

**IMPACT OF THE NEW SOUTH AFRICAN AND
GERMAN CONSTITUTIONS ON LABOUR LAW:
A COMPARATIVE ANALYSIS**

**BY
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**Thesis presented in fulfilment of the requirements
for the degree of Master of Laws by research
at the University of Cape Town**

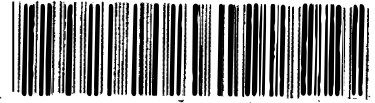
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September 1999

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DECLARATION

I declare that the dissertation entitled impact of the new South African and German Constitutions on labour law: A comparative analysis that is submitted herewith has not been submitted by me for a degree at another university. All sources have been acknowledged by means of complete references.

Signed by candidate

(Silke Woehlert)

September 1999

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ABSTRACT

The main concern of the study is to present some reflections on the impact which the new South African and German constitutions have on labour law and labour relations. It assesses the efficacy of the two constitutions in the development of labour law and promotion of various employees rights such as freedom of association, collective bargaining, workplace democracy and industrial conflict resolution. The content of human rights standards and the role of the state in the exercise of such rights are considered in interpreting the constitutions. The study locates labour relations within the context of International Labour Organisation standards. The relevance of Conventions no. 87 and no. 98 of the International Labour Organisation on the right to form and belong to unions and to bargain collectively and to strike are examined. There are also other factors, which have to be taken into account. These factors include the different historical development and the different economic and political contexts of both legal systems. In this regard, the study discusses the problems and benefits of each system.

The contention is made that there is a profound effect on employment and labour law where fundamental worker rights have been adopted. Continental systems of labour laws as in Germany have experienced a different judicial performance as a result of the constitutional entrenchment of worker rights. The new South African constitution is going to have a profound effect on labour law because the constitution is supreme law and enumerates workers rights with the Constitutional Court has the power to adjudicate on the validity of all such laws.

The study concludes that the South African constitution will achieve success and improve the working lives of employees in many aspects.

CHAPTER 1

INTRODUCTION

This study examines the impact of the new South African and German constitutions on labour law and labour relations. The scope of the study will be defined and an examination made as to why the study has been undertaken. The chapter will be divided into six sections.

The first section contains the statement of the problem for investigation. Section 2 contains the justification of the study and framework of approach. Section 3 reveals the structure and objectives of the study. The historical developments in each country are described in section 4. This is followed by information about the economy and labour force. The last section contains a general introduction into the primary sources of law, the German constitution and the South African constitution.

1.1 STATEMENT OF THE PROBLEM FOR INVESTIGATION

The Republic of South Africa has had profound political, social and economic changes since 1990. This change was brought about by the opposition to the pre-existing political system and its apartheid policy, from the population and the international community. South Africa's economy had been put under strong pressure by international economic sanctions.

In 1994, democratic elections were held, which effectively ended the era of apartheid in South Africa. New institutions comprising representatives from all major social groups emerged. The Government decided to undertake far-reaching reforms within the framework of the Reconstruction and Development Programme (RDP). The main objectives of the RDP were to create a stable social-economic environment while also reducing the social disparities and inequalities. In 1996, the Government reiterated the objectives of the RDP and decided further trade liberalization measures in its Growth, Employment and Redistribution Programme (GEAR). Moreover, the need for an industrial policy that would favour labour-intensive sectors was emphasized.¹

¹ International Labour Office, Studies on the social dimensions of globalization South Africa, ILO, Geneva 1999.

The new social and political order included new developments in labour relations and labour and employment law. The democratic Parliament of South Africa passed a new Labour Relations Act (LRA) under the new constitution² which was adopted by the constitutional Assembly on 8 May 1996. The new constitution contains human rights and freedoms of relevance to employment and labour law. South Africa has followed developments in Western industrialised nations, where a constitutionally charter of rights has already formed the object of litigation and discussion. Therefore a closer look on the connections with these developments could give a deeper insight in the structure of the new South African labour law.

Nearly at the same time the two German states were unified that South Africa introduced a new constitution. Germany, too had to face profound structural changes after reunification, which also affected the situation of employees especially in the Eastern part of Germany which once formed the German Democratic Republic.

The total breakdown of the Soviet block led to the unification of the two German states on 3 October 1990, when the former German Democratic Republic joined the Federal Republic of Germany. The chance to frame a new constitution was not used, because the German Democratic Republic amended the constitution on 17 June 1990. In the unification treaty the German Democratic Republic accepted the political, economic and legal system of the Federal Republic of Germany with several reservations.³

These historical parallels make it even more interesting to have a closer look at the details and the impact of the constitutions on labour law. The purpose of this study is to present some reflections on the impact which a Charter of fundamental rights has on the law governing the relations between labour and industrial relations; to understand the extent to which the constitutions have an effect, and to examine how constitutional labour rights can help achieve a better outcome. A comparative study of these developments will be the main task of this research.

² constitution of the Republic of South Africa, Act 200 of 1993, as amended by Act 2 of 1994, Act 3 of 1994.

³ Weiss M, Labour Law and Industrial Relations in Germany, (1994) International Encyclopedia for Labour Law and Industrial Relations 5 pp. 1-206; Stein E, Staatsrecht, (1998) pp. 21f.

1.2 JUSTIFICATION OF THE STUDY AND FRAMEWORK OF APPROACH

The aim of the study is to present some reflections on the impact which the South African and the German constitutions have on labour law and industrial relations. In many parts of the world that impact has been very considerable, and continues to be so. It may be thought that an analysis of the role constitutions play in the development of labour law may perhaps not be of a comparative lawyer's interest.

The first reason why the subject is of comparative interest is that no organised community can exist without a constitution in the substantive sense which means a constitution denoting the total sum of the rules which determine the organisation of government and the fundamental rights and liberties of the individual.⁴

The second reason is that we could witness a movement towards the formalisation of a new constitution in South Africa; towards the enactment of a bill of fundamental rights and civil liberties. The South African constitutional and legal order underwent a transformation to a political democracy based upon the principle of constitutional supremacy with the birth of the interim constitution on 27 April 1994. Prior to this date, South Africa had a system of parliamentary sovereignty. This meant that the Parliament had unlimited power to make laws. Since then South Africa has become a constitutional state where the constitution is supreme.⁵

The new constitution is going to have a profound effect on all aspects of law, especially on labour law because the constitution is supreme law and enumerates a set of fundamental rights against which the constitutional Court has the power to prove the validity of all laws.⁶

⁴ Kahn-Freund O, *The impact of constitutions on Labour Law*, (1976) *Cambridge Law Journal* 35 (2) pp. 240-271. Regarding to Kahn-Freund the United Kingdom is an example for a country with a substantive constitution, because its constitution is partly laid down in Acts of Parliament and there is no systematic exposition of the constitutional principles. constitution understood in a formal sense, the sense by the French tradition since 1791 and by the American tradition since 1787, that is as denoting a document or documents systematically setting forth the principles of the substantive constitution.

⁵ Jordaan B, *The new constitution and Labour Law*, (1994) *Labour Law News and Court Reports* 4 (1) pp. 1-5.

⁶ Cheadle H, *Impact of the constitution on Labour Law*, (1994) *Current Labour Law* pp. 73-84.

To see how formulated civil rights and liberties affect labour relations and employment this study looks at South Africa and Germany. Analyzing the different national systems one obviously finds enormous diversity between the countries. The contrasts are great but one must question whether any lesson can be drawn which might be useful in understanding one's own system or even improving it.

Continental systems of labour laws as in Germany have experienced a different judicial performance particularly as a result of the constitutional entrenchment of workers rights. The influence of the Bill of Rights of the German constitution is all-pervasive, and this is particularly true of labour law.⁷ In Germany the debate is far more advanced than is the case in South Africa and may therefore serve as a fruitful source of information to South Africa. The fact that the German controversy has flared up again after the reunion of East and West Germany in 1990 - in the light of the socio-economic backlog prevailing in the former East Germany - causes German constitutional law to be of exceptional topical interest.

Not all rights affect labour law. The most likely are the rights to equality, privacy, association, assembly, expression and labour relations rights. There are three different ways in which these rights impact on labour law.

There are direct challenges to the constitutional validity of legislation and administrative actions which means that the constitutional Court can strike down laws of parliament because they do not conform with the rights. Then the constitution provides interpreting legislation to conform with the chapter of fundamental rights and understand labour law. Finally the constitution has a possible application to the common law.⁸

The possible impact of some of the above rights will be discussed within that framework. This framework is historical. An historical approach will help to understand current developments and problems through the examination of what happened in the past.

⁷ Davis D, constitutionalization of Labour Rights, (1994) Van Wyk, Rights and constitutionalism: The new South African Legal Order, pp. 439-454.

⁸ Cheadle H, Impact of the constitution on Labour Law, (1994) Current Labour Law pp. 73-84.

1.3 STRUCTURE AND OBJECTIVES OF THE STUDY

1.3.1 Structure of the study

The study is structured as follows.

The main part of the study gives a detailed comparison of both constitutions and their impact on labour law and labour relations. It gives an analysis of the development of various employees rights and their historical background.

Chapter 2 focuses on the right of freedom of association and trade union movements. In Chapter 3, the study deals with the right of collective bargaining as a means of regulating relations between management and employees. Chapter 4 focuses on workplace democracy and provides a description of workplace forums and work councils in regard to their respective functions in the labour management relationship. In Chapter 5, the study deals with strikes and lock-outs and compares it with the German industrial relations system.

Chapter 6 is the conclusion. This chapter brings various topics together and comes to a conclusion as to whether there is an impact of the new South African and German constitutions on labour law and the extent to which it exists.

1.3.2 Objectives of the study

This comparison must first of all relate to the political context of the national system concerned. It is obvious that the role of trade unions and of collective bargaining, the right to strike and other ways of influencing management decisions-making by labour, differ fundamentally according to the type of political system in which a labour relation system exists.

In Western pluralistic democratic societies like in Germany, with greater trade union freedom, collective bargaining, and the right to strike, the existence of divergent interests and possible conflicts is recognized and the parties involved are allowed to participate in their resolution. The system for resolving industrial disputes in Germany is characterized by two distinctive features, voluntarism and diversity. Solutions are the product of the parties own devising, without intervention of the government.⁹

⁹ Hanami T, Blanpain R, Industrial conflict resolution in market economies, (1989) pp. 1ff.

Different devices are used to prevent open conflict or to limit it as far as possible and to arrive at solutions. The negative means are for certain activities and sectors of industry industrial actions are prohibited in the army, the police or other elements of the public sector, or restricted in essential services. Other limits to industrial conflict are that only a union has the right to strike; certain kinds of dispute are not to be settled by strife; the peace obligation, cooling off periods, terms of notice and obligation mediation, conciliation, fact finding. The positive means are seek to involve employees in the decision-making process through information, consultation, collective bargaining, sitting on the board of the company, job enrichment.¹⁰

I summarize the provisions that are relevant to the issue, then I explore their scope, purpose and effect and analyse the social function of the institutions which these rights guide. The content of human rights standards and the role of the state in the exercise of such rights, should also be considered in interpreting the constitutions. The comparison between the recent developments in both countries will be critically discussed with a focus on improvements in the employees rights.

This study follows the comparative technique and will compare the South African constitution to the German constitution.¹¹ Some similarities as well as major differences between the two legal systems will be pointed out and examined how far the constitutional changes have prepared the way for today's labour law. The constitutions will consequently be considered in the light of international standards of constitutional interpretation and international law.

In considering the comparative aspect, particular reference to the standard-setting work of the International Labour Organisation is made. Labour legislation in many countries was inspired by the Conventions and Recommendations of the ILO. This is particularly true of the development of freedom of association in its industrial relation context. The functional understanding of freedom of association is to a large extent the product of ILO instruments and provisions.¹²

¹⁰ Hanami T, Blanpain R, *Industrial conflict resolution in market economies*, (1989) pp. 1ff.

¹¹ See Zweigert K, Kötz H, *Einführung in die Rechtsvergleichung* (Introduction to Comparative Law), (1996) pp. 31ff.

¹² Von Prondzynski F, *Freedom of association and industrial relation, a comparative study*, (1987) pp. 6f.

1.4 HISTORICAL DEVELOPMENTS

1.4.1 South African labour law

South Africa has a system of employment law and industrial relations which goes a long way back and meets international standards as embodied in the International Labour Organisation (ILO) Conventions. It is a system underpinned by statutory enactments, the balance between organised business and labour and the dismissal and labour practice jurisprudence of the Labour Court.

Originally based on the common law, which emphasised freedom of contract, the capacity of the employers and employees to regulate their rights and duties between each other by independent agreement has been reduced by statutory enactments. In so far South Africa has followed developments in Western industrialised nations.

The process began with the first labour legislation, the Industrial Conciliation Act 11 of 1924. It provided for the registration of employers' organisations and trade unions, brought in a framework for collective bargaining and for the settlement of disputes and regulated strikes and lock-outs. The process was accelerated with the LRA 28 of 1956, as amended, after the recommendations of the Wiehahn Commission. The amendments to the 1956 LRA provided the basis for most of what has followed. The LRA 28 of 1956 sought to promote collective bargaining and to put away unfair labour practices in industry. Trade unions and employers' organisations were recognised in labour relations. In some industries they created a system of collective bargaining forums in form of industrial councils.¹³

The Act further created a hierarchy of labour courts to decide controversies concerning alleged unfair labour practices, and to grant relief. The predecessors of the Labour Relations Act introduced the unfair labour practice doctrine into South African law and developed new principles in their unfair labour practice jurisdiction. The definition of unfair labour practice was extremely open-ended, and obliged the courts to formulate general guidelines as to what is fair and unfair in the workplace.¹⁴

¹³ Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D, Christie S, (1998) *The Labour Relations Act of 1995* pp. 3f.

¹⁴ Thompsen C, *Borrowing and Bending: The development of South Africa's unfair labour practice jurisprudence*, (1993) *The international journal of comparative labour law and industrial relations* 9 pp. 183-205.

But the 1956 Act also constructed the racially exclusive industrial relation system in South Africa and brought the labour legislation into line with the policy of apartheid. The political system of apartheid made it difficult for unions to organize and develop. It entrenched the racial division of workers by forbidding the registration of new unions with skilled white and coloured members. Existing unions had to establish separate branches for their white and coloured members and just white members could be in the executing office. The collective bargaining was usually conducted by unions catering for skilled white, coloured and Asian workers. When they reached collective agreements in industrial councils, those were extended to all employers and employees in the industry. This included black workers whose unions were not represented on such councils.

African workers could not form or join registered trade unions and strike. Although unions catering for black workers were not forbidden and existed, they could not register regulating collective bargaining and make use of the statutory collective bargaining structures in terms of the legislation. Restrictions made it also difficult for unions to obtain offices and other facilities.

Then as another form of statutory discrimination 'job reservation' was innovated, which meant that special work could only be done by a person of a specified race. This protection was clearly for the white workers. In practice job reservation mostly favoured white workers and lesser coloured and Asian workers.¹⁵

The most important labour statute is the LRA, 1995 which was implemented on 11 November 1996 under the new constitution and marked a change in South Africa's statutory industrial relations system. The existing LRA was repealed and the various institutions created by the Act were replaced by new structures and institutions, which give the employers new opportunities in their labour relations. The new LRA reforms the legislative system to advance economic development, social justice, labour peace and the democratisation of the workplace. It gives statutory expression to innovations which have been developed by more progressive employers and trade unions as it was ever possible by private arrangement under the old regime.¹⁶

¹⁵ Piron J, Roux P, *Labour Law and Industrial Relations in South Africa*, International Encyclopaedia for Labour Law and Industrial Relations, (1993) 11 pp. 1-156 (24f).

¹⁶ Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D, Christie S, (1998) *The Labour Relations Act of 1995* pp. 3f.

The new Act resulted from a process of extensive consultation and negotiations between organised employers, labour and the government. The most important of which took place at the National Economic Development and Labour Council (NEDLAC), a forum consisting of the State, organised labour and organised business. The so called Cheadle Commission began its work in 1994. The main point for the new Act was provided by the successes and failures of the old system. Its main criticisms were that labour law did not necessarily conform to the requirements of the new constitution or international instruments, that it was too complicated for employers to follow, that it operated too slowly, that it was regulated by too many differing statutes and regulations, and finally that it did not effectively promote collective bargaining or dispute-resolution.¹⁷

1.4.2 Labour Law in Germany

Under the present constitution of Germany¹⁸ the federation has legislative jurisdiction in matters of labour relations and employment. The composite and the component share in theory the legislative jurisdiction, but in practice it has been almost absorbed by the *Bund*. Experience in federal countries like Germany, has shown that a division of legislative powers between governmental units and the composite unit is important for the development of labour law. Where fundamental rights have been adopted, their effect on employment and labour law was great. This happened sometimes in a sense favourable to labour or in a sense favourable to capital. There is the tendency towards integration of labour law over wide areas, under the impact of the harmonisation of Law by the European Community.¹⁹

After the end of World War I the Weimar Republic, the first democratic and parliamentary republic was established. It was named after the city Weimar where the assembly met and drafted the first German constitution. The Weimar Empire constitution of 11 August 1919²⁰ was the first German constitution to include social and economic rights. The economic order had to be in accordance with the

¹⁷ Draft Negotiating Document in the Form of a Labour Relations Bill GN 97 of 10 February 1995.

¹⁸ Basic Law Art. 74 No.12.

¹⁹ Kahn-Freund O, The impact of constitutions on Labour Law, (1976) Cambridge Law Journal 35 (2) pp. 240-271; Hanami T, Blanpain R, Industrial conflict resolution in market economies, (1989) pp. 1f.

²⁰ Art. 157.

principles of justice; the labour force was to be placed under the particular protection of the Empire and freedom of association and trade unions were protected by means of the prohibition of all actions which hindered or restricted them. The Weimar Empire constitution contained that the German Reich would create a unified labour law, and this in a geographical and in the occupational sense. It was important to abolish local legislation, because in parts of Germany there were separate laws for agricultural workers and domestic servants²¹ and made for example trade unions organisation impossible. The extension of the federal legislative power to the entire area of labour law by the constitution was a milestone in the history of labour law in Germany.²²

In 1933 the NAZI-State interrupted democratic developments. It was defeated in 1945. After the end of World War II the allies divided Germany into an American, British, French and Soviet zone of occupation. In those zones the occupying powers had governmental authority. In 1949, the three western zones occupied by Britain, France and the United States formed the Federal Republic of Germany, a parliamentary, federal, republican democracy. The Soviet Union formed the German Democratic Republic, a communist totalitarian state.²³

From the beginning, reconstruction, especially in labour law, was different in the two systems and became more and more intense over the years. Whereas in the Federal Republic of Germany the system of labour courts was rebuilt, labour matters were handled by ordinary courts in the German Democratic Republic. Those courts were not intended as being neutral conflict resolving bodies between employees and employers. They were an instrument to promote the Party's goals. The government, the parliament, and the courts were not separated powers and had the same function. The functional goals of labour law were mainly performance of the Plan²⁴, full employment and workers' education in the spirit of

²¹ Especially the Prussian *Gesinde-Ordnung*

²² Stein E, *Staatsrecht*, (1998) pp. 8f.

²³ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp. 1-206.

²⁴ The highest executive committee of the former GDR the so called *Zentralkomitee* established a plan of five years duration, in which the economic and political aims for that period was formulated; Kunz F, *The challenge to labour law in the 1990s under the conditions of German unification from the viewpoint of a citizen of the former German Democratic Republic*, (1991) *The International Journal of Comparative Labour Law and Industrial Relations* 7 pp. 1-15.

socialist morality. The right to work was guaranteed in the constitution and each person willing and capable to work was guaranteed a job. The administrative effort to promote career planning and distribution of jobs was extreme.²⁵ As in other communist countries in the German Democratic Republic the rules on labour law were codified in a Labour Code which was amended several times.

The border between the two German states was heavily guarded. However the total breakdown of the Soviet block brought down the Berlin wall and the German frontier. It led to the unification of the two German states on 3 October 1990, when the former German Democratic Republic joined the Federal Republic of Germany. On 2 March 1990, the parliament of the German Democratic Republic passed a resolution which contained a program for the development for a structure of social standards in a unified Germany. Unification had to be achieved "by a way of a mutual reform of both systems of social protection in the two German states, integrating their positive elements". This meant for labour law in a unified Germany that "historically grown social standards in both German states are to be maintained, further developed and lifted to a higher level of social protection". Labour law was conceived to become a mixture of the better parts of both systems.

Yet such a strategy met with strong opposition in the Federal Republic of Germany because it was interested to transfer its system, including labour law, to the territory of the former German Democratic Republic. The Treaty on Monetary, Economic and Social Unification of 18 May 1990 was a first step in this direction. It transferred the most important parts of collective labour law to the German Democratic Republic. At the same time the German Democratic Republic was supposed to abolish all legal provisions inconsistent with the Treaty. This led to an amendment of the German Democratic Republic constitution on 17 June 1990 and to a total revision of the Labour Code on 2 June 1990.²⁶

According to Article 8 of the Unification Treaty, all legal and institutional framework of the former Federal Republic of Germany, including individual labour law, was transferred to the territory of the former German Democratic Republic.

²⁵ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp. 1-206.

²⁶ Kunz F, *The challenge to labour law in the 1990s under the conditions of german unification from the viewpoint of a citizen of the former German Democratic Republic*, (1991) *The International Journal of Comparative Labour Law and Industrial Relations* 7 pp. 1-15.

1.5 ECONOMY AND LABOUR FORCE

1.5.1 Introduction

The ILO surveys a vastly different landscape of industrial relations emerging in the global economy, driven more by capital mobility, new methods of production and communication and innovative approaches to human resource development than by traditional collective labour relationships. It foresees an era of reduced government intervention in economies, greater autonomy for enterprises and increased competition for jobs and investment. It says that coping with the potentially negative social fallout from these trends will be a major challenge for governments, employers and workers alike.

The increasing mobility of capital means for enterprises previously limited by national horizons a variety of options in the global competition for plant and investment.

The impact is likely to be greatest on low-paid, low-skilled labour, thus widening social inequalities. Trade competition and capital mobility risk dividing the workforce by seeking out and bidding up the wages of highly skilled workers at the expense of the less-skilled, who used to be protected from wage competition.

Employers also face new challenges as a result of reduced government intervention and increased competition.

In reducing the autonomy of national macroeconomic policy, globalisation enhances a firm's role as the primary engine of wealth and job creation. However, the same forces erode the shelter in which firms used to operate. Enterprises have responded by transforming how they organise work and production and, in the process industrial relations structures have come under pressure to adapt.

While these new methods offer certain advantages to workers in the form of greater autonomy, responsibility and decisions-making power, the benefits have frequently been offset by higher unemployment, reduced employment security, limited career prospects and a growing number of peripheral workers on casual, temporary or part-time contracts.²⁷

²⁷ International Labour Organisation, ILO Highlights Global Challenge to Trade Unions, <http://www.irnet.co.za/special>, Geneva 1997.

1.5.2 Economy

The Republic of South Africa has had profound political, social and economic changes since 1990. South African economy has been characterized by a high degree of state interference and regulation, despite the fact that the government have permitted the development of a mixed economy. Since the election in 1994 the government adopted a policy of privatization, deregulation and commercialization.

Several decades of relative economic isolation meant that firms were not well prepared to take advantage of the opportunities arising from trade liberalization. A major recession during the early 1990's had led to falling living standards for the majority of the population. In addition, past economic policies had tended to favour capital-intensive sectors and to the detriment of labour-intensive ones. Following several decades of segregation, the African population aspired to a rapid improvement in political rights and better social and economic conditions. The main policy issue was to satisfy these aspirations while at the same time creating a stable macroeconomic framework and enhancing the integration of South Africa in the international economy.²⁸

From this time the South African economy has been characterized by a slow but steady economic growth. Between 1994 and 1997, the Gross Domestic Product has grown by a modest 2.5 per cent per year on average. Inflation has been on a downward trend and there are no major fiscal financial imbalances. Various factors have contributed to this, including the lifting of economic sanctions, trade liberalization, improved access to foreign capital, termination of the exchange control in 1997 and the double currency system. South Africa has become an active member of the World Trade Organization and it is the most important participant of the South African Development Community.²⁹

Despite advantages such as a good infrastructure, a wealth of mineral resources, the termination of economic sanctions and growing access to markets in Africa and

²⁸ International Labour Office, *Studies on the social dimensions of globalization South Africa*, ILO, Geneva 1999.

²⁹ International Labour Office, *Studies on the social dimensions of globalization South Africa*, ILO, Geneva 1999; ILO, *Report on Social and Economic Developments in South Africa Summit 1998*, <http://www.finance.gov.za>, Geneva 1999.

elsewhere, the economy faces a difficult task in providing jobs for the population and meet the needs of the country such as housing education and health care. This led to proposals that the country's labour laws and industrial relations structures should be adapted to meet these needs.³⁰

The Federal Republic of Germany, constantly supported by the Western Allies, grew into one of the economically most prosperous western democracies. The former German Democratic Republic followed a system of strict centralized planning and was economically on a much lower level. After the fall of the wall and the introduction of the market system the former German Democratic Republic had to endure drastic economic setbacks. There is still a large economic difference between the two parts of Germany.³¹

The overall economic activity in the Federal Republic of Germany considerably grew as an annual average in 1998. According to the Federal Statistical Office, the Gross Domestic Product increased by 2.8 per cent in real terms compared with 1997. This was the highest rise since the German unification. The expansion process increasingly lost momentum in the second half-year in view of the economic and monetary turbulences in various regions of the world.

