THE EFFECTIVENESS OF CODES OF CONDUCT OF SELECTED SOUTH AFRICAN MINING COMPANIES IN REGULATING LABOUR STANDARDS: WINDOW DRESSING OR GENUINE REGULATORY INSTRUMENTS?

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Dedication

In memory of my grandmother ***Esnath Kapondoro*** *and my late father* ***Zabron Mudimu*** *who imparted the importance of education in my early childhood.*

Abstract

Inequality and injustice are deeply rooted within the South African mining industry, and have been since at least the discovery of commercially viable diamonds in 1868, followed by gold in 1886. From the labour policies of the past, the effects of globalisation, and the dysfunctional labour relationships on many mines (as depicted by the Marikana tragedy of 2012) arise mismatched regulatory patterns on labour relations. Labour patterns in the mining sector are continuously shifting, yet the foundations of labour regulation have remained largely the same, focusing primarily on protecting employees who are in a standard employment relationship at the expense of non-standard workers. This has left many workers in non-standard employment relationships inadequately protected by the labour framework. Non-standard mineworkers generally lack full-enabling rights, including the ability to exercise their rights to freedom of association and collective bargaining effectively. In addition, they face challenges when exercising their right to a working environment that is not harmful to their health and safety, leading to the worsening of their already dire socio-economic conditions.

The state is battling to protect these workers from exploitation, but continues to legislate, primarily attempting to widen the definition of those who qualify to access rights under the legal framework. Notwithstanding these attempts, numerous workers at mines remain inadequately protected, thereby stimulating regulatory debates on new ways of organising non-standard workers.

One such mechanism, which continues to gather traction in the regulatory debates is the use of codes of conduct to offer protection to workers who, by virtue of the arrangements of their work, cannot organise or access the full rights under the applicable legal framework. Codes of conduct have been popular in many sectors, such as the apparel industry but have not been fully tested in the mining context, leaving many questions around whether they can be labelled genuine regulatory instruments or whether they are mere window dressing tools. Through an assessment of codes of conduct, tracing their development, place in the regulatory spectrum and usage by mining companies in South African mines, this thesis assesses their effectiveness in protecting non-standard workers' rights. Questions on whether such instruments can be viewed as genuine complementary regulatory instruments are raised, focusing on the weaknesses of these instruments. This dissertation offers recommendations for redesigning codes of conduct to make them more legitimate, effective and democratic instruments in the regulation of labour standards at mines.

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Table of Abbreviations

BCEA	Basic Conditions of Employment Act
CC	Corporate Citizenship
CSR	Corporate Social Responsibility
DMR	Department of Mineral Resources
DoL	Department of Labour
HCT	HIV Counselling and Testing
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LRA	Labour Relations Act
MDGs	Millennium Development Goals
MHSA	Mine Health and Safety Act
SDGs	Sustainable Development Goals
SDGs	Sustainable Development Goals
SETA	Sector Education and Training Authorities
SLP	Social and Labour Plans
UDHR	Universal Declaration on Human Rights
WIEGO	Women in Informal Employment: Globalizing and Organising
CEACR	Committee of Experts on the Application of Conventions and Recommendations
ITUC	International Trade Union Confederation

Chapter 1: Introduction

1 Introduction

In South Africa, like in other mineral-endowed African countries, considerable mineral wealth has failed to translate into meaningful economic and social development for mine workers, mining communities and the general citizenry.[1] Across the South African economy, a significant gap in profit sharing between workers and mine owners has created overt inequality.[2] This inequality is more evident in the mining sector, where the systematic exploitation of workers developed from an early stage in the extraction of mineral resources.[3] The level of inequality increases conflict between mine workers and management.[4]

Research on employment trends in the mining sector suggests that new forms of employment relationships are circumventing the protections provided by labour law.[5] Existing scholarship already emphasises how subcontracting, in the South African gold mining industry is creating deeper inequalities.[6] Subcontracting exists mainly in two

[1] AD Elbra 'The forgotten resource curse: South Africa's poor experience with mineral extraction' (2013) 38 *Resource Policy* 549; M Tran "Africa's mineral wealth hardly denting poverty levels, says World Bank" (2012) *The Guardian*.

[2] H Marais *South Africa limits to change: The political economy of transition* (2001) 8.

[3] H Marais (2001) 8, where the author notes that the current sharp contrast between the rich and poor in South Africa is closely linked to the exploitation of diamonds in 1867 and gold in 1886; F Wilson 'Historical roots of inequality in South Africa' (2011) 26 *Economic History of Developing Regions* 6.

[4] T Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ* 836, 836; T Bell "Mining people for profits" *GroundUp* (17-08-2015).

