBLR* 20.

written agreement, should be determined by the Special Negotiating Body¹⁶⁹³ and the competent organs of the participating companies.

The Special Negotiating Body and the competent organs of the participating companies should negotiate “in a spirit of cooperation” with a view to reach an agreement about the involvement of the employees within the SE,¹⁶⁹⁴ *inter alia*, covering the following matters:¹⁶⁹⁵

- (i) the scope of the agreement,¹⁶⁹⁶
- (ii) the composition of the representative body as the discussion partner of the competent organ of the SE,¹⁶⁹⁷
- (iii) the functions and procedure for the information and consultation of the representative body,¹⁶⁹⁸
- (iv) frequency of meetings,¹⁶⁹⁹
- (v) resources to be allocated to the representative body¹⁷⁰⁰ and
- (vi) arrangements for participation on the administrative or supervisory body.¹⁷⁰¹

Du Plessis *et al* point out that the special rules that have been laid down in provisions prescribing the further composition of the Special Negotiating Body, its proceedings and its functioning found in Article 3 are “bordering on ridiculous”.¹⁷⁰² Article 12(2) of the SE Regulation provide that no SE may be registered unless one of three conditions (similar to those in the European Works Council Directive (EWC), Council Directive 94/45/EC, OJ L

¹⁶⁹³ Article 3(7) of the SE Employees’ Directive provide that “any expenses relating to the functioning of the special negotiating body and, in general, to negotiations shall be borne by the participating companies so as to enable the special negotiating body to carry out its task in an appropriate manner.”

¹⁶⁹⁴ Article 4(1) of the SE Employees’ Directive.

¹⁶⁹⁵ See also Villiers 2006 *IJCLIR* 188 in this regard.

¹⁶⁹⁶ Article 4(2)(a) of the SE Employees’ Directive.

¹⁶⁹⁷ Article 4(2)(b) of the SE Employees’ Directive.

¹⁶⁹⁸ Article 4(2)(c) of the SE Employees’ Directive.

¹⁶⁹⁹ Article 4(2)(d) of the SE Employees’ Directive.

¹⁷⁰⁰ Article 4(2)(e) of the SE Employees’ Directive.

¹⁷⁰¹ Article 4(2)(g) of the SE Employees’ Directive.

¹⁷⁰² Du Plessis *et al German Corporate Governance* 234.

254/64 in 7.3 below) concerning employee involvement has been satisfied.¹⁷⁰³ Article 7(1) of the SE Employees' Directive provides as follows:

- (i) management and employee representatives have reached an agreement on employee involvement; or
- (ii) the representatives of the employees have decided not to negotiate special involvement arrangements for the SE; or
- (iii) the Standard Rules on employee involvement as set out in the Annex to the SE Employees' Directive, have been triggered, usually where the parties have failed to reach an agreement regarding the employee involvement rules that will be applied in the SE.¹⁷⁰⁴

Part 3(b) par 2 of the Standard Rules contained in the Annex provides as follows:

If none of the participating companies was governed by participation rules before registration of the SE, the latter shall not be required to establish provisions for employee participation.

Part 3(b) par 2 does not apply to SEs formed by transformation but the requirement for participation in SE applies if the rules of a Member State relating to employee participation are applied before registration.¹⁷⁰⁵ The Standard Rules, on the other hand, say that "if board level participation is to be found in any of the founding companies, it must be present in the SE as well", which means that the form of participation "in principle to be adopted by the SE is the most advanced of the systems required by national laws applying to the founding companies".¹⁷⁰⁶ Par 3(b), in this regard, is as follows:

¹⁷⁰³ The structure of the SE Employees' Directive is very much the same as the one in the EWC Directive. It provides for a special negotiating body. It also list the topics for negotiation and leaves everything to negotiations and provides that where the negotiations fail, there is a "safety-net", the so-called standard rules. The SE Employees' Directive contains two different topics, which have to be distinguished carefully: Information and consultation's "structure is very similar to the one developed in the directive on EWCs" but the application of EWC Directive is excluded in the SE Company (see Weiss 2010 *IJCLIR* 11 in this regard).

¹⁷⁰⁴ See also Davies 2003 *ILJ (UK)* 79 in this regard.

¹⁷⁰⁵ Part 3(a).

¹⁷⁰⁶ Davies 2003 *ILJ (UK)* 84.

In other cases of the establishing of an SE, the employees of the SE, its subsidiaries, and establishments and/or their representative body shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SE *equal to the highest proportion*¹⁷⁰⁷ in force in the participating companies concerned before registration of the SE.¹⁷⁰⁸

Du Plessis *et al*¹⁷⁰⁹ highlight the following practical implication for the use of the words “equal to the highest proportion” in par 3(b) above:

In this sentence the words ‘equal to the highest proportion’ are of vital importance as they illustrate the practical effect of these arrangements. These words leave no doubt that if the negotiations between the companies and the employees’ representatives fail, then the employees’ codetermination will not be curtailed – in comparison to the state before the formation of the SE – by the creation of an SE, provided that the employees’ representatives cannot reach any agreement in their negotiations within the Special Negotiating Body. Thus, in the last resort, the employees – particularly of German SEs – have the final say, almost a type of an ultimate veto on any codetermination system they are not happy with. It means that the employee representatives can cause the negotiations to come to an end because of their ‘veto’ and then the default position is that the codetermination system in place before the SE was formed will remain the one binding the SE.

¹⁷⁰⁷ My emphasis.

¹⁷⁰⁸ According to Article 8(1) of the SE Regulation, an SE can transfer its registered office from one Member State into another Member state. This process takes place in accordance with Articles 8(2)-(13). Such a transfer may not result in the creation of a new legal person or the winding up of the SE. The legal personality of the SE remains intact irrespective of the change in laws governing the SE (see Du Plessis *et al German Corporate Governance* 231 in this regard). Complicated transfer procedures are captured in Articles 8(2)-(16). Du Plessis *et al German Corporate Governance* 232-233 sums up the effects of such a transfer of co-determination as follows: “The SE Employees’ Directive confers upon the competent administrative body of the SE and the representatives of the employees (the so-called Special Negotiating Body) the authority to agree on an individually shaped form of codetermination, which takes into consideration the special needs of the SE and its employees and the particular circumstances surrounding it. These specific arrangements are not impaired by the transfer of the registered seat of the SE into another Member State but remain in effect. In addition, Article 8(2)(c) of the SE Regulation prescribes that the transfer proposal by the management or administrative organ shall also cover ‘any implication the transfer may have on employees’ involvement’. Article 4(2)(h) further provides that the agreement reached between the administration of the SE and the Negotiating Body shall specify ‘. . . cases where the agreement should be renegotiated and the procedure for its renegotiation’. Should such agreement be silent on the case of the transfer of the registered seat, the demand for a renegotiation of the agreement could eventually be based on Section 21(4) of the *Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (SE-Beteiligungsgesetz - SEBG)*, stating that the agreement should be renegotiated in case of ‘structural changes’ of the SE. It is doubtful, however, as to whether the transfer of the registered seat of an SE represents such ‘structural change’. Uncertainties loom in this respect.”

¹⁷⁰⁹ Du Plessis *et al German Corporate Governance* 235.

7.2.3.4 The Cross-border Merger Directive

On 26 October 2005 the European Parliament and Council adopted Directive 2005/56/EC on cross-border mergers¹⁷¹⁰ of limited liability companies (OJ L 310, 25.11.2005).¹⁷¹¹ The Court of Justice of the European Communities delivered a ground-breaking judgment¹⁷¹² enabling companies in Europe to merge across borders. The implication of the merger process is that companies no longer have to comply with the “complicated and burdensome” provisions of the SE Statute or the CBM Directive.¹⁷¹³

Du Plessis *et al*¹⁷¹⁴ succinctly summarise the development process of the CBM Directive as follows:

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on Cross-Border Mergers of limited liability companies followed a Proposal by the EC issued on 18 November 2003. The substance of the Proposal was maintained although it has been changed in minor respects. The Directive was addressed to the EU Member States. Article 19(1) provides that the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 15 December 2007.

In an ‘Explanatory Memorandum’ preceding the Proposal, the EC pointed out that employee participation in a company created by cross-border merger was the reason for the deadlock over the original Proposal of 1984 for such a Directive. The overriding fear concerning cross-border mergers was that the process might be hijacked by companies which, faced with having to live with employee participation, might try to circumvent it by means of such a merger. The solution found by the SE Regulation of 8 October 2001 and by the SE Employees’ Directive of the same day was used, *mutatis mutandis*, also with a view to solving the problem of codetermination in the proposed Directive.

¹⁷¹⁰ Cross-border mergers are beyond the scope of this thesis: employee participation under the CBM Directive will be briefly addressed.

¹⁷¹¹ On 29 December 2006, Germany introduced the Co-determination Act of the Employees in Cross-Border Mergers (*Gesetz über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitenden Verschmelzungen, MgVG*) came into force, implementing Art. 16 of the EU Directive 2005/56/EC of October 26, 2005, on Cross-Border Mergers of Limited Liability Companies. The main objectives of the CBM directive are to facilitate cross-border mergers of corporations and to protect the co-determination rights of employees in existing merging companies (see Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 313).

¹⁷¹² in Case C-411/03, *SEVIC Systems AG* (“SEVIC”).

¹⁷¹³ Storm 2006 *European Company Law* 130.

¹⁷¹⁴ Du Plessis *et al German Corporate Governance* 251.

A fundamental principle of the CBM directive, emphasised in recitals 3 and 18 of the preamble, is the so-called “before and after” principle.¹⁷¹⁵ According to Art 2(3) CBM Directive and Article 12(2) SE Regulation an examination of the employee participation arrangements before the merger can take effect should be considered when a company is formed as a result of a merger.¹⁷¹⁶ Section 16 is relevant: it concerns employee participation under the CBM Directive. Although the CBM Directive largely refers to the SE Employees’ Directive, differences exist:

The guiding principle in the Cross-Border Merger Directive is that the applicable rights are those of the Member State where the company resulting from the cross-border merger has its registered office (Art. 16, §1). However, to avoid the ‘regime shopping’ temptation whereby companies could choose to register in a Member State with fewer or no participation rights compared with their previous situation, the Directive includes some safeguarding mechanisms which, at first sight, seem very similar to provisions in the SE.¹⁷¹⁷

In certain cases the CBM Directive provides for an alternative regime, which applies in the following three situations/exceptions:¹⁷¹⁸

- (i) where at least one of the merging companies has more than 500 employees and is subjected to an employee participation system six months before commencement of the cross-border merger;¹⁷¹⁹ or

¹⁷¹⁵ See discussion in par 7.2.3.3 above. See Laagland and Zaal “Employee Board-level Representation” 291 and Davies 2003 *ILJ (UK)* 84 in this regard.

¹⁷¹⁶ See also Laagland and Zaal “Employee Board-level Representation” 291; François and Hick “Employee Participation” 32-33.

¹⁷¹⁷ Cochon 2013 *Economic Report Series* 36. Storm 2006 *European Company Law* 136 points out that the CBM Directive also does not deal with information and consultation. They are left to the national laws implementing the EWC Directive 94/45/EC (which will be discussed under 7.3 below) and other directives.

¹⁷¹⁸ Article 16(1) CBM Directive.

¹⁷¹⁹ The degree of employee participation is irrelevant here. This system, however, “opens the door to the alternative system where the rights of employees are not at risk” (Laagland and Zaal “Employee Board-level Representation” 291).

- (ii) where the applicable national law which is applicable to the resulting company does not provide for at least the highest level of participation as operated in each of the relevant merging companies;¹⁷²⁰ or
- (iii) where the national law does not provide the same level of protection for employees in other Member States as in the Member State where the registered office of the company is located.

Strong points out, when the whole of Article 16 is considered, that “the protection of employee participation is rather strong” and “results in most cases in the application of the highest level of participation to be found in the merger companies subject to the alternative created by Article 16(2)(b)”.¹⁷²¹ It is evident that the CBM Directive follows the same pattern as the SE Employees’ Directive and the SE Regulation as far as the co-determination rights of employees, “acquired under the laws of one of the *leges societatis*, are concerned: those rights shall not be curtailed in the slightest way by cross-border mergers”.¹⁷²²

7.3 Social co-determination

7.3.1 Social Co-determination in Germany

7.3.1.1 Overview

Two forms (as pointed out in 7.2 above) of co-determination exist in Germany, namely “management co-determination” (“supervisory co-determination”) or “social co-

¹⁷²⁰ Laagland and Zaal “Employee Board-level Representation” 292 points out that the “text does not make it clear how different levels should be compared” because the CMM Directive refers in Article 16(2) “to the proportion of employee representatives on the administrative or supervisory board or their committees or the management group of the company” and in relation to Article 2(k) SE Statute, this means “the right to elect, appoint, recommend, or oppose the appointment of members (Article 16(2) CBM refers to Article 2(k) SE Statute). The SE Directive thus takes a quantitative approach and in all probability the same thus applies to the CBM Directive (Laagland and Zaal “Employee Board-level Representation” 292-293).

¹⁷²¹ Storm 2006 *European Company Law* 137.

¹⁷²² Du Plessis *et al German Corporate Governance* 252.

determination".¹⁷²³ The former has been discussed above in the context of Germany, as well as the EU. "Social co-determination" refers to instances when employee participation takes place at shop-floor level through works councils (*Betriebsräte*), safety committees, productivity committees, job classification committees, and so on.¹⁷²⁴

The German industrial relations system is characterised by a "dualism" of employee representation through works councils and trade unions.¹⁷²⁵ The German concept of social co-determination in essence revolves around the idea of works councils.¹⁷²⁶ Works councils typically refer to "a system where ordinary workers are actively involved in structuring their day-to-day environment in personal and social matters".¹⁷²⁷ Works councils "are powerful institutions in Germany, since they not only fulfil important functions but also have easy access to labour courts, which act as watch-dogs for social cooperation and which tend to favour employees".¹⁷²⁸

In Germany collective agreements are negotiated between trade unions and employers' associations at industrial level, whereas works councils provide a highly developed mechanism for "establishment-level" participation.¹⁷²⁹ Work councils are institutionally separated from trade union although they are closely connected to them.¹⁷³⁰ Works councils in Germany are elected by all employees in an establishment whether they are unionised or not, whereas trade unions represent only their members.¹⁷³¹ A well-functioning separation exists between trade unions and works councils, in that both support and strengthen each other.¹⁷³²

¹⁷²³ Du Plessis *et al German Corporate Governance* 151.

¹⁷²⁴ Du Plessis *et al German Corporate Governance* 151.

¹⁷²⁵ Weiss 2002 *IJCLIR* 251; Waas "Employee Representation" 71; Hübler and Jirjahn 2003 *Scot J Pol Econ* 471.

¹⁷²⁶ Du Plessis *et al German Corporate Governance* 151.

¹⁷²⁷ Du Plessis *et al German Corporate Governance* 151.

¹⁷²⁸ Du Plessis *et al German Corporate Governance* 153.

¹⁷²⁹ Hübler and Jirjahn 2003 *Scot J Pol Econ* 471.

¹⁷³⁰ Weiss 2002 *IJCLIR* 251.

¹⁷³¹ Weiss 2002 *IJCLIR* 251.

¹⁷³² Weiss 2002 *IJCLIR* 251.

The development of works councils, however, has not been without controversy. In this context Weiss notes:

To understand the system as it is at present [in 1989] it should be borne in mind that it is not by any means an invention of the labour movement. During the last century, as a reaction to growth of the labour movement, employers voluntarily established some rudimentary form of workers participation. There were essentially two reasons for doing this, to keep unions out of the establishment, and to provide employer policies at plant level with better legitimation.¹⁷³³

The first statutory provisions on German social co-determination were in place by the end of the nineteenth century.¹⁷³⁴ The first developments in co-determination, however, took place before the First World War when both liberal and Christian theorists developed it “as a process necessitated by industrialisation and as an acceptable alternative to revolutionary employee practices”.¹⁷³⁵ The first practical examples of co-determination in Germany occurred long before the first statutory provisions were introduced. The 20th century is credited with the first comprehensive legislation, introduced in 1920.¹⁷³⁶

The Works Councils Act of 1920 (*Betriebsrätegesetz*)¹⁷³⁷ was enacted soon after the German Revolution of 1918 and historically, is the most important development concerning social co-determination.¹⁷³⁸ The Works Councils Act of 1920 conferred certain co-determination rights upon employees.¹⁷³⁹ Originally these rights were conferred on works councils only at shop-floor level not at the supervisory board level.

¹⁷³³ Weiss *Labour Law* 149.

¹⁷³⁴ Du Plessis *et al German Corporate Governance* 151.

¹⁷³⁵ Du Plessis *et al German Corporate Governance* 151.

¹⁷³⁶ Weiss 2002 *IJCLIR* 252.

¹⁷³⁷ Anstey *Employee Participation* 104; Weiss and Schmidt *Labour Law and Industrial Relations* 222; Du Plessis *et al German Corporate Governance* 152; Waas “Employee Representation” 72.

¹⁷³⁸ Du Plessis *et al German Corporate Governance* 152; Du Plessis *et al German Corporate Governance* 152; Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 55.

¹⁷³⁹ Du Plessis *et al German Corporate Governance* 152. See also the overview discussed in para 7.2.2.3 above regarding the historical development of co-determination in Germany.

In 1922, the Works Councils Act of 1920 was amended, by the 1922-Amendment Act¹⁷⁴⁰ to the Works Councils Act of 1920.¹⁷⁴¹ The 1922-Amendment Act extended co-determination to supervisory boards and enabled works councils in all companies to appoint representatives to their supervisory boards.¹⁷⁴² The provisions regarding the power of works councils to appoint members to supervisory boards were in place from 1922 until 1934, soon after the National Socialist Government came to power in 1933.¹⁷⁴³ The Works Councils Act of 1920 as well the 1922-Amendment consequently were repealed and labour rights and structures were effectively destroyed.¹⁷⁴⁴

After the Second World War the Works Council Constitution Act of 1952 (*Betriebsverfassungsgesetz – BetrVG* (1952)) was passed by the German Federal legislative bodies, after the foundation of the Federal Republic of Germany in 1949.¹⁷⁴⁵ The *BetrVG* reintroduced a works council system in 1952 but from the outset trade unions fought the *BetrVG* (1952).¹⁷⁴⁶ The aims of the *BetrVG* were two-fold: first, it resumed the tradition of the Works Councils Act of 1920 and, since 1952, became the basic law regulating the activities of works councils and, second, by way of Section 76 of the *BetrVG* (1952) it introduced the model of one-third employee participation in the supervisory boards of companies in Germany.¹⁷⁴⁷

In 2004, section 76 of the *BetrVG* (1952) was replaced by the One-Third Participation Act

¹⁷⁴⁰ This Amendment Act was pertinently named the Act on the Power of Works Councils to appoint Members to the Supervisory Board of 1922 (*Gesetz über die Entsendung von Betriebsratsmitgliedern in den Aufsichtsrat*) (Du Plessis *et al German Corporate Governance* 152).

¹⁷⁴¹ Du Plessis *et al German Corporate Governance* 152.

¹⁷⁴² Du Plessis *et al German Corporate Governance* 152.

¹⁷⁴³ Anstey *Employee Participation* 104; Weiss and Schmidt *Labour Law and Industrial Relations* 222; Du Plessis *et al German Corporate Governance* 152.

¹⁷⁴⁴ Anstey *Employee Participation* 104; Weiss and Schmidt *Labour Law and Industrial Relations* 222; Du Plessis *et al German Corporate Governance* 152.

¹⁷⁴⁵ Anstey *Employee Participation* 104; Weiss and Schmidt *Labour Law and Industrial Relations* 222; Du Plessis *et al German Corporate Governance* 152; Waas "Employee Representation" 72.

¹⁷⁴⁶ Anstey *Employee Participation* 104; Weiss and Schmidt *Labour Law and Industrial Relations* 222; Waas "Employee Representation" 72.

¹⁷⁴⁷ Du Plessis *et al German Corporate Governance* 153.

of 2004 (*Drittelbeteiligungsgesetz*).¹⁷⁴⁸ These days the *BetriebsVG* (1952) “no longer contains the provisions regarding one-third employee participations at supervisory board level but deals exclusively with matters relating to the works councils”.¹⁷⁴⁹ However, the one-third employee participation regime (in practical terms) did not change in 2004. Now, it is regulated under a different piece of legislation, namely the One-Third Participation Act of 2004 (*Drittelbeteiligungsgesetz*).¹⁷⁵⁰

The *BetrVG* (1952) was finally and fundamentally amended and replaced by the Works Constitution Act 1972 (*BetrVG* (1972)) in 1972.¹⁷⁵¹ Only minor amendments were introduced until 2001: the most recent and significant amendment to the Works Constitution Act 1972 (*BetrVG* (1972)) occurred in 2001.¹⁷⁵² The amendment to *BetrVG* (1972) in 2001 was supposed “to improve the conditions for the application of the *BetrVG* in small and medium-sized establishments, to adapt the traditional organizational structures to an ever changing reality, to improve the resources available to the works councils and to increase the work council’s powers in certain areas”.¹⁷⁵³ The structure of workers co-determination, however, did not change.¹⁷⁵⁴

¹⁷⁴⁸ See 7.2.2.3.4 above for a detailed discussion on the One-Third Participation Act of 2004 (*Drittelbeteiligungsgesetz*).

¹⁷⁴⁹ Du Plessis *et al German Corporate Governance* 153.

¹⁷⁵⁰ Du Plessis *et al German Corporate Governance* 153.

¹⁷⁵¹ Weiss “Germany” 107; Anstey *Employee Participation* 104; Weiss and Schmidt *Labour Law and Industrial Relations* 222; Weiss 2002 *IJCLIR* 252.

¹⁷⁵² Weiss and Schmidt *Labour Law and Industrial Relations* 223; Weiss 2002 *IJCLIR* 252.

¹⁷⁵³ Weiss and Schmidt *Labour Law and Industrial Relations* 223; Weiss 2002 *IJCLIR* 252.

¹⁷⁵⁴ Waas “Employee Representation” 72.

7.3.1.2 Works Councils

7.3.1.2.1 Composition

In Germany works councils apply to the private sector, whereas staff councils are prevalent in the public sector.¹⁷⁵⁵ The Works Constitution Act of 1972 (*BetrVG*) forms the legal basis of works councils¹⁷⁵⁶ and regulates all basic matters relating to the works councils.¹⁷⁵⁷ Section 1 of the *BetrVG* provides that all companies that employ at least five people are required by law to establish a works council.¹⁷⁵⁸ But many small and medium-sized establishments so not have a work council.¹⁷⁵⁹ Sections 9 and 10 of the *BetrVG* specify in detail the numbers of members for works councils which are made up exclusively of employee representatives who act as counterparts to management.¹⁷⁶⁰ Works councils form “autonomous legal bodies”¹⁷⁶¹ which represent the interests of all employees of the

¹⁷⁵⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 222.

¹⁷⁵⁶ Weiss and Schmidt *Labour Law and Industrial Relations* 222-247.

¹⁷⁵⁷ Du Plessis *et al German Corporate Governance* 153.

¹⁷⁵⁸ A central or company works council (*Gesamtbetriebsrat*) can be established where works councils exist in establishments of a multiplant enterprise, a group works council (*Konzernbetriebsrat*) for a group at the level of the parent company, and a European works council (*Europäisches Betriebsrätegesetz*) for companies with at least two operations located in different European member states. (see Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 13; Weiss and Schmidt *Labour Law and Industrial Relations* 225 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 58 in this regard).

¹⁷⁵⁹ See Weiss 2002 *IJLLIR* 251-264 for more detail as to the reasons why irrespective to the 2001 amendments many small and medium-sized establishments still do not have work councils.

¹⁷⁶⁰ See also Weiss “Germany” 108; Weiss and Schmidt *Labour Law and Industrial Relations* 223-224. The size of the work council will depend on the size of the enterprise. In an establishments with up to 20 employees there is only one work council member; in firms with more than 20 and up to 50 employees there should be three members; where there are more than 7,000 and up to 9,000 employees have 31 works council members and above this level, the number of works council members increases by two for each additional 3,000 employees (Weiss “Germany” 109; Weiss and Schmidt *Labour Law and Industrial Relations* 225). S 27 *BetrVG* provides that if a work council consists of at least nine members that an executive committee (*Betriebsausschuss*) that deal with current routine affairs should be established. In terms of s 28 *BetrVG* works councils may delegate specific functions and rights to the executive committee or other committees where an establishment has more than 100 employees. Similarly where an enterprise has more than 100 employees s 106 *BetrVG* provides that an “economic committee” dealing with economic affairs (*Wirtschaftsausschuss*) must be appointed by the works council. The “economic committee” must consist of at least three and at most seven members. The “economic committee” is entitled to be regularly informed and consulted by the employer on business matters and is obliged to report back to the works council about these matters (see Wiess “Germany” 109; Weiss and Schmidt *Labour Law and Industrial Relations* 223-225; Waas “Employee Representation” 76; Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 58).