In 1998 economic growth continued to differ widely in regional terms. While the Gross Domestic Product rose by 2.9 per cent in the former federal area, it increased by 2.1 per cent in the eastern federal states. The catching-up process in eastern Germany thus again made no progress with regard to this important aspect. Although the performance of the eastern German economy has improved since the end of the planned economy, it continues to be considerably lower than in western Germany. In the previous year, overall economic productivity, for example, amounted to only slightly less than 60 per cent of the level registered in the western federal states.³²

³⁰ International Labour Office, Studies on the social dimensions of globalization South Africa, ILO, Geneva 1999; ILO, Report on Social and Economic Developments in South Africa Summit 1998, <http://www.finance.gov.za>, Geneva 1999.

³¹ Weiss M, Labour Law and Industrial Relations in Germany, (1994) International Encyclopedia for Labour Law and Industrial Relations 5 pp. 1-206.

³² Federal Ministry of Finance, The economic situation in the Federal Republic of Germany, Economic and Financial Reports, <http://www.bundesfinanzministerium.de> 1999.

1.5.2 Labour force

In South Africa employment performance over the past decade has been far from satisfactory and constitutes one of the major challenges for the development of the country. Unemployment remains very high and has even been increasing recently, endangering social stability and partly contributing to explain the rise in crime rates. South Africa's unemployment rates are estimated at between 23 and 38 per cent. A job summit was recently held between the social partners, highlighting concern over the issue and the importance of job creation.³³

From 1990 to 1997, a reduction in total formal employment of 8.7 per cent has reflected net job losses in all sectors except for government and private services. Mining, construction and manufacturing have all been severely affected, with these sectors continuing to shed significant numbers of jobs through 1997. There was a strong decline in total non-agricultural employment between 1990 and 1993, stagnation from 1994 to 1996 and further job losses in 1997. Job losses have continued during 1998.

There were an employment creation during 1990-97 in the public sector, trade and private services. Since 1990, overall government employment has risen by 3.9 per cent reflecting increases in public service employment. In addition, as the rationalisation of the public service under the new government began to take effect, government employment declined by 1.9 per cent during 1997 and this pattern is expected to continue. This suggests that future job creation will largely depend on the private sector.

The latest data for manufacturing employment reveal that the overall employment trends in this sector are a combination of job creation in some areas and job losses in others. During 1997, the largest reductions in employment have been in food products, clothing, chemicals and motor vehicles. Employment has only increased in plastics, metals and in machinery. These patterns reflect the response by firms to the need to improve their international competitiveness in the face of tariff liberalisation and in order to win export markets.³⁴

³³ International Labour Office Geneva, *Studies on the social dimensions of globalization South Africa*, ILO, Geneva 1999.

³⁴ ILO, *Report on Social and Economic Developments in South Africa Summit 1998*, <http://www.finance.gov.za>, Geneva 1999.

As a result of the developments in employment and production in both the public and private sectors, productivity has increased significantly. It has also outstripped increases in wages, such that real unit labour costs have declined by 5.7 per cent over the last five years.³⁵

The situation on the German labour market was characterised by diverging trends. The pace of growth of the Gross Domestic Product has put an end to the long-lasting decline in employment, but it was not strong enough to result in substantial improvements of the employment situation. While the improvement was primarily due to the economic expansion in the western federal states, the main reason in the new part of the federal area was more use of labour-market-policy measures.

The number of jobless men and women increased and again surpassed 4 million (4.197 million). The unemployment rate in terms of the total civilian labour force amounted to 10.9 per cent. The rate registered in western Germany was 9.3 per cent and 17.4 per cent in the eastern federal states.³⁶

The less advanced an economy, the greater the percentage of the labour force employed in agriculture. Although this ratio is gradually declining in the developing world, in 1992 almost three-fifths of the labour force in the developing world was still active in the agricultural sector.

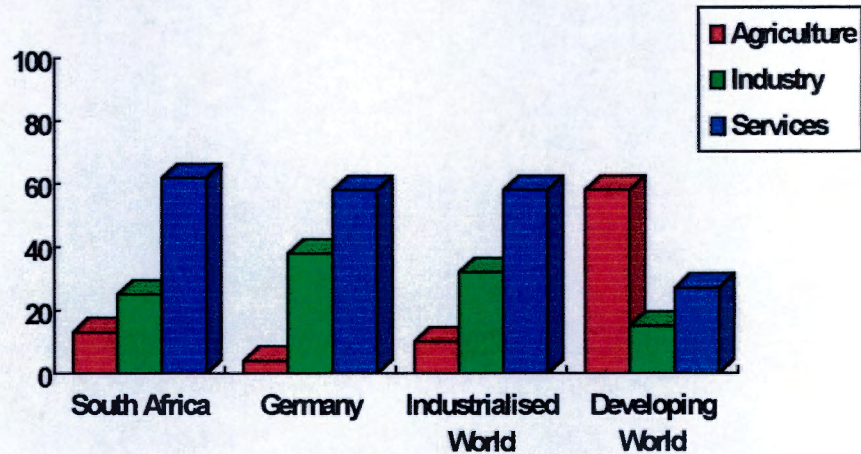
South Africa has also experienced a noticeable decline in the ratio of the labour force in agriculture, while in 1992 more than 60% of the labour force in agriculture was employed in the large and diversified services sector, as compared with 0,9% in Germany. But the agricultural sector still occupies an important position in the South African economy. The agriculture provides an important source of raw material for South Africa's secondary industries. In Germany agriculture, forestry and fishing only plays a small role. For a long time the big majority of the german working population was employed in manufacturing, and now the majority has shifted to services.

³⁵ International Labour Office Geneva, Studies on the social dimensions of globalization South Africa, ILO, Geneva 1999; ILO, Report on Social and Economic Developments in South Africa Summit 1998, <http://www.finance.gov.za>, Geneva 1999.

³⁶ Federal Ministry of Finance, The economic situation in the Federal Republic of Germany, (1999) Economic and Financial Reports, <http://www.bundesfinanzministerium.de> 1999.

This trend is expected to continue. In all cases there has been a decided shift towards employment in the services sector, while, on the other hand, the percentage of the population employed in industry has declined in the industrial market economies. These shifts can be shown best by taking the figures for 1992:

Labour force in percentage (1992)



(source: The World Bank, World Development Report, 1996, Oxford University Press, Washington 1996)

1.6 Primary sources of Law

1.6.1 Introduction

The advent of a constitution with entrenched fundamental rights has had a profound effect on all branches of the law, especially on labour law. The constitution is at the top of the hierarchy of sources of labour law. It plays an important role in individual and collective labour law. The problems which are not regulated by the Legislator have to be solved by recourse to the constitution. This is why the constitution is shaping the legal framework to a great extent. When the principles laid down in the constitution are very unspecific, the leeway for interpretation is rather wide. This leads to increase the powers of the interpreting agencies, particularly the courts.³⁷

³⁷ Weiss M, Labour Law and Industrial Relations in Germany, (1994) International Encyclopedia for Labour Law and Industrial Relations 5 pp. 1-206.

1.6.2 The South African constitution

South Africa's constitutional and legal order underwent a transformation to a political democracy based upon the principle of constitutional supremacy with the birth of the interim constitution on 27 April 1994. It proclaimed in Chapter 1 the aim to advance economic development, social justice, labour peace and the democratisation of the workplace. The Act also regulated the fundamental rights of section 27 of the constitution; to give effect to South Africa's obligations as a member of the ILO; to provide a framework for collective bargaining and industrial policy by trade unions, employers and employers' organisations; and to promote orderly collective bargaining, and employees participation.

The interim constitution was replaced by the final constitution for the Republic of South Africa. The constitution which was adopted by the constitutional Assembly on 8 May 1996 contains in Chapter 2 human rights and freedoms of relevance to employment and labour law.³⁸ Section 23 of the constitution deals specifically with labour relations and provides:

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right –
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union;
 - (c) to strike.
- (3) Every employer has the right –
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right -
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to bargain collectively; and
 - (d) to form and join a federation.
- (5) The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements.

³⁸ Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D, Christie S, (1998) The Labour Relations Act of 1995 pp. 3f; Brassey M, Labour relations under the new South African constitution, (1994) Southern African labour monographs 5/94 pp. 1-36.

These rights constitute enforceable law. All laws therefore have to conform to its provisions in order to be valid. Acts of Parliament are now subject to judicial enquiry into their constitutionality. The constitution will also be the ultimate authority against which the validity of executive acts and decisions will be judged.

The constitutional rights provide a framework within which the national legislation has to be interpreted. The national legislation is the new Labour Relations Bill (LRA) aims to give statutory effect to new constitutional rights, to promote collective bargaining and consultation and joint decision making in the workplace. The LRA is the first labour statute that must comply with the provisions of the constitution.³⁹

The constitution affects labour law in a number of ways. Firstly, all labour relations, employment and social security legislation are subject to constitutional scrutiny. The impact of section 23 may be limited as a result of the insulation of labour legislation that promotes fair employment practices, orderly and equitable collective bargaining, and the regulation of industrial action. In terms of section 33(5)(a) such legislation shall remain of full force until repealed or amended by the legislature. This invites a court to test existing legislation against these criteria before finding that such legislation shall remain in force. The laws which section 33(5)(a) is intended to insulate from constitutional scrutiny are among others the Labour Relations Act 28 of 1956. Section 23 is only applicable to those categories of employees and employers who are not covered by four statutes, which include domestic workers, teachers at private schools, academics at universities and technikons and certain public servants.⁴⁰

Values such as fair labour practice, freedom of association and the right to organise, collective bargaining and the right to strike have to give an effect on the civil courts interpretation of the rights of employers and employees.

When a court is interpreting chapter 2 of the constitution section 39 of the constitution provides that it must consider international law. One of the oldest

³⁹ Brassey M, Labour relations under the new South African constitution, (1994) Southern African labour monographs 5/94 pp. 1-36; Jordan B, The new constitution and Labour Law, (1994) Labour Law News and Court Reports 4 (1) pp. 1-5.

⁴⁰ Davis D, constitutionalization of Labour Rights, (1994) Van Wyk, Rights and constitutionalism: The new South African Legal Order pp. 439-454.

existing international organizations are the conventions and recommendations of the ILO.⁴¹

Although the provisions of section 23 constitute minimum rights, the open-textured nature of the section allows the ordinary courts and the constitutional Court to develop a parallel labour jurisprudence. Furthermore, the labour courts' judgments on issues as the dismissal of striking workers are subject to review by the constitutional Court. The entrenchment of labour rights raises the prospect of a constitutional jurisprudence which is developed by the civil courts and the constitutional Court and will have an important effect on the way the contract of employment and the employment relationship are approached in future.

It is necessary to consider the principles underlying constitutional interpretation before comparing labour rights. The South African constitution should be interpreted in terms of chapter 15 and section 35.⁴² The courts and others interpreting, applying and developing the common law or customary law have to regard "the spirit, purport and objects of the Bill of Rights" according to section 35(3). The constitution prescribes that applicable principles of public international law, including international human rights law, must be used for the interpretation. In terms of section 35(1) comparable foreign case law may be taken into account in the interpretation of the Bill of Rights.

Two principles can be drawn from the German experience. Firstly a constitution has to be dealt with as an interlinked unit. The German constitutional Court held that an individual constitutional provision can not be considered as an isolated

⁴¹ South African National Defence Union v Minister of Defence, Chief of the South African National Defence Force, (1999) CTT 27/ 98 pp.1-35.

⁴² Section 35 states:

- (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.
- (2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid by reason of the fact that the wording used *prima facie* exceeds the limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.
- (3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and object of this Chapter.

clause and be interpreted alone. A constitution has an inner unity, and the meaning of any one clause is linked to that of other provisions. Taken as a unit, the constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.⁴³

Secondly the Basic Law comprises a hierarchial value system which has to be interpreted in accordance with the intention of the framers. This objective order of values shows the constitution to be the incorporation of the basic value choices of the framers. It should be considered that the German constitutional interpretation is due to Germany's unique historical experience and its legal and political traditions and culture. But German and South African political, cultural and historical experience are not dissimilar, so that there is an interrelationship between the structural theory of interpretation and the objective theory of values.⁴⁴

Yet the inclusion of labour relations rights has not been universally welcomed. The major problem foreseen was that it would lead to increasing judicialization of labour law, particularly in the area of collective bargaining where the solution to issues would become the prerogative of the courts.⁴⁵ Another argument put forward was that courts can easily abuse constitutional guarantees to make the quality of working life worse rather than better.

In favour of the inclusion of labour rights it was stated that constitutional bills of rights have improved the quality of life for working people in many ways. Courts have used constitutional charters to invalidate rules and regulations of labour policy which were arbitrary or unfair. They have promoted the constitutionality of collective bargaining and employment standards legislation which try to protect and improve the welfare of employees as a group.⁴⁶ Moreover the inclusion of labour relation rights counterbalances the individualism of constitutional rights which could destroy the collective bargaining process.

⁴³ BVerfGE 14 (1951).

⁴⁴ Lourens J, Frantzen M, The South African Bill of Rights - public, private or both: a viewpoint on its sphere of application, (1994) *International Comparative Law Journal of South Africa* pp. 340-356.

⁴⁵ Friedman S, Bill of rights: juristocracy vs democracy, (1992) *Labour Law News and Court Reports* 1(9) p.1-4.

⁴⁶ Beatty D, constitutional labour rights: Pros and Cons, (1993) *Industrial Law Journal* 14 pp. 1-16; Jordaan B, The new constitution and Labour Law, (1994) *Labour Law News and Court Reports* 14(1) pp.1-5.

1.6.3 The German constitution

The German constitution plays a dominant role in the field of labour law. This is especially the case for collective labour law where legislation is very fragmented. The problems not regulated by the German legislator have to be solved by recourse to the constitution. All the rules on industrial conflict were developed by interpretation of principles laid down in the constitution. But the constitution also plays an important role in individual labour law. Many legal provisions concerning the contractual relationship originate from a totally different period, namely from the turn of the century. They are embedded in the Civil Code which was promulgated in 1900. Thus many of those provisions are no longer compatible with basic principles laid down in the constitution. This is why the constitution, also in the area of individual labour law, is shaping the legal framework to a great extent.⁴⁷

Unlike the constitution of South Africa the first 19 articles of the Bonn Basic Law of 1949 did not have to supply a set of common values for a heterogeneous society, because the national society of Germany is very homogeneous. However, the German constitution had to fill gaps left by a broken history. On the one hand the constitution was intended to be a clear commitment to some elementary principles of justice and civilisation which Germany had abandoned in the past. On the other hand it was intended as an emphatic proclamation of that rule of law which had been abandoned in the East of Europe right next to Germany. The fundamental human rights were formulated in very general terms. They left the task to interpret them to the Courts, but the historical experience of Germany and an order of values underlying the Basic Law gives them a significant substance. Finally there is an overwhelming power through of interpreting these "inviolable and inalienable human rights" of article 1 of the Basic Law as "the foundation of any community of men, and of peace and justice in the world".⁴⁸

A fundamental problem is whether the fundamental rights are to protect the individual in relation to the State or whether they operate also between individual citizens. In Germany the constitutional guarantee of the freedom of organisation

⁴⁷ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp. 1-206.

⁴⁸ Freud K, *The Impact of constitutions on Labour Law*, (1976) *Cambridge Law Journal* 35 (2) pp. 240-271.

has by Article 9 III of the Basic Law expressly been given an extended effect, called *Drittwirkung*. The constitutional Court held that the fundamental constitutional rights are not subjective defensive rights of the citizen against the State, but objective norms which establish a system of values comprising all branches of the law. This decision led to a great controversy in the case of other fundamental rights.⁴⁹

Germany is as a member of the European Community, the Council of Europe, the United Nations and the International Labour Organisation subject to European Community law, and has also ratified a high number of the Charters and Conventions of other organisations. The consciousness of the relevance of international sources was for a long time rather underdeveloped in Germany but has grown over the last two decades. In some areas the discrepancy between supranational law and national law became an issue of public discussion.⁵⁰

The right to freedom of association and protection of the right to organise closely follows the ILO's Convention on Freedom of Association and Protection of the Right to Organize (87 of 1984), the European Convention on Human rights and the European Social Charter of 1961. The Social Charter has important provisions which obliges the State to ensuring freedom for workers and employers to form and join organizations for the protection of their economic and social interests. Article 6 commits the State to ensure collective bargaining, promotion of joint consultation and voluntary negotiations for collective agreements and the right to strike. However the European Convention on Human Rights has been the more important document in shaping national labour law in Europe, especially in Germany. Whereas the Charter allows for complaints only to the committee of experts, the European Convention on Human Rights allows parties to complain to the European Commission and to the Court of Human Rights, which can award damages to individuals. Unfortunately, deprived of the collective standards expressed in the Charter, the European Court of Human Rights did not develop its jurisprudence and it reflects the needs of workers collectively organized.

⁴⁹ Federal constitutional Court 2 May 1967, BVerGE 22 362 (372); Stein E, Staatsrecht (1998) pp. 364ff.

⁵⁰ Weiss M, Labour Law and Industrial Relations in Germany, (1994) International Encyclopedia for Labour Law and Industrial Relations 5 pp. 1-206. An important example was the compatibility of national law on the prohibition of sexual discrimination with the directive of the European Community. The decisions of the European Court led to an increased sensitivity for the relevance of supranational sources in the field of labour law.

CHAPTER 2

SPECIFIC EMPLOYEES RIGHTS IN SOUTH AFRICA COMPARED TO RIGHTS IN GERMANY: FREEDOM OF ASSOCIATION

2.1 INTRODUCTION

The remaining chapters of this study will give an analysis of the development of various employees rights governing the relationship between employers and employee collectivities and their historical background. As far as the topic is concerned the impact of the constitutional changes in South Africa as well as in Germany should be revealed.

This chapter gives a detailed comparison of the South African and German constitutions and their impact on the rights of freedom of association. The differences between the trade unions, their registration and the diversity of their union movements will be identified and analysed. The main question regarding a meaningful comparison of freedom of association rights is whether they are intended to serve broadly similar functions and purposes, and whether the trade unions operate in equivalent labour relation contexts.

It is a fact that in modern industrial society both employees and employers constitute and distinct opposing interest groups, which tend to promote and protect their respective interests. The divergent interests should be accommodated and reconciled. The way in which such interests are expressed is the subject of industrial relation. This will necessarily vary from country to country. This comparison must bring out and explain the differences and similarities of national industrial relations systems.

History has been for employees to recognise that their strength lies in collective organisation and action, trade unions were build, and individualism was displaced by collective bargaining. Modern labour legislation seeks to regulate the relationship between collective groups in an orderly and equitable manner. It also reflects a change in the philosophy of employment from a exchange of services regulated by market values to the recognition of joint decision making and

responsibility for the common good of the individual. Modern industrial relations legislation may accordingly be viewed as an instrument by which democratic values are infused into the employment context.⁵¹

The new constitution of South Africa and the constitution of Germany contain several provisions of relevance to their labour law. In Germany a constitutionally enshrined charter of rights has already formed the object of extensive litigation and discussion. The first seventeen articles of the German constitution of 23 May 1949 contain a catalogue of protected rights. Some are socio-economic rights, such as a constitutional guarantee of the freedom of association. The most important legal source in this respect is Article 9(3) of the Basic law, the first part of which reads as follows:

The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations and professions. Agreements which restrict or seek to impair this right shall be null and void; measures directed to this end shall be illegal.

Important parts of the German law on collective agreements and industrial conflict are a result of court interpretation of this Article.

The new South African constitution also affects labour law in a number of ways. All labour relations, employment and social security legislation are subject of the constitutional instance. Chapter 3 of the constitution has several provisions that specifically regulate labour relations. Of these the most important is section 23. First it gives every person the right to fair labour practices. Then it gives workers the right to form trade unions, to join those that have been formed, to organize collectively, to bargain collectively and to strike for the purposes of collective bargaining. Finally, it gives employers the right to form employers' organizations, to join those that have been formed, to organize collectively, and to bargain collectively and to lock-out for the purposes of collective bargaining.⁵²

⁵¹ Hanami T, Blanpain R, Industrial conflict resolution in market economies, (1989) pp. 1ff.

⁵² Brassey M, Labour relations under the new South African constitution, (1994) Southern African labour monographs 5/94 pp. 1-36; Jordaan B, The new constitution and Labour Law, (1994) Labour Law News and Court Reports 4 (1) pp. 1-5; Cheadle H, Impact of the constitution on Labour Law, (1994) Current Labour Law pp. 73-84.

2.2 SOUTH AFRICA

2.2.1 Historical background and development

In South Africa a succession of laws was promulgated dealing with various industrial sectors and labour in general between 1911 and 1918. In 1922 an attempt was made to regulate relations between management and labour. This found expression in the Industrial Conciliation Act 11 of 1924, which was followed by the Wage Act 27 of 1925, and the Industrial Conciliation Act 36 of 1937.

After 1948, a review by the Botha Commission of Inquiry led to legislation which had a far-reaching effect on the labour structure in South Africa. Trade unions were racially divided, job reservation was introduced, and black workers were precluded from joining registered trade unions. Then the government created a separated legislative framework for black workers in general. The Black Labour Relations Regulation Act 48 of 1953 made provision for the creation of a Central Black Labour Council and regional committees, black labour officials and black workers' committees. These workplace committees were introduced as a substitute for trade unions. Denied an official existence, black trade unions forged a survival and growth strategy through recruiting members on a plant by plant basis.⁵³

Until 1979 the former LRA contained only two provisions protecting employees' freedom of association in South Africa. Employers could not prevent employees from belonging to a union or dismiss employees for belonging to a union, participating in its activities or formation or victimise them in certain other ways. This protection was afforded only to employees classified as white, coloured and asian workers.⁵⁴ Although the previous LRA protected freedom association rights for employees, it did not do it in a comprehensive or accessible way. The fact that victimization was a criminal offence and punishable through the criminal courts was also undesirable.⁵⁵

⁵³ Thompsen C, *Borrowing and Bending: The development of South Africa's unfair labour practice jurisprudence*, (1993) *The international journal of comparative labour law and industrial relations* 9 pp. 183-205; Friedman S, *Building Tomorrow Today - African Workers in Trade unions 1970-1981*, (1987) Raven Press p.87.

⁵⁴ Piron J, Roux P, *Labour Law and Industrial Relations in South Africa*, *International Encyclopaedia for Labour Law and Industrial Relations*, (1993) 11 pp. 1-156 (27ff).

⁵⁵ Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) *Industrial Law Journal* pp. 278ff; ILO, *Restrictions on freedom of association and the right to organise in South Africa*, ILO, Geneva 1983.

This dualistic system of labour relations lasted until the beginning of the 1980's, when, as a result of the recommendations of the Wiehahn Commission⁵⁶, the labour laws were de-racialised and the Act was extended to employees of all racial groups. The recommendations were that all trade union rights be accorded black workers, job reservation be abolished, Manpower Commission be established, and the Industrial Court replaced the existing Industrial Tribunal and be given extended powers.

In 1979 the concept 'unfair labour practice' was introduced. It provided a more effective remedy for challenging certain infringements on the freedom of association. However, this definition essentially protected individual employees. It made no reference to trade unions or employers' organisations. In an attempt to give effect to the recommendations of the Wiehahn Commission, significant amendments were made to the former LRA which with further amendments formed the legislative structure for collective labour relations for the next 15 years.⁵⁷

From 1988 to 1991 paragraph (j) of the amended definition of 'unfair labour practice' included 'direct or indirect interference with the right of employees to associate or not to associate'.

While opening space for introducing principles of public international law on freedom of association, a more significant effect was to undermine the positive element of this freedom by incorporating a right not to associate. After a campaign by the trade union movement, the pre-existing definition of 'unfair labour practice' was reinstated in 1991 with only minor changes.⁵⁸

⁵⁶ Published as The Complete Wiehahn Report, (1982).

⁵⁷ Thompson C, *Borrowing and Bending: The development of South Africa's unfair labour practice jurisprudence*, (1993) *The international journal of comparative labour law and industrial relations* 9 pp. 183-205; ILO, *Restrictions on freedom of association and the right to organise in South Africa*, ILO, Geneva 1983.

⁵⁸ Cheadle H, Thompson C, *The new Labour Relation Act (1989)* pp. 35-41; ILO, *Prelude to Change Industrial Relations Reform in South Africa*, Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, (1992) *Industrial Law Journal* 13 pp. 739-783.

Trade union membership in South Africa has grown percentage of 7.4 percent of the economically active population in 1985 to 130,8 per cent of the workforce falling, with most increase in the post-apartheid era 1995.⁵⁹ In 1987 there were 205 registered trade unions in South Africa with a total membership of 1 879 400 (Department of Manpower 1988). In addition the Department of Manpower has estimated that there were 88 unregistered trade unions with approximately 240 600 members. Trade unions were not homogeneous organisations but vary in size, structure, ideology and scope of membership. In 1987 only 106 trade unions were registered on a non-racial basis, while 99 were member of a particular racial group.⁶⁰

The heterogeneity of the population and the history of politics in South Africa, have resulted in a seriously divided trade union movement and a strongly adversarial relationship between employers and the state. Ideological differences relating race, politics and economic systems have prevented trade unions, in many instances, from perceiving their common interests. The apartheid system resulted in powerful impediments to genuine non-racial trade unionism. There were provisions which impinge on workers' freedom of association. The most important of these is the Internal Security Act of 1982. In terms of Section 4 of this Act an organization, including a trade union, could be declared an 'unlawful organization' in certain circumstances. Of more practical importance, were those provisions which enabled the authorities to prohibit 'gatherings' or mass meetings in certain circumstances. These provisions have been utilized in the past to prohibit various meetings, including union meetings.⁶¹

But even within the black trade union movement, involvement with political matters has ideologically divided unions from their way towards unity. The lack of political power of the black worker to influence government policy and legislation has restricted the mobilisation of the unions. In terms of the Public Safety Act of

⁵⁹ ILO, ILO Highlights Global Challenge to Trade Unions, <http://www.ironet.co.za/special>, ILO Geneva 1997.