[5] A Bezuidenhout 'New Patterns of Exclusion in the South African Mining Industry' *in* A Habib & K Bentley (eds) *Racial redress & citizenship in South African mining industry* (2008) 186; E Webster, K Joynt & T Sefalafala 'Informalization and decent work: labour's challenge' (2016) 16 (2) *Progress in Development Studies* 203. The authors provide a fairly recent state of affairs on casualisation and informalisation of work in South Africa; Centre for Development and Enterprise 'Marikana and the future of South Africa's labour market' (2013) Available at <https://www.cde.org.za/marikana-and-the-future-of-south-africas-labour-market/> (accessed 20-12-2018) 11.

[6] J Crush, T Ulicki, T Tseane & E Jansen van Veuren 'Undermining labour: The rise of sub-contracting in South African gold mines' (2001) 27 *Journal of Southern African Studies* 5, 6-7; see also R Rees 'Irregular Labour in the Manufacturing, Retail and Construction Sectors: A Review of Conditions and Policy' (1997) Paper for Workshop on Regulating New Employment Norms.

forms namely, job subcontracting and labour subcontracting.[7] Whereas under job subcontracting, the contract is centred on the completion of a certain job, labour subcontracting entails a contractor, supplying his or her own workers to a client and the contractor is paid for the number of workers and the time they work.[8] Similarly, the work of Bezuidenhout highlights that the growing casualisation,[9] externalisation[10] and informalisation[11] of work in mines is undermining the existing labour framework.[12] The extensive restructuring of employment relationships affects the traditional institutions of labour law, including the right to freedom of association and the effectiveness of collective bargaining institutions.[13] In addition, it affects the ability of workers to enforce the rights to a safe working environment.[14] The background of this problem, as discussed below, is vital to the understanding of the inadequacy of regulation.

2 Background and Context

International labour standards refers to legal instruments, drafted by the International Labour Organisation (ILO) which set out minimum accepted standards that every

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[7] J Crush, T Ulicki, T Tseane & EJ van Veuren (2001) 27 *Journal of Southern African Studies* 6.

[8] J Crush, T Ulicki, T Tseane & EJ van Veuren (2001) 27 *Journal of Southern African Studies* 6.

[9] A Bezuidenhout 'New Patterns of Exclusion' (2008) 186 defines casualisation as the deviation in the standard employment relationship and usually implies part time work, fixed-term contracts.

[10] A Bezuidenhout 'New Patterns of Exclusion' (2008) 186 defines externalization as a system whereby a third party enters the employment relationship, leading to the formation of a triangular contracts of employment. The main goal is to insulate the client from being directly responsible for the employment relationship with workers.

[11] A Bezuidenhout 'New Patterns of Exclusion' (2008) 187 notes that the overall effect of casualisation and externalization of work is the creation of an informal employment relationship. The employment relationship between the parties is then insulated from State regulation.

[12] These terms are further explained under chapter two, part 4.1; A Bezuidenhout 'New Patterns of Exclusion' (2008) 187; see also S Buhlungu & E Webster "Work Restructuring and the Future of Labour in South Africa" *in* S Buhlungu & E Webster (eds) State of the nation: South Africa: 2005-2006 (2006) 249 where the authors argue that the biggest changes to the workplace post-apartheid is the shift from a domestic oriented economy to a global economy.

[13] M Bolt & D Rajak 'Introduction: labour, insecurity and violence in South Africa' (2016) *Journal of Southern African Studies* 797, 805; I Martin 'Corporate social responsibility as work law? A critical assessment in the light of the principle of human dignity' (2015) 19 *Canadian Labour & Employment Law Journal* 255.

[14] The Constitution of the Republic of South Africa, 1996 s 24 (a); Mine Health and Safety Act 26 of 1996.

worker is entitled.[15] Labour standards on the other hand refers to 'rules and regulations that govern working conditions, working time, employment stability, workers representatives rights, minimum wages, health and safety in the workplace.'[16] The core international labour standards are made up of eight fundamental conventions which are recognised internationally.[17] These conventions are Freedom of Association and the Protection of the Right to Organise Convention;[18] Right to Organise and Collective Bargaining Convention;[19] Forced Labour Convention;[20] Abolition of Forced Labour Convention;[21] Minimum Age Convention;[22] Worst Forms of Child Labour Convention;[23] Equal Remuneration Convention;[24] and Discrimination (Employment and Occupation) Convention.[25] Realising new challenges to the world of work, the ILO Declaration on Fundamental Principles and Rights at Work outlines four international labour standards enshrined in the eight conventions and makes them universal.[26] These are the freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour and the effective abolition of

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[15] See, ILO *Rules of the game: A brief introduction to international labour standards* (2014) 15.