¹⁷⁶¹ Waas “Employee Representation” 72.

enterprise and act independently of trade unions.¹⁷⁶² Sections 13–20 of the *BetrVG* contain provisions on the election of the members of works councils.¹⁷⁶³ The *BetrVG* prescribes the separation of functions and personnel and functional links between trade unions and works councils.¹⁷⁶⁴ Works councils are legally entitled to appoint their own electoral boards to organise elections. However, trade unions with members in the workplace are entitled to be represented on the electoral boards. Trade unions are also entitled to challenge the outcome of the elections on procedural grounds.¹⁷⁶⁵ Unions have overcome “the institutional pattern of dual representation”, as the vast majority of works council members are also trade union members.¹⁷⁶⁶ Section 31 of the *BetrVG* makes provision for trade unions with delegates on the works council to attend work councils meetings in an advisory capacity.¹⁷⁶⁷

7.3.1.2.2 Competences of the Works Council

Section 80 *BetrVG* provides for the general tasks of a works council. Works councils must ensure that employers abide by duties arising from labour law,¹⁷⁶⁸ in that a works council must “guard the effectiveness of Acts, ordinances, safety regulations, collective agreements and works agreements that are in force for the benefit of the employees”.¹⁷⁶⁹

¹⁷⁶² Weiss “Germany” 108; Weiss and Schmidt *Labour Law and Industrial Relations* 224; Du Plessis *et al German Corporate Governance* 15; Waas “Employee Representation” 72.

¹⁷⁶³ Works council members are elected by secret ballot by all employees at the enterprise who are over 18 years of age. Employees who have been employed for at least six months (and who are over 18 years of age) may be elected for a term of four years. No term limits. S 1 of the *BetrVG* provides for the election of works council members. In such an election every establishment must have at least five employees over 18 years of age, provided three of them have been employed for at least six months. The 2001 amendment brought about that blue-collar (manual) workers and white-collar workers are no longer treated as separate groups. All employees are now treated as a homogenous group (see Weiss and Schmidt *Labour Law and Industrial Relations* 223–225; Weiss 2002 *IJCLIR* 255; Waas “Employee Representation” 75).

¹⁷⁶⁴ Van der Walt 2008 *SA J of Hum Res Man* 47.

¹⁷⁶⁵ Du Toit 2000 *ILJ* 1548; Weiss and Schmidt *Labour Law and Industrial Relations* 229.

¹⁷⁶⁶ Weiss “Germany” 108; Weiss and Schmidt *Labour Law and Industrial Relations* 224–229.

¹⁷⁶⁷ See in this regard the judgments of Federal Labour Court of 01/20/2009-1 AZR and 06/22/2010-1 AZR where the court has granted trade union representatives access to work councils on the basis of freedom of association as enshrined in Article 9(3) of the German Constitution (see also Waas “Employee Representation” 73 in this regard).

¹⁷⁶⁸ Waas “Employee Representation” 81.

¹⁷⁶⁹ Section 80(1) *BetrVG*.

The *BetrVG* grants the works council several specific rights of participation: these include access to information, and the right to be heard, control and veto rights, and the right to co-determination.¹⁷⁷⁰ The decision-making process is no longer the prerogative of management in instances where these rights apply.¹⁷⁷¹ Co-determination in this context means “management cannot make any decisions without the consent of the works council. In the absence of consensus, any unilateral move by management would be illegal”.¹⁷⁷²

The most far-reaching rights that works councils enjoy are the so-called “true codetermination rights” (*echte Mitbestimmung*).¹⁷⁷³ Co-determination places the employer and the works council on an equal footing¹⁷⁷⁴ as it gives both an equal voice in the decision-making process.¹⁷⁷⁵ Either side, in principle at least, can take the initiative and call for a new settlement.¹⁷⁷⁶ If the parties cannot reach agreement, the matter is referred to the arbitration committee whose decision is binding on management and the works council.¹⁷⁷⁷ Either the employer or the works council is entitled to appeal to the Labour Court (whose power to review is very limited).¹⁷⁷⁸

Although co-determination rights are important rights of works councils, other information and consultation rights are also important.¹⁷⁷⁹ A central feature of the German industrial relations system is that collective bargaining by trade unions is separated from participation by means of consultation and decision-making by works councils.¹⁷⁸⁰

¹⁷⁷⁰ Weiss “Germany” 110; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 13; Weiss and Schmidt *Labour Law and Industrial Relations* 236; Waas “Employee Representation” 81 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 59 and Biasi 2014 *IJLLI* 462 in this regard.

¹⁷⁷¹ Weiss “Germany” 110; Weiss and Schmidt *Labour Law and Industrial Relations* 236.

¹⁷⁷² Weiss “Germany” 110; Weiss and Schmidt *Labour Law and Industrial Relations* 236.

¹⁷⁷³ Waas “Employee Representation” 83.

¹⁷⁷⁴ Waas “Employee Representation” 83.

¹⁷⁷⁵ Weiss “Germany” 110; Weiss and Schmidt *Labour Law and Industrial Relations* 236.

¹⁷⁷⁶ Weiss “Germany” 110; Weiss and Schmidt *Labour Law and Industrial Relations* 236.

¹⁷⁷⁷ Weiss and Schmidt *Labour Law and Industrial Relations* 236-237.

¹⁷⁷⁸ Weiss “Germany” 110; Weiss and Schmidt *Labour Law and Industrial Relations* 237.

¹⁷⁷⁹ Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 59.

¹⁷⁸⁰ Du Toit 2000 *ILJ* 1555.

Participation rights can be divided into three areas: (i) social matters, personnel matters and economic matters.¹⁷⁸¹ These matters are addressed below.

(a) Social Matters

A principal function of works councils is with regard to social matters” at plant level.¹⁷⁸² Social matters¹⁷⁸³ are difficult to understand as they have an economic impact and, therefore, are not easy to separate entirely from economic matters.¹⁷⁸⁴ The general understanding regarding social matters is: “those relating only to the social consequences of economic issues”.¹⁷⁸⁵ Works councils are “vested with the most extensive rights to co-determination” in this area.¹⁷⁸⁶ Waas points out that “[t]he cornerstone of what in Germany is referred to as ‘co-determination that can be enforced upon the employer (*erzwingbare Mitbestimmung*)’ is section 87(1) *BetrVG*. Section 87 *BetrVG* provides for the following cases:

- (i) matters relating to the operation of the establishment as well as rules regarding the conduct of employees in the establishment;
- (ii) the beginning and end/termination of daily working hours, including breaks and the dissemination of working hours over the days of the week;
- (iii) temporary reduction or extension of normal working hours in the establishment;
- (iv) time, place, and the manner in which payment of wages and salaries takes place;
- (v) the establishment of general principles in order to regulate annual leave, the establishment of leave schedule, as well as the fixing of individual employee’s leave

¹⁷⁸¹ Weiss “Germany” 110; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 14; Weiss and Schmidt *Labour Law and Industrial Relations* 237; Waas “Employee Representation” 81; Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 61-63 and Biasi 2014 *IJLLI* 463-464 in this regard.

¹⁷⁸² Du Plessis *et al German Corporate Governance* 153.

¹⁷⁸³ The Federal Labour Court of 11/29/1989-1 ABR 57/88 have granted works councils a corresponding “right of initiative” (*Initiativrecht*), which entails that “the works council does not need to wait for the employer to approach it, but it may take the initiative even if the employer feels there is no need to regulate a given matter” (Waas “Employee Representation” 84).

¹⁷⁸⁴ Weiss and Schmidt *Labour Law and Industrial Relations* 237.

¹⁷⁸⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 237.

¹⁷⁸⁶ Weiss “Germany” 111; Weiss and Schmidt *Labour Law and Industrial Relations* 237.

schedule in the case of failure to reach an agreement between employer and employee fail;

- (vi) the introduction and use of technical devices designed to monitor conduct or performance of employees;
- (vii) regulations for the prevention of occupational accidents and diseases as well as health protection on the basis of safety regulations or legislation
- (viii) the form, structure, and administration of social services in instances where they are limited to the establishment, to the enterprise, or to the group;
- (ix) the allotment and withdrawal of rooms, apartments or houses rented to employees in lieu of their employment relationship, as well as general stipulations of the conditions of using these facilities;
- (x) questions related to remuneration arrangements especially with regards to the establishment of principles of remuneration and the introduction and application of new remuneration methods as well as the modification of existing methods;
- (xi) the determination of piece-rates, premiums and other comparable payments based on results, including money factors;
- (xii) the establishment of principles for the handling of proposals/suggestions for improvements;
- (xiii) principles on the performance of team-work for example where routine work is preformed and employees perform the task assigned to them essentially on their own authority.

(b) Personnel Matters

Personnel matters include matters such as hiring, transfer or dismissal of employees, personnel planning and vocational training. With regard to personnel planning the works council is granted in terms of Section 92 *BetrVG* only the right to information and

consultation.¹⁷⁸⁷

(c) Economic Matters

Economic matters are those that concern the economic policy of management, such as investment, production and marketing and also include the works council's co-determination rights if the employer plans on restructuring the establishment, for example, by mass dismissals.¹⁷⁸⁸ The economic committee enjoys specific rights under the *BetrVG* but is limited to information and consultation.¹⁷⁸⁹

More important are the participation rights of the works council in specific economic decisions:¹⁷⁹⁰ decisions that may cause substantial disadvantage to the workforce of the establishment or relevant parts of the establishment are referred to as "substantial alteration to the establishment" (*Betriebsänderung*).¹⁷⁹¹ Section 111 *BetrVG* provides that in companies with more than 20 employees, the employer must inform the works council of plans to implement any operational changes that may cause a substantial or material disadvantage to the employees. The participation rights of the work council includes the following decisions:

- (i) the reduction of operations,¹⁷⁹²
- (ii) partial or total closings,

¹⁷⁸⁷ Weiss "Germany" 112; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 14; Weiss and Schmidt *Labour Law and Industrial Relations* 239; Waas "Employee Representation" 84 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 61 in this regard.

¹⁷⁸⁸ Weiss "Germany" 112; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 14; Weiss and Schmidt *Labour Law and Industrial Relations* 239; Waas "Employee Representation" 84 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 62 in this regard.

¹⁷⁸⁹ Weiss "Germany" 112; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 14; Weiss and Schmidt *Labour Law and Industrial Relations* 239; Waas "Employee Representation" 84 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 62 in this regard.

¹⁷⁹⁰ Weiss "Germany" 112; Weiss and Schmidt *Labour Law and Industrial Relations* 239.

¹⁷⁹¹ Weiss "Germany" 112; Weiss and Schmidt *Labour Law and Industrial Relations* 239.

¹⁷⁹² A mere reduction of the workforce without a reduction of equipment will also constitute a reduction in operations therefore collective redundancy is in principle included. Reduction of operations in this sense, however, are not identical to collective dismissal (Weiss "Germany" 112; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 14; Weiss and Schmidt *Labour Law and Industrial Relations* 239).

- (iii) a transfer of the establishment or transfer of essential parts of it,
- (iv) a merger with other establishments or the breaking up of establishments,
- (v) basic organisational changes,
- (vi) basic changes of the purpose of the establishment,
- (vii) changes affecting the plant facilities,
- (viii) the introduction of new work methods and production processes.

In cases of substantial alteration management should provide the works council in advance with full information in order to engage with them. "Information in advance" means that "it has to be given at an early planning stage", whereas "full information" means that "management must not only disclose its plans but must supply information on all possible alternatives and modifications which were, or are, taken into account in the particular situation".¹⁷⁹³ This disclosure obligation enables the works council to participate in the decision-making process by it having access to the same information as the employer and provides it with the opportunity to have an input.¹⁷⁹⁴

In addition to supplying information to the works council, management is required to arrive at "reconciliation issues" (*Interessenausgleich*)¹⁷⁹⁵ and reach an agreement with the works council on whether or how the specific measures that management plan to implement will be executed.¹⁷⁹⁶ If no agreement is reached either party can refer the matter to the President of the *Land* Employment Agency to mediate the issue.¹⁷⁹⁷ If mediation is not successful or neither party wants mediation to take place, the matter may be referred to the arbitration committee.¹⁷⁹⁸ The arbitration committee can make only a proposal when a reconciliation of issues is at stake; it has no power to impose binding decisions on the parties. Management and the works council must decide whether they want to accept or

¹⁷⁹³ Weiss "Germany" 112; Weiss and Schmidt *Labour Law and Industrial Relations* 240.

¹⁷⁹⁴ Weiss "Germany" 112; Weiss and Schmidt *Labour Law and Industrial Relations* 240.

¹⁷⁹⁵ Section 112 *BetrVG*.

¹⁷⁹⁶ Weiss "Germany" 113; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 14; Weiss and Schmidt *Labour Law and Industrial Relations* 240; Waas "Employee Representation" 84 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 63 in this regard.

¹⁷⁹⁷ Weiss "Germany" 113; Weiss and Schmidt *Labour Law and Industrial Relations* 240.

¹⁷⁹⁸ Weiss "Germany" 113; Weiss and Schmidt *Labour Law and Industrial Relations* 240.

reject the proposal.¹⁷⁹⁹

The law has a provision for a procedure in order to reach a reconciliation of interests. However, if the procedure proves to be unsuccessful, it is up to management to decide: the works council is powerless as it cannot force management to go in a certain direction.¹⁸⁰⁰ Whether or not management has fulfilled its duty to inform the works council and has tried to reach an agreement with the works council on a reconciliation of interests, the works council can enforce a "social plan" (*Sozialplan*).¹⁸⁰¹

This "social plan" (can be enforced in terms of Section 112 *BetrVG*), which will regulate the compensation of payments¹⁸⁰² for disadvantages by the employer, for substantial alterations to the establishment or in cases of insolvency.¹⁸⁰³ A social plan is not confined to financial compensation, but may include programmes such as re-training programs, transfer of employees to other establishments of the enterprise, and so on.¹⁸⁰⁴ If an agreement on a social plan cannot be reached, the employer or the works council will be entitled to appeal to the arbitration committee.¹⁸⁰⁵ The arbitration committee acts as the final decision-maker, whose decision is binding on both parties.¹⁸⁰⁶

¹⁷⁹⁹ Weiss "Germany" 113; Weiss and Schmidt *Labour Law and Industrial Relations* 240.

¹⁸⁰⁰ Weiss "Germany" 113; Weiss and Schmidt *Labour Law and Industrial Relations* 240.

¹⁸⁰¹ Weiss "Germany" 113; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 14; Weiss and Schmidt *Labour Law and Industrial Relations* 240 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 63 in this regard.

¹⁸⁰² There are no are no minimum or maximum financial limits for a social plan in cases of insolvency (Weiss and Schmidt *Labour Law and Industrial Relations* 241).

¹⁸⁰³ Weiss "Germany" 113; Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 14; Weiss and Schmidt *Labour Law and Industrial Relations* 240 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 63 in this regard.

¹⁸⁰⁴ Weiss "Germany" 113; Weiss and Schmidt *Labour Law and Industrial Relations* 241 in this regard.

¹⁸⁰⁵ Weiss "Germany" 113; Weiss and Schmidt *Labour Law and Industrial Relations* 241 in this regard.

¹⁸⁰⁶ Weiss "Germany" 113; Weiss and Schmidt *Labour Law and Industrial Relations* 241 in this regard.

(d) Works Agreements

Works councils (as indicated earlier) are powerful institutions as they enjoy “far-reaching rights”, for example, in the social and personnel realms as well as having the ability to enter into collective agreements with an employer “which take normative effect.”¹⁸⁰⁷

A works agreement (*Betriebsvereinbarungen*)¹⁸⁰⁸ is a “special type”¹⁸⁰⁹ of agreement, which may be concluded between an employer and a works council.¹⁸¹⁰ Works agreements deal not only with matters in which the works councils have rights of co-determination but apply to “all matters relating to labour/management relations in the establishment”.¹⁸¹¹ If no right to co-determination exists, the works council has “no formal power to induce management” to sign the works agreement.¹⁸¹² Works agreements are concluded on a voluntary basis, but they present a means of “exerting” co-determination rights.¹⁸¹³

If the arbitration committee replaces an agreement between the employer and the works council, the effect of such replacement is that the arbitration committee’s decision is understood to be a works agreement.¹⁸¹⁴ According to section 77(2) *BetrVG* works agreements must be in writing and signed by the employer and the works council. Works agreements, as a collective agreement, may establish the rights and duties of the employer and works council and may also contain “individual normative provisions”¹⁸¹⁵ as

¹⁸⁰⁷ Waas “Employee Representation” 84.

¹⁸⁰⁸ Section 77 *BetrVG*.

¹⁸⁰⁹ Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 64.

¹⁸¹⁰ Weiss “Germany” 113; Weiss and Schmidt *Labour Law and Industrial Relations* 242; Waas “Employee Representation” 84 and Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 64 in this regard.

¹⁸¹¹ Weiss “Germany” 113; Weiss and Schmidt *Labour Law and Industrial Relations* 242.

¹⁸¹² Weiss “Germany” 113; Weiss and Schmidt *Labour Law and Industrial Relations* 242.

¹⁸¹³ Waas “Employee Representation” 84.

¹⁸¹⁴ Section 77(2) *BetrVG*; Weiss and Schmidt *Labour Law and Industrial Relations* 242.

¹⁸¹⁵ Individual normative provisions may regulate issues such as the content, conclusion and termination of the individual contract of employment and cover a range of issues such as payment, working hours etc (Weiss and Schmidt *Labour Law and Industrial Relations* 187).

well as “collective normative provisions”.¹⁸¹⁶ The normative provisions have an “automatic and mandatory effect” on the parties to the individual employment relationship and may be concluded for a definite or indefinite period.¹⁸¹⁷ Works agreements may be terminated by giving three months’ notice (unless otherwise agreed upon)¹⁸¹⁸ and parties remain free to agree to different terms.

7.3.1.3 *The relationship between collective bargaining and works councils*

Works councils in Germany (as indicated above), in principle, gain the right to conclude “normative agreements” with employers.¹⁸¹⁹ The same can be said about trade unions.¹⁸²⁰ Trade unions¹⁸²¹ (in the context of institutionalised workers’ participation and by means of elected representatives) represent not only their members but the workforce as a

¹⁸¹⁶ Weiss and Schmidt *Labour Law and Industrial Relations* 242. Collective normative provisions covers two types: (i) employee representation participation and participation in the establishment and (ii) provisions regarding employees as part of the workforce of the establishment. The former types of provisions will include the extension of works council rights whereas the latter includes the use of parking areas, the use of telephones for personal purposes etc (Weiss and Schmidt *Labour Law and Industrial Relations* 189).

¹⁸¹⁷ Section 77(5) *BetrVG*; Weiss and Schmidt *Labour Law and Industrial Relations* 242 and Waas “Employee Representation” 84.

¹⁸¹⁸ Section 77(5) *BetrVG*; Weiss and Schmidt *Labour Law and Industrial Relations* 242.

¹⁸¹⁹ Waas “Employee Representation” 87.

¹⁸²⁰ Waas “Employee Representation” 87.

¹⁸²¹ Trade unions have a long history in Germany. Their role remains important (Waas “Employee Representation” 87). Weiss sums up the position regarding trade unions in Germany as follows: “A characteristic feature of today’s union structure in Germany is the fact that different political and ideological wings are amalgamated in one association. This means that within the union movement there is no political or ideological fragmentation (so-called principle of amalgamated unions). There are, however, exceptions to this general pattern: the Christian Unions which so far play only a marginal role. ... The second important characteristic of unions in Germany is the fact that they are organized on an industry or branch basis. This means that a union is open to all employees in the industry concerned, no matter which trade or occupation they are engaged in. This again implies that there is only one union for all employees of the branch or industry. Industry or branch in this context should be understood in a very broad sense. Thus, for example the Metal Workers’ Union covers the automobile industry as well as for example the electrical industry, the shipbuilding industry, the machine building industry, and the computer industry, to mention just a few. Again there are unions which do not fit in this industry - or branch - based pattern, e.g. the Union of Education and Science, which is not open to all employees of an establishment but only to those who have specific professions and occupations in the system of education and science” (Weiss 2004 *Managerial Law* 74). See also Waas “Employee Representation” 87-88 with regard to unionisation and collective bargaining.

whole.¹⁸²² Institutionalised workers' participation (as indicated above) can be divided into two channels, namely, works councils, which act as counterparts to management, and workers' representatives on the supervisory board.¹⁸²³ The power to conclude collective agreements is considered "part and parcel of the freedom of association (*Koalitionsfreiheit*)"¹⁸²⁴ which is enshrined in Article 9(3) of the German Constitution.¹⁸²⁵ The freedom to form an association, to join an association, to remain in an association, and to be active in an association in Germany is called the "positive freedom of association". With regard to collective bargaining Weiss points out that

... it is highly contested whether and in how far the freedom not to join an association or to leave an association, the so-called 'negative freedom of association' is protected by this very article. In spite of the fact that the negative freedom of association has never been endangered, the Federal Labour Court interprets Article 9 para. 3 of the Constitution as guaranteeing also this aspect of freedom of association. The 'negative' freedom is simply regarded as the mirror of the 'positive' freedom of association. In actual practice it is very difficult to tell from which point on the trade union infringes the negative freedom of association.¹⁸²⁶

Because both trade unions and works councils can enter into agreements, the following might be the result:

It can easily be claimed that the relationship between works councils and employers, on the one hand, and the parties to collective agreements, on the other hand, represents one of the key problems of German labour law. Specifically, both works councils and trade unions have the power to arrive at agreements that take normative effect: Works councils enjoy the right to conclude collective agreements, so-called works agreements, with the employer. Similarly, the right to conclude collective agreements (so-called collective bargaining capacity, *Tariffähigkeit*) is enjoyed by trade unions and employers' associations as well as by individual employers. Because works councils and trade unions are able to conclude collective agreements, the question arises which collective agreements should take precedence in case of a (possible) conflict.¹⁸²⁷

¹⁸²² Weiss 2004 *Managerial Law* 73.

¹⁸²³ Weiss 2004 *Managerial Law* 73.

¹⁸²⁴ Waas "Employee Representation" 87.

¹⁸²⁵ Waas "Employee Representation" 87; Weiss 2004 *Managerial Law* 73.

¹⁸²⁶ Weiss 2004 *Managerial Law* 73.

¹⁸²⁷ Waas "Employee Representation" 88-89.

The engagement in collective bargaining is the main function that can be attributed to trade unions and employers' association.¹⁸²⁸ The Act on Collective Agreements of 1949 (amended in 1969) is the legal foundation for collective bargaining and provides that parties to a collective agreement may be trade unions, on the employees' part, whereas on the employers' side, it can be either individual employers or associations of employers.¹⁸²⁹

Collective bargaining can encompass two types of agreements (see above): (i) works agreements between the employer and the works council and (ii) agreements with a trade union (trade union agreements).¹⁸³⁰ Two types of collective bargaining agreements with trade unions exist: (i) those concluded between an employers' association and the trade union ("association agreement", *Verbandstarifvertrag*),¹⁸³¹ and (ii) those concluded between the employer and the trade union ("company agreement, *Firmetarifvertrag*).¹⁸³² Association, as well as company, agreements regulate issues such as working conditions, especially remuneration and working hours, bonuses, vacation leave and notice periods.¹⁸³³

Collective agreements concluded at company level between a trade union and a single employer are rare and exceptional in Germany as collective agreements, generally, are concluded between a trade union and an employers' association.¹⁸³⁴ These collective agreements may cover the entire territory of the Federal Republic for a certain industry or a certain region of an industry. For purposes of collective bargaining the territory of Germany, in most industries, is divided into different regions and it is up to the associations to decide on the boundary of such regions.¹⁸³⁵ Weiss points, since collective bargaining in Germany takes place at sectoral level, two effects are almost inevitable:

¹⁸²⁸ Weiss 2004 *Managerial Law* 79; Weiss and Schmidt *Labour Law and Industrial Relations* 180.

¹⁸²⁹ Weiss 2004 *Managerial Law* 79; Weiss and Schmidt *Labour Law and Industrial Relations* 180

¹⁸³⁰ Waas 2011 *Comparative Labor Law and Policy Journal* 613; Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 68.

¹⁸³¹ Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 68.

¹⁸³² Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 68; Weiss and Schmidt *Labour Law and Industrial Relations* 180.

¹⁸³³ Lingemann, von Steinau-Steinrück and Mengel *Employment & Labor Law* 68.

¹⁸³⁴ Weiss 2004 *Managerial Law* 79; Weiss and Schmidt *Labour Law and Industrial Relations* 181.

¹⁸³⁵ Weiss 2004 *Managerial Law* 79.

First, the conditions laid down cannot take account of particular circumstances in individual companies. Thus, by necessity, the standards must be vague and ambiguous. Secondly, since the agreements cover a huge number of enterprises and employees, public attention and public pressure is rather significant. Parties to collective agreements hence have no choice but to act in an economic and responsible manner. This means that, at least in general, the minimum standards laid down in collective agreements cannot exceed the possibilities of small companies within the respective industry. This is why collective agreements are quite often only of limited relevance for the more prosperous sectors within an area covered.¹⁸³⁶

Works agreements cannot deal with remuneration and other conditions of employment if such matters are already regulated by a collective agreement and have been fixed by or are annually fixed by such a collective agreement.¹⁸³⁷ A matter is considered to be “already regulated”¹⁸³⁸ if such a matter is regulated in collective agreements in a particular region and industry branch: this entails that such a collective agreement will pre-empt a works agreement even if such a collective agreement does not apply to the specific establishment and to the employment relationships within this establishment.¹⁸³⁹

Waas points out that “even if a works agreement is more beneficial for an employer than an applicable collective agreement, the latter agreement prevents the works agreement from becoming effective”.¹⁸⁴⁰ The implication is that “even in establishments where neither the employer is a member of the employers’ association nor the employees are union members, remuneration or other working conditions cannot be regulated by works agreements”.¹⁸⁴¹ This rigid rule applies only to works agreements on matters about which the works council has no right to co-determination, as the works council has no power (in

¹⁸³⁶ Weiss 2004 *Managerial Law* 79.