⁶⁰ Finnemore M, van der Merwe R, Introduction to Industrial Relations in South Africa, (1989) pp. 48ff; Piron J, Roux P, Labour Law and Industrial Relations in South Africa, International Encyclopaedia for Labour Law and Industrial Relations, (1993)11 pp. 1-156 (27ff).

⁶¹ Piron J, Roux P, Labour Law and Industrial Relations in South Africa, International Encyclopaedia for Labour Law and Industrial Relations, (1993)11 pp. 1-156 (27ff).

1953, the State President was empowered to proclaim a state of emergency. During the 1980's two states of emergency were declared and regulations were published which directly affected industrial relations in South Africa. Where trade unions have become involved in directly challenging the state, arrest and detention of trade union officials, office-bearers and members have affected union organisation further. The last state of emergency was lifted during 1991.⁶²

The Fact Finding and Conciliation Commission, which investigated the law relating to freedom of association in South Africa during the course of 1992, recommended that various steps be taken in this regard. The following are some of the more important of these recommendations: that certain restrictions on the right of unions and employers' organizations to draw up their constitutions in full freedom be eliminated; that certain powers of the Industrial Registrar be eliminated; system of registration be simplified; unracial unionism prohibited; statutory controls on the ability of unions to raise funds be done away with; steps taken by the government to ensure that attacks on trade unions and their premises cease and that the government cease its interference in trade union affairs; labour legislation be harmonized and that the procedures for a legal strike be simplified.⁶³

The union movement, that part of it affiliated to the Congress of South African Trade Unions (COSATU) played a major role in forcing the retreat by the previous regime which led to the election of a 'government of national unity' led by the African National Congress (ANC), in April 1994. Since then the circumstances of these unions have changed dramatically. The ANC had fought the election with COSATU and the South African Communist Party (SACP). A significant number of union leaders have been drawn into government and public administration at national provincial and local levels.⁶⁴

⁶² Thompsen C, *Borrowing and Bending: The development of South Africa's unfair labour practice jurisprudence*, (1993) *The international journal of comparative labour law and industrial relations* 9 pp. 183-205; ILO, *Restrictions on freedom of association and the right to organise in South Africa*, ILO, Geneva 1983.

⁶³ ILO, *Prelude to Change Industrial Relations Reform in South Africa*, Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, (1992) *Industrial Law Journal* 13 pp. 739-783.

⁶⁴ Du Toit D, *Corporatism and Collective Bargaining in a Democratic South Africa*, (199) *Industrial Law Journal* pp. 785-806; Finnemore M, van der Merwe R, *Introduction to Industrial Relations in South Africa*, (1989) pp. 54f.

2.2.2 Freedom of association and the International Labour Organization

In 1994 the interim constitution came into effect, granting a right of freedom of association which remained unchanged in the final constitution of 1996. Section 27(2) protects the right of employers and employees to belong to trade unions and employers' organisations while section 17 protects the right to associate for other purposes, for example, membership of a political party or social club. Employers and employees are guaranteed freedom of association by the LRA and enforceable by a new Labour Court with Supreme Court status.

The LRA is the first labour statute that must comply with the provisions of the constitution. It marks a significant break from the way that rights bound up with the freedom of association were protected in the past. The previous Act contained limited protection of the rights of employees, and to a lesser extent of employers, falling short of international standards.⁶⁵

The Act is the first labour law that gives effect to the basic principles of the ILO. The right to freedom of association and protection of the right to organise closely follows the ILO's Convention on Freedom of Association and Protection of the Right to Organize (87 of 1948) and guarantees employees the right to form, join and hold office in trade unions. Victimisation in any form is forbidden.

Convention 87 contains four main provisions. Article 2 provides that workers and employers without distinction, shall have a right to establish and, subject only to the rules of the organisation concerned, to join organizations of their own choosing without previous authorisation.⁶⁶

Secondly, workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives, to organize the administration and activities, and to formulate their programme.

⁶⁵ Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D, Christie S, (1998) *The Labour Relations Act of 1995* pp. 3f; Brassey M, *Labour relations under the new South African constitution*, (1994) Southern African labour monographs 5/94 pp. 1-36.

⁶⁶ Article 9(1) of the same Convention provides that the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations. See, *South African National Defence Union v Minister of Defence, Chief of the South African National Defence Force*, (1999) CTT 27/ 98 pp.1-35 where it has been said that if the approach of the ILO is adopted, it would seem to follow that when section 23(2) speaks of worker, it would be interpreted to include members of the armed forces, even though the relationship they have with the Defence Force is unusual and not identical to an ordinary employment relationship.

Thirdly, there is a prohibition against the suspension and dissolution of workers' and employers' organizations by administrative authority.

Finally organizations shall have the right to establish and join federations and confederations, which will have the same right as their constituent organizations, and to affiliate with international organizations of workers and employers.⁶⁷

The employees' right is protected from interference by the state, employers and trade unions. Not only unions and their supporters can use the new Charter against governmental restraints on their freedom of action. Dissident employees can appeal on their new rights and freedoms to challenge key aspects of the standard labour law regime.⁶⁸

South Africa withdrew from the ILO in 1964. Notwithstanding this, ILO played an important role in opposing apartheid. In 1964 the International Labour Conference adopted the Declaration concerning the Policy of Apartheid of the Republic of South Africa in which it was declared that such policy was contrary to the constitution of the ILO and to the declaration of Philadelphia.

In accordance with the programme for the elimination of apartheid in the labour sphere various steps were taken, which included, inter alia, aid to liberation movements, black workers and their unions. During the period from 1964 until the introduction of the 1990 reforms, contact between the South African government and the ILO, between employers' organizations and ILO were reduced. But ILO instruments and publications dealing with freedom of association influenced the Industrial Court.⁶⁹

⁶⁷ Von Prondzynski F, *Freedom of association and industrial relation, a comparative study*, (1987) pp. 6f.; Davis D, *constitutionalization of Labour Rights*, (1994) Van Wyk, *Rights and constitutionalism* pp. 439-454. A number of other international organizations have adopted standards of protecting freedom of association such as the Universal Declaration of Human Rights (arts 20 and 23) of the United Nations; the International Covenant on Civil and Political Rights (art 22), the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (art 11), and the European Social Charter of 1961 (Part II art 5 and 6).

⁶⁸ Benjamin P, *Innovation and Continuity: Responding to the Labour Relations Bill*, (1995) *Industrial Law Journal* 16 (2) pp. 258-277.

⁶⁹ Jordaan B, *The relevance of ILO standards for South African labour law*, (1994) *Labour Law News and Court Reports* 3 (8/9) pp. 1-6; Mandela N, *The continuing struggle for social justice*, (1995) *Industrial Law Journal* 15 (4) pp. 732-734.

2.2.3 Closed shop

Freedom of association raises one of the labour law's controversies - whether the freedom of association includes the freedom not to associate. This arises from the fact that the full exercise of the freedom often requires compulsion. That controversy affects every aspect of collective labour law, especially the closed shop agreements. The constitution, however, endorses freedom of association without resolving the question.

The former LRA, since 1924, recognized the closed shop as an institutional prop to orderly collective bargaining. Many industrial councils owe their stability and industrial peace to the closed shop. The closed-shop arrangements were employed by uniraical unions as a form of job reservation. Especially during the 1980's, they were used as a mechanism by older unions who were parties to industrial councils to prevent newer unions from gaining membership in industries and from joining industrial councils. Legislative changes as well as changed circumstances, have eliminated these problems. Nevertheless, the way in which closed-shop arrangements were used against them has resulted in many of the newer unions, even when they have established themselves in an industry.⁷⁰

There is no doubt that closed shops violate freedom of association. While direct challenges to the constitutionality of non-statutory closed shops are not possible, given the fact that constitution does not apply directly to agreements between private persons, statutory closed shops, those imposed in terms of a industrial council agreement, may be impugned.

The LRA proposes that existing closed shops established under the LRA should continue to have force. Then it provides for an agency shop. In terms of an agency shop non-union employees who benefit from collective bargaining by a union contribute to a collective bargaining fund.⁷¹

⁷⁰ Cheadle H, *The Impact of the constitution on Labour Law*, (1994) Current labour law pp. 73-79; Piron J, Roux P, *Labour Law and Industrial Relations in South Africa*, International Encyclopaedia for Labour Law and Industrial Relations, (1993)11 pp. 1-156 (100ff).

⁷¹ Benjamin P, *Innovation and Continuity: Responding to the Labour Relations Bill*, (1995) *Industrial Law Journal* 16 (2) pp. 258-277; Agency shops have been found valid in the United States, Canada and the United Kingdom.

Brassey M, *Labour relations under the new South African constitution*, (1994) *Southern African Labour Monographs* 5/94 pp. 1-36. In *Lavigne v Ontarion Public Service Employees Union* the Canadian Supreme Court held in the majority that, though freedom from association was a concomitant of freedom to association and so protected under the freedom of association clause, there had been no infringement of the right or that the infringement was justified under the limitation clause, (1991) 81 DLR (4th) 545.

Although statutory closed shops under section 48(8) of the LRA are protected by the orderly and equitable collective bargaining in section 33, contractual closed shops can be attacked. If the employer resiles from its obligations under such an agreement, the courts will be seized of the issue if the unions wants to enforce the agreement. An employee that is dismissed for refusing to belong to a union will also raise constitutional issues in the industrial court or the Supreme Court.⁷²

2.2.4 Registration of trade unions and employers' organisations

The registration system in South Africa has changed. The former LRA allowed only one trade union and employers' organisation to be registered for a particular interest in a particular area. Registration was made compulsory and unregistered trade unions were not allowed to operate. The wide powers given to the registrar and the prohibition of registration where an existing union was considered to be sufficiently representative contravened ILO's standards in particular Article 2 of Convention 87 which guarantees to all workers the right to form and join trade unions of their choice without previous authorization from the authorities.

The previous LRA provided for a total prohibition on political affiliation and funding of political parties or candidates by trade unions. This was in contravention of the ILO's standards protecting freedom of association. The registration of trade unions by reference to a racial group and permitting trade unions with racially-based constitutions to be registered similarly conflicted with ILO standards.⁷³

The registration procedure for trade unions and employers' organisations is brought into line with ILO standards and greatly simplified. All trade unions and employers' organisations have now the right to be registered provided they meet a number of formal requirements. The trade union must be registered if the application is in the prescribed form and manner, its constitution complies with the Act, it does not discriminate unfairly on grounds of race or gender, its name is not the same as or too similar to that of another trade union, and it is independent. A

⁷² Cheadle H, *The Impact of the constitution on Labour Law*, (1994) Current Labour law pp. 73-79. He states that the European Court of Human Rights has noted the the majority of European States recognize the negative aspect of the freedom of association. It held on that basis that closed shop infringes the freedom of association.

⁷³ Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) Industrial Law Journal pp. 278ff; ILO, *Prelude to Change Industrial Relations Reform in South Africa*, Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, (1992) Industrial Law Journal 13 pp. 739-783.

trade union will be regarded as independent if it is not under the domination or control of an employer and is not subject to influence by an employer through financial assistance or by any other means. With this the Bill gives effect to the constitution because the registration of an organization that discriminates unfairly would be subject to constitutional attack. Moreover the action of racially unions as unregistered unions is not prohibited, but they have no important benefits. Also international labour standards are very sceptical of provisions allowing the registration of racially exclusive unions.

Although registration is not compulsory, it has important consequences. Only a registered trade union may enter into collective agreement that is binding in terms of the Bill and apply to the Commission for the establishment of a workplace forum. One more important advantage of the registration is the right to participate on bargaining councils.⁷⁴

2.3 GERMANY

2.3.1 Historical background and development

Worker representation can be traced back to the 19th century. Until 1869 freedom of association was not legally recognized but subject to penal sanctions in the German Empire. The ban on freedom of association was lifted in 1869. In practice, however, the restrictions that had been placed on political parties still kept freedom of association very much in check. This was the case especially in Prussia, where trade unions constituted part of political parties. During parliamentary debates, the Social Democratic Party regarded the protection by the state of freedom of association as the fundamental elements of a dignified human existence.

In 1863, the most important trade union movement became organized. The General German Worker's Association was founded. In 1869, a further and competing union was founded. In 1878 socialist trade unions were banned since they were considered dangerous to the system. The goal of the unions was to overthrow the capitalistic system and to strengthen the solidarity movement.⁷⁵

⁷⁴ Benjamin P, *Innovation and Continuity: Responding to the Labour Relations Bill*, (1995) *Industrial Law Journal* 16 (2) pp. 258-277.

⁷⁵ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp. 1-206; Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 876f.

Since 1918 with the exception of the Nazi period employers guaranteed full recognition of trade unions. The Weimar Empire constitution of 11 August 1919 was the first German constitution to include social and economic rights. The economic order had to be in accordance with the principles of justice; the labour force was to be placed under the particular protection of the Empire and a uniform labour law formulated; freedom of association and formation of trade unions were protected by means of the prohibition of all actions which hindered or restricted them. Workers organisations, along with those of officials and entrepreneurs, were recognised and provisions were made for the formation of economic and labour committees.⁷⁶ Article 159 of the Weimar constitution guaranteed to 'everyone and to all occupations' the freedom of association 'to safeguard and improve working and economic conditions.'

This is where Article 9(3) of the constitution of Germany has its roots. Article 9(3) of the constitution has become the most important legal source for collective labour law in Germany.

The Russian Revolution of 1917 was the turning point in the struggle for social and economic rights in Eastern Europe. A bill of socio-economic rights was written into the Russian Soviet Congress of 1918, and from there found its way into the constitution of the Russian Soviet Republic of 1918. In compliance with Marxist theories, the working class became the bearer of rights and duties in the socialist order, and private property was nationalised along with the means of production and transport, as well as banks. Freedom of association was applicable only to labourers and farmers. After 1945 this scheme was obligatory for all Eastern European people's democracies.⁷⁷

After 1949 the role of the trade union movement was a totally different one in the Federal Republic of Germany and the German Democratic Republic. In comparison to the position of an employee in the German Democratic Republic those in the Federal Republic of Germany always have enjoyed individual rights. It always has been up to them whether they wanted to enforce their rights.⁷⁸ In the German Democratic Republic the main focus was on abuse of individual rights, thereby

⁷⁶ Scholz R, Isensee J, Kirchhof P, *Handbuch des Staatsrechts* (1989) 6 pp. 1116ff; Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 93ff.

⁷⁷ Brunner G, *Die Problematik der sozialen Grundrechte, Recht und Staat*, (1971) pp. 3-37.

⁷⁸ Scholz R, Isensee J, Kirchhof P, *Handbuch des Staatsrechts*, (1989) 6 pp. 1116 ff.; Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 97ff.

giving the trade unions the power to decide whether it is suitable or not to insist on their protection. The educative effect for the collective of workers was the decisive criterion. Trade unions in the German Democratic Republic were not considered to be associations to represent workers' interests against employers. Their main function was not to fix minimum conditions for workers but to guarantee the performance of the economic plan and to execute the Socialist Party's and government's intentions. The so called collective agreements concluded between trade unions on the one side and government and industrial units on the other side only had the name in common with collective agreements in a Western sense.⁷⁹

In the Federal Republic of Germany the trade unions were re-organised along the same pattern they had before. They are organized on an industry or branch basis which means that the union is open to all employees in the industry no matter which trade or occupation they are engaged in. The most important associations of employees in Germany are the individual unions organized in the German Federation of Trade Unions (DGB). Members of this federation are not individual employees but unions. An important exception is the Union of Education and Science (GEW) which is only open to those who have specific professions and occupations in the system of education and science. Civil servants are not allowed to form a union but they also have an association of their own, the German Federation of Civil Servants (DBB). The main function of the DBB is lobbying with the Government and the legislator. The White-Collar Employees' Union (DAG), is organised according occupation. It is divided into eight occupational groups, commercial clerks, bank clerks, insurance clerks, non-civil service workers in the public sector, technical clerks, civil servants, senior craft people and white-collar mining workers.⁸⁰

After the German unification also the trade unions of the former German Democratic Republic were dissolved and the trade unions and employers' associations of the former Federal Republic of Germany extended their scope of activity to the former German Democratic Republic. The factual conditions which

⁷⁹ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp. 1-206.

⁸⁰ Hanami T, Blainpain R, *Industrial conflict resolution in market economies* (1989), pp. 81-133.

are necessary for the functioning of the law also were exported to the territory of the former German Democratic Republic.⁸¹

Trade union membership in Germany remained relatively stable between 30 and 40 per cent. In 1970 30.5 per cent of the workforce were organized in the DGB, in 1990 these were 31 per cent.⁸² Trade union membership Germany has grown between 1985 and 1995 to 40,9 per cent of the workforce falling due to a bigger amount of unionization in the former German Democratic Republic after the reunification.⁸³

2.3.2 Freedom of association

The German constitution contains in article 9(3) the guarantee of freedom of association, which means in the context of industrial relations the freedom to form a trade union, to join a trade union and to participate in its activities.

The German Federal Labour Court and the Federal constitutional Court have interpreted the right to form associations for the safeguarding of improvements of working and economic conditions. In Germany it is the accepted view that the freedom of association wouldn't make sense unless the organisations formed by employees also enjoy some protection. Article 9(3) has therefore been interpreted to provide not only an individual freedom of association, but also a measure of protection for trade unions. According to the German constitutional Court, article 9(3) means that the trade union may take steps to protect and increasing their membership, indeed, they may do whatever is necessary in order to protect their own existence.⁸⁴ Furthermore, article 9(3) has been interpreted to include a protection of trade union activities, as the safeguarding and improvement of working and economic conditions, which are mentioned in the constitutional provision.

⁸¹ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp. 1-206; Kunz F, *The challenge to labour law in the 1990s under the conditions of german unification*, (1991) *The International Journal of Comparative Labour Law and Industrial Relations* 7 pp. 1-15.

⁸² Statistisches Bundesamt, *Institut der deutschen Wirtschaft*.

⁸³ ILO, *ILO Highlights Global Challenge to Trade Unions*, <http://www.irnet.co.za/special/Geneva1997>.

⁸⁴ BVerfGE 4, 96 (109); 28, 295 (304); 50, 290 (373); Scholz R, Isensee J, Kirchhof P, *Handbuch des Staatsrechts* (1989) 6 p.1165; Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 99ff.

Only associations that have these purposes as their goal enjoy the constitutional protections contained in article 9(3).⁸⁵

The very specific wording of the constitution, which guarantees freedom of association to everyone, is generally considered to have prohibited restrictions based on particular kinds of employment or specific professions, and so such restriction has in fact been attempted in respect of union membership. At the same time certain union activities, including strike action, on the part of the police, army and civil service have been declared illegal.⁸⁶

In terms of section 2(1) of the Collective Agreement Act of 1969, parties of collective agreements are defined as trade unions. In 1978, the Federal Labour Court held that an organisation had to be in a position to exert pressure on the other collective bargaining party to fall within the scope of trade union. In 1981, the Federal constitutional Court repeated this argument and sanctioning another prerequisite for an employee-organisation to qualify as a trade union. This limited in fact the constitutionally guaranteed freedom of association.⁸⁷

2.3.3 Closed shop

Union security arrangements did exist before 1933. Closed-shop agreements with employers in the printing industry were known to exist prior to the First World War, and other employments, such as transport and acting, were added in the Weimarer period. However, after 1945 such agreements apparently did not reappear. Instead, unions sought to secure improved terms and conditions for members only, so that trade unionists would enjoy better conditions than non-unionists. Nevertheless, de facto compulsory membership does exist in certain limited areas of employment, although it would be difficult to estimate how many workers are affected.⁸⁸

⁸⁵ Soellner A, *Das Begriffspaar der Arbeits- und Wirtschaftsbedingungen in Art. 9 III GG*, (1978) *Das Arbeitsrecht der Gegenwart* 16 pp. 19f.

⁸⁶ Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 99ff.; von Prondzynski F, *Freedom of association and industrial relation, a comparative study*, (1987) p. 23.

⁸⁷ BVerfGE 58, 232.

⁸⁸ Von Prondzynski F, *Freedom of association and industrial relation, a comparative study*, (1987) p. 120.

The German development of labour law shows how judicial attitudes and how the significance the judges attach to different types of fundamental rights impinge on the political effect the Bill of Rights has in practice. One illustration is the interpretation of the guarantee of the freedom to organise as an implicit guarantee of the freedom not to organise. In spite of the fact that this negative freedom of association was never threatened, in the past the Federal Labour Court has included it into the scope of Article 9.

In Germany it is generally thought that closed shops either do not occur at all or only in very rare circumstances. Largely this is due to the assumption that any form of compulsory union membership is unconstitutional, and this legal obstacle is apparently taken seriously by employees and employers and trade unions. While it is uncontested that closed shops agreements are a violation of the negative freedom of association, the question arises in how far the association is allowed to provide privileges for their members. In 1967 the Federal Labour Court held the clauses granting privileges to union members in comparison to non-union members to be void. The Court confirmed its view in several recent decisions.⁸⁹

The right to join a trade union is expressly recognized by article 11 of the European Convention on Human Rights. However the single case decided on this issue by the European Court concerned the possible illegality of the closed shop as an institution in British industrial relations. It prioritized individual rights of employees over the collective interests of trade unionists. The European Court held that compelling an individual to join particular union violated article 11. It held that the right to freedom of association with other enshrined in article 11(1) embodied the negative freedom as well. The majority said that it would strike at very substance of the freedom if the article were constructed as permitting every sort of trade union membership. A minority took the view that article 11 protected the right not to join a trade union as well as the rights of trade union membership.⁹⁰

⁸⁹ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp. 1-206 Däubler W, *Das Arbeitsrecht*, (1998) pp. 111ff.

⁹⁰ Welch R, *Collectivism versus Individualism in Employee relations: For Human Rights at the Workplace*, *Industrial Law Journal* pp. 1041-1055; Young, *James & Webster v UK* (1982) 4 EHRR 38; Brassey M, *Labour relations under the new South African constitution*, (1994) *Southern African Labour Monographs* 5/94 pp. 1-36.

2.4 COMPARATIVE SUMMARY

Article 9(3) of the Basic law is the equivalent of section 23(2)-(4) of the constitution of South Africa. Section 23(2) also protects the right of employers and employees to belong to trade unions and employers' organisations. In stark contrast to section 23(4) of the South African constitution, there are no constitutional provisions which explicitly guarantee a right to bargain collectively, or a right to strike. No express provision is made for trade unions and employers' association.

In Germany the in general terms formulated right of association left the influence to the Courts to interpret it, but the historical experience of Germany and an order of values underlying the constitution gives them a great substance. The German constitution contains in article 9(3) the guarantee of freedom of association, which means in the context of industrial relations the freedom to form a trade union, to join a trade union and to participate in the activities of a trade union.

The German Federal Labour Court and the Federal constitutional Court have interpreted the right to form associations for the safeguarding of improvements of working and economic conditions. In Germany it is the accepted view that the freedom of association wouldn't make sense unless the organisations formed by employees also enjoy some protection. Article 9(3) has therefore been interpreted to provide not only an individual freedom of association, but also a measure of protection for trade unions. Furthermore, article 9(3) has been interpreted to include a protection of trade union activities, as the safeguarding and improvement of working and economic conditions, which are mentioned in the constitutional provision. Only associations that have these purposes as their goal enjoy the constitutional protections contained in article 9(3).

As well as in Germany the closed shop is unconstitutional in South Africa. But while direct challenges to the constitutionality of non-statutory closed shops are not possible, statutory closed shops, those imposed in terms of a industrial council agreement, may be impugned in South Africa. Although statutory closed shops under section 48(8) of the LRA are protected by the orderly and equitable collective bargaining in section 33, contractual closed shops can be attacked.

In respect of the registration of trade unions, major differences exist between Germany and South Africa. In South Africa all trade unions and employers' organisations have now the right to be registered provided they meet a number of formal requirements. The trade union must be registered if the application is in the prescribed form and manner, its constitution complies with the Act, it does not discriminate unfairly on grounds of race or gender, its name is not the same as or too similar to that of another trade union, and it is independent. With this the Bill gives effect to the constitution because the registration of an organization that discriminates unfairly would be subject to constitutional attack.

In terms of section 2(1) of the German Collective Agreement Act of 1969, parties of collective agreements are defined as trade unions, single employers as well as employer associations. An organisation had to be in a position to exert pressure on the other collective bargaining party to fall within the scope of trade union. This limited in fact the constitutionally guaranteed freedom of association.

While unions in most countries have moved towards a less adversarial and more cooperative approach, trade unions have shown themselves capable of wielding power in times of crisis. In a number of recent industrial and political conflicts German trade unions proved decisive in reaching settlements.⁹¹

The role of trade unions, however, is one of the main differences. In Germany the role of unions as organizations representing the workers' interest is generally accepted and uncontested. The German unions' influence is clearly limited by law. The trade unions are not only factually integrated in society but they have quite a few institutionalized rights of participation. These rights are not only limited to matters of the labour market. The unions are integrated on boards dealing with educational and cultural matter, on boards of mass media, in institutions dealing with economic and social security matters, in the system of labour courts and social security courts.