[16] OECD 'Labour Standards and Economic Integration' Available at <https://www.oecd.org/els/emp/2409984.pdf?> (accessed 19-04 2019) 137.

[17] ILO *Rules of the game: A brief introduction to international labour standards* (2014) 15.

[18] International Labour Organization (ILO) *Freedom of Association and Protection of the Right to Organise Convention* 87 of 1948.

[19] International Labour Organization (ILO) *Right to Organise and Collective Bargaining Convention* 98 of 1949.

[20] International Labour Organization (ILO) *Forced Labour Convention* 29 of 1930.

[21] International Labour Organization (ILO) *Abolition of Forced Labour Convention* 105 of 1957.

[22] International Labour Organization (ILO) *Minimum Age Convention* 138 of 1973.

[23] International Labour Organization (ILO) *Worst Forms of Child Labour Convention* 182 of 1999.

[24] International Labour Organization (ILO) *Equal Remuneration Convention* 100 of 1958.

[25] International Labour Organization (ILO) *Discrimination (Employment and Occupation) Convention* 111 of 1958.

[26] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010) Available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf> (accessed 19-12-2019).

child labour and the elimination of discrimination.[27] Due to the effect of globalisation, the changing nature of employment relationships, pressure from human rights groups and the failure of member states to regulate international labour standards effectively, most companies have internalised and privatised the above core labour standards in their operations.[28]

The protection and advancement of labour standards across the ILO member states have been primarily the responsibility of governments.[29] The internalisation of labour standards by companies in codes of conduct as part of corporate social responsibility (CSR) has been widespread, with many companies operating with a code of conduct.[30] Some have argued that the internalisation of labour standards within CSR instruments has not been purely voluntary, with non-governmental organisations (NGO's), trade unions and retailers pressuring companies to improve human and labour rights.[31] A code of conduct refers to a set of principles, adopted by a company committing to upholding various standards in its operations and supply chains on several aspects including labour rights, human rights and health and safety principles.[32]

The hypothesis explored here is that self-regulation mechanisms on labour standards under private codes of conduct do not seem to be as effective as they can be.[33] Most

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[27] See, ILO *Rules of the game: A brief introduction to international labour standards* (2014) International Labour Office: Geneva.

[28] T Brandt & T Schulten 'The impact of liberalisation and privatisation on labour relations' (2013) *Privatization of Public Services* 146.

[29] DD Raman 'Privatisation of labour standards under corporate social responsibility and social reporting in New Zealand' (2007) 15 *Waikato Law Review* 240, 240.

[30] A Kolk & R van Tulder 'The effectiveness of self-regulation: corporate codes of conduct and child labour' (2002) 20 *European Management Journal* 260; D Wells 'Too weak for the job: Corporate Codes of Conduct, on-governmental organizations and the regulation of international labour standards (2007) 7 *Global Social Policy* 51, 52.

[31] CA Rodriguez-Garavito 'Global governance and labor rights: Codes of conduct and anti-sweatshop struggles in global apparel factories in Mexico and Guatemala' (2005) 33 *Politics & Society* 203, 204; R Pearson & G Seyfang 'New hope or false dawn? Voluntary codes of conduct, labour regulation and social policy in a globalizing world' (2001) *Global Social Policy* 49, 50.

[32] R Pearson & G Seyfang (2001) 50.

[33] See, ILO *Rules of the game: A brief introduction to international labour standards* (2014) International Labour Office: Geneva. The core labour standards are made up of four internationally recognised rights. These are freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour; effective abolition of child

mining companies whose operations are contributing to workers' rights violations have committed to the labour standards, including providing safe working standards within their codes of conduct.[34] In some instances, their mining operations are certified by independent certification schemes,[35] attesting to safe working conditions, at least in theory.[36] Flynn, writing in 1992 on the South African mining safety and its threat to human life remarked that "one human [being] died for every single ton of gold mined".[37] The author observes further how, despite CSR provisions committing to labour standards and health and safety provisions, numerous deaths were still recorded at mines.[38] The unsafe working conditions, labour and human rights violations that characterised the mining industry decades ago are still prevalent in the industry today.[39]

This study explores the codes of conduct of selected mining companies in the coal, platinum and gold sectors in South Africa to test the mentioned hypothesis.[40] There is extensive evidence that human and labour rights violations continue to occur in these

labour and the elimination of discrimination. Codes of conduct go by many names, including voluntary initiatives, management systems, codes of ethics, industry self-regulation – see D Szablowski *Transnational law and local struggles: Mining, communities and the world bank* (2007) 63.

[34] See chapter six, part 2.

[35] For example, the UN Security Council Resolution 1459 on *Kimberley Process Certification Scheme for Rough Diamonds* (KPCS) S/RES/1459 (2003).