¹⁸³⁷ Section 77(3) *BetrVG*. See also Waas “Employee Representation” 89 and Weiss and Schmidt *Labour Law and Industrial Relations* 242-243 in this regard.

¹⁸³⁸ See for example Federal Labour Court Case 04/20/1999-1 ABR 72/98 where the court had to deal with a trade union taking legal action against standard type arrangement which regulates matters “already regulated” in a collective agreement. The court held that the collective freedom of association granted in Article 9(3) of the German Constitution was violated because it not only prevented an association from concluding a collective agreement, but also agreements or measures whose aim was frustrating or bypassing of collective agreements. See also Waas “Employee Representation” 87 and Weiss and Schmidt *Labour Law and Industrial Relations* 245.

¹⁸³⁹ Weiss and Schmidt *Labour Law and Industrial Relations* 243.

¹⁸⁴⁰ Waas “Employee Representation” 89.

¹⁸⁴¹ Weiss and Schmidt *Labour Law and Industrial Relations* 243.

these cases) to induce the management to sign such an agreement (see discussion above).¹⁸⁴²

The reason for excluding such works agreements in cases of already existing collective agreements is to prevent the works council from competing with trade unions. Section 77(3) *BetrVG* makes it clear that no rivalry (with reference to collective bargaining) should exist between trade unions and works councils.¹⁸⁴³ Rivalry between works councils and trade unions is regarded as “a threat to the collective bargaining system”, because, if there is a breakdown in the system of collective agreements, then the result would be “no adequate substitute at plant level where works agreements cannot be enforced by the works council”.¹⁸⁴⁴ Weiss and Schmidt point out, in order to “safeguard the strength of the collective bargaining system, the prerogative of parties to a collective agreements to regulate working conditions must be respected”.¹⁸⁴⁵

Waas maintains that it comes as no surprise that the courts have extensively interpreted Section 77(3) *BetrVG* as follows:

First, section 77(3) WCA deal with all conditions of employment independent of their quality or nature. Second, it is not required for the employer to actually be bound to a collective agreement (by being a member of the employers’ association which entered into such an agreement) to legally block the conclusion of a works agreement. If, for instance, a collective agreement exists for the metalworking industry, the employer who does business in this sector is prevented from concluding a works agreement with the works council, even if he/she is not a member of the employers’ association which concluded the agreement and, as a result, is not bound to that agreement. Third, it is not required for a collective agreement to actually be in force. According to the wording of section 77(3) WCA, it is sufficient when a certain subject matter is ‘usually fixed by collective agreement’, which is the case if, first the matter was once the subject of collective bargaining and if, second, it is reasonable to believe that it will again become the subject of collective bargaining in the foreseeable future.¹⁸⁴⁶

¹⁸⁴² Weiss and Schmidt *Labour Law and Industrial Relations* 243.

¹⁸⁴³ Section 77(3) *BetrVG*. See also Waas “Employee Representation” 89 and Weiss and Schmidt *Labour Law and Industrial Relations* 242-243 in this regard.

¹⁸⁴⁴ Weiss and Schmidt *Labour Law and Industrial Relations* 243.

¹⁸⁴⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 243.

¹⁸⁴⁶ Waas “Employee Representation” 89.

7.3.1.4 *The relationship between collective bargaining and industrial action*

The important role of trade unions in Germany (as indicated earlier) cannot be downplayed: they have been “the typical vehicle” through which concerns are raised and articulated.¹⁸⁴⁷ Trade unions provide a practical answer for workers through industrial action “to have an outlet to express their concerns”, which is “particularly important in times of austerity”.¹⁸⁴⁸ In Germany Article 9(3) the German *Grundgesetz* (Basic Law) provides as follows: “The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession”. Waas points out that Article 9(3) covers both individual and collective freedom of association, however, the right to bargain collectively is not expressly mentioned.¹⁸⁴⁹ However, it is generally understood that the right to bargain collectively forms an essential element of the freedom of association.¹⁸⁵⁰ In this context Waas points out:

though the right to collective action is also not mentioned in Article 9(3), it is understood as being included in the freedom of association insofar as such a right is necessary to ensure an effective right in collective bargaining.¹⁸⁵¹

Barnard stresses that “the operation of collective bargaining would be undermined if trade unions did not have the power to put pressure on employers or employers' associations to enter into collective agreements on reasonable terms”.¹⁸⁵² In this context Barnard points out the following regarding the relationship between collective bargaining and strike action:

¹⁸⁴⁷ Barnard 2012 *E L Rev* 120.

¹⁸⁴⁸ Barnard 2012 *E L Rev* 120; Waas “The Right to Strike” 236.

¹⁸⁴⁹ Waas “The Right to Strike” 236.

¹⁸⁵⁰ Waas “The Right to Strike” 236.

¹⁸⁵¹ Waas “The Right to Strike” 236.

¹⁸⁵² Barnard 2012 *E L Rev* 120.

Collective action is the means of equalising the power of the employer and it is the most important and effective way that workers have to express their concerns. And so strike action is the corollary of collective bargaining, a link made express by both art.6 of the European Social Charter 1961 (and 1996) and art.28 of the EU Charter of Fundamental Rights. This link was recognised too by the German Federal Labour Court as early as 1955 when it made clear that 'industrial conflict must be exclusively understood as complementary to collective bargaining'. Article 9(3) of the German Constitution was amended in 1968 to include a provision that certain emergency measures could not be taken against industrial action, declared by associations on either side, to safeguard and improve working conditions. By implication, industrial action is now a constitutionally protected right in Germany.¹⁸⁵³

Virtually "no statutory provisions" refer to industrial action in Germany, nevertheless, it is regulated in detail and the law regarding industrial action is, exclusively, "judge-made law".¹⁸⁵⁴ Judge-made law is of increasing importance and of particular relevance regarding labour law in the fields of individual and collective labour law,¹⁸⁵⁵ but, particularly, collective labour law.¹⁸⁵⁶ Because of the inactivity of the legislator, the labour courts have developed legal rules on industrial action or trade union rights as they dealt with cases on these topics.¹⁸⁵⁷ Weiss points out, in other areas, such as collective bargaining, where statutory rules exist, that these rules are "vague and fragmentary", which means that crucial problems are left to the judiciary.¹⁸⁵⁸ In areas such as workers' participation through works councils the statute is detailed but has not prevented the courts from continuously trying to "re-balance the power relationship" between individual employers and works councils.¹⁸⁵⁹ Of particular importance in this regard is the following:

Of course, in order to play the game correctly, the judges have to take recourse to a statutory provision, even if this provision does not say anything. In case of the topics dealt with in this chapter the point of reference was and still is article 9 par. 3 of the German

¹⁸⁵³ Barnard 2012 *E L Rev* 121.

¹⁸⁵⁴ Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 200; Weiss and Schmidt *Labour Law and Industrial Relations* 199; Weiss "Judge-made Labour Law" 122 and 126.

¹⁸⁵⁵ Weiss "Judge-made Labour Law" 122.

¹⁸⁵⁶ Weiss "Judge-made Labour Law" 122.

¹⁸⁵⁷ Weiss and Schmidt *Labour Law and Industrial Relations* 199; Weiss "Judge-made Labour Law" 122 and 126.

¹⁸⁵⁸ Weiss "Judge-made Labour Law" 122.

¹⁸⁵⁹ Weiss "Judge-made Labour Law" 122.

Constitution. This article deals with freedom of association and says nothing about the lawfulness of industrial action.¹⁸⁶⁰

The important feature is the term “industrial action”, which was not included in Article 9 paragraph 3 of the German Constitution.¹⁸⁶¹ Article 9 paragraph 3, however, was amended by the so-called Emergency Acts of 1968 (*Notstandsgesetze*), to include a provision “according to which certain emergency measures may not be directed against industrial action, declared by associations of either side, to safeguard and to improve working and economic conditions”.¹⁸⁶² The amendment does not define the legal boundaries of industrial action, but it implies the following: “if industrial action is constitutionally protected against measures of emergency, industrial action must be lawful, at least to a certain extent”.¹⁸⁶³

In 1955 the Federal Labour Court (*Bundesarbeitsgericht*, FLC) delivered a “basic and still leading” judgment,¹⁸⁶⁴ which outlined the basic structure of strike and lock-out law. The FLC has since refined and modified this position in subsequent judgments.¹⁸⁶⁵ Due to the fact that freedom of association impacts directly on collective bargaining, the relationship between collective bargaining and industrial action (according to case law/judge-made law) can be put as follows:

Therefore, in the view of the FLC, industrial action has to be understood as being merely an annex to collective bargaining. Industrial action is only allowed in so far as its purpose is the achievement of a collective agreement, and the achievement of aims that can be regulated in a collective agreement. Any industrial action for other purposes, whatever they may be, is understood to be illegal from the very outset. A very important implication of this interrelationship between collective bargaining and industrial action is the following: industrial action may legally only be carried out by parties competent to conclude a collective agreement. For the employees’ side, this means that a strike can only be called out by a trade union. The consequence of this understanding is that all strikes declared by a group of

¹⁸⁶⁰ Weiss “Judge-made Labour Law” 126.

¹⁸⁶¹ Weiss and Schmidt *Labour Law and Industrial Relations* 199; Weiss “Judge-made Labour Law” 126.

¹⁸⁶² Weiss and Schmidt *Labour Law and Industrial Relations* 199; Weiss “Judge-made Labour Law” 126-127.

¹⁸⁶³ Weiss and Schmidt *Labour Law and Industrial Relations* 199; Weiss “Judge-made Labour Law” 126-127.

¹⁸⁶⁴ Federal Labour Court (FLC) of 28 January 1955, *Arbeitsrechtliche Praxis*, No.1 Art. 9 GG Arbeitskampf.

¹⁸⁶⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 199; Weiss “Judge-made Labour Law” 127.

employees which are not backed by the union,¹⁸⁶⁶ so-called wild-cat strikes,¹⁸⁶⁷ are illegal, no matter what their goals may be and no matter how reasonable these goals are. Therefore, in Germany the right to strike is in fact a trade union right and not a right of the individual.¹⁸⁶⁸

Other requirements are set by the FLC for lawful strikes: some important developments are highlighted. The FLC originally (in 1955) introduced the principle of "social adequacy"¹⁸⁶⁹ in order to evaluate the legality of a strike.¹⁸⁷⁰ However, it became obvious that the principle of social adequacy was not helpful in resolving the problem of legitimacy. Then the FLC in 1971 applied the principle of proportionality¹⁸⁷¹ as the governing criterion of strike law.¹⁸⁷² The principle of proportionality tends to prevent the abuse of strikes as the strike itself is governed by this principle.¹⁸⁷³ Proportionality implies:

¹⁸⁶⁶ Waas acknowledges that consensus exists that only certain trade unions can "rightfully call a strike" ("The Right to Strike" 237). He adds in this context: "Trade unions are empowered to call a strike itself if, and only if, they enjoy the so-called 'capacity to bargain collectively.' This capacity requires, among other things, an ability to enforce their objectives (so-called social power). Trade unions must be in a position to exert sufficient pressure to induce the counterpart to conclude a collective bargaining agreement. Because the right to bargain collectively is only constitutionally applicable to those groups which can make sensible contributions to the spheres not explicitly regulated by the state, trade unions must be in a position to exert sufficient pressure to push their counterpart to commence negotiations for a collective agreement. That the right to strike is conditional on the 'capacity to bargain collectively' seems plausible given the fact that German law guarantees the right to strike only insofar as that right is understood as being necessary to ensure proper collective bargaining" (Waas "The Right to Strike" 237-238).

¹⁸⁶⁷ Waas also points out that according to the courts wildcat strikes may be with retrospective effect be legitimised by trade unions taking over the strike. The reason for this is two-fold: "First, trade unions would be put in a position of mere observers if 'wildcat strikes' could not be legitimised. Second, trade unions must be able to determine the point in time at which a strike should be initiated. Against this background, the courts also acknowledge a trade union's aim to surprise employers with sudden strike action (by taking over a strike that was initially initiated by a group of workers)" (Waas "The Right to Strike" 238).

¹⁸⁶⁸ Weiss and Schmidt *Labour Law and Industrial Relations* 199; Weiss "Judge-made Labour Law" 127. See also Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 200.

¹⁸⁶⁹ FLC of 28 January 1955 – GS 1/54, *Arbeitsrechtliche Praxis*, No. 1 Art. 9 GG Arbeitskampf.

¹⁸⁷⁰ Weiss "Judge-made Labour Law" 127.

¹⁸⁷¹ FLC of 21 April 1971 – GS 1/68, *Arbeitsrechtliche Praxis*, No. 43 Art. 9 GG Arbeitskampf.

¹⁸⁷² Weiss "Judge-made Labour Law" 128.

¹⁸⁷³ Weiss and Schmidt *Labour Law and Industrial Relations* 203; Weiss "Judge-made Labour Law" 128. See also Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 201.

the strike is only admissible after all other options for solution of the problems are exhausted, which in turn means that all negotiations must have failed (the so-called '*ultima ratio*' principle).¹⁸⁷⁴

From the principle of proportionality the FLC has derived the following specific prerequisites:¹⁸⁷⁵

- (i) the strike must respect the peace obligation (the peace obliges the parties to the collective agreement to maintain industrial peace for the duration of the agreement in question),
- (ii) the strike must be fair and
- (iii) the strike be the last resort.

According to the FLC, "not only a strike as such would violate the peace obligation, but any activity initiating and preparing a strike".¹⁸⁷⁶ consequently, "before the peace obligation has expired, no preparation for a strike may lawfully be carried out".¹⁸⁷⁷ The *ultima ratio* principle is of great importance in cases where employees, for example, stop work for two

¹⁸⁷⁴ Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 201; Waas "The Right to Strike" 240-241.

¹⁸⁷⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 203; Weiss "Judge-made Labour Law" 128. See also Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 201 and Waas "The Right to Strike" 242-243.

¹⁸⁷⁶ Waas "The Right to Strike" 242.

¹⁸⁷⁷ FLC of 31 October 1958 – 1 AZR 632/57, *Arbeitsrechtliche Praxis*, No. 2 § 1 TVG Friedenspflicht. See also Weiss "Judge-made Labour Law" 128. Waas, with reference to the peace obligation, points, out: "The peace obligation, as acknowledged by the courts, is 'double-edged' in the sense that it not only entails that the parties bound to it must abstain from calling or otherwise supporting industrial action (passive side), but also that the parties must see to it that their members abstain from such action (active side). ... The peace obligation means that industrial action is illegal during the validity period of the collective agreement if it is directed against the collective agreement as a whole or against part of it. An employer can rely on a peace obligation that is part of a collective agreement concluded by an employers' association to which he or she belongs. This peace obligation also protects him or her from a strike that a trade union calls in order to get him or her to conclude a 'company collective agreement' on subjects already covered by the other collective agreement. As a result, employers whose employees enjoy working conditions that are fixed by a collective agreement can, in principle, rely on not being targets of industrial action. In Germany, collective agreements continue to have some effect following their termination. During that period, there is no 'statutory' peace obligation, though the parties may agree on a continuing peace obligation to gain time for negotiations that are not threatened by a strike" (Waas "The Right to Strike" 242-243).

to three hours during negotiations to put pressure on the employer.¹⁸⁷⁸ The proportionality principle is applied in Germany with considerable caution:¹⁸⁷⁹

Though an *ultima ratio* principle is known in the German law on strikes and lock-outs, it is very reluctantly applied by the courts because, among other things, it is regarded as the very aim of a strike to make the employers suffer. As a consequence a strike might only be regarded as 'out of proportion' if it aims at destroying the employer economically.¹⁸⁸⁰

Short and spontaneous "warning strikes" lasting not more than a few hours during the negotiation stage as a means of exerting pressure have remained marginal and more or less isolated incidents during the bargaining stage.¹⁸⁸¹ The FLC found that these strikes during negotiations are not lawful, as they were not utilised as a last resort in the case when negotiations failed.¹⁸⁸² In this context the developments and views regarding the position of the FLC on whether a strike is a "warning strike" or "normal strike" can be summarised as follows:¹⁸⁸³

This traditional view changed when, in 1976, the FLC had to decide on the lawfulness of a short strike of a few hours in one establishment which remained the single action of this kind

¹⁸⁷⁸ Kirchner, Kremp and Magotsch *Key Aspects of German Employment* 201. See also Weiss "Judge-made Labour Law" 129 regarding the so-called warning strikes.

¹⁸⁷⁹ Barnard 2012 *E L Rev* 123 where Barnard refers to private correspondence with Waas.

¹⁸⁸⁰ See also Weiss and Schmidt *Labour Law and Industrial Relations* 204 in this regard.

¹⁸⁸¹ Weiss and Schmidt *Labour Law and Industrial Relations* 204; Weiss "Judge-made Labour Law" 129.

¹⁸⁸² Weiss and Schmidt *Labour Law and Industrial Relations* 204; Weiss "Judge-made Labour Law" 129.

¹⁸⁸³ Weiss further sums up the reaction of the trade unions regarding this development as follows: "Faced with this situation some trade unions developed the strategy of so-called 'new mobility'. This strategy consisted in 'warning strikes' rotating within the area to be covered by a collective agreement and conducted during negotiations. The question was whether or not these local short strikes, based on a highly developed union strategy, fell under the category 'normal strike' or under the category 'warning strike'. In the first case they would have been unlawful since the above mentioned prerequisites for a lawful strike were not met, whereas they would have been lawful in the second case. For the unions, the strategy of 'new mobility' has a great advantage when compared to a 'normal strike'. Due to the obligation to pay strike benefits granted by the unions' standing rules, a normal strike has become very expensive for German trade unions. By contrast, a strike along the lines of 'new mobility' is very cheap, the union does not pay any benefits at all. Thus, for the unions it was crucial whether 'new mobility' was lawful. In 1984, the FLC confirmed the legality of the strikes conducted in the framework of 'new mobility' by categorising them as being warning strikes. This decision provoked strong opposition from the employers' side. Employers and employers' associations were questioning the constitutionality of this judgment. They argued that the system of free collective bargaining, as guaranteed by the Constitution, would be endangered by the fact that, due to the lawfulness of the strategy of 'new mobility', the employees' side would become too powerful, thereby destroying the balanced negotiation procedure" (Weiss "Judge-made Labour Law" 129).

during all following bargaining rounds within the respective industry and region.¹⁸⁸⁴ The Court evidently wanted to legalize warning strikes for the very simple reason that in the past it had quite often turned out that those small 'warning strikes' led to a quicker compromise, thereby eliminating the necessity for a big strike. Thus, with regard to the principle of last resort [*ultima ratio*], the Court stated: 'the principle is only meant for a strike of a longer duration or a strike of an indefinite period... If the only intention of a strike is to promote negotiations by demonstrating the employers' side the employees' readiness to go on strike, then this mild pressure, by way of a short warning strike, may be exerted before means of negotiation are exhausted.' In other words, the criterion of last resort only applies to a normal strike, but not to warning strikes. Since 1976 consequently the question has become controversial of where to draw the demarcation line between 'normal strike' and 'warning strike', the latter being characterized by mild pressure and short duration.¹⁸⁸⁵

However, this position of the FLC has changed dramatically: it no longer differentiates between normal and warning strikes with regard to the *ultima ratio* principle (principle of last resort).¹⁸⁸⁶ At the same time the FLC has significantly lowered the conditions to be met in order to abide by the requirements of *ultima ratio*. The implication is that it is now much easier to go on strike, even at an early stage of negotiations.¹⁸⁸⁷ According to the FLC, the principle of *ultima ratio*:

does not require a formal declaration that collective bargaining has broken down as a prerequisite for initiating industrial action of any kind. That initiation rather reflects the free declaration of the party concerned, a declaration which is not open to review and, hence, solely determining, that it considers the possibilities of reaching an understanding without recourse to pressure to be exhausted. This means that there is no later determining point of time as from which industrial action other than warning strikes ... becomes lawful. There is a uniform point as from which a warning strike, like any other form of industrial action, is not excluded, even though collective bargaining continues¹⁸⁸⁸

The implication of this new approach is that the principle of *ultima ratio* "has more or less become meaningless".¹⁸⁸⁹

¹⁸⁸⁴ FLC of 17 December 1976 – 1 AZR 605/75, *Neue Juristische Wochenschrift*, 1977, 1079.

¹⁸⁸⁵ Weiss and Schmidt *Labour Law and Industrial Relations* 204-205; Weiss "Judge-made Labour Law" 129.

¹⁸⁸⁶ FLC of 21 June 1988 – 1 AZR 651/86, *Arbeitsrechtliche Praxis*, No. 108 Art. 9 GG Arbeitskampf. See also Weiss and Schmidt *Labour Law and Industrial Relations* 204-205; Weiss "Judge-made Labour Law" 130.

¹⁸⁸⁷ Weiss and Schmidt *Labour Law and Industrial Relations* 205; Weiss "Judge-made Labour Law" 130.

¹⁸⁸⁸ Weiss and Schmidt *Labour Law and Industrial Relations* 205-206; Weiss "Judge-made Labour Law" 130.

¹⁸⁸⁹ Weiss and Schmidt *Labour Law and Industrial Relations* 206; Weiss "Judge-made Labour Law" 130.

7.3.2 Social co-determination under European law

7.3.2.1 Overview

In 1985 European labour law was “still at a rudimentary stage”.¹⁸⁹⁰ The European Economic Community (EEC)¹⁸⁹¹ Treaty’s approach to social policy was “still minimalist”: the dominant perspective was economic and the primary effort was to construct a single market.¹⁸⁹² Regardless of the fact that the EEC lacked legislative powers in the area of labour law a number of directives on labour law were in existence.¹⁸⁹³ These directives included the following:¹⁸⁹⁴

- (i) equal pay for women and men;¹⁸⁹⁵
- (ii) comprehensive equal treatment for women and men in employment;¹⁸⁹⁶
- (iii) protection of workers against collective redundancies;¹⁸⁹⁷ and
- (iv) protection of workers in the case of transfer of undertakings and insolvency of the employer.¹⁸⁹⁸

The starting point of the EEC:

is utmost diversity between the different Member States. This diversity has increased significantly due to the recent EU-enlargements ... The differences of the labor law and industrial relations systems between the Member States are deeply rooted in each country’s history and culture. They cannot easily be changed. Therefore, even if the European Community is a supra-national entity with legislative, executive, and judicial powers it was clear from the very beginning that harmonization leading to uniformity cannot be the goal. The strategy from the very beginning, therefore, was to establish minimum-conditions by

¹⁸⁹⁰ Weiss 2010 *IJCLIR* 3.

¹⁸⁹¹ The European Economic Community (EEC) was renamed the European Community (EC) (see Weiss 2010 *IJCLIR* 3 in this regard).

¹⁸⁹² Weiss 2010 *IJCLIR* 3.

¹⁸⁹³ Weiss 2010 *IJCLIR* 3.

¹⁸⁹⁴ Weiss 2010 *IJCLIR* 3.

¹⁸⁹⁵ Directive 75/117/EEC of 10 February 1976, L 45/19.

¹⁸⁹⁶ Directive 76/207/EEC of 9 February 1976, OJ 1976, L 39/40.

¹⁸⁹⁷ Directive 96/34/EC of 3 June 1996, OJ 1996, L 145/9.

¹⁸⁹⁸ Directive 77/187/EEC of 5 March 1977, OJ 1977, L 61.

way of a very specific legislative instrument, the so-called Directive. The roof confederations of both sides of industry on the European level play an important role in the production of such Directives. A Directive only defines the purpose to be achieved and fixes some cornerstones but leaves all the rest to the implementation by the Member States. Therefore, each Member State has the possibility to adapt the European rules into its very context in a different way.¹⁸⁹⁹

The first signs of employee involvement in Member States Directives developed as recently as the 1970s. The Directives on Employee Involvement in the Event of Collective Redundancies was “the reaction to a spectacular case in which it turned out that uneven structures among Member States in this area may be abused by transnationally operating companies”.¹⁹⁰⁰ The driving force behind the Directive on transfer of undertakings was the attempt to increase job security in the case of a transfer of undertaking. The real breakthrough came in 2002 when the Directive on a framework for information and consultation came into effect.¹⁹⁰¹

In 2009 an important development was the Charter on Fundamentals Rights of the EU, which had been passed in 2000 as a “legally non-binding” declaration, became a “legally binding” part of the Lisbon Treaty.¹⁹⁰² The Charter contains a chapter on fundamental social rights: which include the right to collective bargaining, the right to strike, the right to information and consultation, the right to working conditions which respect health, safety and dignity, the right to protection against unjustified dismissal, to mention a few.¹⁹⁰³ The legislative powers of the EC regarding labour law were significantly extended by the protocol to the Maastricht Treaty in 1992 as well as by the Treaty of Amsterdam in 1998.¹⁹⁰⁴ The EC was empowered to legislate practically all aspects of labour law, except “pay, the right of association, the right to strike and the right to impose lock-outs”¹⁹⁰⁵ and

¹⁸⁹⁹ Weiss 2007 *Comp Lab L & Pol'y* J 471.