In South Africa the role of the trade unions has changed with the new constitution. South African unions are the only institutions able to apply for the establishment of workplace forums; they also are able to conclude collective agreements about the constitution and details of workplace forums. The fact that trade unions have such a strong position in South Africa has other consequences. Because of their right to

⁹¹ ILO, ILO Highlights Global Challenge to Trade Unions, <http://www.irlnet.co.za/special> Geneva 1997.

establish a trade union based workplace forum, unions get direct access to plant and plant related issues. This is unknown in Germany. Trade unions are active at industry level. In contrast to Germany South African trade unions were not integrated on social boards beside the labour market in the past. The new freedom of association is a chance to increase integration in South Africa's society in the future.

2.5 CONCLUSION

While in Germany the freedom of association was fully recognised since 1918 and the present structures and principles draw on a long tradition the new South African constitution marks a significant break from the way that rights bound up with the freedom of association were protected in the past.

Although the previous LRA protected freedom association rights for employees, it did not do it in a comprehensive or accessible way. The fact that victimization was a criminal offence and punishable through the criminal courts was also undesirable. The heterogeneity of the population and the history of politics in South Africa, have resulted in a seriously divided trade union movement and a strongly adversarial relationship between employers and the state. Ideological differences relating race, politics and economic systems have prevented trade unions, in many instances, from perceiving their common interests. The apartheid system resulted in powerful impediments to genuine non-racial trade unionism. There were provisions which impinge on workers' freedom of association. The employment and the economy demanded reform of the labour relations system. Moreover the trade unionism does not built on tradition. It remains to be seen how many will be perceiving their common interests.

The impact of the South African constitution on labour law concerning freedom of association is considerable. Section 23 protects the right of employers and employees to belong to trade unions and employers' organisations. Employers and employees are guaranteed freedom of association by the LRA and enforceable by a new Labour Court with Supreme Court status. The LRA is the first labour statute that must comply with the provisions of the constitution and gives effect to the basic principles of the ILO. The right to freedom of association and protection of the right to organise in Germany and now in South Africa closely follow the ILO's

Convention on Freedom of Association and Protection of the Right to Organize (87 of 1984) and guarantees employees the right to form, join and hold office in trade unions.

I see increased democracy and freedom for South African workers to form representative organizations. While much of the decline of the trade union members is attributable to such economic factors as reduced public-sector employment, heightened economic competition and a falling share of manufacturing industries in total employment, the dramatic rise or fall of trade union membership is linked to changes in governance or major legislative.

Much of the decline in Germany's unionization rate (20 per cent versus a 16 per cent average in the EU) is attributable to the drop in former East Germany. In contrast, the largest single increase in trade union membership came in South Africa, which saw unionization rates leap by 130.8 per cent, with most of the increase coming in the post-apartheid era.

The decline in trade union membership shows that economic openness means coming to change and the extent of countries' involvement in globalisation is in no way limited by the existence of strong trade unions. The benefits of globalisation are likely to be stronger when the social partners are capable of assuring wage earners of a reasonable measure of security in the face of change.⁹²

In South Africa trade unions have an important role to play in ensuring that dismissed workers, farm and domestic workers, disabled workers all benefit from the new laws. Firstly, it is important that workers know about their rights; rights to be treated fairly at work, to certain basic conditions of employment, to join trade unions. Unions play a vital role in informing workers of their rights. Secondly, the laws provide strengthen trade unions and advance industrial democracy.

While trade unions have the economic function during industrial restructuring trade, they continue to play an important role as vehicle of democracy and advocates of social justice, notably by reaching out to women, minorities, consumer groups, the unemployed and the growing number of working poor in countries like South Africa and Germany.

⁹² ILO, ILO Highlights Global Challenge to Trade Unions, <http://www.irnet.co.za/special> Geneva 1997.

CHAPTER 3

COLLECTIVE BARGAINING

3.1 INTRODUCTION

This chapter gives a detailed comparison of the South African and German constitutions and their impact on the rights of collective bargaining. It gives an analysis of the development of the rights and their historical background.

The provisions that are relevant to the issue will be summarized and their scope, purpose and effect will be examined. The differences between the institutions, the procedures and the diversity of their workforces and union movements will be identified and analysed. The main question regarding a meaningful comparison of collective bargaining rights is whether they are intended to serve broadly similar functions and purposes. Moreover this chapter will assess the challenges behind the recent labour market reform in South Africa, the characteristics of the current labour market regulatory framework and the functioning of collective bargaining in the labour relation contexts.

As far as the topic is concerned the impact of the constitutional changes in South Africa as well as in Germany should be revealed.

The central objective of modern industrial relations legislation is to promote collective bargaining as a means of regulating relations between management and employees and for reaching agreements on issues of concern between them. Labour market regulations and collective bargaining are important issues in a globalized economy. Given that globalization involves economic restructuring, employment has to be adaptable to facilitate adjustment. At the same time, labour market institutions need to ensure that fundamental worker rights and labour standards are not undermined. These rights and standards should protect workers, but they can also have a positive impact on the economy and ensure a degree of social stability.⁹³

⁹³ International Labour Office Geneva, *Studies on the social dimensions of globalization South Africa*, ILO, Geneva 1999.

3.2 SOUTH AFRICA

3.2.1 Historical background and development

The bargaining process began with the first labour legislation, the Industrial Conciliation Act 11 of 1924. It brought in a framework for collective bargaining and for the settlement of disputes. The process was accelerated with the LRA 28 of 1956, as amended, after the recommendations of the Wiehahn Commission.⁹⁴

The former LRA sought to promote collective bargaining and to put away unfair labour practices in industry. Trade unions and employers' organisations were recognised in labour relations. The LRA has favoured a majoritarian system of industrial-level bargaining in the form of industrial councils. Inspired by the British Whitley councils, industrial councils are voluntary associations of trade unions and employers' and employer organizations in the private sector with jurisdiction over specific industries and areas. The most significant of these was the Industrial Council for the Iron, Steel, Metallurgical and Engineering Industry. There were other influential industrial councils in the construction, motor and textile industries.

Collective agreements bodies were given statutory force by the ministerial proclamation and were extended to all parties in the industry and areas concerned. In the past, this politic has been undermined by the exercise of the Minister's discretion and the Industrial court's jurisprudence. This included black workers whose unions could not be represented on such councils.⁹⁵

The parties to the industrial councils met, usually on an annual basis, to negotiate minimum wages and conditions of employment, to set up pension, provident and sick pay funds, training funds and to deal with other matters of interest in the industry. The industrial councils could reach collective agreements binding on all parties to the council. They also had a dispute-resolution function, and the Act also made provision for ad hoc conciliation boards. These were convened on application to the Department of Labour for the purpose of settling disputes.

⁹⁴ Published as The Complete Wiehahn Report, (1982); see Thompsen C, *Borrowing and Bending: The development of South Africa's unfair labour practice jurisprudence*, (1993) *The international journal of comparative labour law and industrial relations* 9 pp. 183-205.

⁹⁵ Piron J, Roux P, *Labour Law and Industrial Relations in South Africa*, *International Encyclopaedia for Labour Law and Industrial Relations*, (1993) 11 pp.1-156 (105f); Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) *Industrial Law Journal* pp.278 ff.

The fundamental problem with this law was the lack of an orderly structure and functions of collective bargaining. The Industrial Court has held that a refusal to bargain could amount to an unfair labour practice. The court's decisions on collective bargaining have been inconsistent, ranging from an insistence on majoritarianism to granting extensive rights to minority unions. The court's decisions have been limited to plant-level disputes and it has refused to order employers to bargain at group or industry level.⁹⁶

Until the enactment of the unfair labour practice definition in 1979, collective bargaining structures were voluntarist. While the law encouraged collective bargaining on an industry-wide level, a party could not be compelled to bargain other than by the exercise of economic power by the party seeking bargaining rights.

During the 1980's, the Industrial Court's jurisprudence, acting in terms of provisions at least designed to protect individual rights, intervened in collective disputes. The court has issued orders compelling parties to bargain collectively, it has determined appropriate bargaining topics and in other cases it has consciously declined to do so. The result has been a confused jurisprudence in which neither party is certain of its rights and in which economic outcomes are imposed on parties which often bear little in relation to the needs of the parties or the power they are capable of exercising. A number of determinations by the Industrial Court have had the effect that the court has acted in a way that has undermined existing collective bargaining relationships.⁹⁷

The lack of commitment to an orderly system of industry level bargaining was also reflected in the structure registration of industrial councils. There were councils that spanned more than one industry, others that covered only a part of an industry, and some a single employer. The bargaining that did take place was usually conducted at a centralized industry level by unions catering for skilled white, coloured and asian workers.

⁹⁶ Benjamin P, *Innovation and Continuity: Responding to the Labour Relations Bill*, (1995) *Industrial Law Journal* 16 (2) pp. 258-277.

⁹⁷ Benjamin P, *Innovation and Continuity: Responding to the Labour Relations Bill*, (1995) *Industrial Law Journal* 16 (2) pp. 258-277; Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) *Industrial Law Journal* pp.278 ff; Grogan J, *The new Labour Relations Bill*, (1995) *Employment Law* 2(3) pp. 50-55.

The exclusion of black workers from the industrial bargaining system for the first 55 years of this dispensation expressed a separate tradition of bargaining at the level of the workplace. The result of these developments was that there was no existing statutory framework which could accommodate and facilitate an orderly relationship between bargaining at industry-level and at workplace-level.⁹⁸

Other problems were the criteria for the representativeness of industrial councils; the bureaucratic structure of these councils; the procedures for the granting of exemptions from industrial council agreements and the enforcement of such agreements by criminal prosecution.

During the early 1980's a fundamental rapprochement between unions, the state and employers have been reached when, following the legal recognition of African workers as 'employees',⁹⁹ independent unions started joining industrial councils.¹⁰⁰

3.2.2 Bargaining

Collective bargaining in South Africa takes place in a wide variety of forums. It may take place at plant or industry levels and has become an important feature of South African labour relations. There are various reasons for the diversity in collective bargaining, including historical factors and the diversity of the work force and union movement.

The most reform proposals of the new LRA under the new South African constitution deal with collective bargaining. Section 23(4) of the constitution entrenches the right to bargain collectively. While under the 1956 LRA the labour courts sought to encourage collective bargaining as the preferred method of resolving workplace disputes, the new Act expressly commits employers and employees to workplace democracy, which entails the active promotion of participative management and joint decision-making.¹⁰¹

⁹⁸ Piron J, Roux P, *Labour Law and Industrial Relations in South Africa*, International Encyclopaedia for Labour Law and Industrial Relations, (1993) 11 pp.1-156; Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp.278 ff.

⁹⁹ in terms of the Industrial Conciliation Amendment Act 94 of 1979.

¹⁰⁰ Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp.278 ff; Du Toit D, *Corporatism and Collective Bargaining in a Democratic South Africa*, (199) *Industrial Law Journal* pp. 785-806.

¹⁰¹ Brassey M, *Labour relations under the new South African constitution*, (1994) *Southern African Labour Monographs* 5/94 pp. 1-36.

The inclusion of labour relations rights has not been universally welcomed in South Africa. The problem foreseen was that the entrenchment would lead to increasing judicialization of labour law, particularly in the area of collective bargaining where the solution to issues which should preferably be resolved through collective bargaining, would become the prerogative matter of the courts.¹⁰²

Considerations about consequences led to the incorporation of qualifying and limiting clauses designed to restrict judicial intervention. Section 33(5)(a) of the constitution states that the provisions of a law in force at the commencement of this constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature. The intention behind this provision was to insulate the existing unfair labour practice and collective bargaining statutory regimes from judicial intervention.¹⁰³

In favour of the inclusion of the right to bargain collectively it was said that it counterbalances the individualism of constitutional rights which could be harnessed to destroy the fabric of the collective bargaining process. Section 23 of the constitution put an end to the possibility of an argument that the right to freedom of association undermines those principles of collective bargaining and the right to strike which have been developed in terms of unfair labour practice jurisdiction contained in the former LRA. The entrenchment of the right to bargain collectively invites a court to reconcile the jurisprudence relating to freedom of association with the provision of section 23. It shields the Industrial court from attacks on the duty to bargain orders it makes and enshrines the right of public servants to bargain.¹⁰⁴

¹⁰² Friedmann S, Bill of rights: juristocracy vs democracy, (1992) Labour Law News and Court Reports 1 (9) pp. 1-4.

¹⁰³ Brassey M, Labour relations under the new South African constitution, (1994) Southern African Labour Monographs 5/94 pp. 1-36.

¹⁰⁴ Jordaan B, The new constitution and labour law, (1994) Labour Law News and Court Reports 4 (1) pp. 1-5; Davis D, constitutionalization of Labour Rights, (1994) Van Wyk, Rights and constitutionalism, pp.439-454; Brassey M, Labour relations under the new South African constitution, (1994) Southern African Labour Monographs 5/94 pp. 1-36.

The Canadian Charter, introduced in 1982, did not include an express right of collective bargaining. Canadian lawyers argued that the right of freedom of association of Section 2(d) include by implication the further right to engage in the activity of collective bargaining which was the basic *raison d'être* of unionism. For several years court judges were divided about the scope of the right of freedom of association. The Supreme Court has decided that the right to associate in no way entrenches the right to bargain collectively. See Weiler P, The Charter at work: Reflection on the constitutionalizing of labour and employment law, (1990) University of Toronto Law Journal 40 pp. 117-190.

The right to bargaining follows the ILO's Convention 98 on the right to organize and bargain collectively and eliminates the legislation of apartheid and unfair labour practice in the workplace.

Convention 98, which does not apply to the armed force, police, and public servants engaged in the administration of justice, has as its objective the protection of workers against anti-union discrimination in respect of their employment and of workers' and employers' organizations against interference by each other. It also calls national conventions to encourage and promote the full development of collective bargaining.¹⁰⁵ The ILO's supervisory bodies have always stressed the importance of voluntary bargaining between the parties, with the public authorities without any interference in order to modify the contents of freely concluded agreements. Any intervention could only be justified for major economic and social reasons and in the general interest.¹⁰⁶

There is no statutory duty to bargain. A fundamental danger in the inclusion of a legally enforceable duty to bargain for the parties and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into the South African labour market that needs to respond to a changing economic environment.¹⁰⁷

Trade unions are regarded as means whereby individually employees can gain control over their working lives and over socio-economic policy. But such a control can only be successful if the union itself is subject to democratic control by its members. Underlying the LRA's approach is that a legislated duty to bargain favours bargaining at plant level at the expense of orderly industry-level bargaining at industry level, as this involve rival employers to bargain jointly. But based on South Africa's past experience, there is little evidence that an imbalance would occur, in particular given the courts' more recent reluctance to interfere in

¹⁰⁵ Davis D, constitutionalization of Labour Rights, (1994) Van Wyk, Rights and constitutionalism pp. 439-454.

¹⁰⁶ ILO, Prelude to Change Industrial Relations Reform in South Africa, Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, (1992) Industrial Law Journal 13 pp. 739-783.

¹⁰⁷ In the United Kingdom the legislated duty to bargain was repealed in 1980 because of problems; see Wedderburn Q, The Italian Workers Statute – Some British Reflections, (1990) Industrial Law Journal 19 pp. 167ff.

prescribing levels of bargaining.¹⁰⁸

The ability of the South African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the nature and structure of bargaining institutions and the economic outcomes that should bind them.¹⁰⁹

Bargaining is voluntary and reinforced only by the entrenchment of organisational rights for representative trade unions. These include the rights of access, to have meetings, to stop-order facilities, to elect union representatives, to conduct ballots, to time off for union activities, and to inform for collective bargaining purposes. Not one of these rights is absolute. Reasonable conditions are imposed upon the exercise of these rights.

The right of access, for example, is granted subject to reasonable and necessary conditions to safeguard life and property and to prevent the undue disruption of work. A recipient of confidential information shall not disclose that information to a third party, except with the consent of the employer. All of the organizational rights guaranteed by the Bill are further qualified by thresholds relating to representativeness. A registered trade union obtains these rights once it has reached certain levels of representation in a workplace. A union with enough members is able to obtain these rights and is then in a position to pressure the employer to negotiate with it over wages and conditions of employment.¹¹⁰

3.2.3 Dispute resolution; bargaining councils

Industrial councils became bargaining councils. The constitution of bargaining councils must provide for the resolution of disputes. Their primary functions remain the regulation of sectors of employment over which they have jurisdiction by collective agreements and the settlement of disputes.

¹⁰⁸ Thompson C, Duty to bargain reexamined, (1993) *Employment Law* 9 (4) pp. 80ff, Du Toit D, Statutory collective bargaining: A duty of fair representation, (1993) *Industrial Law Journal* 14 (5) pp. 1167-1173.

¹⁰⁹ Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp. 278ff.; Brassey M, Labour relations under the new South African constitution, (1994) *Southern African Labour Monographs* 5/94 pp. 1-36.

¹¹⁰ Benjamin P, Innovation and Continuity: Responding to the Labour Relations Bill, (1995) *Industrial Law Journal* 16 (2) pp. 258-277; Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp. 278 ff.

Registered bargaining councils now cover 32% of the workforce and approximately 53 000 employers.¹¹¹

The new approach of the bill is resolving disputes without the necessity for industrial action or court intervention. The former system of Industrial and Labour Appeal Courts are not more. Collective bargaining agreements can be enforced legally and may incorporate dispute resolution procedures. Trade unions and employers and employers' organizations are able to conclude legally binding collective agreements to regulate all aspects of their relationship.¹¹²

Effective collective bargaining systems led to the empowerment for the workforce as a whole and the individual employee. Such empowerment must be based on notions of workplace justice, democracy and dignity which can be achieved if employers discuss plans and proposals with trade union representatives in a collective bargaining forum. In particular, employers should not be able to change by management but through negotiated collective agreements and collective consultations. Trade unions, employers and employers' organizations are now required to be responsible for the enforcement of their own agreements, with trade union representatives in the workplace having the right to enforce these agreements without fear of victimization. This establishes the continuing centrality of effective trade unionism and collective bargaining in securing and maintaining justice at the workplace in South Africa.¹¹³

Disputes concerning the infringement of organisational rights are determined by arbitration. Now bargaining councils serve public and private sectors and support that small business interests are represented. The constitution of a bargaining council must provide for the resolution of disputes which arise within its scope. If it is accredited it may execute dispute resolution functions itself or it must appoint an accredited agency to perform the function. The minister retains the power to extend agreements to non-parties. He must do so if the agreement does not discriminate against non-parties. This is in line with the bill's promotion of the

¹¹¹ Mdladlana M, Labour Budget Vote 1999/2000 in the National Assembly, 19 March 1999.

¹¹² Grogan J, The new Labour Relations Bill, (1995) *Employment Law* 2(3) pp. 50-55; Benjamin P, Innovation and Continuity: Responding to the Labour Relations Bill, (1995) *Industrial Law Journal* 16 (2) pp. 258-277.

¹¹³ Welch R, Collectivism versus Individualism in Employee Relations: For Human Rights at the Workplace, (1996) *Industrial Law Journal* 17 (4) pp. 1041-1055.

parties' autonomy to design their own bargaining and dispute resolution arrangements. All agreements are binding within 30 days of signature, subject to arbitration in the event of disputes over their terms.¹¹⁴

Important demarcation disputes are reserved for the Commission for Conciliation, Mediation and Arbitration (CCMA). While the CCMA, as a new organisation, has had its growing pains, it has offered a vastly improved service, a service that is speedier and more accessible than in the past. The CCMA has been able to resolve over 70% of the disputes referred to it.

Disputants may follow one of two routes, depending on the nature of the dispute. These are arbitration or judicial determination. Dismissals connected with conduct or incapacity and disputes concerning the payment of severance pay are arbitrated by the Commission. The Labour Court handles other disputes, including retrenchments, strike dismissals, and dismissals for impermissible reasons such as pregnancy, race, political opinion, belief and other forms of victimisation. An escape clause allows parties to voluntarily submit to arbitration by the Commission those matters otherwise reserved for the Labour Court.

Disputes concerning the acquisition or the exercise of organizational rights are to be determined by speedy arbitration, after reference of the dispute to the Commission for conciliation. Speedy arbitration is regarded as appropriate given the urgency of the circumstances within which disputes concerning the exercise of organizational rights often arise and the diverse nature of the modern workplace.¹¹⁵

3.3 GERMANY

3.3.1 Historical background and development

Until the beginning of the economic crisis in the mid-seventies, collective bargaining was mainly concentrated on remuneration and other economic benefits. This strategy included financial and other compensations in case of rationalization. Since the eighties, however, other issues are becoming more and more important. Generally collective agreements are concluded between individual unions on the one side and individual employers' on the other. These agreements may cover a

¹¹⁴ Benjamin P, Innovation and Continuity: Responding to the Labour Relations Bill, (1995) *Industrial Law Journal* 16 (2) pp. 258-277.

¹¹⁵ Grogan J, The new Labour Relations Bill, (1995) *Employment Law* 2 (3) pp. 50-55. This is a state funded, but independent statutory body, governed by labour, capital and the state.

certain region of an industry or the entire territory of Germany. Since collective bargaining takes place at such a high level and cover a a lot of enterprises and workers the conditions laid down in the collective agreements cannot take account of particular circumstance in individual companies and public attention is rather significant.

Up to now and for the next few years collective bargaining in the territory of the former Federal Republic of Germany and in the former German Democratic Republic remains seperated. The conditions are not yet equal. Especially in reference to wages there area quite a few collective agreements concluded for East Germany providing an amelioration of working conditions step by step. Recently in East Germany as well as in West Germany more and more companies had difficulties to cope with the minimum conditions as laid down in the collective agreements. This led to the flexibilisation of the collective agreements and the emposement of the actors on plant and enterprise level. The effect is a decentralization of bargaining power and bargaining activities.¹¹⁶

3.3.2 Bargaining

The German constitution did not include an express right of collective bargaining. However, according to the German constitutional Court, the autonomy to bargain collectively is part of the constitutional guarantee of the freedom of association.¹¹⁷

Article 9(3) has been interpreted to provide not only an individual freedom of association, but also a measure of protection for trade unions by constitutional Court. Furthermore, Article 9(3) has been interpreted to include a protection of trade union activities, as the safeguarding and improvement of working and economic conditions, which are mentioned in the constitutional provision. The protection of trade union activities in turn includes what the German courts have called a protection of the essential core of a collective bargaining system. The autonomy to bargain collectively is part of the constitutional guarantee of the freedom of association, and, with that, the foundation of a system of collective agreements. Otherwise the associations would not be able to fulfill their function

¹¹⁶ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) International Encyclopedia for Labour Law and Industrial Relations pp. 1-206.

¹¹⁷ Federal constitutional Court 6 May 1964 and 18 December 1974 and 1 March 1979; BVerfGE 20, 312 (317).

and arrange a detailed working life by collective agreements.¹¹⁸

According to the leading opinion in labour law, the formula 'working and economic conditions' is used as a kind of residual category, the collective agreement may only provide data for the management's decisions, the decision as such is subject to the employers' freedom. Collective agreements may fix the costs of management's decisions by setting standards for remunerations, vacation, working hours etc. and they may regulate the effects of such decisions.¹¹⁹

Collective bargaining is basically regulated by the Collective Agreements Act of 1949, amended in 1969. This law determines who is competent to conclude a collective agreement. Its provisions govern the form and content of the agreement, regulate its effect on the individual employment contract and determine for whom the agreement is binding. According to Section 2 of the Act on Collective Agreement, parties to a collective agreement are only the unions and in addition to individual employers associations of employers. Collective agreements cover practically all areas of the private and public sector.¹²⁰

There is no statutory definition of trade union or employers' association. But not any group of employees or employers may be entitled to be a party of a collective agreement because there would be the danger that the bargaining system could lose its function. Collective agreements exist on two levels, the first deals with the rights and obligations of both parties, the second regulates the conclusion, conditions and termination of employment contracts as well as the establishment and its legal structure. These terms have an automatic and mandatory effect on the contract of employment.

The collective agreement can be extended in certain cases to non-organized employers. This so-called declaration of general binding is made by the Federal or

¹¹⁸ Scholz R, Isensee J, Kirchhof P, Handbuch des Staatsrechts, (1989) 6 pp. 1115f, 1164f.; Mischke C, Industrial Action in German Law, (1992) Industrial Law Journal 13 (1) pp. 1-13; Federal constitutional Court 6 May 1964 and 18 December 1974 and 1 March 1979 BVerfGE 20, 312 (317).

¹¹⁹ Soellner A, Das Begriffspaar der Arbeits- und Wirtschaftsbedingungen in Art. 9 III GG, (1978) 16 pp. 16ff.; Weiss M, Labour Law and Industrial Relations in Germany, (1994) International Encyclopedia for Labour Law and Industrial Relations 5 pp. 1-206.

¹²⁰ Scholz R, Isensee J, Kirchhof P, Handbuch des Staatsrechts, (1989) 6 pp. 1164ff.; Däubler W, Das Arbeitsrecht, (1998) 1 pp. 139f.

State Minister of Labour upon application by of the parties and a committee.¹²¹

Since the system of collective bargaining is understood to be a system which must produce a certain result the conditions which guarantee such a result must be regulated by law. Therefore it is a consequence of this approach that certain prerequisites must be fulfilled by the associations in order to be accepted as parties of collective agreements. In addition to the self-evident implications of the guarantee of collective freedom of association the Federal Labour Court has established criterias to be observed by associations being parties of collective agreements.