[36] For example, AngloGold Ashanti, Code of Business Principles and Ethics regulate health and safety standards.

[37] L Flynn *Studded with diamonds and paved with gold: Miners, mining companies and human rights in Southern Africa* (1992) 3.

3. This was a conclusion the author reached after analysing the number of mining deaths in the sector; see also T Ngcukaitobi (2013) p. 836 for a general discussion of human rights violations.

[38] L Flynn (1992) 3.

[39] L Flynn (1992) 3; Mine deaths, injuries, mine related diseases among other issues continue to affect the sector.

[40] The codes of conduct will be from selected mining companies in the gold, platinum and coal sectors. This choice is influenced by the tumultuous nature of these sectors. Furthermore, these sectors play crucial roles towards the functioning of the economy. They also have high employment figures. Coal for example, is a driver to most industries due to its role in power generation. The preliminary research found more than 34 mining companies listed on the JSE in these sectors. Some are subsidiary companies of bigger mining companies operating in South Africa.

sectors, despite both state and private regulation mechanisms being in place.[41] In addition, the limits of state regulation and the weakened collective bargaining structures in the mining sector necessitate the need to explore other self-regulation mechanisms.[42]

In the mining sector, strike action is a frequent occurrence, stemming from workers demanding fair wages and better working conditions.[43] Strikes in the mining sector are often characterised by violence and destruction of property.[44] Given the high frequency and the violent nature of strikes within the mining sector, it is argued that the state, employers and trade unions are failing to regulate labour standards effectively. Furthermore, there is evidence of human and labour violations in the mining sector.[45] The combination of violent striking behaviour and all-around disregard for labour standards amount to what this thesis refers to as "regulatory failure".[46] Notably, the regulatory failure is interconnected to the South African historical past and to the global economy. Various actors, including the mining companies, trade unions and governments have responded to the regulatory failure as shown below.

2.1 Global responses to regulatory failure

The South African mining sector is facing the effects of the globalised economy.[47] Globalisation has created a regulatory shift from national governments to

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[41] T Ngcukaitobi (2013) 34 *ILJ* 836.

[42] HW Arthurs 'Labour law without the State' (1996) 46 *The University of Toronto Law Journal* 1.

[43] L Muswaka (2014) 64.

[44] See A Myburgh 'Interdicting protected strikes on account of violence' (2008) 39 *ILJ* 703; African News Agency 'Gold Fields accuses NUM of intimidation, violence during strike at South Deep Mine' (6 November 2018) BusinessReport.

[45] See SD Kamga & O Ajoku 'Reflections on how to address the violations of human rights by extractive industries in Africa: A comparative analysis of Nigeria and South Africa' (2014) 17 *PER* 453, 460-466.

[46] In this thesis, regulation failure refers to the failure of the existing labour institutions, such as collective bargaining to protect workers falling outside the ambit of labour law. Where applicable, it will also refer to the absence of such laws, regulations, codes of conduct and norms within the mining sector.

[47] I Robinson 'The globalization of the South African mining industry' (2016) 116 *The Journal of the Southern African Institute of Mining and Metallurgy* 769.

corporations.[48] Companies are increasingly incorporating and internalising the regulatory role within their operations, including on labour standards.[49] The discussion on finding new, innovative ways to regulate labour standards must be understood in the broader context of the International Labour Organisations' (ILO) bid to create decent work.[50] Since its inception, the ILO has advocated for social justice as the foundation for lasting peace through the adoption of minimum conditions of work by member states.[51] Similarly, the Declaration of Philadelphia places emphasis on the role of the ILO in advocating for full employment and raising of standards of living; the effective recognition of the right to collective bargaining and the adequate protection for the life of and health of workers in all occupations.[52] Having identified the weaknesses and limitations of national governments, the ILO, the United Nations (UN) and other organisations have embarked on a process of mobilising non-state actors into incorporating ILO labour standards in their operations.[53] The ILO's decent work agenda is informed by the realisation that globalisation diminishes the regulatory capacity of national governments.[54] This gap has resulted in an increase of non-state actors incorporating labour standards in their operations.[55]

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[48] B Bercusson & C Estlund 'Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions' *in* B Bercusson & Cynthia Estlund (eds) *Regulating labour in the wake of globalisation: New challenges, new institutions* (2008) 1.

[49] B Bercusson & C Estlund (2008) 13.

[50] B Bercusson & C Estlund (2008) 13.

[51] International Labour Organisation (ILO) *Constitution of the International Labour Organisation*, 1919, Adopted by the Peace Conference of Versailles.

[52] ILO Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia) III; N Valticos 'The ILO: A retrospective and future view' (1996) 135 *International Labor Review* 473, 480.