¹⁹⁰⁰ Weiss 2007 *Comp Lab L & Pol'y* J 477.

¹⁹⁰¹ Weiss 2007 *Comp Lab L & Pol'y* J 478.

¹⁹⁰² Weiss 2010 *IJCLIR* 4; Weiss “Re-inventing Labour Law?” 50. The Charter came into effect on 1 December 2009.

¹⁹⁰³ Weiss 2010 *IJCLIR* 4; Weiss “Re-inventing Labour Law?” 50.

¹⁹⁰⁴ Weiss 2010 *IJCLIR* 4.

¹⁹⁰⁵ Art 137 para 5 EC-Treaty. See also Weiss 2010 *IJCLIR* 4 in this regard. Collective action will be discussed below.

to enact legislation on most of the subject matters by qualified majority.¹⁹⁰⁶ However, the EC was allowed to pass directives only on minimum standards and had to observe the principles of “subsidiarity and proportionality” as contained in the Treaty.¹⁹⁰⁷

In the context of labour law, the international standards developed by the ILO as “universal basis of the international body of labour law”¹⁹⁰⁸ and the role of ILO conventions in the European context, need to be noted. Weiss points out that the ILO’s approach of standard setting is not without problems:

... first, many of the conventions are outdated and no longer feasible for the modern world of work. Second, a significant number of Member States are very hesitant in ratifying conventions. Third, it has to be stressed that ratification does not mean implementation. In many countries the administrative mechanisms for such implementation are simply not available. In addition the monitoring procedure by the ILO is relatively complicated but in the very end rather inefficient. Not much progress has been made in this respect. The sanctioning mechanism is still based on the idea of ‘mobilization of shame’. But it seems that ‘shame’ is not very widespread among those who do not live up to what they have ratified. Fourth, quite often ILO standards are shaped according to the needs and conditions of highly industrialized countries and not according to the situation of developing countries. Without going into further details, much has to be improved in the ILO’s standard setting, the rules are to be adapted to the challenges of today’s world of work and the enforcement machinery has to be strengthened significantly.

The situation is different if standard setting on a regional scale is envisaged. If Europe is taken into account a distinction has to be made between the Council of Europe and the EU. The European Social Charter developed in the context of the Council of Europe has the same problems of enforcement as the ILO. It also is based on the assumption of ‘mobilization of shame’. This, however, is different in the context of the EU, a supranational entity with legislative and judicial powers. EU law has supremacy over national law. EU law already has shaped significantly important areas of labour law: anti-discrimination law, law on health and safety or law on new forms of employment, to take just some examples of the individual employment relationship, and promotion of information and consultation of workers’ representatives on the collective side. However, the EU regulation of labour law is still very fragmentary. And in view of the heterogeneous interests of the 27 Member States it may well be doubted whether a comprehensive regulation on this level can be expected.¹⁹⁰⁹

The following sections will now consider the European Union’s legislative measures in the

¹⁹⁰⁶ See also Weiss 2010 *IJCLIR* 4 in this regard.

¹⁹⁰⁷ See also Weiss 2010 *IJCLIR* 4 in this regard.

¹⁹⁰⁸ Weiss “Re-inventing Labour Law?” 52.

¹⁹⁰⁹ Weiss “Re-inventing Labour Law?” 52-53.

area of labour law: they are of greater importance to the central theme of the thesis than the inputs into individual labour law.¹⁹¹⁰ Three particular legislative steps in the area of workers' participation in the EU can be identified: two refer to transnational undertakings and groups of undertakings, one refers to domestic structures within the Member States.¹⁹¹¹

7.3.2.2 *Collective Labour Law*

7.3.2.2.1 The Directive on European Works Councils

Economic, social and political integration has meant that not only legislation in Europe but also workers' participation schemes and collective bargaining had to be internationalised:¹⁹¹² especially given cognisance of the transnational structure of workers' participation as established by EU law; most importantly through the European Works Councils (EWCs).¹⁹¹³ The European Works Council Directive (EWC),¹⁹¹⁴ amended in 2009,¹⁹¹⁵ focuses on the establishment of a body representing the interests of all employees in undertakings and groups of undertakings. Thus, it covers transnational undertakings and groups of undertakings in the EU, which must have at least 1000 employees and at least 50 employees of the undertaking or of different undertakings of the group in each of at least two different Member States.¹⁹¹⁶ EWCs were designed as "a tool for information and consultation",¹⁹¹⁷ however, the EWC system "has developed dynamics of its own and gone far beyond information and consultation towards

¹⁹¹⁰ For a detailed discussion on developments on individual labour law in the EC consult Weiss 2007 *Comp Lab L & Pol'y J* 472-475 as well as Weiss 2010 *IJCLIR* 5-9.

¹⁹¹¹ Weiss 2010 *IJCLIR* 9.

¹⁹¹² Weiss "Re-inventing Labour Law?" 54.

¹⁹¹³ Weiss "Re-inventing Labour Law?" 54.

¹⁹¹⁴ Directive 94/45/EC of 22 Sep, OJ L 254/64. See also Hendrickx 2010 *ELLJ* 75 in this regard.

¹⁹¹⁵ Directive 09/38/EC of 6 May 2009, OJ L 122/28. Weiss points out the following regarding the 2009 amendment: "The amendment of 2009 mainly has brought clarifications on the timing and content of information and consultation, has integrated ECJ's judgements into the directive and has strengthened the link between EWC and national workers' representatives. Far-reaching requests by the trade unions were not met" (Weiss 2010 *IJCLIR* 10).

¹⁹¹⁶ Article 2(1)(a)-(c) of EWC Directive. See also in this regard also Weiss "Re-inventing Labour Law?" 53; Weiss 2010 *IJCLIR* 9.

¹⁹¹⁷ See Article 1(1) of EWC Directive. Seifert "Transnational Collective Bargaining" 87.

negotiations, leading to agreements” which cover a variety of topics, including restructuring (including relocation).¹⁹¹⁸ Weiss points out that the “legal effect of all these agreements is still totally unclear”, nevertheless, they have a “factual impact”.¹⁹¹⁹

To establish such an EWC a “relatively complicated procedure” is provided for:¹⁹²⁰

- (i) Employee representatives in each undertaking or each group of undertakings must form a “special negotiating body”.¹⁹²¹ The special negotiating body must be composed of employee representatives from each Member State in which the Community-scale undertaking or group of undertakings employs at least 100 employees.
- (ii) The EWC must then be set up by written agreement between the central management of the Community-scale undertaking or of the controlling undertaking of the group and the special negotiating body. The EWC (in cases where a Community-scale undertaking or group of undertakings has its central management or its controlling undertaking outside the EU) must be set up by written agreement between its representative agent within the EU or, in absence of such an agent, the management of the undertaking or of the group of undertaking with the largest number of employees and the special negotiating body.

¹⁹¹⁸ See in this regard also Weiss “Re-inventing Labour Law?” 53.

¹⁹¹⁹ See in this regard also Weiss “Re-inventing Labour Law?” 53. In this context Weiss points out the following: “Since in this context the interaction between national and European actors is far more developed than in the context of the inter-professional and sectoral social dialogue, the EWC pattern might be somehow the forerunner for a system of European collective agreements, of course confined to the respective groups of undertakings. This development is not without risks. The danger might be that the focus is too much on big groups of undertakings, thereby neglecting other companies, in particular small and medium-sized enterprises. One of the difficult tasks in developing a European system of collective bargaining will be to find the right balance between big groups of transnationally operating undertakings and all the many other companies which are not linked to the EWC structure. ... Without any legal base, the workforce of some MNEs (such as VW, Daimler, or Renault) has established world works councils whose powers should not be overestimated. But they certainly are a step in the right direction. And Framework Agreements between MNEs on the one side and world works councils or international trade unions are concluded to an increasing extent. ... In short and to make the point: there are rudimentary signs of developing trans-national collective schemes and agreements. This development has to be strengthened in the future” (Weiss “Re-inventing Labour Law?” 53).

¹⁹²⁰ Weiss 2010 *IJCLIR* 9; Seifert “Transnational Collective Bargaining” 87.

¹⁹²¹ See discussion in 7.2.3 above regarding the special negotiating body.

If the special negotiating body, by a two-thirds majority, decides not to request such an agreement, then this will end the matter.¹⁹²² The subsidiary requirements in the Annex to the EWC apply only if the central management refuses to commence negotiations within six months of receiving such a request or if after three years the two partners are unable to reach an agreement.¹⁹²³

Weiss accordingly points out that these “fall back clauses are the only form of pressure available to the special negotiating body”¹⁹²⁴ because they

expressly limit the EWC's competence to information and consultation to information and consultation on matters which affect either the trans-nationally operating undertaking or group of undertakings as a whole or at least two subsidiaries of the undertaking or two undertakings of the group situated in different Member States.¹⁹²⁵

7.3.2.2.2 The SE Employees' Directive

The second issue with regard to legislative steps in the area of workers' participation in the EU is the directive supplementing the statute for a SE company. See paragraph 7.2.3 above for a detailed discussion of this directive.

7.3.2.2.3 The Information and Consultation Directive

The Directive on a framework for information and consultation of 2002¹⁹²⁶ (as opposed to the two directives mentioned above which refer to the transnational context) shapes the participation structure within the member states: it covers both public and private undertakings with at least 50 employees and establishments with at least 20 employees in

¹⁹²² See Article 5(5) of EWC Directive.

¹⁹²³ See Article 7 of EWC Directive.

¹⁹²⁴ Weiss 2010 *IJLLIR* 10.

¹⁹²⁵ Weiss 2010 *IJLLIR* 10.

¹⁹²⁶ Directive 02/14/EC of 11 March 2002, OJ L 80/29.

Member States.¹⁹²⁷ The preamble of the Information and Consultation Directive provides as follows: "information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in different Member States".

The Directive defines the structure of information¹⁹²⁸ and consultation,¹⁹²⁹ and contains important "procedural requirements".¹⁹³⁰ Article 4(2) of the Directive provides that information and consultation shall cover the following aspects:

- (a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
- (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
- (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).

Article 4(3) of the Directive provides that information "shall be given at such time and in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation". Consultation has to meet several requirements:¹⁹³¹

- (1) the appropriateness of the timing, the method and the content must be ensured;
- (2) consultation has to take place at the appropriate level of management and representation, depending on the subject under discussion;
- (3) the employees' representatives are entitled to formulate an opinion based upon the relevant information that is supplied by the employer;

¹⁹²⁷ Art 3(1) of the Information and Consultation Directive. See also Weiss 2010 *IJCLIR* 12.

¹⁹²⁸ Art 2(1) of the Information and Consultation Directive defines information as follows: "transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it".

¹⁹²⁹ Art 2(1) of the Information and Consultation Directive defines consultation as follows: "the exchange of views and establishment of dialogue between the employees' representatives and the employer".

¹⁹³⁰ See also Weiss 2010 *IJCLIR* 12.

¹⁹³¹ Art 4(4) of the Information and Consultation Directive.

- (4) consultation must also take place in such a way that the employees' representatives are entitled to meet with the employer and to obtain a response as well as the reasons for that response, to any opinion they may formulate; and
- (5) an attempt has to be made in case of decisions within the scope of the employer's management powers to seek prior agreement on the decisions covered by information and consultation.¹⁹³²

Weiss points out that the Directive, as a whole, “remains very flexible and leaves the structural framework and the modalities to a great extent to the member states”, nevertheless it is “an important step to promote minimum conditions for information and consultation throughout the Community”.¹⁹³³ Because the directive provides only a minimum framework, it does not affect more favourable arrangements in Member States and can also not be used to justify the “reduction or destruction of existing patterns”.¹⁹³⁴

7.3.2.2.4 Collective bargaining and industrial action in the European Union

Before we commence a discussion on transnational collective bargaining in the European Union, Weiss provides a good summary of the developments:

In the 1960s visions of legal structures that had no link to reality were in fashion. One favourite object of these dreams was the European Collective Agreement. Quite a few models for such a system of European collective bargaining and European collective agreements were developed. This dream was based on the naïve assumption that the huge differences of the existing systems of collective bargaining in the Member States could simply be abolished and turned into a uniform European structure. However, it soon turned out that these differences in the Member States’ systems of collective bargaining – referring to all possible aspects, including the different form of the actors, the different levels of bargaining, the different legal quality and effect of collective agreements, the scope of coverage by such agreements, the mechanisms of conflict resolution, in particular strike and lock-outs – were the result of specific cultural traditions in the Member States. They were to be seen as a sort of expression of national identity, that could not simply be modified or even abolished. Therefore, it comes as no surprise that these dreams were given up quite soon and that

¹⁹³² Weiss points out that the directive unfortunately “does not tell what is happening if an agreement is reached, but the employer is not implementing it” (Weiss 2010 *IJCLIR* 12).

¹⁹³³ See also Weiss 2010 *IJCLIR* 12.

¹⁹³⁴ See also Weiss 2010 *IJCLIR* 12.

collective bargaining in its traditional sense up to now has remained a matter for the Member States, and this will be the case for the foreseeable future.¹⁹³⁵

Collective bargaining in Europe is exclusively a matter of national policy: although there have been attempts at coordination, these have not been very successful.¹⁹³⁶ Weiss asserts that there is a pattern or “social dialogue” at the European level, which should not be confused with collective bargaining, but, at the same time, should “not be underestimated”.¹⁹³⁷ In the context of social dialogue the so-called “voluntary framework agreements” have been concluded:¹⁹³⁸ “inter-professional social dialogue” has produced four such agreements in the last decade: on telework (2002), on stress at the workplace (2004), on harassment at the workplace (2006), and on violence at the workplace (2009).¹⁹³⁹ These agreements are beyond the scope of the thesis.¹⁹⁴⁰

Before transnational collective bargaining became a “social phenomenon”, there was support for the adoption of a legal framework on European collective agreements by the European Economic Community (EEC).¹⁹⁴¹ Seifert points out, however, that it came as no surprise that the Statue for the SE company,¹⁹⁴² adopted in 2001, no longer provides for transnational collective bargaining:¹⁹⁴³ the first proposal on the incorporation of transnational collective bargaining could not find acceptance with the majority of (the then six) Member States (of the ECC).¹⁹⁴⁴

Collective bargaining (starting in the late nineteenth century) has been an important instrument within European countries to equalise the balance of power between workers

¹⁹³⁵ See also Weiss 2010 *IJCLIR* 13.

¹⁹³⁶ Weiss “Re-inventing Labour Law” 53.

¹⁹³⁷ Weiss “Re-inventing Labour Law” 53; Weiss 2010 *IJCLIR* 13.

¹⁹³⁸ Weiss “Re-inventing Labour Law” 53; Weiss 2010 *IJCLIR* 13.

¹⁹³⁹ Weiss “Re-inventing Labour Law” 53; Weiss 2010 *IJCLIR* 13.

¹⁹⁴⁰ See discussion earlier regarding framework agreements.

¹⁹⁴¹ Seifert “Transnational Collective Bargaining” 76.

¹⁹⁴² See 7.3.2 above for a detailed discussion on the SE company.

¹⁹⁴³ Seifert “Transnational Collective Bargaining” 77.

¹⁹⁴⁴ Seifert “Transnational Collective Bargaining” 77.

and management.¹⁹⁴⁵ The traditional model of industrial relations, limited to the borders of the respective states in Europe, appears increasingly to have becoming problematic due to the opening and merging of markets through the European integration process.¹⁹⁴⁶ The Treaty on the Functioning of the European Union (TFEU), especially with regard to the freedom of establishment, the free movement of commodities, services and capital and the freedom of movement of workers, in which these freedoms “have essentially contributed to build up an Internal market on European scale” and, thus, the mobility of companies has “considerably increased” due to the merging of the different national markets of the Members States.¹⁹⁴⁷

In context of the above, close attention will be given to the balancing of economic and social rights in the EU, especially with reference to the provisions of TFEU regarding the free movement of goods, persons, services and capital. These issues were put under the spotlight when the European Court of Justice (ECJ)¹⁹⁴⁸ was required to deliver judgment in *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line*¹⁹⁴⁹ and *Laval v Svenska Byggnadsarbetareförbundet*.¹⁹⁵⁰ These cases put collective action (which includes strike action as well as other forms of industrial action, like work-to rule or overtime bans) in national, EU and international contexts.¹⁹⁵¹ In these cases, the ECJ held the Treaty provisions have “horizontal direct effect” against trade unions that organise industrial action and the industrial action infringes an employer’s free movement rights regarding freedom of establishment (Article 43 EC) and freedom to provide services (Article 49 EC).¹⁹⁵²

¹⁹⁴⁵ Seifert “Transnational Collective Bargaining” 77.

¹⁹⁴⁶ Seifert “Transnational Collective Bargaining” 77.

¹⁹⁴⁷ Seifert “Transnational Collective Bargaining” 77-78.

¹⁹⁴⁸ Now called the Court of Justice of the European Union.

¹⁹⁴⁹ C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* (Judgment 11 December 2007).

¹⁹⁵⁰ Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* (Judgment 18 December 2007).

¹⁹⁵¹ See for a detailed discussion of these cases Barnard 2012 *E L Rev* 117-135; Davies 2008 *ILJ (UK)* 126-148; Malmberg and Sigeman 2008 *Common Market Law Review* 1115-1146 as well as Dawson 2011 *E L Rev* 208-225.

¹⁹⁵² See Barnard 2012 *E L Rev* 121; Davies 2008 *ILJ (UK)* 126 as well as Dawson 2011 *E L Rev* 221.

The ECJ recognised that the right to strike is a fundamental right within the EU and that trade unions may protest against these claims by asserting the right to strike. However, it is not an unconditional right: “only where they are acting proportionately in the exercise of that right”.¹⁹⁵³ In Finland and Sweden the right to strike is recognised as a fundamental right; in other cases the right to strike is only implied.¹⁹⁵⁴ It is clear that the Constitution of the ILO or any of its conventions does not explicitly include the right to strike, however, the right has been affirmed through case law which was developed by the ILO’s Freedom of Association Committee when interpreting Convention No. 87.¹⁹⁵⁵

Barnard points out that an express right to strike is contained in the 1961 European Social Charter (and the revised version of 1996).¹⁹⁵⁶ The latter provision has now been read into art.11 of the European Court of Human Rights (ECHR), as a result of the significant and important rulings by the Court of Human Rights in *Demir and Baykara v Turkey*¹⁹⁵⁷ and *Enerji-Yapi Yol*.¹⁹⁵⁸ In this context Article 28 of the EU Charter of Fundamental Rights expressly recognises the right to strike (subject to the limitations laid down by national and EU law).¹⁹⁵⁹

Many thought that the right to strike fell outside the European Union’s “constellation of interest” because Article 153(5) TFEU excludes competence, at least under Article 153(1) TFEU, for the European Union to enact any legislation in respect of industrial action.¹⁹⁶⁰ Barnard declares:

¹⁹⁵³ See Barnard 2012 *E L Rev* 120; Davies 2008 *ILJ (UK)* 126 as well as Dawson 2011 *E L Rev* 221.

¹⁹⁵⁴ Barnard 2012 *E L Rev* 119.

¹⁹⁵⁵ Barnard 2012 *E L Rev* 119.

¹⁹⁵⁶ Barnard 2012 *E L Rev* 120.

¹⁹⁵⁷ *Demir and Baykara v Turkey*, Application No.34503/97 (November 12, 2008).

¹⁹⁵⁸ *Enerji Yapi-Yol* Application No.68959/01.

¹⁹⁵⁹ Barnard 2012 *E L Rev* 120.

¹⁹⁶⁰ Barnard 2012 *E L Rev* 120.

Yet it was the references in *Viking* - and its sister case *Laval* - that brought collective action to the attention of the European Union. And it was the Court of Justice that declared the right to strike to be a fundamental right of EU law.¹⁹⁶¹

In both *Viking* and *Laval* collective actions were taken by trade unions, respectively, against Finnish and Swedish employers to force them to accept the Finnish instead of a cheaper Estonian agreement and a Swedish agreement instead of a Latvian agreement.¹⁹⁶² Both *Viking* and *Laval* were based on an infringement of the fundamental freedom of movement provisions in the EU Treaty (Articles 49 and 56 TFEU).¹⁹⁶³ The ECJ in *Viking* held that “the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the [Treaties]” and that “the protection of workers is one of the overriding reasons of public interest recognised by the Court”.¹⁹⁶⁴ The ECJ dealt with the question of proportionality and indicated that the strike action was “suitable”¹⁹⁶⁵ because “collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members”.¹⁹⁶⁶ The ECJ said that strike action “might not be necessary”¹⁹⁶⁷ since it is for the national court to examine whether the “FSU [Finnish Seaman’s Union] did not have other means at its disposal which were less restrictive of freedom of establishment”¹⁹⁶⁸ to bring to a successful conclusion the collective negotiations entered into with *Viking*, and, “whether that trade union had exhausted those means before initiating such action”.¹⁹⁶⁹

¹⁹⁶¹ Barnard 2012 *E L Rev* 120; Malmberg and Sigeman 2008 *Common Market Law Review* 1129.

¹⁹⁶² See for a detailed discussion of these cases Barnard 2012 *E L Rev* 117-135; Davies 2008 *ILJ (UK)* 126-148 Malmberg and Sigeman 2008 *Common Market Law Review* 1115-1146 as well as Dawson 2011 *E L Rev* 208-225.

¹⁹⁶² See Barnard 2012 *E L Rev* 121; Davies 2008 *ILJ (UK)* 126; Dawson 2011 *E L Rev* 221 as well as Jasper “The Future of Collective Labour Agreements” 97.

¹⁹⁶³ Barnard 2012 *E L Rev* 121; Davies 2008 *ILJ (UK)* 126-148 as well as Dawson 2011 *E L Rev* 208-225. See also Jasper “The Future of Collective Labour Agreements” 97.

¹⁹⁶⁴ *Viking* para 77. See also Barnard 2012 *E L Rev* 121 for a discussion of *Viking*.

¹⁹⁶⁵ Barnard 2012 *E L Rev* 122.

¹⁹⁶⁶ *Viking* para 81. See also Barnard 2012 *E L Rev* 122 for a discussion of *Viking*.

¹⁹⁶⁷ Barnard 2012 *E L Rev* 122.

¹⁹⁶⁸ *Viking* para 87. See also Barnard 2012 *E L Rev* 122 for a discussion of *Viking*.

¹⁹⁶⁹ *Viking* para 87. See also Barnard 2012 *E L Rev* 122 for a discussion of *Viking*.

Barnard puts forward four criticisms of the *Viking* judgment:¹⁹⁷⁰

First, despite the express recognition of the right to strike in *Viking*, the Court has actually made strike action more difficult in the context of transnational disputes than before the judgment. This is because trade unions must now satisfy not only national rules on strike action (e.g. balloting and notice requirements), as they had to prior to the judgment, but also the requirements laid down in *Viking* (collective action can only be taken when jobs or terms and conditions of employment are under serious threat and that action must be the last resort (the *ultima ratio* principle)).

Secondly, despite the talk of balancing, the Court adopted an essentially one-sided or asymmetrical approach: it says that the economic right has been infringed by the exercise of the social right with the result that the onus is on the trade union to justify this breach *and* show that it is proportionate. This explains the accusation, made largely by trade unions, that the Court is in fact favouring economic interests of employers over the social interests of workers. A caveat does, however, need to be made. The precedence of the economic over the social is not necessarily a bad thing for developing a social dimension of the European Union in the general sense, since opening up the markets will benefit the Estonian workers, improving their prosperity and thus giving effect to the aspiration originally expressed in art.117 EEC. Kukovec puts this succinctly, 'like Wittgenstein's duck-rabbit picture, what appears as economic is social and what social is economic, depending on the angle from which we see the dilemma. The debate could just as well be framed in terms of social rights of [Estonian] workers against the [Finnish] interpretation of the freedom of movement provisions which ignores their realisation.'

While this argument has much merit, it distracts from the general thesis of this article, namely that in terms of preserving the integrity of national social systems, the *Viking* judgment is severely damaging to rules developed by the states in the social field--the very area over which the initial Treaty of Rome settlement deliberately gave autonomy to the states--because fundamental (EU) economic rights take precedence in principle over fundamental (national) social rights.

Thirdly, the Court adopted a restrictive approach to the proportionality principle: trade unions have to carry on negotiating longer than before, especially when a well-advised employer holds out the prospect that there might be a settlement just round the corner. How will a trade union know if it has "exhausted" other means at its disposal before initiating industrial action? These uncertainties, the case-by-case nature of the review process and the potential of an uncapped damages award mean that *Viking* (and *Laval*) have had a significant chilling effect on collective action.