First, the association has to be created for an indefinite time. There should be a guarantee that the association continues to exist, at least during the period of the collective agreement.

Secondly, the association must have a corporate structure and be organized in a way which guarantees its continuity even if members leave the association.

Thirdly, an association is only accepted to participate in collective bargaining if it is independent from the opposite side. This criterion is mainly a reaction to experiences from the Weimar period. There so-called yellow unions turned out to be mere instruments of the employers to undermine the labour movement.

The fourth criterion is based on the same idea: an employees' association may not be confined to one establishment but must exceed this scope. This attempt to exclude so-called company unions has again its roots in Weimar where those company unions turned out to be identical with yellow unions. According to the fifth criterion, associations must be independent from the state and from political parties. Neither the state Government nor a political party may be in a position of influence the policy of such an association.¹²²

Should the parties fail to reach accord on the conclusion of a collective agreement during preliminary negotiations, the conflict can be resolved in two way, by a settlement procedure based on a collective settlement agreement or, if the first step fails, by industrial action.

¹²¹ Hanami T, Blainpain R, *Industrial conflict resolution in market economies* (1989), pp. 81-133.

¹²² Scholz R, Isensee J, Kirchhof P, *Handbuch des Staatsrechts*, (1989) 6 pp. 1164ff.; Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 105ff.; Hanami T, Blainpain R, *Industrial conflict resolution in market economies* (1989), pp. 81-133.

3.4 COMPARATIVE SUMMARY

Section 23(4) of the constitution entrenches the right to bargain collectively. The entrenchment of the right to bargain collectively invites a court to reconcile the jurisprudence relating to freedom of association with the provision of Section 23.

In stark contrast to Section 23(4) of the South African constitution the German constitution did not include an express right of collective bargaining. However, according to the German constitutional Court, the autonomy to bargain collectively is part of the constitutional guarantee of the freedom of association and, with that, the foundation of a system of collective agreements. Otherwise the associations would not be able to fulfill their function and arrange a detailed working life by collective agreements. It wouldn't make sense, on the one hand, to give employees and employers the right to form associations, and on the other hand, to withhold the right to collective bargaining.

In contrast to the LRA under the new South African constitution, there are no provisions for the establishment of a bargaining council. Trade unions and employers' associations bargain collectively on a regular basis for years. Therefore, the partners do not feel a need for the establishment of legal structures for the bargaining process. But there are organs like the CCMA with the competence to conciliate between the social partners. Although there is a difference between the two systems in this respect according to section 64(3) of the LRA the requirement of subsection (1) do not apply if the strike or lock-out conforms with the procedures in a collective agreement. This means that in South Africa is also room for self-regulation, which lies at the heart of the German bargaining system.

Furthermore there are no provisions in German law that in case that the dispute concerns a refusal to bargain an award must be made by a commissioner before a party can embark on industrial action.

Firstly collective bargaining at level of the individual plant and the task of concluding binding collective agreements is performed by works councils which are independent and separate bodies of workers' representatives. But there is a strong interrelationship between works councils and trade unions. According to the Works constitution Act the employer is under obligation to bargain in good faith. If the employer acts contrary to this obligation the works council is prevented from

calling a strike because both have to keep peace within the establishment.

Secondly collective bargaining at sectoral level doesn't bound an employer or an employers' association by a duty to bargain. Article 9(3) has been interpreted by the Federal Labour Court that the freedom to bargain includes not only of the freedom to enter into negotiations but also comprises the freedom to abstain from bargaining. It would be contrary to the constitutionally guaranteed autonomy to bargain collectively if the law forced negotiations upon one of the parties concerned. This is similar to the South African LRA which has also done away with such an obligation. But in Germany the other party can immediately enter into industrial action if the parties refuse to bargain collectively.¹²³

3.5 CONCLUSION

The South African Explanatory Memorandum treats adversarial industrial relations as a central obstacle to economic progress. Cooperation, in contrast, emerges as an autonomous and decisive factor in the quest for competitiveness. Such a view is not prevalent among authorities on the systems of worker participation in countries such as Germany which helped to inspire the draft bill of the new LRA under the new South African constitution.

Industrial relations on plant level is understood as only one of several factors which determine economic performance. Investment levels, for example, have historically been far higher in the successful countries like in Germany. Nor does it follow that production related topics of consultation are necessarily less controversial or more conducive to agreement than the distributive topics of collective bargaining. And there is little evidence that the institutions of worker participation reflect a willingness to collaborate on the part of management and labour while collective bargaining reflects an attitude of confrontation.

In South Africa, the attitude of the parties has been influenced by the historical experiences through which present labour relations have been shaped. Decades of deprivation, conflict and mistrust on the part of black workers will not disappear overnight.

¹²³ Scholz R, Isensee J, Kirchhof P, *Handbuch des Staatsrechts*, (1989) 6 pp. 1115f, 1164f.; Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 242f.

While in Germany the right of collective bargaining was fully recognised as a part of the constitutional guarantee of the freedom of association since 1949 the new South African constitution marks a significant break from the way that rights bound up with collective bargaining were protected in the past. While under the 1956 LRA the labour courts sought to encourage collective bargaining as the preferred method of resolving workplace disputes, the new Act expressly commits employers and employees to workplace democracy, which entails the active promotion of participative management and joint decision-making.

The fundamental problem with the former labour law was the lack of an orderly structure and functions of collective bargaining. The Industrial Court has held that a refusal to bargain could amount to an unfair labour practice. The court's decisions on collective bargaining have been inconsistent. The lack of commitment to an orderly system of industry level bargaining was also reflected in the structure registration of industrial councils. The bargaining that did take place was usually conducted at a centralized industry level by unions catering for skilled white, coloured and asian workers. Other problems were the criteria for the representativeness of industrial councils; the bureaucratic structure of these councils; the procedures for the granting of exemptions from industrial council agreements and the enforcement of such agreements by criminal prosecution.

The impact of the South African constitution on labour law concerning collective bargaining is considerable. I see increased democracy and freedom for South African workers to form representative organizations to engage in collective bargaining with their employers and to participate in decisions affecting society and the workplace.

In contrast to the German constitution section 23(4) of the South African constitution entrenches the right to bargain collectively in support of such bargaining. The entrenchment of the right to bargain shields the Courts from attacks on the duty to bargain orders it makes and enshrines the right of public servants of bargain. Labouring outside the Charter is not a preferred position for workers. It means that governments can pass laws on the most basic issues in employment and labour relations which run over the interests of workers. In Germany the in general terms formulated right of association left the influence to the Courts to interpret it, but the historical experience of Germany and an order of values underlying the constitution gives them a great substance.

The Labour Relations Act under the new South African constitution is aimed at promoting collective bargaining, providing an efficient mechanism for preventing and settling disputes, and generally facilitating a more stable and peaceful labour relations environment. It is now easier to organise, to secure rights of access, stop order facilities, agency shop agreements and so on.

The LRA provides opportunities that can advance worker rights, strengthen trade unions and advance industrial democracy. The Act allows for closed and agency shops. These can contribute to labour stability and the advancement of collective bargaining at plant and sectoral level.

The LRA has introduced first class dispute resolution mechanisms. Both business and labour are satisfied with the services provided by our leading dispute resolution institutions, the CCMA and the Labour Court.

While the CCMA, as a new organisation, has had its growing pains, it has offered a vastly improved service, a service that is speedier and more accessible than in the past and one which compares favourably with similar services offered in many other countries. Since November 1996, an average of 270 cases per working day were referred to the CCMA and 85% of these were resolved. These interventions by the CCMA and the many cases dealt with by the Labour Court have significantly helped avoid disruptive strikes previously caused by conflicts other than those related to the collective bargaining processes.

The LRA has contributed significantly to improving the functioning of collective bargaining and dispute resolution. This is particularly evident when compared to the pre-1994 period, rather than the previous year. In 1994, 2,5 million workdays were lost compared to 2,3 million in 1998. The law has laid the foundations for more co-operative labour relations and enabled South Africa move away from the adversarialism of the past.¹²⁴

¹²⁴ Mdladlana M, Labour Budet Vote 1999/2000 in the National Assembly, <http://www.irnet.co.za/special> 19. March 1999.

CHAPTER 4

WORKPLACE DEMOCRACY

4.1 INTRODUCTION

This Chapter deals with the workplace forum and compares it with an institution which served as an influential model: the German works council. Comparisons are made between the two institutions in a formal sense and in regard to their respective functions in the labour management relationship. The differences between the respective co-determination rights, the procedures and the rights of works councils and workplace forums and their members will be identified and analysed. The main question regarding a meaningful comparison of workplace forums and works councils is whether they are intended to serve broadly similar functions and purposes, and whether the institutions operate in equivalent industrial contexts. As far as the topic is concerned the impact of the constitutional changes in South Africa as well as in Germany should be revealed.

Worker participation is used as an instrument for the transformation of society. Participation should be a process in which employer and worker representatives confer about decisions to be made. An economic motivation for worker participation aimed at curbing industrial action. Internationally, it is recognized that beside of its economic role, worker participation also has moral objectives. The parties should be involved in discussing and taking such decisions. From this standpoint, maximum involvement in decision making at work is a basic human right.¹²⁵ There has been a growing trend over the last twenty years towards more integrative forms of management. The ILO has passed a number of recommendations for steps to be taken at the national level to promote consultation and co-operation on issues not usually dealt with by means of collective bargaining.¹²⁶

¹²⁵ Du Toit D, Corporatism and Collective Bargaining in a Democratic South Africa, (1995) *Industrial Law Journal* 16 (4) pp. 783-805.

¹²⁶ Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D, Christie S, (1998) *The Labour Relations Act of 1995* pp. 252f.

The advantages and drawbacks of employee participation have been extensively discussed. Of particular interest in a developing country are the economic benefits associated with integrative forms of management. While it cannot eliminate industrial conflict, it is viewed as an important option in the quest for improved industrial relations and enhance economic efficiency.¹²⁷ Much of the discussion surrounding employee involvement can be traced back to its bearing on power relations in the workplace.

In the case of South Africa, economic and historical reasons have prompted considerations about legal transplants. The German works council has served in key respects as a model for the South African drafters of the workplace forum. This adoption, however, is not without its risks. The German works council has developed within an entirely different environment over a long period. Germany is one of the most developed countries in the world and this may be a reason why the participation structure works there well. In addition, German industry operates with a stable political environment.¹²⁸ The situation in South Africa is different. The South African political climate is still going through a process of stabilization, as the economy is.

Such German system may have only a limited utility as comparator on the South African agenda. Nor has the European debate about workers' participation in the enterprise which links labour and company law produced general answers, either for national law and practice or at the level of European Community. The starting point of most of the European debate in the 1970's was that collective bargaining can do a lot, but it cannot do everything. That is why the debate, in systems already strong in collective bargaining, turned to supplementary measures such as minority worker directors or new powers for works council or legislation promoting wider rights to negotiation itself.¹²⁹

¹²⁷ Summer C, *Workplace Forums from a Comparative Perspective*, (1995) *Industrial Law Journal* 16 (4) pp. 805-808; Olivier M, *Workplace Forums: Critical Questions from a Labour Law Perspective*, (1996) *Industrial Law Journal* 17(3) pp. 805-808.

¹²⁸ von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763; Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp. 1-206.

¹²⁹ Wedderburn Q, *Labour Law, Corporate Law and the Worker*, (1993) *Industrial Law Journal* 14 (3) pp. 517-542.

4.2 SOUTH AFRICA

4.2.1 Historical background and development

Until the recently participation in South African workplaces existed only rarely. As South Africa entered into new economic international markets, it faced demands for restructuring of the labour relations system which requires greater flexibility in the workplace. To achieve this, a major restructuring process of industries and economy was required. The former system of adversarial industrial relations, designed in the 1920's, and the former LRA of 1956 were not suited to this task. For a successfully restructuring management and labour had to find a new way of dealing with each other.¹³⁰

With workplace forums a new form of participation has been introduced in South Africa. Workplace forums, in the context of the LRA, are advanced and demanding institutions. They are a way of allowing such flexibility to develop without its being at expense of workers' rights and job security. However, besides the political and economical reasons which made a change of the labour relation inevitable, humanization of work, democratization of the enterprise structure, greater economic equity and solidarity are further aims which are mentioned regarding worker participation. Although the introduction was precipitated by economic considerations, it was not a consequence of historical development. The participation structure does not built on tradition; it has been offered to unions and thrust upon employees without any precedent.¹³¹

Following the legal recognition of African workers as employees in terms of the Industrial Conciliation Amendment Act 94 of 1979,¹³² independent unions started joining industrial councils during the early 1980's. By this time 3000 works committees had already been established. The lifespan of the committees was extended by a provision in the LRA.

¹³⁰ Du Toit D, *Corporatism and Collective Bargaining in a Democratic South Africa*, (1995) *Industrial Law Journal* 16 (4) pp. 785-805.

¹³¹ Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) *Industrial Law Journal* pp. 278 ff (310).

¹³² The integration of the independent trade union into the statutory collective bargaining system and their commitment to orderly industrial relations had been a central objective of the Wiehahn Commission whose report formed the basis of the amendment Act.

The new LRA introduced the institution of an works council, consisting of half worker representatives and half employer representatives. Their right to bargain collectively was used very little in practice. The functions of these committees remained vague. Owing to this historical background, the new LRA rejects the terminology of works councils.¹³³

4.2.2 Workplace forums

The new LRA aims to give effect to new constitutional rights, to promote collective bargaining and consultation and joint decision making in the workplace. The LRA is the first labour statute that must comply with the provisions of the constitution. South Africa started with help of the new LRA in direction of a participatory system in workplaces.¹³⁴ The introduction of a participatory structure seems consequent since the South African nation decided in favour of a democratic state system. This leads naturally to democratization of the work structure.¹³⁵

Chapter V of the LRA proposes the introduction of workplace forums for cooperative workplace relations between employers and workers and worker participation. In terms of section 79 of the LRA, the duties of workplace forums are to seek to promote the interests of all employees in the workplace, whether or not they are union members and seek to enhance efficiency in the workplace.

The former Minister of labour has described worker participation as more than a moral or ethical imperative, situated within parameters of equity and social justice.¹³⁶

In creating a structure for dialogue between management and workers, statutory recognition is given to the realization that unless workers and managers work together more effectively they will fail to improve productivity and living standards. The motivation of workers seems to increase with raising their possibilities to take part in the decision-making process. Workplace forums were

¹³³ Piron J, Roux P, *Labour Law and Industrial Relations in South Africa*, International Encyclopaedia for Labour Law and Industrial Relations, (1993) 11 pp.1-156.

¹³⁴ Brassey M, *Labour relations under the new South African constitution*, (1994) Southern African labour monographs 5/94 pp. 1-36; Jordan B, *The new constitution and Labour Law*, (1994) Labour Law News and Court Reports 4 (1) pp. 1-5.

¹³⁵ Du Toit D, *Corporatism and Collective Bargaining in a Democratic South Africa*, (1995) Industrial Law Journal 16 (4) pp. 785-805.

¹³⁶ Former Minister Tito Mboweni, *A New Era for Labour Relations*, speech at the launch of the Labour Relations Bill Johannesburg 2 February 1995.

designed to perform functions that collective bargaining cannot achieve: the joint solution of problems and the resolution of conflicts over production. The workplace forum's focus is on non-wage matters, such as restructuring, the introduction of new technologies and work methods, changes in the organization of work physical conditions of the workplace.¹³⁷

Workplace forums appear at plant level for regular meetings between elected representatives of the workforce and management. According to section 82(1)(c) of the LRA workplace forums consist only of employee representatives; the employer is represented in this body. Employers are obliged to meet regularly with these forums, to disclose to them information relating to matters on a regular basis, and to consult with them over a range of issues. They shall lay the basis for cooperative workplace relations between employers and workers and create a climate for greater worker participation in decision making.¹³⁸

These forums are established on application to the commission by a trade union, which represents more than half the workers in a workplace in respect of employers with more than 100 workers. The LRA provides that only trade unions representing a majority of employees in the workplace shall have the capacity to trigger the establishment of workplace forums. Without a union application no workplace forum can be established. This leading role is emphasized by a late addition providing for trade union-based forums. Here worker representation consists of trade union members only. Furthermore representative unions and employers organizations can conclude collective agreements about the entire procedure and subject matter of a workplace forum. And finally the unions are the institutions which can apply for a ballot about the dissolution of a workplace forum.¹³⁹

¹³⁷ Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp. 278 ff (310); Du Toit D, Corporatism and Collective Bargaining in a Democratic South Africa, (1995) *Industrial Law Journal* 16 (4) pp. 785-805.

¹³⁸ Benjamin P, Innovation and Continuity: Responding to the Labour Relations Bill, (1995) *Industrial Labour Journal* 16 (2) pp. 258-277.

¹³⁹ Du Toit D, Corporatism and Collective Bargaining in a Democratic South Africa, (1995) *Industrial Law Journal* 16 pp. 785-805; Benjamin P, Innovation and Continuity: Responding to the Labour Relations Bill, (1995) *Industrial Labour Journal* 16(2) pp. 258-277.

According to section 82(1)(i) of the LRA workplace forum members are elected by the whole workforce and not merely by trade union members. The number of members of the workplace forum depends on the size of the workplace. The upper limit is 20 members. Employers are obliged to meet the workplace forum, present a report on its employment and financial situation and discuss any issue that may affect employees.

Most unions fear that workplace forums might undermine their role as worker representatives. Having this in mind the Ministerial Legal Task Team stressed that unions and workplace forums have different functions. The forums are entitled to adequate information concerning specific matters. Negotiations over wages and conditions of employment take not place in the workplace forum. Certain issues cannot be implemented unilaterally by an employer: consensus must first be reached with the workplace forum.¹⁴⁰ But the LRA does not specify which matters remain to the responsibility of the trade unions. The unions are left in the dark about their rights, and the topics they can bargain about.¹⁴¹

The provisions of Chapter V only apply if a collective agreement on the subject was not concluded. The Bill allowed a collective agreement to override only the establishment and governance of the workplace forum. Now section 80(6) of the LRA allows an agreement to displace all provisions regulating the workplace forum. The parties are therefore free to establish their own workplace forum with its own rules and functions. Section 82 of the LRA regulates the constitution of a workplace forum. This section, however, only applies as long as the parties have not concluded a collective agreement on the subject.¹⁴²

Disputes between the workplace forum and the employer have to be solved according to section 94 of the LRA, as long as no specific regulation applies. Thus consultation does not prescribe a binding procedure to solve a dispute; it depends

¹⁴⁰ Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp. 278 ff (310).

¹⁴¹ Summer C, Workplace forums from a comparative perspective, (1995) *Industrial Labour Journal* 16 (4) pp. 806 ff.

¹⁴² Du Toit D, Corporatism and Collective Bargaining in a Democratic South Africa, (1995) *Industrial Law Journal* 16 (4) pp. 785-805.

on the parties. In contrast, disputes regarding matters of joint-decision making have to be resolved by compulsory arbitration. In Chapter V of the LRA the principle of conciliation and arbitration applies to any dispute. No other proceedings are possible, thus appeals to the Labour Court are excluded according to section 94 of the LRA.

4.3 GERMANY

4.3.1 Historical background and development

During World War I the establishment of worker committees was guaranteed by law for the first time. After World War I employers guaranteed full recognition of trade unions. In 1918 every company with more than 20 employees was under a duty to establish worker committees. Co-determination of employment conditions then took place for the first time. This happened despite the resistance of the unions, which demanded unified worker representation on industry and plant level. The trade unions supported early the idea of worker participation. However, they did not have institutions like works councils in their mind but forms of direct participation. The employers did disapprove of the idea of direct worker participation. The trade unions, however, in return did not support the change to indirect worker participation for fear of being weakened by the works councils.¹⁴³

The dual development was legally secured in 1919 by Article 165 of the Weimarer constitution. The formation and functions of the works councils were regulated by the Works Councils Law. It provided for the establishment of the works councils in companies with more than 20 employees and gave them additional rights such as co-determination in social and personnel matters. Regarding economic matters, the works council had only information rights.¹⁴⁴

Worker participation was cut short by the NAZI-State in 1933. The Works Council Act 1920 was repealed and instead of works councils, confidential councils were established. They only had consultative functions, and were not elected but nominated by the government. After the end of World War II, the need to restructure the entire German economy entailed problems with the drafting of a

¹⁴³ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp.1-206.

¹⁴⁴ von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763.

new Act on worker participation. The final legislation, the Works constitution Act of 1952 upheld the principle of a free management as a basis for a free economic structures. The Works Council Act 1952 only provided for participation in form of consultation. Joint decision making was not included.¹⁴⁵

The Works constitution Act of 1972 is a subsequent development of the Works constitution Act of 1952, adjusted to economic and social changes in the country. In contrast to the Works Council Act 1952, works councils now have co-determination rights in the form of joint decision making. Therefore works councils are provided with stronger rights than ever before. The Federal Labour Court held that co-determination rights of works councils increase law and order in the plant and therefore quality of life and willingness to work.¹⁴⁶

Although the Works constitution Act of 1972 now effective in its 1988 form is the main source for the German works council, several other Acts provide regulations for it. The establishment and the rights and duties of the works councils are prescribed in the Works constitution Act. The Election Act of 1972 consists of additional provisions regarding the election for the establishment of the works council. Arbitration and mediation procedures are regulated in section 76 of the Works constitution Act but also in section 101 f. of the Labour Court Act. Provisions regarding disputes between the employer and the works councils are found in the Labour Court Act.

The rise of works councils in former East Germany also demonstrates the correlation between worker participation and democracy. Previously the ruling Communist Party allowed no works constitution. The re-establishment of works councils was only possible after the collapse of the communist dictatorship. In 1989, the first freely elected works councils were established. During the short process of reunification works councils, as defined by West German law, were elected. Today, the same provisions of worker participation which existed in West Germany prior to reunification apply to the united Germany.¹⁴⁷

¹⁴⁵ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations*, pp.1ff.; von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763.

¹⁴⁶ von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763.

¹⁴⁷ Däubler W, *Das Arbeitsrecht*, (1998) pp. 298ff.

4.3.2 Works councils

Worker representation is provided for company level through a supervisory board and also on plant level through a works council. The German industrial relations system is characterized by two tiers.

Works councils in Germany are exclusively made out of worker representatives, in contrast to many other countries where these bodies consist half of employers and half of employee representatives. German works councils are therefore counterparts of the management.¹⁴⁸

Elections can only take place in plants with more than 5 regular working employees. The works council members are elected by a secret ballot by all workers of the plant. In small establishments with less than 50 employees works councils are very rare.¹⁴⁹

The number of the members of the works council depends on the size of the workforce. The elections have to be held separately for white and blue collar workers. The number and the proportion of representatives of each group in the works council depends on the proportion of members in the workforce.¹⁵⁰

If an employer operates more than one plant and in at least two of these plants works councils exist, a general works council has to be established. According to section 50 of the Works constitution Act the general works council is independent from the individual works councils and is not established on a higher level. It is only responsible for matters which affect several different works councils and which require central decisions. They are authorized to deal only with matters which cannot be regulated at plant level.¹⁵¹

¹⁴⁸ Wedderburn Q, Labour Law Corporate Law and the Worker, (1993) Industrial Law Journal 14(3) pp.517-542; Weiss M, Labour Law and Industrial Relations in Germany, (1994) International Encyclopedia for Labour Law and Industrial Relations 5 pp.1-206.

¹⁴⁹ Hanami T, Blainpain R, Industrial conflict resolution in market economies, (1989) pp. 81-133.

¹⁵⁰ Weiss M, Labour Law and Industrial Relations in Germany, (1994) International Encyclopedia for Labour Law and Industrial Relations 5 pp.1-206.

¹⁵¹ Hanami T, Blainpain R, Industrial conflict resolution in market economies, (1989) pp. 81-133.

The Works constitution Act provides for participation rights for the works council. It is a three level model, involving information, consultation and co-determination. The matters for participation are carefully defined in various regulations.¹⁵²

Disputes between works council or general works council and employers have to be resolved in different ways, depending on the subject matter in question. The Works constitution Act provides arbitration in several regulations. Voluntary arbitration, for example, is provided in section 88 of the Works constitution Act. More often, however, compulsory arbitration is prescribed¹⁵³, for example in social matters like social services, circumstances of working hours, introduction of technical facilities, social plans.

In matters in which the works council and employer are not able to reach a compromise, the Works constitution Act provides an appeal to the Labour Court.¹⁵⁴ If the works council and the employer have a dispute about the rights and duties of the parties provided for in the Works constitution Act, the Labour Court has to be invoked according to section 2 a of the Labour Court Act. The same procedure applies when the employer neglects its responsibilities as defined by the Works constitution Act. Either the works council or a union can file a claim.¹⁵⁵

4.4 COMPARATIVE SUMMARY

4.4.1 Parties and Establishment

In respect of the establishment and the parties concerned, major differences exist between the workplace forum and the works council.

In Germany a works council can be established in a plant with more than 5 employees working regularly at the plant according to Article 1 of the Works constitution Act. According to section 80(1) of the LRA, a workplace forum can be established in a workplace with 100 or more employees. The threshold of the number of workers is much higher than in Germany. It was estimated 74% of the

¹⁵² Wedderburn Q, *Labour Law Corporate Law and the Worker*, (1993) *Industrial Law Journal* 14 (3) pp. 517-542; see to that below at 4.4.2.

¹⁵³ For example at sectionsection 87 II, 91, 98 IV, 109 Works constitution Act.

¹⁵⁴ For example at sectionsection 99 IV, 100 II, 103 II Works constitution Act.