[53] The International Labour Organisation 'Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and other Private Sector Initiatives Addressing Labour Issues' (1998) Working Party on the Social Dimensions of the Liberalization of International Trade GB.273/WP/SDL/1 (Rev.1) 273rd Session, Geneva, Available at <https://www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-1.htm> (accessed 11-02-2019).

[54] K Van Wazel Stone 'Labour and the global economy: Four approaches to transitional labor regulation' (1994-1995) 16 *Michigan Journal of International Law* 987, 988.

[55] K Van Wazel Stone (1994-1995) *Michigan Journal of International Law* 988.

The ILO is increasingly widening the scope of regulation to be inclusive of the informal economy, including promoting decent work in conditions of freedom, equality, security and human dignity.[56] Over the years the ILO has conducted research on the importance of self-regulation mechanisms on labour standards, particularly the use of codes of conduct by companies.[57] Similarly, other initiatives such as the United Nations Global Compact (UN Global Compact), were launched to fill the gaps.[58] The UN Global Compact calls upon companies to align their strategies and operations with ten principles that deal with labour, environment, human rights and anti-corruption.[59] These organisations and initiatives are discussed further in chapter four.[60] The following part looks at some of the responses to the regulatory failure by companies and corporations.

2.2 Mine companies' responses to regulatory failure

Mining companies have developed and adopted private codes and standards[61] to self-regulate various labour standards[62] in their operations. The reasons for adopting codes

[56] The ILO 'Report of the Director-General: Decent Work' (1999) International Labour Office, 87th Session, Geneva. The Decent Work Agenda was launched in 1999 and it focusses on employment, social protection, workers' rights and social dialogue; Informal economy is used in this thesis to refer to economic activities that are not formalised, encompassing unregulated, unregistered and unenforced by the State (see D Boels *The informal economy: Seasonal work, street selling and sex work* (2016) Palgrave MacMillan 4.

[57] The International Labour Organisation 'Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and other Private Sector Initiatives Addressing Labour Issues' (1998) Working Party on the Social Dimensions of the Liberalization of International Trade GB.273/WP/SDL/1 (Rev.1) 273rd Session, Geneva, Available at <https://www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-1.htm> (accessed 11-02-2019).

[58] United Nations Global Compact, Available at <https://www.unglobalcompact.org/> (accessed 11-02-2019).

[59] United Nations Global Compact, Available at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 21-01-2019). The principles cover four core areas of human rights, labour, environment and anti-corruption. It is the largest global corporate sustainability initiative, consisting of over eight thousand companies and four thousand non-business participants in over 160 countries.

[60] See chapter four, part 4.

[61] For example, International Organization for Standardization (ISO) defines a standard as 'a document that provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose', Available at <http://www.iso.org/iso/home.htm> (accessed 29-02-2020).

[62] For the purposes of this thesis, 'labour standards' will refer to selected internationally agreed value

of conduct are divergent and there is no single explanation.[63] Reasons include addressing human and labour rights violations.[64] With these voluntary[65] codes,[66] mining companies want to redeem themselves from bad publicity and self-regulate[67] their operations.[68] In addition, through codes of conduct, mining companies purport to implement principles of decent work in their operations.[69]

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judgments, whose primary focus is to protect workers' rights, see ILO Rules of the Game: A brief introduction to International Labour Standards' (2014).

[63] See for example D Wells (2007) 7 *Global Social Policy* 52.

[64] S Deva 'An analysis of the nature of corporate responsibility' *in* T Novitz & D Mangan (eds) *The role of labour standards in development: from theory to sustainable practice?* (2011) 108. The author argues that companies adopt codes of conduct for a wide range of reasons, including but not limited to pre-empting public regulation, as a fashion statement, as a window dressing device and also because they feel it as the right thing to do. See also D Cassel 'Corporate initiatives: A second human rights revolution? (1996) 19 *Fordham International Law Journal* 1978; DM Chirwa 'The long march to binding obligations of transnational corporations in international human rights law' (2006) 22 *SAJHR* 77.

[65] D McBarnet 'Corporate social responsibility beyond law, through law, for law' (2009) 3 Working Paper Series, Available at <https://core.ac.uk/download/pdf/28968976.pdf> (accessed 29-02-2020). The author argues that describing CSR as a voluntary initiative by companies is misleading as companies adopt these in certain context specific settings and driven by external forces.

[66] Ibid; Australian Non-Governmental Organizations 'Principles for the Conduct of Company Operations within the Minerals Industry' (1998) Available at <http://hrlibrary.umn.edu/links/minind.html> (accessed 29-02-2020) defined a code of conduct as 'a statement of universal principles and ethical guidelines for the way that a company will regulate a whole range of relationships between the company and the stakeholders who are affected by its activities.