Fourthly, and most fundamentally, industrial action and the proportionality principle are unhappy and probably incompatible bedfellows. The more successful a strike from a trade

¹⁹⁷⁰ Barnard 2012 *E L Rev* 122-123.

union's point of view (e.g. a complete closing down of the employer's business), the less likely it is to be proportionate. For this reason some Member States, such as the United Kingdom, do not subject strike action to a (substantive) proportionality review at all.¹⁹⁷¹

It has been said that the decisions in *Viking* and *Laval* have become “symbols for the trade union movement of how the European Union is failing workers”; which is also evident from the European Union's response to the economic crisis where it “has exacerbated these concerns, especially in respect of those countries in receipt of a bailout where severe cuts to the minimum wage and reform to other employment rights have become a condition for further EU/IMF support”.¹⁹⁷²

Article 9 of Rome II¹⁹⁷³ provides “some evidence of the willingness of the European legislator to respect the right of industrial action as recognised in the Member States”.¹⁹⁷⁴ Dorssemont and van Hoek add that a right to industrial action as a fundamental right, “which falls outside the regulatory scope of competence of the EU, should be safeguarded from restrictions imposed by instruments of secondary EU law”.¹⁹⁷⁵ Article 2 of the Monti Regulation¹⁹⁷⁶ “also stressed the neutral character” regarding the level of protection granted by the freedom or right of industrial action in Member States.¹⁹⁷⁷ The same sentiment is found in the 22nd preamble in the Posting of Workers Directive 96/71 (which preceded the Monti Regulation) as well as the Services Directive.¹⁹⁷⁸ The former directive expresses the desire that the directive “was to be without prejudice to the law of the Member States concerning collective action to defend the interests of trades and

¹⁹⁷¹ Barnard 2012 *E L Rev* 122-123.

¹⁹⁷² Barnard 2012 *E L Rev* 134.

¹⁹⁷³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

¹⁹⁷⁴ See in this regard Dorssemont and van Hoek 2011 *European Labour Law Journal* 114. Art 9 of Rome II with reference to industrial action provides as follows: “Without prejudice to Article 4(2), the law applicable to a non- contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.”

¹⁹⁷⁵ Dorssemont and van Hoek 2011 *ELLJ* 114-115.

¹⁹⁷⁶ Regulation no 2679/98, OJ EU, 1998, L 337, 12 December 1998.

¹⁹⁷⁷ Dorssemont and van Hoek 2011 *ELLJ* 115.

¹⁹⁷⁸ See art 14 and 15 of Directive 2006/123 regarding the right to collective action.

professions”, and the latter directive pays “homage” to the autonomy of Member States regarding labour actions.¹⁹⁷⁹ Dorssemont and van Hoek caution, due to their nature, provisions like these that can be found in secondary EU law “cannot safeguard the right to industrial action against the impact of the fundamental freedoms as they are laid down in the EC Treaty”:¹⁹⁸⁰

... The recognition of the right to industrial action as a general principle of EU law may mitigate the unimpaired application of fundamental freedoms to the detriment of workers rights, but even this cannot neutralise the (treaty-based) economic freedoms. The Court rulings in *Laval* and *Viking* cases are clear examples of this. In these cases, the European Court of Justice encourages the referring court to balance the exercise of the right to industrial action as recognised in national law against the fundamental freedoms recognized¹⁹⁸¹ in the EC Treaty. Both cases contain evidence that at times the European Court of Justice is quite willing to perform this review itself. ... What this case law demonstrates, however, is that the protection provided by conflict of laws for the right of industrial action does not suffice, whereas the willingness to respect national autonomy in secondary legislation does not provide any guarantee either.

7.4 Conclusion

From the discussion of supervisory and social co-determination in Germany and the EU it is evident that these examples do not provide South Africa with a practicable solution to address the shortcomings regarding employee voice and participation. The German model makes provision for institutionalised participation, via supervisory boards and works councils; labour law, in particular with regard to collective bargaining and industrial action, provides employees a voice, via freedom of association protection. The system in Germany, although not perfect, offers a number of lessons. The German work councils work well due to the particular regulation of powers, topics and bargaining levels: the South-African system of workplace forums does not work because the collective bargaining system largely is adversarial and majority trade unions have too much power regarding the establishment of workplace forums.

¹⁹⁷⁹ Dorssemont and van Hoek 2011 *ELLJ* 115.

¹⁹⁸⁰ Dorssemont and van Hoek 2011 *ELLJ* 115.

¹⁹⁸¹ Different spelling used by the authors (Dorssemont and van Hoek) as per their article.

A crucial question flows from this whether social co-determination can work in South Africa if workplace forums are not a viable option: Clearly distributive issues and non-distributive issues should be split between what forms part of the collective bargaining framework and what is discussed at workplace forum level. It is evident that the dual system that was intended in South Africa is not successful. Trade unions are not eager to initiate the establishment of workplace forums and adversarial collective bargaining covers both distributive and non-distributive issues. However, it is possible for collective bargaining to facilitate social co-determination on condition that the bargaining parties agree to some "social and economic plan". The "social and economic plan" can include issues such as re-training of employees instead of retrenchments, transfer of employees to other sections of an undertaking and the regulation of compensation for payments in the case of insolvency or transfer of undertakings.

It is suggested that the duty of disclosure of information in South Africa, and, thus, information-flow, should be enhanced and strengthened. In Germany co-determination rights are important rights to works councils, but other information and consultation rights are also important. The German industrial relations system's central feature is that collective bargaining by trade unions is separated from participation by means of consultation and decision-making by works councils in three areas: (i) social matters, personnel matters and economic matters. Information (in the South African context) should be disclosed in advance to the bargaining party (trade union) at an early planning stage. A call is made for the disclosure of "full information", meaning that not only management's plans must be disclosed but also information on all possible alternatives and modifications which were, or are, taken into account in the particular situation. This disclosure-obligation will enable the parties to participate in the decision-making process by them having access to the same information and thus the opportunity to make an input. In essence, such a bold move calls for trust between trade unions and employers, unfortunately, South African labour relations are lacking in this respect. A disclosure obligation will enhance the rights granted to trade unions/workplace forums in sections 16,

84, 86, 189, 189A, 197 and 197A of the LRA. The submission, therefore, is for an extension of the disclosure-obligations of employers to other parties if there is no trade union or workplace forum in place.

Social co-determination in South Africa in the absence of workplace forums could be enhanced, for example, by introducing at shop-floor level health and safety committees, productivity committees, job classification committees and employment equity committees in terms of the OHSA and the EEA. These committees enable worker “voice” and enhance worker participation by dealing with specific issues that can be specifically excluded from collective bargaining and negotiations. In Germany, works councils have consultation and information rights (as pointed out above) that specifically deal with social, personnel and economic matters. It is not suggested that the establishment of such committees should keep trade unions out of the establishment, but rather they assist them and the employer to focus on issues relevant to the bargaining table: non-distributive issues, such as restructuring of the workplace (including the introduction of new technology and work methods), changes in the organisation of work, education and training, the dismissal of employees for reasons based on operational requirements, and so forth, would be dealt with by the specialised committees, whereas collective bargaining would be concerned with issues regarding terms and conditions of employment and matters of mutual interest, which include dispute resolution regarding issues such as improved conditions of employment, higher wages or changes to existing collective agreements. These committees provide structure and context to policies that employers have in place and legitimise decisions, since workers’ input is required.

As suggested in chapter three of the thesis, the social and ethics committee can provide employees with greater voice and participation (in addition to labour law) in the domain of company law than is currently provided for by the *Companies Act*. Although the *Companies Act* does not allow employee representatives on the social and ethics committee, it is suggested that this situation should be changed, which would grant employees a form of supervisory function and meaningful voice in companies in addition to the other rights

granted by the *Companies Act*. Second, South Africa needs to address the issue regarding protracted and violent strikes especially when strike action has lost its functionality and goes on for a long period without resolution. As pointed out in chapter five above, most of the time non-wage issues prevail and filter into the negotiations between employers and trade unions. Third, a form of compromise is necessary in the regulation of strikes in South Africa. If a clear deadlock is reached and the strike has lost its functionality, the courts (or the CCMA) should be able to intervene and force the parties to commit to compulsory arbitration: it is evident a form of interest arbitration is necessitated under such circumstances.

For example, a similar body to the German arbitration committee could resolve a dispute if there is a deadlock between the employer and the works council. In Germany the right to strike is conditional on the “capacity to bargain collectively”: the right to strike is guaranteed only insofar as that right is understood as being necessary to ensure proper collective bargaining. It is suggested that when deadlock is reached and the matter is referred to compulsory arbitration, that a limitation should be placed on embarking on strike action and that workers return to work. This practice will enhance the principle of good faith and contribute to the re-establishment of trust between the bargaining parties. Such a regulation will address the economic and social problems associated with strikes that carry on for long periods of time. In the latter instance employees would return to work as a condition of the arbitration process.

Originally, it was suggested that the strike ballot should return but in the 2014 amendments to the LRA this provision was scrapped. Its return would have provided the necessary structure regulating strike action in the labour market. It would have provided employees with more power over their trade union representatives, especially in instances when the agendas of trade unions and the employees they represent are not the same. Strike balloting would also support the introduction of the “*ultima ratio*” (proportionality) principle found in German labour and EU law into the domain of South African labour relations. It would increase the legitimacy of the process of calling strikes by handing

power back to employees when, during a deadlock, a proposed strike is on the table, as well as force the trade unions to listen to the demands of their members. In other words, if a strike is called without complying with the ballot requirement, the strike will be unprotected because a procedural requirement was not adhered to by the trade union. It will also ensure that trade unions adhere to notice periods when calling strike action and guarantee that the use of strike action is used as a last resort, that is, where jobs and conditions of employment are under serious threat. Such checks and balances should enhance the trust relationship between collective bargaining parties.

Unemployment, as well as the levels of education and training of employees, are huge problems in South Africa (although not unique to South Africa) and need to be addressed 20 years into a democratic dispensation. Companies, as social partners, need to be more committed to issues such as education and training and the social and economic betterment of employees and the immediate communities in which they operate. Although profit is important for companies, it should not be the only driving force behind the company's existence. Companies should contribute more to social investment in South Africa.

All the social, political and economic partners have to be committed to working towards the same goals. Trade unions cannot abuse their power to cause economic damage to employers, if employers commit to bettering their employees' life conditions. A valuable lesson may be learnt from the German system in which the social parties respect each other.

Strikes in South Africa must be limited to the ambit of collective bargaining as issues that deal with rights disputes or political or other socio-economic issues that fall outside this ambit should be dealt with at the appropriate forum and level. These issues should be removed from the table because the underlying reasons for collective bargaining are: (i) to ensure that workers are provided with certain standards of distribution of work, (ii) the provision of rewards and (iii) to ensure that they have stability of employment, as well as

to maintain “industrial peace”. In this context, it is possible to push for the enhancement of a peace obligation, especially, in terms of section 65(1) of the LRA, or even to extend it to the situation if, in a previous bargaining cycle, strike action either was not functional or ended up being violent or unprotected, then in the next negotiating cycle the parties cannot make use of the right to strike or the recourse to lock-out. In such cases the parties may be forced to make use of arbitration.

The two-tier board structure would not work in South Africa as our political, social and economic conditions are too different. From the discussion above, that the SE company presents its own problems in the EU as the Member States have different ideological, economic, political and social foundations: mere cut and paste provisions will not suffice. As well, labour law integration in the EU is problematic, as are cross-border strikes.

These are underlying problems that are evident in the EU and Germany, as well as in South Africa. Crucial concepts need to be reconsidered and rebalanced: stakeholder value versus shareholder value, industrial peace versus industrial conflict, and cooperation versus adversarial patterns. As indicated in chapter three above, one should try to achieve an appropriate balance between the interests of shareholders and those of other stakeholders, such as employees. It has been proposed, for example, that the interests of employees may outweigh those of shareholders at a particular moment: a company (as a social actor), instead of paying out full dividends to shareholders, should utilise a portion of such funds for the betterment of the facilities of workers, or pay performance bonuses, or reinvest it in the immediate community by building a school or by improving sports facilities.

A new debate arises as to how synergy may be achieved between the role players in the context of corporate law, as well as in the domain of industrial relations. Industrial peace is preferable to industrial conflict, which is costly to the corporation and to shareholders, as well as to employees and society at large. Industrial peace furthers an objective of the LRA: the peaceful resolution of disputes. Cooperation, too, is preferable to adversarial

behaviour. It is in the interest of all parties to cooperate. However, for this to be achieved calls for full disclosure of information, increased trust and the resolution of disputes by first utilising the prescribed deadlock-breaking mechanisms instead of prematurely embarking on the disruption of work and production processes.

For effective participation and its benefits to apply, parties need to look beyond a “us versus you” approach and adopt a “we” approach. Here, the principles of integrity, accountability, transparency and discipline come into play: both employees and employers should subscribe to these principles when they negotiate. In this context Kahn-Freud’s view regarding the countervailing power of trade unions is relevant:

As a power countervailing management the trade unions are much more effective than the law has ever been or can ever be... Everywhere the effectiveness of the law depends on the unions far more than the unions depend on the effectiveness of the law. The effectiveness of unions, however, depends to some extent in forces which neither they or the law can control.¹⁹⁸²

Excessive demands by trade unions when they bargain need to be curbed and employers should be honest with trade unions about the economic well-being of the company. Trade unions should try not to cause harm, damage property or attempt to destroy the business of the employer. Employers should not pay executive bonuses if the company is undergoing financial difficulties (“money is too tight to mention”). In Germany the so-called abuse of right (principle of good faith) applies to strikes, especially with regard to “reckless” behaviour or where the intended purpose of the strike is to economically destroy the employer economically.

It is in this context it is suggested that “strong” versus “weak” forms of employee participation should be weighed up against each other: management co-determination is not always possible. Although employees cannot input all decisions pertaining to decision-making or the running of the company, some instances lend themselves to the

¹⁹⁸² Davies and Freedland *Kahn-Freund* 21.

involvement of employees in decision-making: the timeous and full disclosure of relevant information supports consultation. It is possible to utilise the unitary board structure in South Africa to extend participation and voice to employees by involving them in the social and ethics committee (see chapter three above). Such a position does not live up to the high level of participation achieved in the German system, but is a great improvement on our current system.

CHAPTER 8 – RECOMMENDATIONS AND CONCLUDING REMARKS

8.1 Revisiting the research questions

The central focus of the thesis was identified in chapter one above.¹⁹⁸³ The primary research question investigated is: What role should (and could) employees play in corporate decision-making in South Africa? The main inquiry of the thesis, therefore, is to explore the issue of granting a voice to employees in companies; in particular, the role of employees in the decision-making processes of companies.

In the research the following issues were addressed:

- (1) different forms of employee participation;¹⁹⁸⁴
- (2) different levels of participation;¹⁹⁸⁵
- (3) the appropriate parties and matters for participation;¹⁹⁸⁶
- (4) the nature of participation (for example disclosure of information, consultation, decision-making);¹⁹⁸⁷
- (5) the status of participation (for example in consultation with, after consultation with, joint-decision-making);¹⁹⁸⁸ and
- (6) the appropriate regulation of participation (for example compulsory or voluntary nature).¹⁹⁸⁹

The research question was answered by addressing a number of secondary (specific) questions:¹⁹⁹⁰

- (1) To what extent can trade unions provide effective participation for employees in decision-making?

¹⁹⁸³ See para 1.4 above.

¹⁹⁸⁴ For more detail see paras 3.2.3.2, 4.3, 6.3, 7.2 and 7.3 above.

¹⁹⁸⁵ For more detail see paras 3.2.3.2, 4.2.1.2, 5.2, 6.2, 6.3, 7.2 and 7.3 above.

¹⁹⁸⁶ For more detail see paras 3.2.3.2, 4.2.1.2, 4.3, 5.2, 5.3.3, 6.2, 6.3, 7.2 and 7.3 above.

¹⁹⁸⁷ For more detail see paras 3.2.3.2, 4.2.1.2, 5.2, 6.2, 6.3, 7.2 and 7.3 above.

¹⁹⁸⁸ For more detail see paras 3.2.3.2, 4.2.1.2, 5.2, 6.2, 6.3, 7.2 and 7.3 above.

¹⁹⁸⁹ For more detail see paras 3.2.3.2, 4.2.1.2, 5.2, 6.2, 6.3, 7.2 and 7.3 above.

¹⁹⁹⁰ Which form the foundation of chapters 2-7.

- (2) To what extent can workplace forums provide effective participation for employees in decision-making?
- (3) To what extent is the two-tier board structure entrenched in German and European law a viable option in South Africa?
- (4) Which empowerment initiatives offer employees the best result in terms of a viable decision-making structure?

Chapter two looked at the overlap between corporate and labour law and evaluated the different “worlds” of company and labour law by specifically exploring the functions, theories and perspectives underlying both corporate and labour law. It looked at issues such as: Who is an employee? It explored libertarian and social justice perspectives, the foundations underlying a collective bargaining framework, the employer (managerial) prerogative, principles of fairness as well as theories and models of companies. Chapter two, in conjunction with chapter one, provides the general theoretical underpinning of the thesis. Chapter three addresses the interaction between corporate governance and corporate social responsibility specifically by looking at the duties of directors, as well as at the responsibilities of companies towards employees. Chapter four looked at the concepts “participation” and “voice”; as well as notions of industrial and economic democracy; notions of employee participation, involvement and voice; and at direct, indirect, weak and strong forms of participation in South Africa. Further, chapter four looked at financial participation and empowerment initiatives (specifically employee share ownership schemes and black economic empowerment) in South Africa. Chapter five focuses on the adversarial labour-relations (as opposed to participatory or cooperative labour-relations) in South Africa, specifically, with regard to the collective bargaining framework and with reference to freedom of association and organisation; the right to strike and other issues related to strikes, such as matters of mutual interest, limitations on strikes, strike ballots and violent, destructive and unprotected strikes. Chapter six addresses co-determination in South Africa, exploring the viability of workplace forums as a complementary system to collective bargaining, as well as exploring a possible shift from adversarialism to participation. Chapter seven broadly explored the different company and labour law perspectives in

Germany and the EU, particularly, with regard to one-tier and two-tier board structures, works councils, collective bargaining and the various relevant EU directives. The essence of chapter seven is to explore the nature of both supervisory and social co-determination in order to find possible solutions in those areas which the South African corporate and labour law frameworks fall short or proper integration is lacking.

8.2 General

In chapter two¹⁹⁹¹ it was pointed out that, centrally, labour law is about power-relations as it is concerned with relations between the employer, on the one hand, and trade unions on the other, as well as with the decision-making power of the employer in the enterprise and the employees' countervailing power.¹⁹⁹² Therefore, it appears that the main goal of labour legislation is to compensate the inequality in bargaining power.¹⁹⁹³ The language of a "contract" between an employer and an employee is often used although the individual relationship between an employer and an employee is based not on contractual equality (or proportionality) of bargaining power, but on subordination.¹⁹⁹⁴ The contract of employment tends to "re-establish" (and not destroy) the unequal status between an employer and an employee in that it specifies the rights of the worker and the obligations of the employer: the rights of the employer and the obligations of the worker, at least in principle, remain "open", "diffuse" or "status-like".¹⁹⁹⁵

From a labour law regulation perspective the following core aspects are important:¹⁹⁹⁶ (i) labour not being a commodity, (ii) personal dependency (as a characteristic feature of the employment relationship), (iii) the endangering of human dignity and (iv) the inter-relatedness of different labour law aspects "labour law cannot be perceived as merely law

¹⁹⁹¹ See para 2.3.1 above.

¹⁹⁹² Collins *Employment Law* 4.

¹⁹⁹³ Davidov and Langille *Labour Law* 71.

¹⁹⁹⁴ Wedderburn 1993 *ILJ* (UK) 523.

¹⁹⁹⁵ Wedderburn 1993 *ILJ* (UK) 523.

¹⁹⁹⁶ Davidov and Langille *Labour Law* 71.

for the employment relationship but has to cover all the needs and risks which have to be met in an employee's life, including the law on creation of job opportunities".¹⁹⁹⁷ The first three factors are closely linked and are core aspects of the same phenomenon: they explain why the employment contract is not merely one type of contract among others: it establishes a relationship *sui generis*.¹⁹⁹⁸

The *Constitution*, as well as the enabling legislation, such as the LRA, BCEA and EEA, play an important role in the protection not only of the right to fair labour practices but also with regard to rights to freedom of association, freedom of expression, privacy and equality. The purpose of the LRA is expressly set out in the Act: namely, to advance economic development, social justice, labour peace and the democratisation of the workplace through the promotion of: (i) orderly collective bargaining, (ii) at sectoral level, (iii) employee participation in decision-making in the workplace and (iv) the effective resolution of labour disputes.¹⁹⁹⁹ These objectives are quite evident from and informed by the provisions of the *Constitution* which, for example, provide for the right to fair labour practices, the right to strike, freedom of association and organisation and the promotion of a collective bargaining framework.²⁰⁰⁰

Collective bargaining is important from a social justice perspective:²⁰⁰¹ it promotes a special form of dialogue for workers by which they exercise collective power. It is evident, as discussed in the thesis, that, with the change to a democratic dispensation in South Africa, changes to workers' rights and the promotion of workplace (industrial) democracy resulted. Worker participation is one of the innovations that flowed from the new democratic dispensation. The protection of workers and workers' "voice" in the decision-making process was regarded as being of such importance as to result in the LRA being one of the first pieces of legislation placed on the law books after the arrival of a

¹⁹⁹⁷ Davidov and Langille *Labour Law* 71.

¹⁹⁹⁸ Davidov and Langille *Labour Law* 71.

¹⁹⁹⁹ S 1 of the LRA.

²⁰⁰⁰ S 23(1)-(5) of the *Constitution*.

²⁰⁰¹ See para 2.3.2.2.2 above.

constitutional dispensation. Trade unions, and in particular majority trade unions, were granted more power and influence, not only in the enterprise but also in the political, economic and social spheres.

From the general developments it becomes evident that socio-economic conditions became important for workers in the context of labour relations, especially in advancement of their rights within enterprises. Socio-economic rights, such as protest action,²⁰⁰² ownership control or changes in undertakings;²⁰⁰³ access to housing,²⁰⁰⁴ to health care,²⁰⁰⁵ to water,²⁰⁰⁶ to food and to education; as well as work hours (work-life balance)²⁰⁰⁷ and social security, including social assistance,²⁰⁰⁸ came to the fore, and, coupled with unhappiness with local government service delivery, unsurprisingly, these issues spilled over into the workplace and collective bargaining domain. These issues, as well as others, such as the advancement of economic development, social justice, labour peace and the democratisation of the workplace, are important to address in correcting the imbalances of the past and to recognise the role and importance of labour within the political, social and economic spheres. They are of special importance in South Africa where workers were not guaranteed the same protections and privileges pre-1996.

In order to address issues pertaining to equality and “voice” in the workplace a stable and productive environment should be created. This requires not only empowerment of workers but also greater co-operation between labour and capital: a form of compromise must be worked out. Conflict between the parties should be resolved in orderly and less disruptive ways and the parties should be able to utilise ways that promote co-operation

²⁰⁰² S 77 of the LRA.

²⁰⁰³ S 197 and 197A of the LRA.

²⁰⁰⁴ See s 26 of the *Constitution* as well as *Government of RSA v Grootboom* 2001 1 SA 46 (CC) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) in this regard.

²⁰⁰⁵ See s 27 of the *Constitution* as well as *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) and *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) in this regard.

²⁰⁰⁶ See s 27 of the *Constitution* and *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

²⁰⁰⁷ S 9 of the BCEA.

²⁰⁰⁸ See *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC).

and joint decision-making rather than cause long-term damage to the relationship that ultimately may result in job losses or the closure of the business.

The lawmakers regard the role of employees as important, not only because they are valuable resources in organisations, who contribute to the financial wealth of enterprises, but also because of their role in the wider social, economic and political spheres. Because work plays an important part in the well-being of individuals, it is submitted that it is important that work is organised in such a way that decent and fair work is promoted through an active role for employees in decision-making.

Traditionally, corporate law was unconcerned with the interests of employees. Corporations primary concern was the promotion of shareholder interests and, occasionally, other relationships such as those with creditors or suppliers. Primarily, company law regulates the actions of companies in the market, therefore, labour law and employees are usually excluded. On rare occasions, corporate law directly and expressly considers the interests of employees: the provisions governing the relationship between employers and employees, primarily, are governed by labour law.

An important question in company law remains: *In whose interest should the company be managed?*²⁰⁰⁹ Shareholders are the most important stakeholders of a company: it is evident from evaluation of the contracts (with various stakeholders) that shareholders “hold sway” and the company ultimately operates to serve their interests. The analysis (in chapter two above) illustrated that corporate law bestows legal personality on businesses which allows them to enter into bilateral employment contracts with workers, whereas labour law subjects the corporation’s actions in establishing, conducting, and terminating such employment relationships to its norms and standards.

However, there is a synergy between corporate and labour law, especially with regard to corporate governance and labour management: for example, both create a framework in

²⁰⁰⁹ My emphasis.

which whistle-blowing is promoted; both recognise the importance of information-sharing, albeit under different circumstances; both recognise the fact that employees and their well-being are important and that their “voice”, relating to social as well as economic rights, should be enhanced and that human rights should be promoted; and both recognise the role that business (employers) plays in society.