¹⁵⁵ Hanami T, Blainpain R, *Industrial conflict resolution in market economies*, (1989) pp. 81-133 (83).

workers could be excluded from the possibility of a workplace forum in the formal sector. Only in very few other industries the workforce in a workplace reaches this threshold.¹⁵⁶ As it was explained by the drafters of the Act, the high number of employees is considered necessary because in bigger workplaces there is more likely to be the necessary skill and knowledge required to make a workplace forum work.¹⁵⁷

In contrast to most countries, the institution for worker representation is not initiated by the employer.¹⁵⁸ In Germany and South Africa labour is the initiating group. In South Africa a workplace forum can only be triggered by a representative trade union or two or more acting jointly; without union support no workplace forum is possible. In Germany the election of a works council is initiated by employees. The union as such has no formal part in the works council, but the great majority of works council members are union members. Trade unions have an important influence, but more in a supportive capacity.¹⁵⁹

In contrast to the South African trade union based workplace forums no comparable institution exists in German law. This kind of trade union orientated workplace forum, would be regarded as a questionable institution. The original idea of works councils turns on the representation of employees independent from their trade union membership. This principle is broken by a trade union based workplace forum. Through the introduction of a trade union orientated workplace forum, worker representation loses its original meaning and function.

The establishment procedure of workplace forums and works councils differs, especially in regards to the initial establishment. The main difference concerns the promotion by the LRA of collective agreements at plant level to regulate and organize the workplace forum. Such a procedure does not exist in Germany. The provisions of the Works constitution Act are compulsory and therefore binding and

¹⁵⁶ von Holdt K, Workplace forums: can they tame management?, (1995) South African Labour Bulletin 19 (1) pp. 31f; Benjamin P, Innovation and Continuity: Responding to the Labour Relations Bill, (1995) Industrial Labour Journal 16 (2) pp. 258-277.

¹⁵⁷ Cheadle H, Workplace Forums, (1995) 5 Current Labour Law pp. 64f.

¹⁵⁸ Different to that of the Netherlands, France, Belgium, Spain and Denmark.

¹⁵⁹ Benjamin P, Innovation and Continuity: Responding to the Labour Relations Bill, (1995) Industrial Labour Journal 16 (2) pp. 258-277; Wedderburn Q, Labour Law Corporate Law and the Worker, (1993) Industrial Law Journal 14 (3) pp. 517-542.

not open to regulation by collective agreements. The German Works constitution Act has the principle of minimum state interference. This has the effect that the number of works council in small and medium businesses is low.¹⁶⁰

The German Works constitution Act provides principles governing co-operation between works councils and employers. These principles are co-operation based on trust, duty to keep the peace, no interference in work procedures and good order of the plant, prohibition on political activities and prohibition on discrimination. Works councils are established to facilitate co-operation between the workforce and the employer.¹⁶¹

To reach the highest rate of productivity, a harmonious atmosphere in the workplace is required. Work councils and employers cannot resort to serious economic weapons such as strikes and lock-outs to enforce their proposals. Industrial disputes are intentionally disruptive, and are therefore not tolerated in the consensus-seeking environment of works councils.

The LRA does not provide any principles regarding the relationship between workplace forums and employers. It was stressed that both parties should work on the principle of co-operation.¹⁶² The drafters of the Act provide the possibility of economic power between a workplace forum and an employer in cases where they do not agree on a proposal. Strikes and lock-outs are an expression of confrontation. By not outlawing economic power in the relationship between workplace forum and employer, scope for disruptive conflict in the plant has been conceded. And this will not promote a relationship of trust between the two bodies.

¹⁶⁰ Du Toit D, *Corporatism and Collective Bargaining in a Democratic South Africa*, (1995) *Industrial Law Journal* 16 (4) pp. 785-805.

¹⁶¹ von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763.

¹⁶² Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) *Industrial Law Journal* pp. 278 ff (310).

4.4.2 Worker Participation

The German Works constitution Act provides a participation structure which leaves the responsibility for planning, organization and direction with the employer. It has to make the basic management decisions and decide how to implement such decisions.¹⁶³ Both South African workplace forum and German works councils are intended to ensure worker participation and co-determination in a workplace and plant respectively.

One expression of democracy in a plant or workplace is the principle of disclosure of information. Effective worker participation is not possible without information sharing. Constructive involvement in rights is only possible if workers know about the employer's plant decisions. The general principle underlying the right of disclosure of information is quite similar in both Acts; and therefore amenable to comparison. Disclosure of information is provided for in section 89 of the LRA and section 82 of the Works constitution Act. Both provisions establish independent rights, although with different content.

Section 83 of the LRA regulates regular meetings with the employer. It has to report about the company, and consultation is required as soon as employees and their employment relationship are affected. In Germany this is regulated in section 90 of the Works constitution Act, which provides a duty of information and gives a right of consultation in the same matters.

The next strongest participation right after the right of disclosure of information is consultation. If employer and workplace forum do not reach consensus in matters of consultation, there is a difference between the procedures of the LRA and the Works constitution Act. In Germany, the employer has an undisputed right to implement his proposal even if the works council does not agree on it.

The LRA provides a similar procedure, though with one step in between. This procedure applies only in case of the conclusion of a collective agreement regulating a procedure to resolve differences in terms of section 85(4) of the LRA. It is different if workplace forum and the employer can not reach consensus. Then the employer can not implement his proposal but instead has to invoke an agreed procedure to resolve the differences. The LRA does not exclude the use of

¹⁶³ von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763.

economic power in matters regarding consultation. Thus the character of this participation right has been modified. As the term consultation already suggests, the matters in question must be considered by both employer and workplace forum. If the parties do not agree on a procedure to resolve the differences, the procedure is the same as in Germany. In both cases the worker representation body has to submit to the decision, and the employer can implement its proposal according to section 85(4) of the LRA.

The main difference between the procedures of the LRA and the Works constitution Act is the right of the workplace forum to take industrial action to resist the employer's proposals.¹⁶⁴

As long as the workplace forum and employer do not agree on a procedure to resolve differences and the workplace forum does not resort to economic power, consultation consists only of meetings and discussions about the matter in question.

If the workplace forum does not submit but takes industrial action or the agreed procedure is invoked, the character of this co-decision right hardens into something stronger than consultation. The employer has then to consult the workplace forum, but then either has to reach consensus at some point or defeat the forum in an economic contest. To get there, they bargain about the matter in question. Consultation then shades into bargaining.

Both the agreed procedure and the strike and lock-out options effectively introduce a limited duty to bargain at plant level. The legislature decided against a duty to bargain between trade unions and employers, despite the fact that the Industrial Court had developed such a duty to bargain.¹⁶⁵ In Germany, on the other hand, since consultation does not require any agreement between the parties, bargaining on such issues does not take place.

This is a main difference between the German and the South African procedure. No sharp line can be drawn between consultation and joint decision making. This may have significant consequences; clarity is especially important for new law. Section 85 of the LRA leads to differences of interpretation of the Act.

¹⁶⁴ Du Toit D, *Corporatism and Collective Bargaining in a Democratic South Africa*, (1995) *Industrial Law Journal* 16 (4) pp. 785-805.

¹⁶⁵ Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) *Industrial Law Journal* pp. 278 ff (310).

Joint decision making gives the opportunity to take part in the decision making process without taking industrial action. The LRA, however, has made the matters of consultation much more extensive than for joint decision making. Germany takes the same approach; but in contrast to South Africa, joint decision making in Germany is much more extensive.

In South Africa the parties are not forced to cooperate. They can rather choose confrontation. There are two sides to the possibility to strike on plant level. On the one hand it helps to persuade trade unions to establish workplace forums. The unions were entitled to bargain about all matters which now are concerning workplace forums. Their agendas are not restricted but the unions see the danger of a loss of power in the workplace. Therefore trade unions perceive as a threat to their power base. The possibility to strike in matters of consultation may limit the suspicion unions have.¹⁶⁶ On the other hand in regard to the relationship between workplace forum and employer in the plant a right to strike about workplace-related matters blurs the lines between collective bargaining and participation in a workplace.

In Germany strike and lock out are expressly forbidden according to section 79 of the Works constitution Act. The Works constitution Act is based on the principle of trustful co-operation between every body represented in the plant, especially between the works council and the employer. Therefore both have the duty to keep the peace in the plant. A resort to economic power does not assist cooperative and productive relations.¹⁶⁷

According to the LRA, the amendment of participation rights and the limitation of consultative subjects is possible by collective agreement. It is quite conceivable that this issue will arise in industrial bargaining. This may comfort the unions, as it ensures their influence on these topics. If the trade unions, however, are not strong enough in the bargaining process, the employer may restrict consultative subjects to a significant extent. Generally speaking, collective bargaining to adjust the subject matter is not inappropriate; the parties can adjust the matters regularly and meet the changing needs of the workplace forum. But collective bargaining may not be the appropriate means to achieve efficient regulation.¹⁶⁸

¹⁶⁶ Du Toit D, *Corporatism and Collective Bargaining in a Democratic South Africa*, (1995) *Industrial Law Journal* 16 (4) pp. 785-805.

¹⁶⁷ Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 298ff.

¹⁶⁸ Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) *Industrial Law Journal* pp. 278 ff.

In contrast to the LRA the German law does not allow the limitation of any rights regarding consultation, and only in a very limited sense in the context of joint-decision making. The provisions of the Works constitution Act are obligatory. They are established to give protection to workers interests and were considered indispensable for appropriate representation.¹⁶⁹ Therefore a limitation through collective agreements could not be tolerated.

In Germany, the participation principle with fixed matters insulated from collective bargaining has proved successful. Nevertheless the guideline laid down in the European Works Council directive 94/54/EC advocates a structure now introduced in South Africa. According to the directive, participation on plant level should be established by collective agreements.¹⁷⁰ This applies to European transnational enterprises and therefore to big companies with a particular history of industrial relations. South Africa, however, has a very adversarial past and it seems doubtful that the parties would easily agree on a well-balanced and effective participation structure.

The matters of consultation differ in the LRA and the Works constitution Act. The German Works constitution Act is based on the principle of minimum conditions. The range of matters regarding consultation is wider than it is in the LRA.

Section 84 of the LRA provides the matters the workplace forum has the right to be consulted about. The issues of section 84(1)(a), (b), (c), (e), (g) and (i) of the LRA are also matters of consultation in Germany. The dismissal of employees for reasons based on operational requirements limits the right of consultation regarding dismissals to a small extent, which is regulated in section 84(1)(e) and expressly in section 189 of the LRA. In Germany participation in respect of all dismissals is regulated in section 102 of the Works constitution Act. The works council has the right to oppose any intended dismissal. The possibility of exemptions from any collective agreement or any law as prescribed in section 84(1)(f) does not exist in Germany. And section 84(1)(j) and (k) of the LRA deals with matters of management, namely product development plans and export promotion. In Germany, on the other hand, the works council has no right to participate in managerial decisions, but has a right to receive information.

¹⁶⁹ von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763.

¹⁷⁰ Richard O, *Directive 94/45/EC- outlook for application in companies*, (1995) p.252.

The right of joint-decision making is the strongest right in the participation system. It is a co-determination right; the employer is not able to implement a proposal without the agreement of the workplace forum and the works council.

The LRA gives unions and employers the opportunity to decide about matters of co-determination. The parties have the option of removing all matters of consultation or joint-decision making as provided for.

The LRA puts the unions in a very strong position by giving them the right to decide which matters will be affected. Since the unions distrust the institution of workplace forums it is doubtful if they will extend the subject matter. Moreover, the rights of workplace forums will become a topic in collective bargaining even on industrial level. And again this is very undesirable, because the workplace forum operates at plant level and should be kept separate from collective bargaining. The possibility of bargaining about plant-level matters at industrial level blurs the border between the two levels again. Where collective bargaining takes place on plant level, it will become more difficult to keep the subject matter of collective bargaining and workplace forums apart.¹⁷¹

In German law the situation is similar. But it is not the same starting point. The matters of joint decision-making can be limited and added to by collective agreement. In Germany only the parties can limit social matters by regulating such issues by collective agreement. The rights are not just removed without substitute. The interests of the workers are still protected.

An important difference is the lack of any right of the workplace forum to take an initiative. The workplace forum can not introduce a proposal independently, forcing the employer to tackle this subject. Instead it has to wait until the employer acts.¹⁷²

It seems doubtful whether the workplace forum has sufficient rights regarding issues of joint decision-making. As long as the workplace forum does not have the right to take initiative protection of the worker's interests is not attainable. The employer has the power to decide if co-determination is to take place or not. In addition, if it does introduce a proposal, and the parties do not reach agreement

¹⁷¹ Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp. 278 ff.

¹⁷² von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763.

and conciliation is unsuccessful, it is for it to decide whether the conflict will be resolved by arbitration or whether the issue will be dropped.

This will not lead to a well-balanced relationship between employer and workplace forum but rather to frustration of the workers.¹⁷³

The LRA provides joint decision making for only four issues while section 87 of the Works constitution Act provides it for 12 matters. Disciplinary codes and procedures are regulated in section 87 I No.1 of the Works constitution Act. However, no adequate provision exists in the LRA for the regulation of the workplace regarding non-performance related issues not related to work performance. The same applies to section 86(1)(c) of the LRA, which regulates measures designed to protect and advance persons disadvantaged by unfair discrimination. This subsection has a close connection to South Africa's apartheid past. The workplace forum will be able to co-determine issues of affirmative action. Although Germany has a different history, the Works constitution Act provides in section 75 the duty of the works council to monitor the equal treatment of the workers irrespective of from religion, gender and political views. Furthermore, the legislator added No. 2a to section 80 of the Works constitution Act, which regulates the duty of the works council to monitor the implementation of measures to achieve equality between men and women.

The fourth matter of joint decision-making, is not specifically mentioned in the Works constitution Act. section 87 No.8, 9 and 11 of the Act relate to the determination such social benefits: No.8 relates to social facilities, No.9 to housing of employees and to fixation of performance-orientated bonuses and piecework bonuses.

Section 87 of the LRA extends the joint decision-making rights of the workplace forum. It has the right not only to take part in decisions of the employer regarding joint decision rights but can also ask for review of pre-existing codes and rules according to section 87 (1)(b) of the LRA. The LRA gives an extensive right in this regard. The employer is not able to undermine co-determination rights by introducing such rules and codes before the establishment of the workplace forum. The Works constitution Act does not provide for such a right.

¹⁷³ von Hoyningen-Huene G, *Münchener Handbuch Arbeitsrecht*, (1993) 3 pp. 740-763.

4.5 CONCLUSION

In Germany, participation on plant level is the result of a gradual process. Participatory structures were as introduced for back as the 1890's, the present structures and principles draw on a long tradition.

In contrast, until the recently participation in South African workplaces existed only rarely and was largely inconsequential. Most South African companies have never had participation in their workplaces.

The employment and the economy demanded reform of the labour relations system. With workplace forums a new form of participation has been introduced. Workplace forums, in the context of the LRA, are advanced and demanding institutions. Although the introduction was precipitated by economic considerations, it was not a consequence of historical development. The participation structure does not built on tradition; it has been offered to unions and thrust upon employees without any precedent. It remains to be seen how many will be established in companies.

The new LRA aims to give effect to new constitutional rights, to promote collective bargaining and consultation and joint decision making in the workplace. South Africa started with help of the new LRA in direction of a participatory system in workplaces. The introduction of a participatory structure seems consequent since the South African nation decided in favour of a democratic state system. This leads naturally to democratization of the work structure.¹⁷⁴

The new LRA introduced a model quite similar to the German works council. The basic structures and principles are the same. The role of trade unions, however, is one of the main differences between the workplace forum and the works council. South African unions are the only institutions able to apply for the establishment of workplace forums; they also are able to conclude collective agreements about the constitution and details of workplace forums. They can apply for ballots to dissolve workplace forums. The German unions have only a supportive role and their influence is clearly limited by law.

¹⁷⁴ Brassey M, Labour relations under the new South African constitution, (1994) Southern African labour monographs 5/94 pp. 1-36; Jordan B, The new constitution and Labour Law, (1994) Labour Law News and Court Reports 4 (1) pp. 1-5.

The fact that trade unions have such a strong position in South Africa has other consequences. Because of their right to establish a trade union based workplace forum, unions get direct access to plant and plant related issues. This is unknown in Germany. Trade unions are active at industry level. The Works constitution Act regarding the functions and the topics of works councils is compulsory. The relationship between collective agreements and the decisions made by employer and works council is well defined.

In South Africa the parties are not forced to cooperate. They can rather choose confrontation and call a strike. The LRA prescribes possibility of economic power if the employer consulted the workplace forum but it did not agree with the proposed decision. This introduces a risk. Economic power is considered to be one of the main causes of economic problems and unproductiveness.

The workplace forum has been established for enhancing the productivity and profitability through rising the motivation of the employees. It seems doubtful that motivation can be increased if a low trust relationship and an atmosphere of adversarialism predominates. The parties, used to adversarialism, will use the strike opportunity to push through their interests in matters of consultation. Therefore the problem of conflict and low trust in South African labour relations is likely to continue. Organized labour cannot but reflect the accumulated aspirations of a deprived working population. The institution of workplace forums will need to be experienced as a means towards realizing at least some of these aspirations.

Without doubt, it would have been helpful to define the provisions of the Act to avoid conflict and misunderstanding. If the consultation mechanisms are used by the parties, conflict must be expected.¹⁷⁵

¹⁷⁵ Du Toit D, Corporatism and Collective Bargaining in a Democratic South Africa, (1995) *Industrial Law Journal* 16 (4) pp. 785-805; Summer C, Workplace forums from a comparative perspective, (1995) *Industrial Labour Journal* 16 (4) pp. 806 ff.

CHAPTER 5

STRIKES AND LOCK-OUTS

5.1 INTRODUCTION

This Chapter deals with strikes and lock-outs and compares it with the German industrial relations system. The comparison brings out and explains the differences and similarities of the two national industrial relations systems in regard to their respective functions in the labour management relationship. The differences between the legal regulations, the procedures, limitations and protection will be identified and analysed. The main question regarding a meaningful comparison of industrial relations systems is whether the legal regulation of strikes and lock-outs are solutions of industrial conflict and whether the institutions operate in equivalent industrial contexts. As far as the topic is concerned the impact of the constitutional changes in South Africa as well as in Germany should be revealed.

Conflict is a necessary consequence of industrial relations. Industrial action manifest itself above all in the interruption of work in order to exert pressure on the opponent for the fulfilment of certain demands. The strike and lock-out are the chief weapons of pressure and counter-pressure. The regulation of strikes and lock-outs is one of the most difficult areas for legal and industrial relations systems. The attitude of the state and the law to industrial conflict has always been a key feature of labour law and labour relations systems and changes in attitude are commonly used as a basic parameter to identify the historical evolution of these systems.¹⁷⁶

In every country workers, employers and governments have both common and divergent interests. The divergent interests should be accommodated and reconciled. The way in which such interests are expressed and reconciled is the subject of industrial relations. This varies from country to country. This comparison relates to the political context of the national systems. It is obvious

¹⁷⁶ Birk R, *The Law of Strikes and Lock-outs*, (1990) *Comparative Labour Law and Industrial Relations* 11 pp. 265f.

that the right to strike and lock-out differ fundamentally according to the type of political system in which labour relation system exists. The right to strike means that the strike is legally permitted and the legal order evaluates the pursuit of collective interests more highly than the opposed individual employment contract.¹⁷⁷

An explicit legal or factual prohibition of the strike cannot be found in any democratic state. It would be incompatible with the principles of democracy. Any industrial relations system that is based on a pluralist perspective, will make provisions for the expression of open conflict as an important element in the maintenance, stability and development of that system. In contrast to the critics of industrial action, who see it as an intolerable abuse of economic freedom, the functional view of industrial action accepts its role as a means of pressure, which may be necessary to enable the parties to reach an agreement. However, from a pluralist perspective this industrial conflict must be confined to actions that are acceptable and not ultimately damaging to the broader society.¹⁷⁸

The most visible facet of industrial action is the organised strike, however, there are various individual expressions of discontent, which result in unorganised industrial action. Here I am concerned only with collective industrial conflict. Sometimes employers reply with a lock-out of the workers. As an essential weapon of the employer, it is a work stoppage closing down a plant in order to exert pressure on the workers to abandon their demands or to accept the demands of their employers.

The form and extent of such conflict and action differ; they are by no means always the same. This depends not only on varying social conditions but it is also a product of the law itself. The law on industrial action, both conceptually and in detail, displays striking and considerable differences.¹⁷⁹

¹⁷⁷ Hanami T, Blanpain R, Industrial conflict resolution in market economies, (1989) pp.1f; Birk R, The Law of Strikes and Lock-outs, (1990) Comparative Labour Law and Industrial Relations 11 pp. 270f.

¹⁷⁸ Finnemore F, van der Merwe R, Industrial Relations in South Africa, (1989) p. 139.

¹⁷⁹ Birk R, The Law of Strikes and Lock-outs, (1990) Comparative Labour Law and Industrial Relations 11 pp. 265f.

5.2 SOUTH AFRICA

5.2.1 Historical background and development

Although strikes that were in conformity with the former LRA were protected from civil and criminal legal proceedings, the procedures required by the Act rendered this protection largely theoretical in South Africa. There were no explicit statutory protection from dismissal for striking employees and significant categories of workers might not strike at all. Until 1983, the law relating to the dismissal of strikers was regarded as being governed by common law contract principles. In terms of these principles, employees who participate in a strike are normally in breach of their contractual obligation to do the work they have agreed to do. In most cases this was viewed as a serious breach of contract that the employer is justified in terminating the employment contract on this ground.¹⁸⁰

The courts have, however, intervened in some strikes and reinstated strikers on the basis that the dismissals constituted an unfair labour practice. Apparently guided by the German notions of proportionality and ultima ratio, along with the Canadian equivalents, the court speculated on the circumstances under which a strike would be regarded as protected activity.¹⁸¹ The courts developed criteria in their decisions, which were always uncertain and unclear. The problem relates not only to the uncertain exercise of discretion, but also to the fact that this discretion always exercised after the event. Workers often were bound to follow fairly time consuming, technical and complicated procedures before they might lawfully withhold their labour.¹⁸²

The Wiehahn Commission regarded the right to withhold labour as a fundamental component of any modern labour dispensation, but neglected to enlarge on its understanding of the right in any meaningful way. Its tentative suggestions on broadening further strike rights were rejected by the government.¹⁸³

¹⁸⁰ Le Roux, Van Niekerk A, *The Dismissal of Strikers*, (1993) *Contemporary Labour Law* 2 (12) pp. 131-139.

¹⁸¹ *Raad van Mynvakbonde v. Kamer van Mynwese van SA* (1984) 5 I.L.J. 344 (IC).

¹⁸² Ministerial Legal Task Team, *Explanatory Memorandum*, (1995) *Industrial Law Journal* pp. 278 ff.

¹⁸³ Thompson C, *Borrowing and Bending: The development of South Africa's unfair labour practice jurisprudence*, (1993) *The international journal of comparative labour law and industrial relations* 9 pp. 183-205.

All this notwithstanding the dispute resolution processes in the existing laws did not function effectively. There were too many unnecessary strikes and lock-outs and a failure to resolve disputes over issues that do not have major cost implications or involve matter of principle. Statistics produced by the Department of Labour demonstrate that less than 30% of all disputes referred to industrial councils are settled and only some 20% of established conciliation boards result in settlement. The failure of these statutory structures to resolve disputes accounts for the excessive workload of the Industrial Court and the high incidence of strikes and lock-outs. Independent mediation services have a success rate over 70%.¹⁸⁴

Such are some of the reasons that the former LRA did not give effect to the right to strike and the right to lock-out as guaranteed in section 27 of the new South African constitution. It also offended the recommendations of the ILO and was contrary to the ILO's constitution and Conventions concerning the principle of freedom of association. The major failures in this regard were complicated and technical pre-strike procedures, onerous ballot provisions, the criminalization of strikers and lock-outs, the prohibition of socio-economic strikers, the availability of interdicts and damages claims and the absence of statutory protection from dismissal for striking employees.¹⁸⁵

5.2.2 Strikes and unfair labour practices

When the resolution of disputes fails, industrial action is the final weapon for management and unions. Section 23(4) of the constitution affords the right to strike and lock-out for purposes of collective bargaining.

Section 23 of the constitution put an end to the possibility of an argument that the right to freedom of association, undermines those principles of collective bargaining and the right to strike which have been developed in terms of unfair labour practice jurisdiction contained in the former LRA. The entrenchment of the right to strike invites a court to reconcile the jurisprudence relating to freedom of association with the provision of section 23. When the labour courts reinstate strikers, the guarantee make their orders easier to defend against constitutional

¹⁸⁴ Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp. 278 ff.

¹⁸⁵ Ministerial Legal Task Team, Explanatory Memorandum, (1995) *Industrial Law Journal* pp. 278; ILO, *Prelude to Change Industrial Relations Reform in South Africa*, Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, (1992) *Industrial Law Journal* 13 pp. 739-783.

attack. If mandatory relief is possible, the refusal of such an order may also be subject to scrutiny under the Chapter. But, because only state actors are bound by the Chapter, the guarantee seems to give strikers in the private sector no direct protection from dismissal. Accordingly many of the difficulties encountered by comparative law will not be applicable within the South African context.¹⁸⁶

The right to strike governs industrial action short of a full-blown strike, such as overtime bans, work-to-rule and go-slows, as well as action taken in contemplation or furtherance of a strike, such as peaceful picketing, secondary strikes and boycotts, but exclude strikes which are unrelated to collective bargaining.