[67] D Brereton 'The role of self-regulation in improving corporate social performance: the case of the mining industry' (2002) Paper presented to the Australian Institute of Criminology Conference on *Current Issues in Regulation: Enforcement and Compliance* Melbourne. The author defined self-regulation as 'mechanisms used by mining companies both individually and in conjunction with other companies and organizations, to raise and maintain standards of corporate conduct within the sector'. 4.

[68] S Dansereau 'Win-win or new imperialism? Public-private partnerships in Africa mining' (2007) *Review of African Political Economy* 47, 48; See also JR Liubicic 'Corporate codes of conduct and product labelling schemes: The limits and possibilities of promoting international labor rights through private initiatives' (1998-1999) 30 *Law and Policy in International Business* 112, 114 in which the author argues that companies submit to private codes as a result of pressure from consumers, investors, the media, and non-governmental organizations. See also A Klarsfeld, E Ng & A Tatli 'Social regulation and diversity management: A comparative study of France, Canada and the UK' (2012) 18 *European Journal of Industrial Relations* (4). The authors argue that companies may self-regulate to avoid further regulations from legislators, unions and other stakeholders 320; D Vogel 'The private regulation of global corporate conduct: Achievements and limitations' (2010) 49 *Business & Society* 68, 76-77 in which the author argues that many companies take CSR as a "Crisis Scandal Response".

[69] J Fudge 'Blurring legal Boundaries: Regulating for Decent Work' *in* J Fudge, S McCrystal & K Sankaran (eds) *Challenging the legal boundaries of work regulation* (2012) 21.

The use of self-regulatory mechanisms, such as codes of conduct has become more significant with today's mining companies.[70] This is due to changes in employment relationships and the decline in trade unionisation which have created gaps in regulation.[71] While trade unions are still relatively strong in South African mines compared to other sectors, the steady decline is nonetheless noticeable.[72] The decline in trade unionisation is partly the result of increases in non-standard employment relationships.[73] Furthermore, the shifting of regulatory power from national governments and trade unions towards companies and corporations[74] justifies the need to strengthen self-regulatory mechanisms as state regulation is failing to protect workers' rights adequately.[75] In addition, state regulation of labour standards continues to find limited application due to the increase in the number of part-time workers across various industries.[76] Coupled with the increase in non-standard work, the proliferation of temporary employment agencies limits the application of core labour standards on such workers.[77]

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[70] H Besada & P Martin 'Mining codes in Africa: Emergence of a 'fourth' generation? (2015) 28 (2) *Cambridge Review of International Affairs* 263.

[71] J Visser 'Trade unions in the balance' (2019) ILO ACTRAV Working Paper 22; B Kenny & A Bezuidenhout 'Contracting, complexity and control: An overview of the changing nature of subcontracting in the South African mining industry' (1999) *The Journal of The South African Institute of Mining and Metallurgy* 185.

[72] P Burkhardt & M Cohen 'Decline of major SA union rattles mining sector' (2016) BusinessReport; J Visser Trade unions in the balance (2019) ILO ACTRAV Working Paper 19.

[73] See M Le Roux 'The new unfair labour practice' (2012) *Acta Juridica* 41, 49 in which the author alludes to the idea that permanent employment is no longer a certainty with most employers; see also I Ness 'Introduction' *in* L Staughton *Solidarity unionism: Rebuilding the labor movement from below* (2ed) (2015) 12.

[74] B Bercusson & C Estlund *Regulating labour in the wake of globalization: New challenges, new institutions* (2007) 1.

[75] Eastlund C 'Rebuilding the law of the workplace in an era of self-regulation' (2005) 105 *Columbia Law Review* 2, 323.

[76] The Labour Relations Amendment Act 6 of 2014, s 2 which amends the s 21 of the Labour Relations Act 66 of 1995.

[77] The government has attempted to address these issues through the Labour Relations Amendment Act 6 of 2014 which also deals with employment agencies.

Yet, despite the popularity of codes of conduct, there is no conclusive proof of their effectiveness in advancing workers' rights.[78] It has been argued that 'the efficacy of these emerging forms of labour regulation [such as codes of conduct], their democratic legitimacy, the goals and values underlying them and the direction of reform are all in dispute'.[79]

3 Problem statement and hypothesis

It is premised that there is poor or inadequate protection of workers' rights in the South African mining sector.[80] First, workers are often exposed to poor working conditions,[81] rendering them vulnerable to work-related injuries[82] and illnesses.[83] Secondly, due to the arrangements of their work, non-standard workers are failing to access key participation rights including the right to freedom of association and the right to collective bargaining at the workplace.[84] Other challenges include the failure by mining companies to provide decent, affordable and adequate housing facilities for workers, despite such housing being required by regulations.[85] In addition, mineworkers face

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[78] R Pearson and G Seyfang 'New hope or false dawn?: Voluntary codes of conduct, labour regulation and social policy in a globalizing world' (2001) *Global Social Policy* 49; Ans Kolk and Rob Van Tulder 'The effectiveness of self-regulation: corporate codes of conduct and child labour' (2002) 20 *European Management Journal* 260; D Hoang and Bryn Jones 'Why do corporate codes of conduct fail? Women workers and clothing supply chains in Vietnam' (2012) 12 *Global Social Policy* 67.