Labour law provides structures but also limits what management may do in its relations with employees: labour law curbs the managerial prerogative. Central to the theme is that the managerial prerogative is important, both in corporate and labour law: employees, and their representatives, can restrict such a prerogative by acting in concert and making use of collective bargaining structures to “level the playing field” and to avoid exploitation by the employer.²⁰¹⁰ It does not mean that the employer’s prerogative is extinguished: it is still expected of employees to render personal service and to act in good faith and the employer still has the right to direct and allocate work.

The notion of “industrial democracy” is a useful tool which provides workers with a say in what goes on in the corporation.²⁰¹¹ The result is that employees do not have to accept demands made by the employer (for example with regard to changes in conditions of employment). However, although labour law protects employees with regard to unilateral changes to their employment contracts, employers are still entitled to change work practices unilaterally: the managerial prerogative grants employers this power.

Collective bargaining, consultation and the accompanying rights and freedoms (the right to strike, freedom of association, as well as freedom of organisation) as aspects of industrial democracy give employees valuable tools and influence to circumscribe the inherent inequality in the management-labour power struggle. These rights and freedoms are central elements to enable industrial and economic democracy. The rights enable workers to gain access to the job market and freely to make their services available in the labour

²⁰¹⁰ See paras 2.3.2.5 and 4.2.1.2 above.

²⁰¹¹ See paras 2.3.2.5 and 4.2.1.1 above.

market. If one views participation in decision-making as a continuum, the disclosure of information and consultation are at one end of that continuum, whereas joint-decision-making is at the other. The right to strike, it is submitted, usually would be utilised in order to achieve a form of participation that is further along the continuum if employees do not have a legal right, as such, to participate in decision-making.

The right to strike plays an important role in South Africa, not only because it has the status of fundamental right in the *Constitution* but, in more practical terms, it provides employees with a powerful economic tool in the collective bargaining process. Its role is of particular significance if there is a deadlock in the negotiation process between the employer and employee parties. The central aim of participation is to allow employees to exercise influence over their work and the conditions under which they are expected to work.²⁰¹² For example, workers can voice their concerns if an employer introduces a shift system that would mean that they have to work overtime, or introduces short-time or requires increased productivity. Employees, ideally, should participate in these decisions in order to effect a mutually beneficial goal.

Labour law has failed to provide workers with proper participation rights in decision-making structures in corporations. Thus, it is important to look at corporate law in order to offer decision-making powers to employees. The modern approach to company law has changed the role of employees as stakeholders in companies (and the workplace): the pursuance of true democratisation of the workplace and of decision-making structures is the ultimate goal of such an endeavour. The German model successfully illustrates employee participation in labour and corporate law: and is seen as a highly developed model of worker participation in that it creates a “dual channel” of representation by which employees are active on supervisory boards and on works councils. Co-determination in

²⁰¹² See paras 4.2.1.2.2 and 4.2.1.2.3 above.

Germany takes two forms, namely, supervisory co-determination²⁰¹³ and social co-determination.²⁰¹⁴

8.3 Lessons from Germany and the European Union

In chapter seven supervisory and social co-determination in Germany and the EU were discussed in the context of employee participation. Germany's "dual representation" model is widely acknowledged as being superior: the country has an integral role in the EU and influences decisions across European borders. Thus, attention is paid to Germany (and the EU) in order to inform possible solutions for developments in South Africa. Of course South Africa is not Germany: the political, economic and social landscapes differ, and workplace forums are not the same as works councils.

Although South African legislation is tailor-made to account for historical, as well as current, realities, South Africa can learn from other jurisdictions in order to enhance and develop areas dealing with worker voice and participation. In some instances a mind shift is required and, in other instances, legislative change is called for. As indicated earlier (in chapter six above and the discussion below) trade unions drive the establishment of workplace forums and contribute to the fact that workplace forums largely remain unpopular and unsuccessful.

Lessons that can be learned from Germany are: (1) work councils are institutionally separated from the trade union although they are closely connected, (2) the manner in which different matters are subject to different forums or bodies. Co-determination rights are important rights of works councils, but other information and consultation rights are important as well. A central feature of the German industrial relations system is that collective bargaining by trade unions is separated from participation by means of

²⁰¹³ See para 7.2.2.3 above.

²⁰¹⁴ See para 7.3 above.

consultation and decision-making by works councils. Participation rights divide into three areas: social matters, personnel matters and economic matters.²⁰¹⁵ For example, collective bargaining, co-determination, consultation and joint decision-making are streamlined and the *BetrVG* grants the works council several specific rights of participation:²⁰¹⁶ these include access to information, the right to be heard, control and veto rights, and the right to co-determination. Works councils enjoy, so-called, “true codetermination rights” (*echte Mitbestimmung*).²⁰¹⁷

Co-determination places the employer and the works council on an equal footing²⁰¹⁸ as it gives both an equal voice in the decision-making process.²⁰¹⁹ Either side, in principle, at least, may take the initiative and call for a new settlement. German works councils, for example, are granted extensive powers of co-determination, which is not the case with joint decision-making in workplace forums and are limited to a list of matters in section 86 of the LRA in the absence of agreement on further issues for joint-decision-making. The utilisation of the right to strike, in the South African context, (regardless of consultation having occurred), is quite different from how German works councils’ function; from which important lessons can be learned.

Co-determination at supervisory level is not evident in South Africa. It is not suggested that the two-tier system should be copied into the South African milieu. What may be useful is to consider how the characteristics of supervisory co-determination may be utilised in South Africa, especially in the context of the possible role and functions of the social and ethics committee (if worker representation were to be allowed on such a committee).²⁰²⁰ A compromise (see discussion below) should be reached between corporate and labour law on the matters to be referred to workplace forums and to collective bargaining. South Africa could achieve a form of “dualism”, which will promote

²⁰¹⁵ See paras 7.3.1.2.1 and 7.3.1.2.2 above in this regard.

²⁰¹⁶ See para 7.3.1.2.1 above in this regard.

²⁰¹⁷ Waas “Employee Representation” 83.

²⁰¹⁸ Waas “Employee Representation” 83.

²⁰¹⁹ Weiss “Germany” 110; Weiss and Schmidt *Labour Law and Industrial Relations* 236.

²⁰²⁰ Regarding supervisory co-determination see para 7.2.2.3 above.

employee decision-making at corporate level, by means other than workplace forums, for example the reimagined social and ethics committee. If, at the same time, the separation between workplace forums and collective bargaining is effected, it could result in a similar separation (as is the case in Germany)²⁰²¹ between the functioning of trade unions and works councils and in a system in which both (that, is a “workplace forum” and/or the social and ethics committee and collective bargaining) co-exist and, mutually, support and strengthen worker participation. With regard to social and personnel matters, for instance, that fall within the domain of works councils, could easily be incorporated into the agenda of the social and ethics committee or even be extended to workplace forums (see discussion under paragraph 8.4 below). The same can be said of operational or economic matters, that include issues such as restructuring of the establishment, partial or total plant closure, mergers and transfers and so forth. These matters, already, are regulated by section 84 of the LRA (see discussion under paragraph 8.4 below).

Access to the flow of information and full disclosure are further useful powers of German works councils which, subject to the condition that the culture of distrust in negotiations is abolished or at least curtailed, could be successfully utilised in South Africa. “Information in advance” requires an employer to give information at an early planning stage, whereas “full information” places an obligation on management not only to disclose its plans but also to supply information on all possible alternatives and modifications which were, or are, taken into account in the particular situation.²⁰²²

The Information and Consultation Directive in the EU context, also offers answers: for example, it is useful to look at the timing and manner in which information is disclosed. Information should be given at such a time and in such fashion and with such content as appropriate to enable, in particular, employees' representatives to conduct an in-depth study and, where necessary, prepare for consultation and/or joint decision-making. This

²⁰²¹ See para 7.3.1.3 above.

²⁰²² See the discussion in chapter 7 at paras 7.3.1.2.2, 7.3.2 and 7.4 above regarding disclosure of information in the German works council system as well as the EU model.

practice would enable employers as well as trade unions to contribute to meaningful consultation. Consultation should take place at the appropriate level of management and representation (via the social and ethics committee, workplace forum or collective bargaining)²⁰²³ depending on the subject under discussion; the employees' representatives are entitled to formulate an opinion based upon the relevant information supplied by the employer. Consultation must take place in such a way that the employees' representatives are entitled to meet with the employer and to obtain a response, as well as the reasons for that response, to any opinion they formulate. Further, an attempt has to be made, in the case of decisions within the scope of the employer's management powers, to seek prior agreement on the decisions through sharing information and consultation.²⁰²⁴

South Africa's corporate and labour law systems are unique, especially on account of the particular political, social; and economic features of South Africa. South Africa's provisions regarding corporate governance are more advanced than those of some developed countries, as is the protection of workers. South Africa's *Constitution* is sophisticated: it contains not only a Bill of Rights, but recognises important labour rights and other rights, such as the right to education, as well as the achievement of equality and dignity. The system, however, is not perfect especially with regard to employee participation and "voice" in the decision-making process of corporations: the shortcomings of which were set out above.²⁰²⁵

The thesis accepts that there are limitations in both the corporate and labour realms, but it suggests changes to both frameworks in relation to participation and "voice" of employees. What is in South Africa's favour is that the *Constitution*, as well as supporting legislation, provide for rights, such as fair labour practices, freedom of association and organisation,

²⁰²³ Regarding the committees see discussion in para 8.4.1.3.8 below. When either the social and ethics committee or both operate in conjunction with collective bargaining, collective bargaining will have to be limited to wage (distributive/non-production) issues and the social and ethics committee and/or workplace forum would have to deal with non-wage (non-distributive/production) issues.

²⁰²⁴ See the discussion in chapter 7 para 7.3.2 above regarding the Information and Consultation Directive. See discussion under para 8.4 with regard to consultation and joint decision-making.

²⁰²⁵ See in this regard para 6.4 above.

the right to strike and to engage in collective bargaining. In labour and corporate law workers are regarded as important role-players and stakeholders in the political, economic and social arenas. This recognition creates an enabling environment that may be further improved to give workers a meaningful voice and participation rights in corporate decision-making.

The next section explores a proposed model of employee participation, as well as making recommendations with regard to improvement of the current legal framework.

8.4 Proposed Model for Employee Participation in South Africa

The recommendations made below are in light of the discussion in chapters one to seven above. As a starting point it is emphasised that a better synergy is needed between labour law and corporate law.²⁰²⁶ Labour and corporate law legislation creates frameworks for employee participation at different levels in different forms, but these frameworks lack real or meaningful forms of participation in decision-making that are effective in practice. The current *corporate law* dispensation has moved away from focusing primarily on shareholders and includes employees as important stakeholders, but it does not provide for full participation rights by employees in corporate decision-making. *Labour law* largely is concerned with the protection of the rights and interests of employees and has also failed to realise actual participation in decision-making through workplace forums. Consultation, joint decision-making, and disclosure of information are issues that labour law covers in this context, outside the traditional collective bargaining arena. In general, the LRA enjoys preference over other statutes and, therefore, has be kept in mind whenever employees are involved.²⁰²⁷ The *Companies Act* failed to provide a platform for better integration between the provisions of the LRA and the *Companies Act*, especially in dealing with issues

²⁰²⁶ See chapters 2 and 3 above for a discussion on the different worlds of labour and corporate law.

²⁰²⁷ S 200A of the LRA regarding the presumption as to who is an employee; s 213 of the LRA regarding the definition of an employee as well as s 210 of the LRA regarding the application of the LRA when in conflict with other laws. See also para 2.3.2 above regarding the perspectives of labour law.

such as employee participation in decision-making, and includes employee input in operational and strategic policies, strategies and direction.

8.4.1 Company Law

8.4.1.1 General

It has been argued that the role of companies as members of society has changed.²⁰²⁸ Shareholder wealth creation no longer is the only concern of companies: evident from developments in corporate law and corporate governance jurisprudence. These developments clearly articulate that shareholder primacy is out-dated and that note should be taken of other stakeholders of companies.²⁰²⁹ The *Companies Act* empowers employees, as stakeholders in the company, not only granting them access to information²⁰³⁰ under certain circumstances but giving them access to the statutory derivative action.²⁰³¹

Companies *must* take due cognisance of the triple bottom line (social, economic and environmental aspects), as well as communicate with stakeholders noting their legitimate interests and expectations. These are vital issues in the new corporate law regime.²⁰³² Corporate reputation has become important for companies, in particular, its treatment of employees, its footprint in the environment, and similar reputational issues.

Company law, at least to an extent, addresses the social component of the relationship between employees and companies. These principles are further enhanced in that the *Companies Act* acknowledges the significant role of enterprises within the social and

²⁰²⁸ See paras 3.2.1 and 3.3 above regarding the role of companies as members of society.

²⁰²⁹ See the analysis and discussion in chapter 2 para 2.4.1 and chapter 3 para 3.2.1 above.

²⁰³⁰ See chapter 3 3.2.3.2.3 and 3.3 above for a discussion of access to information with reference to the *Companies Act*.

²⁰³¹ See chapter 3 paras 3.2.3.2.1 and 3.3 above for a discussion of the statutory derivative action.

²⁰³² See chapter 1 para 1.1 and chapter 3 at paras 3.2.1 and 3.3 above for a discussion of the triple bottom line.

economic life of the nation. The *Companies Act* aims to balance the rights and obligations of shareholders and directors within companies and it encourages the efficient and responsible management of companies. Moreover, companies obtain certain benefits, such as the recognition of a separate legal personality, as well as the regulatory framework within which they operate. Companies have access to a customer base that enables them to sell their products and become profitable.²⁰³³ In return companies have corresponding obligations towards society, such as to comply with human rights imperatives. The “social contract”, in exchange for these benefits, requires that companies, for example, “do no harm”; they may be required to take positive steps to improve the society in which they operate by facilitating social benefits.

The social benefits include refraining from human rights abuses, including abusive labour practices, environmental damage or violations of the fundamental rights to equality, dignity and freedom. Such transgressions constitute an infringement of the negative duty not to cause harm. They also infringe the positive duty to improve the socio-economic conditions not only of workers but of the larger community. The latter duty includes investment in education, access to clean water, payment of fair wages, and so forth.

That companies must note not only economic benefits but also social benefits indicates the importance of CSR in corporate governance.²⁰³⁴ The benefits of CSR extend to employees and to the community in general in which corporations operate. The demand by society that corporates must act in a responsible manner and be good corporate citizens is evident in the new corporate law regime. Issues such as integrity, accountability, and sustainability are fundamental components of this new regime and how directors exercise their duties.

²⁰³³ See chapter 2 paras 2.2 , 2.4.1.2 and 2.4.1.3 and chapter 3 para 3.2.1 regarding the importance of customers to a company.

²⁰³⁴ See chapter 3 above for a detailed discussion of corporate governance and CSR pertaining to employees (para 3.2.3 above). Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights: enhancing labour market regulation; establishing of minimum labour standards, and promoting collective-bargaining to the extent that basic labour rights, such as freedom of association, the rights to organise and to bargain collectively, are included in a legislative framework.

These obligations on companies and directors clearly benefit employees and increase the participatory role of employees in the company.

The pluralist approach²⁰³⁵ (although the enlightened shareholder approach is preferred in the *Companies Act*)²⁰³⁶ emphasises that employees, as stakeholders, have an important role to play in advancing the interests of the company as a whole. A reading of various reports on corporate governance in South Africa, as well as the *Companies Act*, supports this approach. From a social and economic perspective it is in the interest of employees to further the interests of the corporation they work for because it not only benefits them economically but also results in social betterment if a corporation invests in social upliftment programmes, training, infrastructure, and so forth, as a result of increased efficiency and profits.

In short, companies no longer reach decisions without taking note of the protection and rights granted to employees by legislation, including the rights afforded to employees by the *Companies Act* itself. It is submitted that if the living conditions of employees are appalling the company or employer should intervene as a social partner and act more responsibly. Companies in South Africa, unlike employees, are hugely powerful and thus they have direct access to political leaders and other business people that could assist these employees.

²⁰³⁵ See paras 3.2.3.1 and 3.2.3.2.3 above.

²⁰³⁶ See para 3.3 above. If the interests of employees are enhanced, for example, by allowing them to be represented on the social and ethics committee, or other rights, such as voting rights (see discussion under para 8.4 below), are expanded then the application of the enlightened shareholder approach, by means of "judicial activism in the interpretation" of the *Companies Act* would be less favoured than the pluralist approach. It follows that if the *Companies Act* is amended in such a way that will facilitate meaningful worker participation (see para 8.4 below) that the enlightened shareholder approach to corporate governance no longer would be the favoured approach followed in interpreting the *Companies Act* (See also Wiese 2013 *ILJ* 2485 in this regard).

8.4.1.2 *New rights afforded by the Companies Act*

The *Companies Act* affords new rights to employees.²⁰³⁷ Previously, employees were not recognised in company law as stakeholders and had to utilise the protection conferred by labour law to (indirectly) enforce any rights against companies (in the capacity of their employer). Although these developments are positive and enable employees to participate in diverse ways by exercising different rights and enforcing various duties on the company, the *Companies Act* fails to grant employees a real voice when it comes to decision-making. The *Companies Act* introduced significant changes to the corporate law landscape in South Africa (employees are more visible in corporate law and issues such as human rights are now recognised as important and relevant for companies) but it does not go far enough in the realisation of a true industrial democracy. For example, the *Companies Act* addresses the issue of worker participation in the instance of the formulation of a business rescue plan, but it fails to extend this participation to the approval of the plan as employees cannot vote on the issue. It would be more meaningful if the *Companies Act* granted trade unions sufficient participation rights regarding the approval of the business rescue plan. Similarly, the social and ethics committee (see discussion below), as proposed by the model for employee participation, could be made more effective as its functions and scope could be expanded.

²⁰³⁷ The *Companies Act* provides for the following rights: (i) it enables worker representatives or trade unions to be involved in the formation of a company; (ii) they can propose an amendment of a MOI (allowing for an alternative arrangement which can be interpreted that worker representatives or trade unions can propose such an amendment) but they are not allowed to vote on such a proposal unless they are shareholders of the company; (iii) the company can be restricted by a trade union from doing anything inconsistent with the *Companies Act* by applying to the High Court for an order to that effect; (iv) the trade union can gain access to financial statements of the company for purposes of initiating a business rescue proceeding; (v) the trade union can apply to the High Court for an order in order to set aside a resolution of the board to stop the commencement of business rescue proceedings on the grounds that the company is not financially distressed; (vi) worker representatives or trade unions are granted *locus standi* to apply for a court order placing a director under probation or declaring a director delinquent. Other rights include the utilisation of alternative dispute resolution mechanisms to resolve a dispute, to gain access to financial assistance by the company to acquire shares in the company, as well as benefitting under an employee share scheme. See chapter 3 at para 3.2.3.2.1 above for a detailed discussion.

8.4.1.3 *Specific participation rights*

The *Companies Act* brought about major changes to governance with regard to employee participation, as is evident from provisions in the *Companies Act* that, briefly, are highlighted.

8.4.1.3.1 Formation of a company

Section 13 of the *Companies Act*, for example, allows trade unions as representatives of the employees, to be a party to the formation of a company. By this innovation employees are viewed as important stakeholders.

8.4.1.3.2 Amendment of the MOI

Section 16 of the *Companies Act* deals with the amendment of the MOI by means of special resolution. It is left to the board of the company, or shareholders entitled to exercise at least 10 percent of the voting rights that may be exercised on such a resolution to introduce an amendment. It appears that a MOI can allow a trade union or worker representatives (which will include a workplace forum) to propose an amendment, but the *Companies Act* does not allow employees to vote on such a proposal unless they are shareholders. It is proposed that workers should be able to vote on an amendment and not merely make proposals for an amendment. This change will show serious commitment by the legislator and enhance the significance of the role employees play in companies. Not only will the participation of employees be ensured, but transparency is promoted and will ensure that companies take not only their economic partners into consideration but also their social partners. Therefore, it is suggested that if workers are granted voting rights that a formula is applied: if a company employs, for example, more than 500 employees, then one worker representative should be allowed to vote in favour or against the amendment of the MOI; if the company employees more than 2000 employees, then

workers are allowed to have two representatives present, and so forth.²⁰³⁸ The workplace composition provides the threshold for worker representivity and voting rights.

8.4.1.3.3 Business rescue

Part 6 of the of the *Companies Act* deals with business rescue proceedings. Sections 31(3), 128, 129 and 131 of the *Companies Act* provide as follows: a trade union must (1) be given access to a company's financial statements for purposes of initiating a business rescue process. The trade union representing employees, or employees who are not represented, (2) may apply to court to place a company under supervision and commence business rescue proceedings. The interests of employees to be informed and to participate in the formulation of the business rescue plan are recognised here.

Employees are recognised as unsecured creditors for any wages owed to them by the company prior to the commencement of the business rescue proceedings. Employees, however, cannot vote on the approval of the business rescue plan, except to the extent that they are also creditors.²⁰³⁹ Thus, employees are ranked lower than other stakeholders, such as creditors. This omission is a shortcoming: employees would have real participation rights if they could vote on the approval of a business rescue plan and they would have greater voice. This goal could be achieved by either gaining a weighted vote in accordance with the number of employees in the company or by providing a veto right to employee representatives with the result that the matter is resolved by adjudication or by means of an alternative dispute resolution. Employees remain employees of the company during the

²⁰³⁸ See para 7.2.2.3.4 for The Model of the One-Third Participation Act on which this approach is roughly based.

²⁰³⁹ As creditors of the company employees have the following rights: (i) the right to form a creditors' committee which is entitled to be consulted by the business rescue practitioner during the development of the business rescue plan; (ii) attend and vote at creditor meetings and (iii) vote on the proposed business rescue plan; and (iv) if the business rescue plan is rejected also propose and vote on the amendment of the business rescue plan or apply to court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on grounds that it was inappropriate or make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan. See in this regard s 128(1)(g), 128(2), 145(2)(b)(i) and (ii), 145(3), 147(3), 152(2), 153(1)(b)(i)(aa) and (bb) and 153(1)(b)(ii) of the *Companies Act*.

company's business rescue proceedings on the same terms and conditions unless changes occur in the ordinary course of attrition or the employees and the company, in accordance with the applicable labour laws, agree to different terms and conditions. Any retrenchment of employees contemplated in the company's business rescue plan is subject to the provisions of sections 189 or 189A of the LRA and other applicable labour legislation.

8.4.1.3.4 Sale of business and mergers

In the case of a sale of business or of a merger worker involvement is not contemplated in the *Companies Act*, rather it is left to the process of consultation in terms of the LRA.²⁰⁴⁰ Section 197 and 197A of the LRA contain the provisions regarding a transfer of business as a going concern and the automatic transfer of employment contracts in these circumstances. The transferee's right to retrench employees due to a transfer as a going concern is regarded as a dismissal in terms of section 186 of the LRA and an automatic unfair dismissal in terms of section 187. An employer, however, may retrench the transferred employees later if an operational reason can be advanced, in which case consultation must take place with the trade union representatives or other worker representatives (including workplace forums).²⁰⁴¹

Neither section 197 nor section 197A provides for disclosure of information or consultation regarding the envisaged transfer of an undertaking. This omission should be addressed as a matter of urgency. Further, it is recommended that a section be included in the *Companies Act* to make provision for consultation and disclosure of information in the event of the transfer of an undertaking as a going concern or merger. Such a provision not only adheres to the current solvency and liquidity requirements that must be met in the case of a merger, which primarily protects creditors, but would extend protection to workers and provide them with an opportunity to access the information relating to a

²⁰⁴⁰ See also in this regard s 84 of the LRA regarding workplace forums in chapter 6 paras 6.2.3.1, 6.2.3.2, 6.2.3.4 and 6.2.4 above.

²⁰⁴¹ See chapter 3 at para 3.2.3.2.1 and chapter 6 para 6.2.3.4 in this regard.

merger and give an input prior to the merger. It is suggested that provision should be made for a notice period to be given to trade unions or worker representatives, as well as allowing workers to vote/ make known their opinion (on the approval) of the transaction.²⁰⁴²

Similar conditions apply in cases of a scheme or arrangement or when takeovers and offers (in parts B and C of chapter 5 dealing with fundamental transactions, takeovers and offers) are proposed in the *Companies Act*. It is recommended that workers be provided with information, a right to consultation and voting rights in instances which affect not only the job security of workers but also the business operations and direction of the company. The extent of the voting rights should be as follows: the trade union or employee representatives, after they have been provided access to relevant information and been consulted by the company, should vote on whether they support a merger, sale of business, scheme, arrangement or takeover. By allowing such a vote the company grants employees the opportunity to make an input prior to the vote taking place and, if the workers do not agree with the direction the company intends taking, they can make their voice heard. Their input could be a consideration put forward at the general meeting of shareholders which decides whether the company should go forward with a merger, sale of business, scheme, arrangement or takeover.

²⁰⁴² However, trade unions or workers representatives would not be able to void such a transaction as the right to trade, the managerial prerogative, as well as the right to property, do not prevent an employer/company from merging or selling its business. In this regard the following is noted (see also paras 2.3.2.3, 4.2.1.2.1 and 4.2.1.2.3 regarding the employer's (managerial) prerogative): the decision-making power of employers (and thus corporations who are employers) is upheld in the free market economy by four notions: (i) the right to property, which enables the owner to dispose of his property as he wishes in order to obtain benefit from it; (ii) freedom of commerce and industry, by which every citizen obtains the freedom to engage in commerce, profession, craft or industry; (iii) freedom of association, which enables an individual to combine his resources in a trade or industry with that of others and form a corporation in order to share profits; and (iv) obtaining power over people: a worker has the freedom to enter into an individual labour contract with an employer he selects and the employer has the power to command the employee (Blanpain 1974 *ILJ* (UK) 6). See also *BTR Dunlop Ltd v National Union of Metalworkers (2)* 1989 10 *ILJ* 701 (IC) regarding the "managerial prerogative".