The new LRA comply with the requirements of the new constitution and with international labour standards, in particular, ILO Conventions 87 and 98 of 1948 which deal with freedom of association and the right to organise and bargain collectively. These Conventions do not expressly refer to the right to strike but the ILO held that the right to strike is included in the right established by Convention 87, of workers to pursue lawful activities for the defence of their occupational interests. The right to strike is regarded as one of the essential means through which employees and their organisations may promote and defend their economic and social interests.

Under the LRA it is the individual employee who has the right to strike. Employees may not be dismissed for participating in a strike staged in conformity with the Bill. This is a further indication of the effect of ILO jurisprudence on the Bill.¹⁸⁷

A strike or lock-out has to comply with certain procedural conditions in order to be protected. The main provision is section 64 of the LRA. Thereafter a strike or lock-out is protected only if the issue in dispute has been referred to a bargaining

¹⁸⁶ Davis D, constitutionalization of Labor Rights, (1994) *Rights and constitutionalism: The new South African Legal Order*, Van Wyk pp.439-454; Brassey M, Labour relations under the new South African constitution, (1994) *Southern African Labour Monographs* 5/94 pp. 1-36; The Canadian Charter, introduced in 1982, did not include an express right to strike. The Supreme Court has decided that the right to associate in no way entrenches the right to strike. See Weiler P, The Charter at work: Reflection on the constitutionalizing of labour and employment law, (1990) *University of Toronto Law Journal* 40 pp. 117-190.

¹⁸⁷ Jordaan B, The right to strike under the new constitution, (1995) *Labour Law News and Court Reports* 4 (6) pp. 1-5; ILO, Prelude to Change Industrial Relations Reform in South Africa, Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, (1992) *Industrial Law Journal* 13 pp. 739-783.

council or statutory council with jurisdiction or to the Commission for Conciliation, Mediation and Arbitration (CCMA).

In case that the issue in dispute concerns a refusal to bargain an advisory award must be made by a commissioner before a party can embark on industrial action. For a strike that at least 45 hours' written notice of the commencement of the strike must be given to the employer. A similar obligation is provided with regard to the commencement of a lock-out.

In contrast to the provision of the old LRA, under the new LRA there is no requirement for a ballot for a protected strike because the right to strike belongs to the employee and not to the union. However, a ballot is required to ensure democracy within the union. An employee may not be expelled or disciplined by a trade union for refusing to take part in a strike unless a majority of members have voted in favour of the strike. In the absence of a ballot or majority support, no action may be taken by the union against members who do not wish to join a strike. Where a ballot has not been held a member can approach the Labour Court for an order interdicting the industrial action or compelling compliance with the requirement. These provisions also apply to sympathy strikes.¹⁸⁸

Where workers take part in unprocedural industrial action, the other party doesn't have to follow agreed or statutory procedures before calling a strike or lock-out. An important provision relating to the conduct of industrial action is that a union can prevent any unilateral implementation in conditions of employment during the dispute resolution process. Registered trade unions have the right to stage peaceful pickets on public property outside an employer's premises. Pickets may be held on an employers' property only with the employer's agreement. The Commission for Conciliation, Mediation and Arbitration has the power to resolve disputes over issues dealing with picketing. But the inclusion of picketing in the LRA does not improve the rights that workers already have in terms of the constitution and the common law.¹⁸⁹

¹⁸⁸ Benjamin P, *Innovation and Continuity: Responding to the Labour Relations Bill*, (1995) *Industrial Labour Journal* 16 (2) pp. 258-277; Jordaan B, *The right to strike under the new constitution*, (1995) *Labour Law News and Court Reports* 4 (6) pp. 1-5; see: Cooper C, *Sympathy Strikes*, (1995) *Industrial Labour Journal* 16 (4) pp. 759-784.

¹⁸⁹ Benjamin P, *Innovation and Continuity: Responding to the Labour Relations Bill*, (1995) *Industrial Labour Journal* 16 (2) pp. 258-277.

5.2.3 Lock-outs

Lock-outs and strikes have always been regarded as countervailing economic weapons available to workers and employers in South Africa. This is also so under the new LRA. The restrictions on the right to strike apply equally to lock-outs. But, while recognizing the right to strike, the Act does not extend the same status to lock-outs. While the interim constitution did not specifically state that employers have a right to lock-out, the final constitution reduces the status of the lock-out. Chapter II of the constitution guarantees the right to strike but does not mention lock-outs at all. Such protection is to be found in section 241, which insulates all the provisions of the LRA, including the lock-out provision, from constitutional attack until they are amended or repealed. As far as the lock-out is concerned, the relevant provisions of the LRA can therefore not be challenged under the constitution for as long as they remain intact. To that extent, recourse to the lock-out is protected under the constitution.¹⁹⁰

The argument usually put forward in support of a prohibition is that strikes and lock-outs are in practice not on the same plane. The power to withdraw labour is counterbalanced by management's power to shut down production, to switch it to different purposes or transfer it to different places. The difficulty with this argument is that once management feels that it must respond to the threat of strike action in this way, it has already lost the dispute. It is foreseen that there will be strong opposition from trade unions here to the fact that employers will, in terms of the constitution, still be permitted to use lock-outs.¹⁹¹

5.2.4 Limitation relating to strikes, protest actions and lock-outs

In exchange for the protection of workers, the right to strike is limited in a number of ways. Disputes over existing collective agreements cannot form the issue of strikes or lock-outs. The most far reaching limitation is the exclusion of disputes of right from the agenda of permissible strike issues. These include disputes over the

¹⁹⁰ Jordaan B, The right to strike under the new constitution, (1995) Labour Law News and Court Reports 4 (6) pp. 1-5; Creamer K, The meaning and implications of the inclusion in the constitution of a right to strike and the Exclusion of a lock-out right. Towards asymmetrical parity in the regulation of industrial action, (1998) Industrial Law Journal 19(1) pp. 1-21.

¹⁹¹ Jordaan B, The right to strike under the new constitution, (1995) Labour Law News and Court Reports 4 (6) pp. 1-5.

exercise of the right of freedom of association and organisational rights, collective agreements, matters reserved for consultation in workplace forums and disciplinary action, dismissal and equality in the workplace. These disputes must be proceeded through statutory mediation and arbitration. Essential service workers may not strike at all and are still required to proceed by way of compulsory arbitration. Such services relate to those services the interruption of which endangers the life, personal safety or health of the whole or part of the population.¹⁹²

According to section 65 participation in a strike or a lock-out is unprotected if the person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute. Dismissal disputes have either to be referred to arbitration or the Labour Court, strikes over dismissals will not be permitted. If a strike or lock-out does not take place in conformity with the Bill, it can be interdicted by the Labour Court and the payment of compensation may be ordered in respect of any loss attributable to the action.

Employees who misconduct themselves during a strike may be dismissed provided the employer is able to establish that the dismissal is for a fair reason and in compliance with a fair procedure. Although employees who engage in a procedural strike are absolutely protected against dismissal for the act of striking, strikers may be dismissed because of the economic consequences of a strike. In such a case, the employer must comply with all the procedural requirements for a dismissal for economic, technological structural or similar reasons and will have to re-employer dismissed workers when business improves. They are not entitled to wages, but an employer is obliged to continue payments in kind, such as free accomodation, the monetary value of which may be recovered on application to the Labour Court after the strike.¹⁹³

5.3 GERMANY

5.3.1 Historical background and development

The first stage of development of the German system as all over Europe was the repression of industrial conflict. But this was soon abandoned because it was viewed as being incompatible with the principles of democracy and pluralism. The

¹⁹² Benjamin P, Innovation and Continuity: Responding to the Labour Relations Bill, (1995) *Industrial Labour Journal* 16 (2) pp. 258-277.

¹⁹³ Jordaan B, The right to strike under the new constitution, (1995) *Labour Law News and Court Reports* 4 (6) pp. 1-5.

second stage of development is characterized as tolerance of individual conflict. Strikes were not prohibited by criminal law because the freedom to strike was recognized, but they fell under the general principles of the private law of contract and torts. This ended in serious restrictions on strike actions as the participation of a worker in a strike normally entailed a breach of the employment contract.

In the third phase, Germany as the most democratic countries has recognized the right to strike. This recognition represented a fundamental innovation with respect to the classical principles of equality and democracy, since it recognizes the right of the workers alone to withdraw their labour in order to defend their economic and social interests.¹⁹⁴

As there is not legislation regulating industrial action, the German Federal Labour Court took on the role of a substitute legislature and developed legal rules on industrial action. The basis for this development was and still is article 9(3) of the constitution. Originally, the term industrial action was not even contented in this article. In connection with the so-called Emergency Laws of 1968, article 9(3), was amended to include a provision by which certain emergency measures may not be directed against industrial action, declared by association on either side, to safeguard and improve working and economic conditions. When article 9(3) of the constitution was amended in 1968 the law on industrial action, as developed by the courts, was already well established.¹⁹⁵

From the end of the Second World War until 1955, the German law of industrial action was developed piece by piece. Some courts held that participation in a strike was a ground for summary dismissal as it amounted to a breach of the employment contract.¹⁹⁶ Since 1955, the Federal Labour Court has succeeded in building up an industrial action jurisprudence. The basic and still leading decision of the Federal

¹⁹⁴ Treu T, Strike Regulation and Job Security, (1992) *Industrial Labour Journal* 13 (5) pp. 1053-1063; Weiss M, Labour Law and Industrial Relations in Germany, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp.1-206.

¹⁹⁵ Weiss M, Labour Law and Industrial Relations in Germany, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp.1-206; Otto H, *Muenchener Handbuch Arbeitsrecht*, (1993) 3 pp.410-739.

¹⁹⁶ Seegert C, *Die Formierung des Streikrechts: Arbeitsgerichtsbarkeit und Koalitionsrecht in Prozeßgesellschaftlicher Restauration 1946 bis 1955*, (1985) pp. 82. The relevant legislation was the industrial code (*Gewerbeordnung*) sections 123 and 124. See also sections 626 and 627 of the Civil Code (*Bürgerliches Gesetzbuch*).

Labour Court originates from 1955. In that decision the Großer Senat outlined the basic structure of the law on strikes and the law on lock-outs. According to the court a strike is a planned cessation of work by a large number of employees in order to achieve a certain aim.¹⁹⁷ Meanwhile the court has refined and modified this original position in many decisions.

From the guarantee of collective bargaining, the German courts have deduced a protection of strikes. They see them as a functional measure for the collective bargaining partners in order to achieve the conclusion of collective agreements. Article 9(3) of the constitution forms the in this regard legal basis for a constitutional guarantee to strike and lock-out, because strikes and lock-outs are regarded as indispensable to collective bargaining.¹⁹⁸ Collective bargaining as a constitutionally protected institution depends in the end on industrial action if the bargaining partners are unable to come to a deadlock.¹⁹⁹ Any industrial action for other purposes, whatever it may be, is understood to be illegal.

At present the positive recognition of the right to strike is a common characteristic of labour law in continental Europe; in fact it was explicitly included in the Social Charter of the Council of Europe of 1961.²⁰⁰

5.3.2 Strikes and lock-outs

This short discussion of article 9(3) of the Basic Law provides the background for a closer look at the German law on industrial conflict. A strike or lock-out must meet four criteria. Although there are no express statutory provisions in this field, the area of industrial action is extensively regulated in Germany.

¹⁹⁷ The collective aspect of industrial action is found in most definitions of strikes and lock-outs. In English Law, a strike is defined as the cessation of work by a body of persons employed acting in combination, or a concerted refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer: Employment Protection Act of 1978 c 44 sch 13 para 24(1).

¹⁹⁸ Mischke C, Industrial Action in German Law, (1992) *Industrial Law Journal* 13 (1) pp. 1-13; Federal constitutional Court 26 June 1991 and 2 March 1992; Federal Labour Court 21 April 1971 and 10 June 1980 and 12 September 1984.

¹⁹⁹ Otto H, *Muenchener Handbuch Arbeitsrecht*, (1993) 3 pp.410-739.

²⁰⁰ Treu T, Strike Regulation and Job Security, (1992) *Industrial Labour Journal* 13 (5) pp. 1053-1063.

Firstly industrial action is allowed only if the aim of the strike or lock-out is to pressure the other party to enter into a collective agreement which means the achievement of a collective bargaining agreement. The reason for this is that the legal basis of the right to strike and the right to lock-out is the right to bargain collectively as guaranteed by article 9(3) and therefore the right to take industrial action is limited.²⁰¹

The functional link between industrial action and collective bargaining also implies limitations on the freedom to resort to industrial action. It implies that industrial action may be taken only by parties who have the capacity to enter into collective agreements and only with objects that can be subject-matter of collective agreements. This implies a rejection of unofficial as well as political strikes and strikes by civil servants. This is not without potential problems. Industrial action becomes a mere adjunct to collective bargaining. It has no independent status of its own and its scope is determined by the scope of the collective bargaining.²⁰²

Secondly not all coalitions within the meaning of article 9(3) are entitled to call a strike or lock-out. There is a great difference between the status of a coalition according to article 9(3) where independence of an association is an requirement and the legal capacity to conclude collective agreements within the meaning of section 2 of the Act on Collective Bargaining Agreements.²⁰³ The Federal Labour Court held that a coalition only has the right to strike and lock-out and conclude collective agreements if they have a democratic organisation, have certain bargaining power, display a willingness to enter into collective agreements etc.²⁰⁴

Thirdly the strike or lock-out underlies the principle of reasonableness. The industrial action has to be necessary in order to persuade the other party to conclude a bargaining agreement; it has to be a suitable means to fulfil the intended purpose. Furthermore, industrial action is subject to an ultima ration principle which means that industrial action can only be used as a last means when all

²⁰¹ Hanami T, Blainpain R, *Industrial conflict resolution in market economies* (1989), pp. 81-133; Federal Labour Court 26 April 1988; Federal constitutional Court 26 June 1991; Otto H, *Muenchener Handbuch Arbeitsrecht* (1993) 3 pp.410-739.

²⁰² Mischke C, *Industrial Action in German Law*, (1992) *Industrial Law Journal* 13 (1) pp. 1-13; Däubler W, *Das Arbeitsrecht*, (1998) 1 pp. 286ff.

²⁰³ Federal constitutional Court 18 November 1954.

²⁰⁴ Federal Labour Court 15 November 1963 and 25 November 1986; Federal Labour Court 16 November 1982 and 10 September 1985 and 25 November 1986 and 16 January 1990; Federal constitutional Court 6 March 1964 and 20 October 1981.

alternative measures of negotiation have been failed.²⁰⁵

Finally the law should be interpreted in a way which ensures each party is not in a position to dominate the other.²⁰⁶

5.3.3 Limitation relating to strikes, protest actions and lock-outs

The extent and types of limitations on the right to strike and lock-out follows deeply rooted traditions and political and legal ideologies. Concerning strikes it is important which subject can decide on and organize strikes. In Germany strike action is considered to be the province of unions, and an unofficial strike is not protected by the law. Political strikes as such are also considered illegal.²⁰⁷

The Federal Labour Court had held that strikes and lock-outs are equal weapons and the lock-out is protected as the strike. But the form of regulation differs from that concerning strikes. In two fundamental decisions in 1971 and 1980, the Federal Labour Court imposed strict rules upon lock-outs. In the 1971 decision, the Court strictly limited the power of the employer to terminate a contract during a lock-out. In terms of this decision, an employer may only carry out a suspensive lock-out, meaning that the employment relationship continues for the duration. Exceptions are permitted during lengthy and particularly heated industrial conflict and in the case of illegal strikes.

In the 1980 decision, the Federal Labour Court placed severe limitations on defensive lock-outs which employers may resort to in order to warn off a strike. Without the strike trade unions would not be in a position to bargain. Strikes forced the employer to weigh up the potential damage that a strike could cause against the consequences of yielding to the demands of the union. But this cannot be said of the lock-out because the employer is by his position as employer, in a powerful position already. The Court tries to make sure that there is a certain equilibrium between trade unions and employers' association. For this reason, the right of the employer to lock-out his employees has been made the subject of certain restrictions. The number of employees affected by a lock-out must be in a

²⁰⁵ Federal Labour Court 21 April 1971 and 28 January 1955; Hanami T, Blainpain R, Industrial conflict resolution in market economies (1989), pp. 81-133.

²⁰⁶ Federal Labour Court 28 January 1955; Federal Social Court 9 September 1975.

²⁰⁷ Treu T, Strike Regulation and Job Security, (1992) Industrial Labour Journal 13 (5) pp. 1053-1063.

certain proportion to the number of workers participating in the strike. The limit is, according to this, 50% of the employees in the area covered by the collective agreement.²⁰⁸

The court held that lock-outs are to be retained as a tactical measure. Employers may resort to lock-out as a defensive measure in order to widen the scope of the industrial action. Thereby the union's bargaining position would be weakened and this would restore the balance of bargaining power.²⁰⁹ These principles were approved by the Federal constitutional Court in 1991. The Court held that the limitation on the right to lock-out did not conflict with the principles of freedom of association as guaranteed in the constitution as there is nothing in the constitution which entrenches the scope and nature of the measures that employers and unions may resort to in order to pressurise the other party to accede to their demands.²¹⁰

5.4 COMPARATIVE SUMMARY

5.4.1 Procedural requirements

According to section 64(1)(b) of the LRA where a at least 48 hours' written notice of the commencement of the strike must be given to the employer, the council or the employers' organisation, no such obligation exists in the German law. Regarding to some labour lawyers the implementation of a duty to give notice would be contrary to with the autonomy to bargain collectively as guaranteed in article 9(3) of the constitution and therefore illegal because the law must ensure that the strike will take the employer by surprise to be effective.²¹¹

However as already mentioned the strike or lock-out underlies the principle of reasonableness and the parties have to exhaust and fail all possibilities of negotiations.

²⁰⁸ Federal Labour Court 11 August 1992; Mischke C, *Industrial Action in German Law*, (1992) *Industrial Law Journal* 13 (1) pp. 1-13; Hanami T, Blainpain R, *Industrial conflict resolution in market economies*, (1989) pp. 81-133.

²⁰⁹ BAG AP Nr 64,65,66 ad art 9 GG *Industrial Action*.

²¹⁰ Mischke C, *Industrial Action in German Law*, (1992) *Industrial Law Journal* 13 (1) pp. 1-13.

²¹¹ Otto H, *Muenchener Handbuch Arbeitsrecht*, (1993) 3 pp.410-739.

In contrast to the new LRA where there is no requirement for a ballot for a protected strike but to ensure democracy within the union the legal situation is different in Germany. This is because there is no reason for a ballot requirement as a precondition for registration which doesn't exist in the German Law.²¹² Moreover as it is the case in South Africa in section 11(4) of the constitution, in Germany under article 9(3) every trade union enjoys the right to regulate its affairs without interference by the State. Contrary to this guarantee would be a provision for a ballot.

According to section 2(1) of the German Act on Collective Bargaining Agreements, coalitions have to be democratically organized to be an association withing the meaning of article 9(3).²¹³ Regarding to some academics in Germany associations must make provisions for a ballot in order to fulfil the requirement of a democratic organisation.²¹⁴ This would mean that the lawfulness of an industrial action would be affected by the incorporation of a ballot clause.

5.4.2 Limitation relating to strikes, protest actions and lock-outs

In contrast to the new South African LRA under the new constitution where every individual employee has the right to strike which according to section 213 can be exercised only by a muliplicity of employees the position is a different under German law. In Germany participation is allowed only if the strike is organized by a trade union which has the legal power to conclude a collective agreement. Trade unions within the meaning of section 2 of the Act on Collective Bargaining Agreements enjoy a right to call a strike as part of the constitutional protection of article 9(3) of the constitution.²¹⁵

Individual employees have a right to participate in a strike. The reason for giving non-union members the same right to join the strike as members is because otherwise a strike wouldn't be powerful enough to force the employer to bargain. The Federal Labour Court has held that spontaneous associations of employees are not qualify as trade unions within the meaning of section 2 and they are not

²¹² Loewisch M, Muenchner Handbuch Arbeitsrecht, (1993) 3 pp. 39-409.

²¹³ Federal Labour Court 15 November 1963 and 25 November 1966; constitutional Court 6 May 1964.

²¹⁴ Loewisch M, Muenchner Handbuch Arbeitsrecht, (1993) 3 pp. 39-409 (208).

²¹⁵ Federal Labour Court 10 June 1980; Loewisch, Münchner Handbuch Arbeitsrecht, (1993) 3 pp. 121f.

coalitions according to article 9(3).²¹⁶ So not all coalitions within the meaning of article 9(3) are entitled to call a strike or lock-out. There is a great difference between the status of a coalition according to article 9(3) where independence of an association is an requirement and the legal capacity to conclude collective agreements within the meaning of section 2 of the Act on Collective Bargaining Agreements.²¹⁷

This is the case in South Africa because section 95(1) of the LRA requires also the independence for registration. But contrary to South Africa where the requirement applies only to trade unions, independence in Germany is required for employers' associations as well. The Federal Labour Court held that a coalition only has the right to strike and lock-out and conclude collective agreements if they have a democratic organisation, have certain bargaining power, display a willingness to enter into collective agreements etc.²¹⁸

According to section 65(1)(a) of the South African LRA where participation in a strike or a lock-out is unprotected if the person is bound by a collective agreement that prohibits a strike or lock-out, German law is more or less the same in this respect. If a party enters into industrial action with the aim of reaching an agreement on an issue of an existing collective agreement that would be unlawful because the strike or lock-out is contrary duty to hold peace. This duty is regarded in Germany as a necessary part of the collective bargaining agreement.²¹⁹ In Germany the parties to a collective agreement are free to extend the peace duty.

First they can establish a duty to hold peace in respect of a matter which has not been regulated in their collective agreement. This could be the case under section 65(1)(a) of the LRA. Second the parties are able to expand the duty of peace beyond the expiry of the collective agreement. There are a number of collective agreements in Germany where this is the case. But the power to extend the peace obligation is not unrestricted because the right to take industrial action is part of

²¹⁶ Federal Labour Court 20 December 1963, 21 November 1969, 17 December 1976 and 14 February 1978; Otto H, Muenchener Handbuch Arbeitsrecht, (1993) 3 pp.410-739 (495).

²¹⁷ Federal constitutional Court 18 November 1954.

²¹⁸ Federal Labour Court 15 November 1963 and 25 November 1986; Federal Labour Court 16 November 1982 and 10 September 1985 and 25 November 1986 and 16 January 1990; Federal constitutional Court 6 March 1964 and 20 October 1981.

²¹⁹ Federal Labour Court 31 October 1958.

the Koalitionsfreiheit and nobody can dispose of this fundamental right.²²⁰ Therefore an extension of the duty to maintain peace is limited where it would amount to a waiver of the constitutionally guaranteed right. Article 9(3) expressly prevents coalitions from disposing of their fundamental right. As regards the situation in South Africa parties to a collective agreement may even dispose of non-union members' rights to strike according to section 65(1) of the LRA.

Section 65(1)(b) of the LRA prohibits industrial action if there is an agreement to refer the issue in dispute to conciliate. This is also the legal position in Germany because parties are free to enter into such an agreement. The parties are not only free to establish a conciliation procedure but are also free to use it or not to use it if they have not agreed otherwise in their collective bargaining agreement and conciliation is a contractual duty.²²¹ Article 9(3) of the constitution states that any agreement between the parties which has the effect of taking away the right to strike or restricting this right is unlawful and therefore null and void. According to its wording, section 65(1)(b) of the LRA may apply not only to collective agreements but also to agreements between individual employers and employees. In South Africa labour lawyers have already raised doubts whether the provision can be regarded as constitutional.²²² From a German point of view these objections are not without foundation.

5.4.3 Consequences of strikes and lock-outs

As far as the consequences of a protected strike or lock-out are concerned it is of importance if participation in a strike means that there is no legal basis for claiming remuneration from the employer. Section 67(3) of the LRA states that the employer is not obliged to remunerate the employee during a protected strike or lock-out. The position in German law is the same because a lawful strike or lock-out has the effect of suspending the essential duties of the parties to the contract of employment.²²³

²²⁰ Loewisch M, *Muenchner Handbuch Arbeitsrecht*, (1993) 3 pp. 39-409 (391f).

²²¹ Otto H, *Muenchener Handbuch Arbeitsrecht*, (1993) 3 pp.410-739 (503f).

²²² Du Toit D, *The Labour Relations Act of 1995*, (1996) p.188.

²²³ Federal Labour Court 28 January 1955, 14 December 1993, 22 March 1994 and 11 July 1995.

Secondly, it is of importance if a worker who participates in lawful industrial action is protected from dismissal by the employer. According to section 67(4) of the LRA, an employer is prevented from dismissing an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike. The German law is very similar, but as is the case in South Africa (section 67(5) of the LRA), the employer's power to dismiss the employee for other reasons remains unaffected.²²⁴

As far as the consequences of an unprotected strike or lock-out are concerned the question is what the sanctions are. According to section 68(1) of the LRA the Labour Court has exclusive jurisdiction to grant an interdict or order to restrain any person from participating in unprotected industrial action and to order the payment of just and equitable compensation for any loss attributable to strike or lock-out. In this regard the German legal position is similar.²²⁵ According to section 68(1)(b) of the LRA the plaintiffs are not necessarily entitled to the full amount of their proven damages but are entitled only to such compensation as is just and equitable. Compensation is the issue; the right to claim for damages in the ordinary courts in terms of principles of the common law is not expressly stated.²²⁶ In German law the plaintiff can claim the full amount of damages.