[79] B Bercusson & C Estlund (2007) 2.

[80] See SD Kamga & OO Ajoku (2014) 17 *PER* 7.

[81] See the ILO 'South Africa could do more for miners, says ILO mining specialist' 24 August 2012, Available at <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_187783/lang--en/index.htm> (accessed 11-02-2019).

[82] MA Hermanus 'Occupational health and safety in mining- status, new developments and concerns' (2007) 107 *The Journal of Southern African Institute of Mining and Metallurgy* 531, 531-532.

[83] HJ Simons 'Death in South African mines' (1961) 5 *Africa South* 41; L Flynn (1992) 3.

(1992); J McCulloch 'Sleights of hand: South Africa's gold mines and occupational disease' (2016) 25 *A Journal of Environmental and Occupational Health Policy* (4) 472. The author argues that it was an industry policy in the mining sector to repatriate sick men with chronic diseases. This in turn resulted in rural households becoming field hospitals for the retrenched, medically repatriated and aging men. This resulted in chronic illnesses and death becoming part of the process. For a discussion in case law of some of the long-term impact of mining operations on the health of miners, see *Mankayi v AngloGold Ashanti Ltd* (2011) 32 *ILJ* 545.

[84] AL Kalleberg 'Globalisation and precarious work' (2013) 42(5) *Contemporary Sociology* 700.

[85] MPRDA, s 100 (1) (a); Department of Minerals and Energy 'Publication of the Housing and Living

retrenchments, which are often in violation of labour laws.[86] Traditionally, trade unions protected the interests of workers through collective bargaining with the employer.[87] However, the new work arrangements make it difficult - if not impossible - for workers to unionise and negotiate with the employer on matters of mutual interest.[88]

In addition to the above, mines remain dangerous working environments with over 11 000 deaths recorded between 1984 and 2005.[89] Despite a decline in the number of accidents and deaths in recent years, several accidents are still occurring in South African mines, leading to injuries and loss of life.[90] Most mining companies whose operations are contributing to workers' rights violations have committed to various standards, including providing safe working standards within their codes of conduct.[91] In certain cases, their mining operations are certified by independent certification schemes,[92] attesting to safe working conditions, at least in theory.[93] Yet the continuous injuries, deaths and labour rights violations seem to suggest that both self-regulation initiatives and state regulation are ineffective.

Conditions Standard for the South African Minerals Energy (2009) *GG* 32166 No 445 of 2009; see also the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (2018) GN 41934/2018, 2.6; The Bench Marks Foundation 'Communities in the Platinum Minefields' (2012) 95 Policy Gap; see also *Association of Mineworkers & Construction Union & Others v Buffalo Coal Dundee (Pty) Ltd & Another* (2016) 37 *ILJ* 2035 (LAC).

[86] See the requirements under MPRDA, s 52.

[87] J Maree 'Trends in the South African collective bargaining system in comparative perspective' (2011) 35 *South African Journal of Labour Relations* 7, 13.

[88] J Maree (2011) 35 *South African Journal of Labour Relations* 13.

[89] Department of Mineral Resources 'Mine Accidents and Disasters' Available at <https://www.dmr.gov.za/mine-health-and-safety/mine-accidents-and-disasters> (accessed 07-12-2019); see also HJ Simons 'Death in South African mines' (1961) 4 *Africa South* 41.

[90] Department of Mineral Resources 'Mineral Resources releases 2018 mine health and safety statistics' Available at <https://www.gov.za/speeches/mineral-resources-releases-2018-mine-health-and-safety-statistics-1-mar-2019-0000> (accessed 07-12-2019).

[91] See chapter six part 2.

[92] For example, the Kimberley Process Certification Scheme (KPCS).

[93] For example, AngloGold Ashanti, Code of Business Principles and Ethics regulate health and safety standards.

This thesis evaluates the efficacy of codes of conduct as self-regulatory mechanisms, adopted voluntarily by selected mining companies in South Africa.[94] While there are many forms of self-regulation initiatives, this thesis focuses on private codes of conduct and analyses their content relating to three rights namely – freedom of association, the effective right to collective bargaining and the right to an environment that is not harmful to health.[95] At first glance, newspaper articles and related anecdotal evidence suggest that codes of conduct have not been very effective, in improving workers' rights.[96] These considerations suggest that a more thorough investigation is warranted to assess whether self-regulation mechanisms can offer protection to workers' rights who fall outside the ambit of labour laws when implemented and monitored properly. The following section highlights the questions, aims and objectives of the research.