8.4.1.3.5 Associated rights

The *Companies Act* contains a number of associated rights: a registered trade union or another representative of employees may apply to court for an order declaring a director delinquent or under probation in the circumstances provided by the statute.²⁰⁴³

Section 20(4) of the *Companies Act* provides that a trade union representing employees of the company may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with the Act. The Act abolishes the common-law derivative action; section 165(2)(c) of the *Companies Act* substitutes it with a statutory derivative action. Thus, a registered trade union that represents the employees of the company or another representative of employees of the company is empowered to bring the statutory derivative action.

The issue of delinquent directors recently has been placed in the spotlight in the Aurora Empowerment matter; the question of the effectiveness of the measure in protecting the interests of the company arose:

The Aurora case involves a R1.5-billion damages claim brought against four directors of a defunct mining start-up, Aurora Empowerment Systems. The directors include Khulubuse Zuma, and Zondwa Mandela. In 2009, Aurora put in a bid for two mines under provisional liquidation which were owned by Pamodzi Gold. Aurora took over management of the mines through an Interim Trade and Management Contract. That contract is at the centre of the case being heard: the Pamodzi liquidators allege that Aurora committed fraud in signing the agreement. One of the most contentious issues in the case is whether or not Aurora could afford the mines at the time of completing the bid. The Pamodzi liquidators, who have taken the case to court, argue that Aurora did not have the R600-million it offered for the Pamodzi mines and therefore committed fraud. However, Aurora directors Zondwa Mandela and Thulani Ngubane have hit back, saying the company would have secured the required funding if not for a strike by workers in March 2010, which scared off a major investor. When Pamodzi Gold was liquidated, liquidators managed it for four months. Aurora Empowerment Systems took over the mine after making a R600-million bid. It was at this point that worker's lives changed. First, salaries weren't paid, though the mineworkers extracted gold from underground. The mine was placed under "care and maintenance" – meaning only essential staff were kept on. During the time that Pamodzi was operational, during the period

²⁰⁴³ See chapter 3 para 3.2.3.2.1 above for specific instances for institution of an action in this regard.

the mine was run by liquidators and for the six months of Aurora management - provident fund deductions were made from workers salaries. However, an enquiry into the Aurora management period has revealed that Aurora did not pay the monies deducted from workers' salaries to the provident fund administrators. Workers lost out on salaries for that period and, likely, will see that money again only if a lengthy court battle goes in their favour. There are major disputes of fact when it comes to the reason behind the destruction of mine property, which the liquidators have blamed on Aurora. In close to two years, the Pamodzi mines were stripped of assets including mine shafts and underground mining equipment. The Pamodzi liquidators have included the loss of these assets in their R1.5-bn claim. It appears that a number of problems existed with the mines before Aurora took them over; one of them being the conduct of the Pamodzi liquidators, some of whom have been removed from the liquidation process. Meanwhile Khulubuse Zuma has separated his fate from that of his fellow directors after an inquiry into the Pamodzi-Aurora deal cleared him of any knowledge of fraud. The report, completed by Advocate Wayne Gibbs, recommends that Mandela and Ngubane be investigated for fraud along with Solly and Fazel Bhana, who acted as consultants for Aurora. Bhana, his son Fazel, some of their family members and business associates are accused of having irregularly received R35-million from Aurora. Aurora has been liquidated and its directors have gone to court to get their money back. The court ruled that R15m of that money should be paid back, but Bhana and his associates are fighting that ruling.²⁰⁴⁴

From the facts of Aurora a trade union (or other employee representative body or even a workplace forum, if a workplace forum is granted legal status)²⁰⁴⁵ would have had legal standing to protect the "legal interests" of the company against the delinquent behaviour of its directors. This provision could have been utilised by a trade union effectively to protect their interests in the Aurora matter, rather than the employees' plight becoming known through the media. It is recommended that these associated rights are made known to workers and their representatives through education awareness initiatives.

8.4.1.3.6 Whistle-blowing

In the effort to promote good corporate governance principles the Act grants employees, who blow the whistle, subsequent protection for such disclosure(s). This type of protection is granted to employees by the PDA and thus, is merely an extension of the protection already granted. Section 159 of the *Companies Act* protects other stakeholders, such as

²⁰⁴⁴ Aurora 2015 <http://www.enca.com/south-africa/five-days-set-aside-r15bn-aurora-case>.

²⁰⁴⁵ See discussion below regarding the legal status of workplace forums, as well as chapter 6 para 6.2.3.4 regarding the legal status of workplace forums.

shareholders, directors, company secretaries, prescribed officers, registered trade union representatives of the employees, suppliers of goods and services to the company or employees of a supplier.²⁰⁴⁶

8.4.1.3.7 Alternative dispute resolution

The *Companies Act* provides for alternative dispute resolution mechanisms in that a dispute can be referred to conciliation, mediation or arbitration to the tribunal, accredited entity or any other person²⁰⁴⁷ stipulated in the Act.²⁰⁴⁸ The concept “dispute” is not defined by the *Companies Act*. Disputes between, for example, a trade union or workplace forum and the company can be referred for alternative dispute resolution if the trade union or workplace forum is entitled to apply for relief or file a complaint in terms of the *Companies Act*.²⁰⁴⁹

Wage disputes, however, are not be covered and have to be resolved in terms of the LRA. It would be useful if the *Companies Act* provided for specific disputes between the company and worker representatives or trade unions to be dealt with in terms of the Act itself. There is no specific provision in the *Companies Act* regulating the position how to deal with disputes regarding the formation and amendment to a MOI; access to information related to directors’ remuneration; financial statements of the company, especially in cases of financial distress or to institute business rescue proceedings; corporate restructuring such as sale of business, mergers, schemes of arrangement and takeovers and offers. It is proposed that the *Companies Act* should be amended in this regard and that disputes dealing with these issues be dealt with under the auspices of the *Companies Act*. An amendment would avoid a scenario such as a trade union or workers

²⁰⁴⁶ See para 3.2.3.2.1 above.

²⁰⁴⁷ In terms of section 156(a) of the *Companies Act* a person with standing may attempt to resolve any dispute with or within a company through alternative dispute resolution. This includes disputes regarding an alleged contravention of the *Companies Act*, or enforcement of any provision of the Act, or rights in terms of the *Companies Act*, a company’s MOI or rules, or a transaction or agreement contemplated in the *Companies Act*, MOI or rules.

²⁰⁴⁸ S 166(1) of the *Companies Act*.

²⁰⁴⁹ S 166(1) of the *Companies Act*.

representatives declaring a dispute in terms of the LRA, which, potentially, could land in the Labour Court for determination, thus placing the dispute in the domain of a labour dispute. Potentially, it addresses the issue of determining jurisdiction between the Labour Court and High Court or other tribunals.

However, it is important to point out that these issues affect, in particular, job security, as well as preferent payments to employees during business rescues or dismissals in terms of sections 189, 189A, 197 and 197A of the LRA. Wage disputes are specifically excluded from the ambit of the *Companies Act*, as well as dismissals in terms of sections 189, 189A, 197 and 197A of the LRA, which specifically are linked to a sale of business or merger. In this regard cognisance must be taken of section 210 of the LRA especially in cases where the application of the LRA is in conflict with other laws.²⁰⁵⁰

8.4.1.3.8 Social and ethics committee

Another innovation in the *Companies Act* is the introduction of a social and ethics committee.²⁰⁵¹ The committee must comprise at least three directors or prescribed officers of the company but no employee representative. Functions of the social and ethics committee include the monitoring of the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice relating to matters such as:

- (i) social and economic development: issues covered here include the EEA; and the BBBEE Act;
- (ii) good corporate citizenship: issues covered here include the promotion of equality, prevention of unfair discrimination and the reduction of corruption; contribution to the development of communities in which its activities are predominantly conducted

²⁰⁵⁰ S 210 of the LRA provides as follows: "If any conflict, relating to matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail".

²⁰⁵¹ See chapter 3 paras 3.2.3.2.2 and 3.2.3.2.3 above for a detailed discussion on the social and ethics committee.

- or within which its products or services are predominantly marketed; and record of sponsorship, donations and charitable giving;
- (iii) the environment, health and public safety, including the impact of the company's activities and its products and services;
 - (iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws;
 - (v) labour and employment: included here are issues such as the company's standing in terms of the ILO Protocol on decent work and working conditions; and the company's employment relationships, and its contribution toward the educational development of its employees.

That employees are not represented on the social and ethics committee is a lost opportunity on the part of the drafters of the *Companies Act*, as it would have provided employees with the opportunity to have an input on issues such as health and safety and labour and employment; matters which affect employees directly. Also, it would have provided them with the opportunity to have a greater voice in a formal company structure, thus expanding their participation rights within a company.

Social and economic development issues, especially the EEA and the BBBEE Act, affect employees and their input could be of value: the legitimacy of decisions relating to such development issues could be considerably improved through their input. Issues, such as good corporate citizenship relating to the promotion of equality, prevention of unfair discrimination, and the reduction of corruption, as well as a contribution to the development of communities in which the corporation predominantly conducts its business activities, should be dealt with in the same way. Issues, such as the environment, health and public safety, as well as labour and employment issues such as the company's standing in terms of the ILO Protocol on decent work and working conditions, the company's employment relationships and its contribution toward the educational development of its employees, all call for giving a greater voice to employees. The workings of the social and ethics committee would be meaningful if it not only gave

considerations to the welfare of employees but if they participated in decision-making by the committee: such a reimagined committee would grant employees a meaningful voice in the company.

Participation by employees on the committee will give legitimacy and authority to its activities and decisions, as the committee will not have merely a monitoring and administrative function. By granting it more authority the social and ethics committee can play a supervisory role (similar to that of the supervisory board in Germany) and, thus, force companies to take the decisions of the committee seriously and promote compliance with its decisions and directions.²⁰⁵²

The supervisory function of the social and ethics committee could evaluate management decisions with regard to non-compliance with the EEA or the BBBEE Act or the company's actions in promoting equality. The powers of the committee would be enhanced to make representations to the general meeting of shareholders at which they vote on decisions made by the board of directors, especially if the board did not have access from information from a director or prescribed officer, or receive an explanation as to why the board did not follow through on recommendations made by the committee. The social and ethics committee, thus, has reporting, supervisory and enforcement functions, especially in cases where there is an overlap between topics of decision-making and collective bargaining (see para 8.4 below).

It is proposed that the *Companies Act* should be amended with regard to the social and ethics committee should be amended as follows:

- Currently the committee comprises at least three directors or prescribed officers of the company. At least one of them must be a non-executive director who was not involved during the previous three financial years in the day-to-day management of

²⁰⁵² See chapter 3 paras 3.2.3.2.2 and 3.2.3.2.3 below. The role of the social and ethics committee is to monitor the company's activities (see in this regard discussion earlier under para 8.4.1.3.8).

the company's business.²⁰⁵³ It is not specifically stated that each member of the committee must be a director but at least one of them must be a director; it seems in view of the non-director requirement, that employees, for example, can be members of the committee.²⁰⁵⁴ It is recommended that the provision pertaining to the composition of the directors is maintained but that the committee should be expanded to include employee representatives in the same ratio as directors or prescribed officers. It is proposed that half of the committee should comprise employee representatives and the other half directors or prescribed officers. This system is similar to the "quasi-parity co-determination" in Germany which can be found in certain industries: shareholders and employees can appoint an equal number of representatives on the supervisory board.²⁰⁵⁵

- Currently, the committee is not a board committee and is appointed by the company (shareholders).²⁰⁵⁶ The committee, as such, is a separate organ of the company. It is proposed that the committee should maintain its monitoring function with regard to the issues mentioned earlier but that the committee be given more authority: the board must take the recommendations of the committee seriously. This will result in the committee not merely supervising or monitoring the activities of the board regarding the issues listed above but also that they approve a decision made by the board regarding these issues. The impact would be that the committee could intervene in cases where the company's interests are seriously affected or where non-compliance of legislation has taken place (see comment above).
- As mentioned, the existence of a workplace forum could create an overlap, especially relating to labour and employment issues, educational development of its employees, social and economic development (issues covered here include the EEA and the

²⁰⁵³ Regulation 43(4) of the Companies Regulations.

²⁰⁵⁴ Esser 2007 *THRHR* 326.

²⁰⁵⁵ See para 7.2.2.3.1 above. Du Plessis, Hargovan and Bagaric *Principles* 349-350. See also Wooldridge 2005 *Amicus Curiae* 21 and Addison and Schnabel 2011 *Industrial Relations* 356-357 regarding parity and quasi-parity.

²⁰⁵⁶ Delpont *New Companies Act* 88.

BBBEE Act), promotion of equality, prevention of unfair discrimination, and so forth. In these instances the powers of a social and ethics committee should be limited. It is possible (depending on the size of the company) that a workplace forum is best suited to deal with these issues. The committee (as pointed out above) would have reporting, supervisory and enforcement functions, especially in cases where there is overlap between topics of decision-making and collective bargaining. It is conceivable in small establishments that neither a workplace forum nor social and ethics committee are best suited. In this case it is suggested that specialised committees should be investigated (see discussion under paragraph 8.4.3 below).

- It is proposed that a social and ethics committee's functions (if a workplace forum is not in place) cover issues of consultation and joint decision-making in terms of sections 84 and 86 of the LRA. When considering the matters included for consultation (with a workplace forum) in section 84 of the LRA it includes restructuring of the workplace (including the introduction of new technology and work methods); changes in the organisation of work, export promotion; job grading, education and training, product development plans, partial or total plant closures, mergers and transfers of ownership in so far as they have an impact on the employees, the dismissal of employees for reasons based on operational requirements, exemptions from any collective agreement or any law, and criteria for merit increases or the payment of discretionary bonuses. It is possible to include some of these non-distributive issues in the work of the social and ethics committee as it already covers many of these matters. Matters that require joint decision-making include disciplinary codes and procedures; measures designed to protect and advance persons disadvantaged by unfair discrimination; rules for the proper regulation of the workplace, other than work-related conduct; and changes to rules of employer-controlled social benefit schemes by the employer or employer-representatives on the trusts or boards governing such schemes.²⁰⁵⁷ Different options are possible: employee representatives, workplace forum representatives, or both workplace

²⁰⁵⁷ S 86(1) of the LRA.

forums and trade unions could represent employees on the social and ethics committee. Such a committee should complement and enhance the functions of a statutory workplace forum. A provision, included in the LRA and the *Companies Act*, should be to the effect that if a workplace forum is in existence, the ethics and social committee cannot make decisions concerning those issues and their role is limited to the reporting, supervision and enforcement of decisions made by the workplace forum. The result would be to establish a complementary system to workplace forums. See the recommendation under paragraph 8.4.2.1 below. Such a committee (in the absence of a workplace forum) can exist in conjunction with a trade union as the trade union's functions would be limited to wage issues and non-wage issues would be dealt with by the social and ethics committee.

However, although there is a drive for a more inclusive and pluralist approach and a recognition of stakeholder rights, it is evident that the enlightened shareholder approach is still preferred in the *Companies Act* and more work needs to be done in this regard (see suggestion above).

8.4.2 Labour Law

8.4.2.1 Workplace forums and collective bargaining

Inequality is a major problem in South Africa, and is not just a social reality but also an economic one. As indicated (under the corporate law discussion) it is evident that corporations, in terms of the legal framework, find ways to address inequality to ensure labour peace. The same can be said of labour law. In South Africa workers have a greater voice since the inception of the *Constitution* and the LRA (and other legislation), especially in the domain of the workplace. The LRA recognises a collective bargaining framework as well as the establishment of workplace forums. Consultation rights and joint decision-making powers by employees were absent in the pre-1995 LRA-era, but through the current LRA the legislator introduced workplace forums as a means to promote employee

participation in workplace decision-making. Workplace forums were introduced as part of a series of progressive labour law reforms and were intended to create a “second channel” of industrial relations or representation to act not as an alternative to collective bargaining but rather as a supplement to it.

The potential conflict between the items on the agenda of collective bargaining and those that are set aside for workplace forums exist because the legislation allows for an overlap. Clear parameters have not been set for which matters or issues are the subject of the collective bargaining process and which issues are earmarked for workplace forums only.

Collective bargaining, by its very nature, is adversarial. It is submitted that in South Africa collective bargaining is the primary means of negotiating with employers to determine working conditions and terms of employment, as well as regulating the relationship between employers and employees. To counter the adversarial nature of collective bargaining and its consequences the legislator introduced workplace forums to complement the collective bargaining system. It was anticipated that it would grant workers participatory decision-making power and a voice and would deal with production/non-wage issues at workplace level. As shown above, this sensible endeavour, regrettably, was spectacularly unsuccessful.

Workplace forums are similar to the works council systems that are found in European countries, such as Austria, Belgium, Germany and the Netherlands. The South-African workplace forum system is largely based on consultation and some issues are subject to joint decision-making. The limitations, in terms of real decision-making, are evident as the issues listed for joint-decision making (and even for consultation) are restricted in terms of the legislative framework. Although it is possible to extend the list of issues through negotiation, in terms of section 23 of the LRA the support of the established trade union would be required in order for the agreement to have binding effect as a collective agreement. A further limitation that predates the former is that the statutory system depends on trade unions approval for the establishment of a workplace forum. The fear on

the part of trade unions that workplace forums will make inroads into their bargaining power (with few benefits immediately visible to them in exchange) means that workplace forums remain unpopular and unsuccessful in South Africa.²⁰⁵⁸

Although the LRA, in sections 84 and 86, clearly identifies the issues that form the subject-matter for consultation and joint decision-making, the back door was left open for trade unions to approve these matters, in any case, in the collective bargaining domain. Clearly, collective bargaining covers issues listed in section 84 and 86 of the LRA, and the topics form part and parcel of trade unions' standard list of demands that, generally, are the subject of negotiations with employers. The results envisaged by the legislature have proved to be unsuccessful. Significantly, the nature and status of any agreement reached between the employer and workplace forum is not addressed in the LRA. Another problem evident from the current regulation, in particular regarding the establishment of workplace forums, is that it is subject to the control of trade unions.

It is suggested that for a dual system to work the following far-reaching changes should be implemented, after buy-in is obtained from the social partners:²⁰⁵⁹

- Workplace forums should be recognised as a legitimate forum in which to address the non-distributive issues identified in sections 84 and 86 of the LRA, as well as those identified by learning from comparative experiences.
- The status and legal nature of workplace forums should be spelled out clearly and the agreements entered into between the workplace forum and the employer should

²⁰⁵⁸ See chapter 6 paras 6.2.2-6.2.4 for the full analysis and discussion of the current system.

²⁰⁵⁹ In chapters 5 and 6 above it was suggested that the manner in which social partners behave should be relooked at. For example, both capital and labour should apply principles of corporate governance, such as integrity, discipline and so forth, as well as apply principles of social responsibility and instil values of good citizenship. Trust is central in how parties consult, negotiate and reach joint-decisions and thus information-flow is very important. Education, on the side of both capital and labour, is important, especially for understanding the socio-economic conditions, background and respect for each other's point of view. A call for the return of good faith bargaining is made, where capital and labour bargain towards a mutual benefit and the use of industrial action is not to cause harm or damage to the other party. It is proposed that long-term commitments and agreements should be advanced rather than short-term monetary agreements.

have the same legal effect as a collective agreement otherwise entered into between a trade union and the employer. A legally binding effect and application similar to works agreements in Germany should be attached to agreements entered into between an employer and a workplace forum.

- The power of trade unions over the establishment of workplace forums should be relinquished after 20 years. It appears to be a major contributor to the failure of workplace forums. From the recent amendments in the 2014-*Amendment Act*, it is evident the legislator is attempting to move away from unbridled majoritarianism, for example, giving an arbitrator the power to grant minority unions (who meet certain conditions) access to the organisational rights that were available only to majority trade unions.²⁰⁶⁰ The same principle should be applied to the establishment of workplace forums: the requirement for majority trade unions to be party to the establishment of a workplace forum thus falls away. In addition, it is proposed, if the dual system of collective bargaining and workplace forums continues, that there be an amendment regarding the representivity of trade unions on workplace forums. A compromise model could grant trade unions with a number of seats on the workplace forum: employee representatives would have 50% representation on such a forum and trade union representatives the remaining 50%; the casting vote in the case of a deadlock would be by an independent elected chairperson. These measures will ensure, when the workplace forum consults or engages with an employer on issues of joint decision-making and a vote is taken, that it results in a smoother process. At least, there should be significant agreement from the side of the trade unions. Another consequence would result in production issues being limited to the domain of workplace forums and non-productive issues to collective bargaining. The model is based on the German model of “quasi-parity co-determination”, which can be found in certain industries and refers to the arrangement whereby “shareholders and employees can appoint an equal number of representatives on the supervisory board, but the right to appoint the chair belongs to the shareholders – thus tilting the power

²⁰⁶⁰ See s 21(8A) and 21(8C) of the 2014-*Amendment Act* discussed under para 5.2.3 above.

balance slightly in favour of shareholder representatives”.²⁰⁶¹ The model is adapted to establish representation on the workplace forum without tilting the favour in the direction of either employee representatives or trade union representatives by appointing an independent chairperson. Such a model attach greater legitimacy to the process, as well as reassuring trade unions that they are not redundant or that their role in the workplace is usurped by the workplace forum.

- It is suggested that in order for the complementary system intended by the LRA to work effectively that clear boundaries be set between issues that fall within the power of workplace forums and issues that fall within the realm of collective bargaining. The non-distributive issues covered in sections 84 and 86 of the LRA fall squarely within the power of workplace forums: wage issues are restricted to the parties partaking in collective bargaining. This system is a mixed system that allows all workers greater decision-making influence and power, as well as adversarial participation power for trade union members. It is suggested that the “merger” between the issues covered by the social and ethics committee and those of workplace forums, if employees are granted participation on the social and ethics committee could be addressed to some extent.²⁰⁶² However, this is dependent on the following: as suggested above, a provision is included in the LRA and the *Companies Act* to the effect, if a workplace forum is in existence, that the ethics and social committee not make decisions in concerning those issues and that their role be limited to the reporting, supervision and enforcement of decisions made by the workplace forum. This provision would result in the establishment of a complementary system to workplace forums and unnecessary duplication would be avoided. If no workplace forum is in place, then the functions of the social and ethics committee can be extended to cover issues that would have been covered by a workplace forum. Such a system would be dependent on the restriction of

²⁰⁶¹ Du Plessis, Hargovan and Bagaric *Principles* 349-350. See also Wooldridge 2005 *Amicus Curiae* 21 and Addison and Schnabel 2011 *Industrial Relations* 356-357 regarding parity and quasi-parity.

²⁰⁶² See para 8.5.1 above for recommendations regarding the social and ethics committee.

distributive/wage/non-productive issues to the domain of collective bargaining. The size of the workplace (company) is a factor that needs to be considered: a social and ethics committee is not always the best-suited solution and a workplace forum would be the better alternative. The type and size of the company (the workplace) plays a role in whether a social and ethics committee or a workplace forum should be the designated body dealing with production issues (which will complement the collective bargaining system). An amendment to both the LRA and the *Companies Act* is called for to enable such a framework. Also, the dependency for the establishment of a workplace forum on the agreement of a majority representative trade union (see above) should be scrapped.

- It is a concern that industrial action is possible after the consultation process (in terms of section 84 of the LRA) has failed. Thus, retaining the right to strike reflects a serious doubt as to whether the distinction between distributive issues (reserved for bargaining and strikes) and non-distributive ones (for workplace forums) realistically can be maintained. The right to strike exists in respect of matters for consultation once there is an issue in dispute in terms of section 64 of the LRA. Strike action is possible in respect of the employer's proposal itself and not in respect of alleged procedural defects in the consultation process (which must be referred to arbitration in terms of section 94 of the LRA).²⁰⁶³ The inclusion of the right to strike in the latter instance has been criticised as straining the co-operative relationship: not only could it ruin the whole endeavour but also introduce adversarial elements into the relationship between workplace forums and employers.²⁰⁶⁴ It is proposed that a position similar to that in Germany is adopted whereby the works council and the employer are required to seek to reconcile their interests as well as negotiate a social plan.²⁰⁶⁵ Another possibility, having regard to Art 2(1) of the Information and Consultation Directive, which defines consultation as follows: "the exchange of views

²⁰⁶³ See in this regard para 6.2.3.2 above as well as Du Toit *et al Labour Relations Law* (2015) 416.

²⁰⁶⁴ See in this regard Slabbert *et al Managing Employment Relations* 5-266 as referred to in para 6.2.3.2 above.