In regard of dismissal, German law is again similar to South African law. Section 68(5) of the LRA states that participation in an unprotected strike is not a fair reason for dismissal, but in determining whether or no the dismissal is fair the relevant code of Good Practice has to be taken into account. That means that the employer should contact a trade union official before terminating the employment relationship. In German law participation in an illegal strike also does not necessarily constitute a sufficient reason for dismissal but it may very well be that a dismissal is justified. But unlike the position in the Code of Good Practice, the employer is not bound to contact a trade union official.²²⁷

²²⁴ Federal Labour Court 21 October 1969; Otto H, *Muenchener Handbuch Arbeitsrecht*, (1993) 3 pp.410-739 (607).

²²⁵ Otto H, *Muenchener Handbuch Arbeitsrecht*, (1993) 3 pp.410-739 (617f).

²²⁶ D Toit D, *The Labour Relations Act of 1995*, (1996) p.198.

²²⁷ Federal Labour Court 21 April 1971, 29 November 1983 and 21 October 1969.

5.5 CONCLUSION

The fact that in Germany the right to strike and the right to lock-out are derived from the constitutional guarantee of the autonomy to bargain collectively has two results. Firstly, strikes and lock-outs are only guaranteed insofar as they relate to collective bargaining. This means that the lawfulness of industrial conflict is more restricted than is the case in South Africa. Secondly, under the German law the legislator, which in these disputes issues is the Federal Labour Court, is prevented from interfering in the affairs of the social partners.

A comparison of the two industrial conflict systems shows that the courts in Germany have developed certain rules which the legislator in South Africa has not introduced. These relate to issues such as whether the law has to guarantee parity between the parties to a conflict²²⁸, the conditions under which employees who are laid off during an industrial action can claim unemployment benefits from the state²²⁹, and whether, as a result of the effect of a strike, an employer can lay off its employees.²³⁰ It could very well be that the court in South Africa will find themselves in a situation where they have to decide these or similar questions without enjoying much help from the legislator.

The new LRA under the new constitution will be the beginning of a new phase in the development of the South African labour jurisprudence. But whether the LRA will succeed in reducing industrial unrest and reduce the number of strikes in South Africa will depend, on how it and the structures it introduces are received and perceived by organised labour and capital.

Whether it accomplishes its other commendable goal – that of simplifying the rules of the workplace and cutting down the time and cost of dispute settlement – is another question. What they have done is to broaden the definition of industrial action, simplify pre-strike procedures, limit the circumstances in which strike action is permissible and accord strikers a measure of statutory protection. Rules are kept to a minimum and technicalities reduced.

²²⁸ Federal Labour Court 10 June 1980, 11 August 1992; Mischke C, *Industrial Action in German Law*, (1992) *Industrial Law Journal* 13 (1) pp. 1-13.

²²⁹ Weiss M, *Labour Law and Industrial Relations in Germany*, (1994) *International Encyclopedia for Labour Law and Industrial Relations* 5 pp.1-206 (165).

²³⁰ Federal Labour Court 10 June 1980.

The elimination of the ballot requirements may deprive employers of the means of interdicting strikes on technical grounds. But it potentially jeopardises an employee's right not to join strike action. The protection clause to allow employers to dismiss procedural strikers on economic grounds and the provision that they may only be dismissed if the fact justifies such action, arguably take South Africa no further than the former law. The most significant change is the requirement that strike action may only be resorted to in respect of disputes which cannot be settled by the Commission or the Labour Court. This will give these bodies extensive powers to intervene in matters. Allowing strikers who ignore the provisions of the LRA to contest their dismissals gives the Labour Court a wide discretion to condone non-compliance.

CHAPTER 6

CONCLUSION

Having presented and compared the impact of the new South African and German constitutions on labour law and the extent to which it exists, I will attempt to substantiate my opinion that the South African constitution will achieve success, have a profound impact on labour law and labour relations and improve the working lives of employers in many aspects. This view is supported by the history of the German constitution.

A comparative paper has to take into account the different histories and the different economic and political context of the legal systems it compares. Labour relations are directly affected by the characteristics of the existing economic system. The contrasting facts of the development of various employees' rights governing the relationship between employers and employee collectivities and their historical background in South Africa and Germany make a comparison interesting, because they help to examine the problems and benefits of each system.

Systems of labour laws as in Germany have experienced a different judicial performance particularly as a result of the constitutional entrenchment of workers' rights. Where fundamental rights have been adopted, their effect on employment and labour law was great. This happens sometimes in a sense favourable to labour or in a sense favourable to capital. There is the growing tendency towards integration of labour law over wide areas, under the impact of the harmonisation of Law by the European Community.²³¹

In Germany a constitutionally enshrined charter of rights has already formed the object of extensive litigation and discussion. The influence of the Bill of Rights of the German constitution is all-pervasive, and this is particularly true of employment

²³¹ Kahn-Freund O, *The impact of constitutions on Labour Law*, (1976) *Cambridge Law Journal* 35 (2) pp. 240-271.

and labour law. The most important legal source in this respect is Article 9(3) of the Basic law. Important parts of the German law on collective agreements and industrial conflict are a result of court interpretation of this Article.

In Germany the debate is far more advanced than is the case in South Africa and serves therefore as a fruitful source of information to South Africa. The fact that the German controversy has flared up again after the reunion of East and West Germany causes German constitutional law to be of exceptional topical interest.²³²

The German Basic Law comprises a hierarchical value system which has to be interpreted in accordance with the intention of the framers. This objective order of values shows the constitution to be the incorporation of the basic value choices of the framers. It should be considered that the German constitutional interpretation is due to Germany's unique historical experience and its legal and political traditions and culture. But German and South African political, cultural and historical experience are not dissimilar, so that there is an interrelationship between the structural theory of interpretation and the objective theory of values.²³³

The German constitution plays a dominant role in the field of labour law. This is especially the case for collective labour law where legislation is very fragmented. The problems not regulated by the German legislator have to be solved by recourse to the constitution. All the rules on industrial conflict were developed by interpretation of principles laid down in the constitution.

Unlike the constitution of South Africa the first 19 Articles of the Bonn Basic Law of 1949 didn't have to supply a set of common values for a heterogeneous society, because the national society of Germany is very homogeneous. But the German constitution had to fill gaps left by a broken history.

On the one hand it was intended to be a clear commitment to some elementary principles of justice and civilisation which had been abandoned in Germany in the past. On the other hand it was intended as an emphatic proclamation of that rule of law which had been abandoned in the East of Europe right next to Germany.

²³² Davis D, constitutionalization of Labour Rights, (1994) Van Wyk, Rights and constitutionalism: The new South African Legal Order, pp. 439-454.

²³³ Lourens J, Frantzen M, The South African Bill of Rights – public, private or both: a viewpoint on its sphere of application, (1994) International Comparative Law Journal of South Africa pp. 340-356.

The fundamental human rights were formulated in very general terms. They left the influence to the Courts to interpret them, but the historical experience of Germany and a order of values underlying the Basic Law gives them a great substance. Finally there is power through interpreting these inviolable and inalienable human rights of Article 1 of the Basic Law as "the foundation of any community of men, and of peace and justice in the world".

After four decades of apartheid South Africa's constitutional and legal order underwent a transformation to a political democracy with the amendment of the interim constitution on 27 April 1994. It proclaimed in Chapter 1 the aim to advance economic development, social justice, labour peace and the democratisation of the workplace. The interim constitution was replaced by the final constitution.

The new constitution affects labour law in a number of ways. All labour relations, employment and social security legislation are subject of the constitutional instance. The Chapter 3 of the constitution has several provisions that specifically regulate labour relations. Of these the most important is section 23.

First it gives every person the right to fair labour practices. Then it gives workers the right to form trade unions, to join those that have been formed, to organize collectively, to bargain collectively and to strike for the purposes of collective bargaining. Finally, it gives employers the right to form employers' organizations, to join those that have been formed, to organize collectively, and to bargain collectively and to lock-out for the purposes of collective bargaining.

There are three different ways in which these rights impact on labour law. There are direct challenges to the constitutional validity of legislation and administrative actions which means that the constitutional Court can strike down laws of parliament because they do not conform with the rights. Then the constitution provides interpreting legislation to conform with the chapter of fundamental rights and understand labour law. Finally the constitution has a possible application to the common law.²³⁴

²³⁴ Cheadle H, Impact of the constitution on Labour Law, (1994) Current Labour Law pp.73-84.

The possible impact of some of the above rights will be discussed within that framework. This framework is historical. An historical approach will help to understand current developments and problems through the examination of what happened in the past.

Firstly, I will give some reflections on the South African experience in policy making under the new constitution since 1994.

South Africa has over the past four and a half years been engaged in successful far-reaching reforms aimed at restructuring the labour market. South Africa has made significant progress in implementing the key pillars of the Ministry of Labour's Five Year Program of Action which was announced in 1994. This included ensuring that the labour market policies promoted economic growth and restructuring, employment absorption, sound and stable labour relations, the elimination of workplace inequality, discrimination and skills development.

The main achievements have related to the enactment of major new labour laws and the establishment of new programmes and institutions to ensure the effective implementation of these laws. The LRA marked the first chapter of legislative programme.²³⁵ It is the first labour statute that must comply with the provisions of the constitution and gives effect to the basic principles of the ILO.

South Africa inherited a labour market based on economic deprivation, adversarial labour relations and the denial of worker rights, massive income and wealth disparities, systematic discrimination against black people, and high unemployment levels. The level of strikes arising from the denial of such basic rights as freedom to form and belong to unions, unfair dismissal or retrenchments and the denial of reasonable conditions of service. These conditions of instability were never going to encourage investment in South Africa's economy, hence the enactment of the LRA under a new constitution.²³⁶

The Act made provision for a new labour relations dispensation, the highlights of which include enhanced organisational rights for trade unions, entrenched the

²³⁵ Mdladlana M, Speech by the Minister of Labour, 1999/2000 Labour Budget Vote in the National Assembly, (15.03.1999) [http:// www.irnet.co.za/special](http://www.irnet.co.za/special).

²³⁶ Mdladlana M, Statement by the Minister of Labour, Parliamentary briefing week, (15.02.1999) [http:// www.irnet.co.za/special](http://www.irnet.co.za/special).

constitutional right to strike, simplified dispute resolution procedures, the promotion of the constitutional right of collective bargaining at the sectoral and workplace level and the codification of dismissal procedures. More efficient institutions have been established to deliver a stable and peaceful labour relations environment.

Has the LRA under the new constitution been successful in South Africa?

I will argue that it has. I see increased democracy, greater pragmatism and freedom for South African workers to form representative organizations to engage in collective bargaining with their employers and to participate in decisions affecting society and the workplace. This view is supported by the development of the German constitution.

The largest single increase in trade union membership came in South Africa, which saw unionization rates leap by 130.8 per cent, with most of the increase coming in the post-apartheid era. The trade union membership increased precisely because it is now easier to organise, to secure rights of access, stop order facilities, agency shop agreements and so on. Union membership has increased and with the introduction of organisational rights, the legitimacy of trade unions has been enhanced. The number of unionised workers is increased from 2,4 million in 1994 to 3,8 million in 1998. This constitutes almost 77% of workers in registered non-agricultural employment and approximately 26% of the estimated 14 356 000 economically active population. In contrast much of the decline in Germany's unionization rate (20 per cent versus a 16 per cent average in the EU) is attributable to the drop in former East Germany.²³⁷

While in Germany the freedom of association was recognised since 1918 the new South African constitution marks a significant change from the way that the freedom of association rights were protected in the past.

The heterogeneity of the population and the history of politics in South Africa, have resulted in a seriously divided trade union movement and an adversarial relationship between employers and the state. Ideological differences relating race,

²³⁷ ILO, ILO Highlights Global Challenge to Trade Unions, <http://www.irlnet.co.za> Geneva 1997.

politics and economic systems have prevented trade unions from perceiving their common interests.

The impact of the new South African constitution on labour law concerning freedom of association is considerable. Section 23(2) protects the right of employers and employees to belong to trade unions and employers' organisations. Employers and employees are guaranteed freedom of association by the LRA and enforceable by a new Labour Court with Supreme Court status. The right to freedom of association and protection of the right to organise closely follow the ILO's Convention on Freedom of Association and Protection of the Right to Organize (87 of 1984) and guarantees employees the right to form, join and hold office in trade unions.

Article 9(3) of the German Basic law is the equivalent of section 23(2)-(4) of the constitution of South Africa. In contrast to section 23(2) of the South African constitution, no express provision is made for trade unions and employers' association. But in Germany the role of unions as organizations representing the workers' interest is generally accepted and uncontested. The German constitution contains in article 9(3) the guarantee of freedom of association, which means in the context of industrial relations the freedom to form a trade union, to join a trade union and to participate in the activities of a trade union.

In South Africa the role of the trade unions has changed with the new constitution. It is a fact that trade unions have a strong position in South Africa. Because of their right to establish a trade union based workplace forum and conclude collective agreements about the constitution and details of workplace forums, unions get direct access to plant and plant related issues. This is unknown in Germany. Trade unions are active at industry level.

Trade unions have an important role to play in ensuring that dismissed workers, farm and domestic workers, disabled workers all benefit from these new laws. Firstly, I believe it is important that workers know about these new laws. Know their rights – rights to be treated fairly at work, to certain basic conditions of employment, to join trade unions. Unions play a vital role in informing workers about their rights.

Secondly, the laws provide opportunities that can advance worker rights, strengthen trade unions and advance industrial democracy. The LRA allows for closed and agency shops. These can contribute to labour stability and the advancement of collective bargaining at plant and sectoral level.

In spite of legal barriers and cultural differences, trade unions are increasingly developing their international ties, notably by participation in international forums, confederations and by increased direct contacts of trade unionists with counterparts overseas, notably those employed by multinational corporations.

The new freedom of association is a chance to increase integration in South Africa's society in the future.

In its short two-year life span, this legislative framework has enabled South Africa to establish more institutions to deliver a more efficient labour relations system. The new LRA has introduced first class dispute resolution mechanisms. Both business and labour are satisfied with the services provided by leading dispute resolution institutions, the CCMA and the Labour Court.

While the CCMA, as a new organisation, has had its growing pains, it has offered a vastly improved service, a service that is speedier and more accessible than in the past and one which compares favourably with similar services offered in many other countries. The CCMA has been able to resolve over 70% of the disputes referred to it. These interventions by the CCMA and the many cases dealt with by the Labour Court have significantly helped avoid disruptive strikes previously caused by conflicts other than those related to the collective bargaining processes.²³⁸

While in Germany the right of collective bargaining was fully recognised as a part of the constitutional guarantee of the freedom of association since 1949 the new South African constitution marks a significant break from the way that rights bound up with collective bargaining were protected in the past. Section 23(4) of the constitution entrenches the right to bargain collectively. This right closely follows the ILO's Convention 98 on the right to organize and bargain collectively and eliminates the legislation of apartheid and unfair labour practice in workplaces.

²³⁸ Mdladlana M, Speech by the Minister of Labour, 1999/2000 Labour Budget Vote in the National Assembly, (15.03.1999) [http:// www.irnet.co.za/special](http://www.irnet.co.za/special).

While under the 1956 LRA the labour courts sought to encourage collective bargaining as the preferred method of resolving workplace disputes, the new Act expressly commits employers and employees to workplace democracy, which entails the active promotion of participative management and joint decision-making. The LRA has contributed significantly to improving the functioning of collective bargaining and dispute resolution. This is particularly evident when compared to the pre-1994 period, rather than the previous year. In 1994, 2,5 million workdays were lost compared to 2,3 million in 1998. Registered bargaining councils now cover 32% of the workforce and approximately 53 000 employers.²³⁹

In stark contrast to Section 23(4) of the South African constitution the German constitution did not include an express right of collective bargaining. However, according to the German constitutional Court, the autonomy to bargain collectively is part of the constitutional guarantee of the freedom of association and, with that, the foundation of a system of collective agreements. Otherwise the associations would not be able to fulfill their function and arrange a detailed working life by collective agreements. It wouldn't make sense, on the one hand, to give employees and employers the right to form associations, and on the other hand, to withhold the right to collective bargaining.

In contrast to the German constitution the South African constitution entrenches the right to bargain collectively in support of such bargaining. The entrenchment of the right to bargain shields the Courts from attacks on the duty to bargain orders it makes and enshrines the right of public servants of bargain. In Germany the in general terms formulated right of association, left the influence to the Courts to interpret it, but the historical experience of Germany and an order of values underlying the constitution gives them a great substance.

In Germany, participation on plant level is the result of a gradual process. Participatory structures were introduced in the 1890's, the present structures and principles draw on a long tradition. In contrast, until the recently participation in South African workplaces existed only rarely and was largely inconsequential. Most South African companies have never had participation in their workplaces.

²³⁹ Mdladlana M, Statement by the Minister of Labour, Parliamentary briefing week, (15.02.1999) <http://www.irnet.co.za/special>.

The employment and the economy demanded reform of the labour relations system. With workplace forums a new form of participation has been introduced. Workplace forums, in the context of the LRA, are advanced and demanding institutions. Although the introduction was precipitated by economic considerations, it was not a consequence of historical development. The participation structure does not built on tradition; it has been offered to unions and thrust upon employees without any precedent. It remains to be seen how many will be established in companies.

The new LRA aims to give effect to new constitutional rights, to promote collective bargaining and consultation and joint decision making in the workplace. This law has clearly had a significant positive impact on the country's participatory system in workplaces. It has laid the foundations for a more peaceful and stable labour relations environment and enabled South Africa to move away from the adversarialism of the past. The introduction of a participatory structure seems consequent since the South African nation decided in favour of a democratic state system. This leads naturally to democratization of the work structure.

The new LRA under the new constitution introduced a model similar to the German works council. The basic structures and principles are the same.

The role of trade unions, however, is one of the main differences between the workplace forum and the works council. South African unions are the only institutions able to apply for the establishment of workplace forums; they also are able to conclude collective agreements about the constitution and details of workplace forums. They can apply for ballots to dissolve workplace forums. The German unions have only a supportive role and their influence is limited by law.

The fact that trade unions have such a strong position in South Africa has other consequences. Because of their right to establish a trade union based workplace forum, unions get direct access to plant and plant related issues. This is unknown in Germany. Trade unions are active at industry level. The Works constitution Act regarding the functions and the topics of works councils is compulsory. The relationship between collective agreements and the decisions made by employer and works council is well defined.

In South Africa the parties are not forced to cooperate. They can rather choose confrontation and enter in industrial action. The LRA prescribes possibility of economic power if the employer consulted the workplace forum but it did not agree with the proposed decision. This introduces a risk. Economic power is considered to be one of the main causes of economic problems and unproductiveness.

The workplace forum has been established for enhancing the productivity and profitability through rising the motivation of the employees. It seems doubtful that motivation can be increased if a low trust relationship and an atmosphere of adversarialism predominates. The parties, used to adversarialism, will use the strike opportunity to push through their interests in matters of consultation. Therefore the problem of conflict and low trust in South African labour relations is likely to continue. Organized labour cannot but reflect the accumulated aspirations of a deprived working population. The institution of workplace forums will need to be experienced as a means towards realizing at least some of these aspirations.

Without doubt, it would have been helpful to define the provisions of the Act to avoid conflict and misunderstanding. If the consultation mechanisms are used by the parties, conflict must be expected.

Adversarial industrial relations is treated as a central obstacle to economic progress. Cooperation, in contrast, emerges as a decisive factor in the quest for competitiveness. Such a view is not prevalent among authorities on the systems of worker participation in countries such as Germany which helped to inspire the draft bill. Plant level industrial relations is understood as only one of several factors which determine economic performance.

In South Africa, the attitude of the parties has been influenced by the historical experiences through which present labour relations have been shaped. Decades of deprivation, conflict and mistrust on the part of black workers will not disappear overnight. Organized labour cannot but reflect the accumulated aspirations of a deprived working population. The institution of workplace forums will need to be experienced as a means towards realizing at least some of these aspirations, or it is unlikely to gain credibility.

While in Germany the rights of strikes and lock-outs were fully recognised as a part of the constitutional guarantee of the freedom of association since 1964 the new South African constitution marks a significant break from the way that strikes and lock-outs rights were protected in the past. Although strikes that were in conformity with the former LRA were protected from civil and criminal legal proceedings, there were no explicit statutory protection from dismissal for striking employees and significant categories of workers might not strike at all.

The impact of the South African constitution on labour law concerning strikes and lock-outs is considerable. Section 23(4) of the constitution entrenches the right to strike and lock-out for purposes of collective bargaining. The new LRA complies with the requirements of the new constitution and with international labour standards, in particular, ILO Conventions 87 and 98 of 1948 which deal with freedom of association and the right to organise and bargain collectively. The ILO held that the right to strike is included in the right established by Convention 87, of workers to pursue lawful activities for the defence of their occupational interests. Under the LRA it is the individual employee who has the right to strike. Employees may not be dismissed for participating in a strike staged in conformity with the Bill. This is a further indication of the effect of ILO jurisprudence on the Bill.

In stark contrast to Section 23 of the South African constitution the German constitution did not include an express right of strikes and lock-outs. From the guarantee of collective bargaining, the German courts have, deduced a protection of strikes. They see them as a functional measure for the collective bargaining partners in order to achieve the conclusion of collective agreements. Article 9(3) of the constitution forms the in this regard legal basis for a constitutional guarantee to strike and lock-out, because strikes and lock-outs are regarded as indispensable to collective bargaining.

The fact that in Germany the right to strike and the right to lock-out are derived from the constitutional guarantee of the autonomy to bargain collectively has two results. Firstly, strikes and lock-outs are only guaranteed insofar as they relate to collective bargaining. This means that the lawfulness of industrial conflict is more restricted than is the case in South Africa. Secondly, under the German law the legislator, which in these disputes issues is the Federal Labour Court, is prevented from interfering in the affairs of the social partners.

There has been an overall decrease in strike action and strike-related violence during the period since 1994, except for 1998, which saw an increase that nonetheless remained below the pre-1994 period. Unlike in the past, the vast majority of strikes have been within the law.

The new LRA under the new Constitution was the beginning of a new phase in the development of the South African labour jurisprudence. But whether the LRA will succeed in reducing industrial unrest and reduce the number of strikes in South Africa will depend, on how it and the structures it introduces are received and perceived by organised labour and capital.

Whether it accomplishes its other commendable goal – that of simplifying the rules of the workplace and cutting down the time and cost of dispute settlement – is another question. What they have done is to broaden the definition of industrial action, simplify pre-strike procedures, limit the circumstances in which strike action is permissible and accord strikers a measure of statutory protection. Rules are kept to a minimum and technicalities reduced.

The elimination of the ballot requirements may deprive employers of the means of interdicting strikes on technical grounds. But it potentially jeopardises an employee's right not to join strike action. The protection clause to allow employers to dismiss procedural strikers on economic grounds and the provision that they may only be dismissed if the facts justify such action, arguably take South Africa no further than the former law. The most significant change is the requirement that strike action may only be resorted to in respect of disputes which cannot be settled by the Commission or the Labour Court. This will give these bodies extensive powers to intervene in matters. Allowing strikers who ignore the provisions of the LRA to contest their dismissals gives the Labour Court a wide discretion to condone non-compliance.

The South African active labour market policies were not only aimed at the entrenchment of rights enshrined in the constitution, but also at building a more efficient and productive economy. According to the South African Reserve Bank, productivity increased from 107.2 in 1994 to 126.4 in June 1998.²⁴⁰

²⁴⁰ Mdladlana M, Statement by the Minister of Labour, Parliamentary briefing week, (15.02.1999) <http://www.irmnet.co.za/special>.

However, also present in the labour market are features that could threaten the labour market stability that has been achieved over the last period. Two of the most significant threats are:

The high income differentials that exist in South Africa. This is illustrated by the fact that South Africa has one of the highest levels of inequality in the world. About 3 million workers earn less than the household minimum level, and between one third and a half of the total population live below the poverty datum line. This, coupled with the fact that workers support large numbers of dependants who are unemployed, leads to severe poverty amongst working people. It results in enormous pressures for wage increases and demands which are beyond the inflation rate.

Job insecurity of workers who face retrenchments due to pressures of globalisation and competitiveness. This creates a negative mood amongst workers and serves to perpetuate adversarial relations between management and workers.²⁴¹

Many of the changes introduced by the Labour Relations Act are still to have an impact on collective bargaining and improve labour peace and stability. As labour market players become increasingly familiar with the law, its benefits will become more pronounced and the teething problems will decline.

While noting the successes that the new constitution had made in improving the lives of all, and especially of those that have been historically disadvantaged, it is a fact that South Africa is not making much progress in eliminating the scourge of unemployment that afflicts a large segment of the labour force.

As a follow-up to the RDP, the South African government had identified employment creation as a focal pillar for social and economic transformation. Unemployment contrived to be the biggest challenge that confronts the South African democracy. The crisis of unemployment derived from the structural deficiencies in the economy that South Africa inherited. Consequently the approach was to embark on a range of measures, like the development of a macro-economic policy, a coherent industrial strategy, restructuring of state assets and a transformation of labour markets. Like in similar situations elsewhere in the world, such interventions take time to show their impact on job creation.²⁴²

²⁴¹ Mdladlana M, Statement by the Minister of Labour, Parliamentary briefing week, (15.02.1999) <http://www.irnet.co.za/special>.

²⁴² Mdladlana M, Speech by the Minister of Labour, 1999/2000 Labour Budget Vote in the National Assembly, (15.03.1999) <http://www.irnet.co.za/special>.

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