²⁰⁶⁵ See para 7.3.1.2.2 above with regard to the competences of a work council.

and establishment of dialogue between the employees' representatives and the employer".²⁰⁶⁶ In this regard the following requirements set by the directive are useful:²⁰⁶⁷

- (i) the appropriateness of the timing, the method and the content must be ensured;
 - (ii) the employees' representatives [workplace forum] are entitled to formulate an opinion based upon the relevant information that is supplied by the employer;
 - (iii) consultation must also take place in such a way that the employees' representatives [workplace forum] are entitled to meet with the employer and to obtain a response as well as the reasons for that response, to any opinion they may formulate; and
 - (iv) an attempt has to be made in case of decisions within the scope of the employer's management powers to seek prior agreement on the decisions covered by information and consultation.
- In addition it is suggested that workplace forums be allowed to initiate the consultative process by submitting proposals to the employer (unlike under the current dispensation by which the employer alone has this power).²⁰⁶⁸ This is a departure as it allows the workplace forum to raise issues in respect of matters listed in section 84 of the LRA and, thus, would be in line with the German position whereby works councils and employers enjoy equal status in raising matters for consultation and joint-decision-making.²⁰⁶⁹ It is proposed that section 85 of the LRA should be amended to call for consultation "in good time",²⁰⁷⁰ as is the position in Germany, currently the provision does not specify when the employer must consult with the workplace forum. For the change to meaningfully affect the way in which employers consult with workers, it should shift from merely notifying the forum of

²⁰⁶⁶ See para 7.3.2.2.3 for a detailed discussion of the directive.

²⁰⁶⁷ Art 4(4) of the Information and Consultation Directive.

²⁰⁶⁸ See s 84(1) of the LRA as well as Du Toit *et al Labour Relations Law* (2015) 403 in this regard.

²⁰⁶⁹ See para 7.3.1.2.2 above with regard to the competences of a work council as well as Du Toit *et al Labour Relations Law* (2015) 403.

²⁰⁷⁰ See Du Toit *et al Labour Relations Law* (2015) 403 in this regard.

any proposal to considering legitimately and in good faith suggestions the workplace forum makes. The demand is for a committed process in which “voice” of the workplace forum is taken into consideration and its proposals are taken seriously: a change which calls for better regulation.

- On the other hand, it is suggested, if matters in terms of section 84 of the LRA were maintained then the option of strike action would either be limited and the dispute subjected to mediation and possibly arbitration after mediation. Immediate strike action would fall away as these issues would not be “strikeable” in terms of the limitation of section 65(1)(c) of the LRA as it would be considered a “rights dispute”. This will thus force the parties²⁰⁷¹ to continue with mediation (possibly followed by advisory arbitration) when consultation is unsuccessful or there is a dispute regarding reaching consensus. The situation would be dealt with in similar manner as when a refusal to bargain takes place. A dispute concerning an alleged refusal to bargain²⁰⁷² is subject to advisory arbitration. It is proposed that in cases where consultation in terms of section 84 of the LRA is unsuccessful that the dispute should be referred to compulsory mediation where an independent mediator would facilitate the process which is then up to the parties to reach an agreement. Further, it is proposed that when mediation is unsuccessful the parties should then refer the dispute to advisory arbitration. The position is similar to the arbitration committee found in the German system. It should be noted that strikes are not ideal after unsuccessful section 84 consultations but in context of fundamental rights and existing suspicion/opposition of trade unions it is proposed that the right to strike should only be allowed after

²⁰⁷¹ If a workplace forum is in place, the LRA should be amended regarding the resolution of disputes by limiting the right to strike regarding issues that are the subject of consultation and joint decision-making. If it is a social and ethics committee that is in place a provision should be inserted in the *Companies Act* that limits the right to strike to issues that are covered by the social and ethics committee and provide that the preferred method of resolving such a dispute is an alternative dispute resolution.

²⁰⁷² See s 64(2) of the LRA in this regard. Refusal to bargain is defined as including (a) a refusal to recognise a trade union in a collective as a collective bargaining agent, or to agree to establish a bargaining council; (b) a withdrawal of recognition of a collective bargaining agent; (c) a resignation of a party from a bargaining council; (d) a dispute about appropriate bargaining units or appropriate bargaining levels or bargaining subjects.

mediation and advisory arbitration has proven to be unsuccessful. An advisory award should be obtained from the CCMA (similar to refusal to bargain cases) before notice of a proposed strike or lock-out is given. In the case of section 86-matters the employer may not unilaterally implement a proposal and the right to strike over such issues also does not exist. The parties are subject to an alternative dispute resolution to settle disputes concerning matters with reference to joint decision-making. It is proposed, in order to address the inclusion of the right to strike in consultation matters, that the limitation (as set out above) should be applied to consultation matters (with regard to the use of strike action).²⁰⁷³ Currently the level of dispute resolution is different when it comes to matters relating to consultation and joint decision-making. Strikes should be limited in cases of consultation after consultation: after consultation was unsuccessful a dispute should also be referred to mediation and if the parties cannot reach an agreement be referred to advisory arbitration, only after advisory arbitration the parties can give notice of industrial action.

8.4.2.2 Industrial action, labour peace and dispute resolution

With regard to industrial action, labour peace and dispute resolution it is suggested that the objectives of the LRA should be enforced more strictly, especially labour peace and dispute resolution.

For purposes of this discussion it is important to reflect on the consequences of strike action in recent years:

²⁰⁷³ The major difference between consultation and joint decision-making is the fact that the employer must seek to reach consensus with the workplace forum in the case of consultation whereas, in the case of joint decision-making, the employer must consult with the workplace forum and actually reach consensus (in respect of the matters listed in section 86 of the LRA) before implementing a proposal. If consultation produces no consensus, the workplace forum or employer may resort to unilateral action whereas, in the case of joint decision-making, "if a workplace forum disagrees with an employer's proposal and thereby prevents its implementation, the employer's only remedy is to refer the matter to arbitration and abide by the arbitrator's award". The level of dispute resolution, therefore, is different (Du Toit *et al Labour Relations Law* (2015) 403).

	2008	2009	2010	2011	2012	2013
Number of work-stoppages	57	51	74	67	99	114
Working days lost	497,436	1,526,796	20,674,737	2,806,656	3,309,884	1,847,006
Loss of wages (ZAR 000m)	ZAR 48,000m	ZAR 235,458m	ZAR 407,082m	ZAR 1,073,109m	ZAR 6,666,109m	ZAR 6,732,108m

Source: Department of Labour Annual Industrial Action Report (2012 Figures 1, 2 and 5 and Figures 1, 2 (2013))²⁰⁷⁴

From the above table strikes clearly are not only disruptive but have huge economic impact. Note the frequency and high level of strike activity, coupled with accompanying violence, has led to the call for the reintroduction of strike ballots.²⁰⁷⁵

The reintroduction of strike ballots could resolve some of the issues raised in the workplace as to whether workers want to strike or in instances when the trade union's interests conflict with those of their members. The opportunity to address the prevalence of unprotected strikes which negatively impact on employer-employee cooperation has been missed. Strike balloting would also support the introduction of the "*ultima ratio*" (proportionality) principle found in German and EU labour law into the domain of South African labour relations. It is submitted that its introduction would increase the legitimacy of the process of calling strikes, as well as 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, the strike will be unprotected because a procedural requirement was not adhered to by the trade union. It has been suggested that the period for the commencement of a strike should be increased as well as the introduction of a secret strike ballot. The increase in the notice period could result in the resolution of the dispute

²⁰⁷⁴ Department of Labour 2012 <http://www.labour.gov.za>; Department of Labour 2013 <http://www.labour.gov.za>.

²⁰⁷⁵ See para 5.3.3.7 above as well Rycroft 2015 *ILJ* 18-19.

by means of conciliation and can possibly be viewed as a “cooling-off” period.²⁰⁷⁶ For example, an extension of a 14-day notice period could bring about changes in how conciliation, as a process, is utilised in the South African labour framework. It is proposed that the manner in which conciliation is viewed as a dispute resolution process utilised as a mere box-ticking exercise and that parties to a dispute should show a serious intention and commitment to resolve the dispute rather than merely comply with an initial stage in the process in order to obtain a required result (the dispute remains unresolved).

The challenges experienced in the past relating to technical non-compliance, arguably, may be addressed with careful regulation. The constitutional framework now ensures that the right to strike is entrenched. Regulation also ensures that trade unions adhere to notice periods when calling a strike action and guarantee that the use of strike action is a last resort. Stricter enforcement by the CCMA and the labour courts is required, especially in cases of a strike which has lost its purpose and has carried on for a long period without achieving anything. It is suggested, in such an instance, that the Labour Court should intervene and force the parties to resolve their dispute by means of compulsory arbitration. Compulsory arbitration would be necessary if a strike is no longer functional, is violent or relates to issues in terms of section 84 of the LRA that are not “strikeable” in terms of section 65 of the LRA, and would be considered a “rights dispute”. This system would be similar to the one found in Germany which involves an arbitration committee in dispute resolution if there is deadlock between the employer and the works council (see chapter seven above).

²⁰⁷⁶ Brand, for example, proposes that, the notice period for a strike should be increased to 14 days, creating a longer period for conciliation and the introduction of a right to a secret strike ballot within the 14 days' notice period (Rycroft 2015 *ILJ* 18-19). “Adherence to this requirement can be rewarded with strike protection under the following circumstances: if (a) the ballot is called by any one of the social partners in a workplace; (b) the ballot is conducted by the CCMA or a suitably accredited independent body; (c) the ballot is conducted among the categories of workers who wish to participate in a strike in a workplace; (d) the quorum for the ballot is 50% plus one of those workers who wish to participate in the strike; (e) 50% plus one of those workers who vote, vote in favour of the strike; and (f) the ballot is conducted within the 14-day notice period before a strike, then the ballot will be deemed to be valid for the purposes of any urgent interim court relief sought by any party. A further ballot may be called after 30 days from the date of a previous ballot” Rycroft 2015 *ILJ* 18-19). See also para 5.3.3.7 above.

It must be stressed that the parties to the bargaining table should try to facilitate the flow of information between them; a prerequisite for smooth negotiations.

It is recommended (in chapter seven above) that, usefully, the German system could be explored in relation to co-determination rights, information and consultation rights, especially with reference to works councils and the separation of workplace councils in terms of consultation and decision-making as they relate to social, personnel and economic matters. Full disclosure of information is needed versus what is currently considered relevant information in the context of the South African framework (see chapter seven above). Such a bold move, in essence, calls for trust between trade unions and employers; unfortunately it is lacking in South African labour relations. A disclosure obligation structured in this way enhances the rights granted to trade unions/workplace forums in sections 16, 84, 86, 189, 189A, 197 and 197A of the LRA. The submission is for an extension of the disclosure-obligations of employers to other parties if there is no trade union or workplace forum in place, as well as to the scope of information to be disclosed in certain circumstances.

The disruptive effect of strike action should be re-examined, especially the long term and adverse effects it has on the well-being of the workers and the corporation. The right to strike should not be abolished or unjustifiably limited, but the parties to the bargaining table should find alternative ways of addressing issues other than the use of industrial action (especially in instances which industrial action was utilised in the previous negotiation cycle). Currently, the conclusion of long-term agreements prevails only in certain industries. It is recommended that the Minister of Labour is granted the power to intervene in certain industries in which strike action is prevalent and compel the bargaining parties to conclude long-term agreements spanning two or three years; collective agreements that are binding on both the employer and the workers. If workers then have problems with the agreement, they should resort to other means of dispute resolution: strike action would be barred in these instances.

Unfortunately the system has failed: 48% of all strikes embarked on in 2013 were unprotected strikes.²⁰⁷⁷ It was mentioned that stricter measures should be implemented to curb the regular occurrence of unprotected strikes and their effects.²⁰⁷⁸ Such measures would place a moratorium on strikes in the case of a trade union embarking on unprotected strike action, or of protected strike action becoming violent, or of strike action being dysfunctional. Stricter liability for trade unions by which they can be held civilly liable or even criminal sanctions may be implemented: the court in *SA Transport and Allied Workers Union v Garvis*²⁰⁷⁹ held that a trade union could escape liability only if the act or omission that caused the damage “was not reasonably foreseeable”, and if it took reasonable steps within its power to prevent that act or omission.²⁰⁸⁰

Parties show their commitment and good faith to the resolution of wage disputes in a particular negotiation cycle by agreeing that in the following cycle an embargo would be placed on industrial action and that disputes would be resolved, for example, by means of arbitration if negotiation fails. The reason that unprotected strikes and unnecessary protracted or violent strikes must be better addressed is that the consequences spill over into the cooperative relationship between employers and workers and negatively influence worker voice in decision-making.

In Germany the right to strike is conditional on the “capacity to bargain collectively”: the right to strike is guaranteed only insofar as that right is understood as being necessary to ensure proper collective bargaining. It is suggested, when a deadlock is reached and the matter is referred to compulsory arbitration that a limitation should be placed on embarking on strike action and that workers would return to work. The definition of a strike in South Africa entails the following:

²⁰⁷⁷ Department of Labour 2013 <http://www.labour.gov.za>.

²⁰⁷⁸ See paras 5.3.3.4, 5.3.3.5, 5.3.3.6 and 5.3.3.7 above in this regard.

²⁰⁷⁹ *SA Transport and Allied Workers Union v Garvis* 2012 *ILJ* 1593 (CC).

²⁰⁸⁰ *SA Transport and Allied Workers Union v Garvis* 2012 *ILJ* 1593 (CC) para 42.

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 over 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.²⁰⁸¹

From the prevalence of strike action in South Africa, in most instances, strikes are used not to remedy a grievance but to force the employer to concede to the demands of trade unions. Sometimes these demands do not relate to the negotiations or fall outside wage issues. It was proposed that a greater commitment should be attached to conciliation as a dispute resolution process before strike action can be embarked on. It is further proposed that issues about which workplace forums should be consulted over in terms of section 84 of the LRA should be limited and be dealt with in a similar manner as regard to the issues listed in section 86 (see discussion above).

Because workplace forums have been hugely unsuccessful and matters listed in sections 84 and 86 of the LRA fall within the domain of collective bargaining and, by implication, within matters of mutual interest, strike action is called upon if these issues fall outside what are called "disputes of right". It is recommended that the issues listed in sections 84 and 86 of the LRA, specifically, be mentioned as a limitation if they were subject to collective bargaining, especially in the absence of a workplace forum. It is also possible to amend the sections on strikes by specifically excluding inter-union disputes: they are not for the purpose of remedying a grievance or dispute between employers and employees. Another possibility (as indicated) is the introduction of the "*ultima ratio*" (proportionality) principle in section 64 of the LRA by which strike action may be exercised only as a last resort. In this regard, as pointed out earlier, the Labour Court should intervene when it appears that the strike is no longer functional or that the trade union has no interest in trying to resolve the dispute and reach an agreement.

²⁰⁸¹ S 213 of the LRA. See also para 5.3.1 above.

8.4.3 Other considerations

It is possible for industrial democracy to facilitate greater worker participation, also decision-making as well, in the workplace through the empowerment of workers, firstly, by enhanced access to company information. The empowerment of workers influences not only the structure but also the process of decision-making. The quality of working life would be enhanced by gaining access to channels previously not available to have a greater voice concerning decisions that affect them. Employee empowerment provides employees with the freedom to question the way their jobs, goals and priorities are structured, their roles and how to reorganise their work and become more efficient.

For empowerment to be successful it is not necessarily dependent on a formalised legal framework, it also is possible when it is initiated as a voluntary process which is the result of negotiation and co-operation between employee and employer parties within an enabling environment.²⁰⁸² It must be stressed that empowerment does not merely refer to economic empowerment: the promotion of financial, rather than participative-democratic, forms of employee involvement is not, in the general sense, empowerment as employees are not granted the opportunity to have a say regarding the strategy or operations of a company. Economic empowerment, nonetheless, is also important and now is facilitated by various statutory frameworks in South Africa.

In terms of the *Companies Act* employees can participate as shareholders through the issue of shares or a consideration for shares.²⁰⁸³ The *Companies Act* also provides for financial assistance for the subscription of securities and employee share schemes. ESOPs have become important in the demand by employees for share ownership and economic inclusion in corporations as they provide a means of financial participation by employees

²⁰⁸² In South Africa empowerment takes place mainly in terms of black economic empowerment, the BBBEE Act. It is possible for empowerment to take place through ESOPs. See para 4.3.5 above. Empowerment is possible when rights such as freedom of association, are advanced, as well as when organisational rights are exercised by trade unions. These enable workers to have a voice in organisations.

²⁰⁸³ See chapter 4 para 4.3.5.1 above.

through the ownership of shares in the company. Employees, through financial participation, especially ESOPs, share in the costs and benefits associated with the company's financial well-being and prosperity. Importantly, as shareholders, they obtain direct participation in decision-making by exercising their vote at a general meeting of shareholders.

In addition, through ESOPs, a more universal economic empowerment can be promoted by redistributing wealth to previously disadvantaged individuals and communities in which employees live and are socially integrated. This is an indirect way for companies to fulfil positive duties regarding the improvement of the society in which they operate. "Apartheid", the resultant economic exclusion and the imbalances created by such exclusion, has made the empowerment of previously disadvantaged black South Africans a priority for government, and resulted in the BBBEE Act.²⁰⁸⁴ Broad-based black economic empowerment forms an integral part of national transformation: it encourages the redistribution of wealth and opportunities to designated categories of persons; the rank and profile of workers, arguably, are an important part.

These forms of empowerment target certain categories of workers (for example black workers) and are viewed as promoting participation or the voice of employees as they now are granted access to economic resources which, previously, was denied them. Various economic empowerment options are open to black people. With reference empowerment, including economic empowerment, participation must be effective and meaningful and, in the case of equitable income distribution, cognisance must be taken of the constitutional right to equality: participation (as envisaged by the *Constitution*) is not simply procedural but also substantive. Further fine-tuning of regulations and their implementation is necessary in order to ensure that the empowerment initiative is broad-based has the greatest possible effect on employee "voice" in the workplace. This matter, unfortunately, is too wide in its scope to consider in the thesis.

²⁰⁸⁴ See chapter 4 para 4.3.5.2 above.

The elimination of unfair discrimination in the workplace (specifically taking note of the EEA) requires the development, or empowerment, of previously disadvantaged designated groups: black people, women and persons with disabilities. The measure for advancement of the designated group is affirmative action in employment,²⁰⁸⁵ which is not discussed at length in the thesis: the Constitutional Court has provided guidelines.²⁰⁸⁶

Further, the SDA is relevant in dealing with empowerment because it creates a framework for the development, training and education of the workforce.²⁰⁸⁷ Through skills development, previously-disadvantaged workers gain access to opportunities that enable them to attain new and improved skill levels and may result in further transformation of their role organisations.

In chapter seven above it was suggested that social co-determination in South Africa in the absence of workplace forums is a viable option and can be enhanced by the introduction of shop-floor level health and safety committees, productivity committees, job classification committees and employment equity committees in terms of the OHSA and EEA. These committees amplify worker “voice” and enhance worker participation by dealing with specific issues that may be specifically excluded from the collective bargaining table. In Germany, works councils, have consultation and information rights (as pointed out above) that specifically deal with social, personnel and economic matters.

It is not suggested that the establishment of such committees keep out trade unions but rather that they assist them and the employer to focus on wage issues relevant to the bargaining table. Production (non-distributive/non-wage) issues, such as the restructuring of the workplace (including the introduction of new technology and work methods), changes in the organisation of work, education and training, the dismissal of employees for reasons based on operational requirements, and so forth, would be dealt with by the

²⁰⁸⁵ See chapter 4 para 4.3.5.2 above.

²⁰⁸⁶ See *South African Police Service v Solidarity obo Barnard* 2014 10 BCLR 1195 (CC) and *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) in this regard.

²⁰⁸⁷ See chapter 4 para 4.3.5.2 above.

specialised committees. Collective bargaining is concerned with issues regarding the terms and conditions of employment and matters of mutual interest, which include dispute resolution on issues such as improved conditions of employment, higher wages or changes to existing collective agreements. The committees would provide structure and context to policies that employers have in place and legitimise decisions as they require input by the workers. The committees would be able to function in conjunction with trade unions if a social and ethics committee or workplace forum is not in place. Such committees could assist the trade union(s) and employer in limiting issues to be discussed at the bargaining table to wage issues: agreement would have been reached regarding the issues the committees cover or will still be negotiated.

8.5 Concluding remarks

The role of employees in corporate decision-making is an important issue in both company and labour law. From the discussion in chapters one to seven above, and in this chapter, a few concluding remarks are made regarding employee “voice” and participation in South Africa:

- The aims of economic democracy coincide with some of the objectives of industrial democracy: continuity consists in the fact that any participation in the economy of the enterprise requires a certain degree of participation in management decisions: evident by reference to the different forms of participation, the different levels, the nature, the status and appropriate regulation of participation. Participation include not only the disclosure of information, consultation and issues pertaining to joint decision-making but should extend to the domain of company law so that employees have a meaningful voice in companies.
- Both “strong” and “weak” forms of employee participation grant employees with “voice” in companies. The degree of voice depends on the circumstances, the role-players involved and the type of participation that is present. It is clear “participation”

and “voice” are problematic terms and no consensus exists exactly as to what they entail or should entail. However, what is clear are the rights to be informed and to be consulted. It is possible to effect small amendments (such as to section 16 of the LRA relating to information which must be disclosed) that might have a significant impact on a social plan. There are varying levels of disclosure of information, consultation and joint decision-making. Unfortunately, a lack of trust impacts directly on the type of information disclosed by capital to labour, as well as on the commitment level in consulting or achieving joint decision-making.

- The two-tier board system is not necessarily the answer to addressing the lack of participation of employees in companies in South Africa. However, it has been suggested that the existing framework should be enhanced to provide employees greater “voice” and participation: first, through providing workers with seats on the social and ethics committee, enhancing new rights provided for in the companies act (such as notification, information and voting rights when it comes to mergers, schemes and arrangements and so forth), as well as granting the social and ethics committee more functions and authority that add to its legitimacy. Second, the amendment of current workplace regulation as indicated above should take place. Third, improving the general environment for cooperative workplace decisions by limiting the unintended and undesirable consequences of too adversarial collective bargaining. In the fourth instance, the manner in which strike action and conciliation is utilised should be addressed, as well as non-compliance with the procedural requirements for strikes and the behaviour of the parties when embarking on industrial action.
- Both labour and company law in South Africa require fixing: in some instances small amendments, in other instances it requires major changes. Proper integration is the key, not only with regard to labour legislation but also regarding corporate and insolvency law where these pertain to employees. At face value it appears that the *Companies Act* has granted employees substantial rights regarding business rescues

and so forth: from the above discussions their role and voice in decision-making are still severely limited and lacking. The same can be said about the LRA: since 1994 no changes have been implemented regarding integrating the workplace forum system within or alongside the collective bargaining framework. Were the positive consequences of employee participation in cooperative structures and processes to be strengthened, it might be a solution to adversarial bargaining in South Africa as parties would try to achieve greater co-operation and a mutually beneficial agreement.

- The objectives of the LRA should be reinforced, especially with regard to orderly collective bargaining and the enhancement of labour peace. In order to achieve this calls for a re-evaluation of how both capital and labour bargain, the perspective they bargain from as well as whether good faith, trust and mutual respect are present. Present in the regulatory framework in South Africa (as suggested above) are good elements regarding both social and management co-determination. What now should happen is the establishment and fostering of a unitary framework that makes provision not only for employee participation in corporations but integrates and enhances the various remedies and protections available.

The thesis has accepted that the primary goal of employee voice is to grant employees access to participation rights within the different levels of decision-making (from shop-floor level to company level). Employees are indispensable resources of and stakeholders in any organisation and are important stakeholders in a company. With the granting of access by employees to structures and processes in corporations it is important to note that both labour and company law should be “in sync” and should facilitate a strict adherence to statutory measures in the event of non-compliance or an abuse.

Bringing company and labour law into line would enhance the existing rights granted to employees and would strengthen the remedies available to employees. Unfortunately, both labour and corporate law disappoint employees as regards facilitating true democratisation

and “voice” in companies. The workplace forum framework will have to be amended (as proposed above) in order for such a system to work in conjunction with collective bargaining. The adversarial element of collective bargaining should be limited and characteristics such as trust, integrity, discipline and good faith, to mention a few, should be evident in the behaviour of the bargaining parties.

The dispute resolution process should be utilised for the intended purpose: resolving a dispute and not merely as a means to reach the next stage in the dispute resolution process. At company law level the rights granted to employees also be enhanced by providing workers with voting rights regarding business rescue proceedings or providing them with proper channels to offer input in the case of a merger or sale of the business. The social and ethics committee can provide a meaningful voice in corporate decision-making by allowing employees not only access to such a committee but also by their input into the issues discussed at the committee.

It is suggested that the proposed changes should be effected as a matter of urgency. They would result not only in the streamlining of provisions in the LRA and the *Companies Act* when it comes to employee decisions in corporations but would result in the proper integration of labour and corporate law frameworks. It is clear that corporations no longer can ignore employees or the principle that labour is not a commodity: corporations must have regard to the social component of the employment relationship in addition to economic principles. The value of employees in achieving the triple bottom-line, as well as their input in decisions that directly and indirectly affect them are important items on the agenda of corporations. South Africa is ready to articulate and deliver a tailor-made regulatory framework (which will then have to be rolled out to the shop floor) in which both social and supervisory co-determination issues are provided for in an integrated fashion.

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