4 Research questions, aims and objectives

This research has the primary aim of evaluating the effectiveness of private codes of conduct in the South African mining sector, focusing on content relating to the right to an environment that is not harmful to health, the right to freedom of association and the right to collective bargaining. The main objective is to assess the extent to which codes of conduct assist workers, particularly non-standard workers in accessing these rights. To achieve this end, the research addresses separate but interconnected objectives.

First, it provides a background and context to the research question and then locates within regulation literature the basis of self-regulation and its justifications. Through tracing some historical developments on the use of codes of conduct in South African mines, this thesis undertakes an evaluation of the notion of CSR in relation to the

[94] The codes of conduct will be from selected mining companies in the gold, platinum and coal sectors. This choice was influenced by the tumultuous nature of these sectors. Furthermore, these sectors are crucial to the economy as they have high employment figures. Coal for example, is a driver to almost all the industries due to its role in power generation.

[95] DK Brown, AV Deardorff & RM Stern 'International Labor Standards and Trade: A Theoretical Analysis' *in* J Bwagwati & R Hudec (eds) *Harmonization and fair trade: Prerequisites for free trade?* (1993) 2-5.

[96] M Kaptein & MS Schwartz 'The effectiveness of business codes: A critical examination of existing studies and the development of an integrated research model' (2007) 77 *Journal of Business ethics* 111.

commitments of selected mining companies (with reference to their codes of conduct) and its place within the mining sector. Second, through tracing both international and domestic legal framework, it demonstrates how a significant number of mine workers are not adequately covered by the current labour framework as a result of changes in employment relationships. It engages with the discussion of whether mining companies have responsibilities towards employees emanating from self-regulation initiatives. Lastly, it provides some recommendations on addressing the gaps in the regulation of labour standards by mining companies as provided in codes of conduct.

To meet the above-stated objective, this research will answer the following question: How can self-regulatory initiatives, particularly codes of conduct by mining companies become useful tools for addressing human and labour rights violations? The study assesses the extent and the circumstances in which self-regulation mechanisms are likely to protect workers' rights against violations by mining companies. The focus of the study will be directed at the gold, platinum and coal mining sectors.[97]

In answering this main question, this thesis engages several sub-questions to guide the research. First, it establishes some perspectives on the concept of regulation and how such perspectives inform self-regulation by mining companies. This is significant as the basis for the use of self-regulation remains uncertain. Second, it engages with the content of codes of conduct as formulated by companies. A third component evaluates the extent to which self-regulation mechanisms by mining companies relate to public regulation and assesses the linkage if any. These questions are crucial in finding ways to make codes of conduct useful instruments towards strengthening the rights of workers. Lastly, the thesis will propose recommendations in addressing the gaps in self-regulation by mining companies.

5 Significance of research

Considerable research has been done on private codes of conduct.[98] For example, the importance of codes of conduct in supply chains and the apparel industries has been

[97] The preliminary research found more than 34 mining companies listed on the JSE in these sectors. Some are subsidiary companies of bigger mining companies operating in South Africa.

[98] TT Galani 'Labour rights and working conditions in corporate codes of conduct: An assessment of the legal dimension, in different national contexts, of selected multinational corporations' corporate

well established.[99] However, to date, less attention has been paid to the use of codes of conduct in the mining sector. An evaluation of private regulation, accountability measures, and their weaknesses is thus warranted. Absent adequate state regulation, focusing on the voluntary or semi-voluntary regulation mechanisms of mining companies has arguably become more significant.

Furthermore, the real impact of codes of conduct on workers' rights has not been well documented, especially in the mining sector.[100] There is no consensus on the status of such codes in relation to the existing labour laws.[101] Some scholars are of the view that these private codes are soft law with a strong basis in hard law.[102] This means that private codes are viewed as quasi-legal instruments, but with no clear binding effect.[103] However, there is no universal recognition of the role or significance of private codes in the regulation of labour standards, particularly in the mining sector.[104] Given these uncertainties, focusing on these voluntary or semi-voluntary compliance mechanisms is warranted.

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social responsibility commitments' (2015) Unpublished PhD Thesis; AB Carroll 'Corporate social responsibility: evolution of a definitional construct' (1999) 38 *Business & Society* 268; E Westfield 'Globalization, governance and multi-national enterprise responsibility: corporate codes of conduct in the 21st century' (2002) 42 *Virginia Law Journal of International Relations* 1075.

[99] Ibid.

[100] K Newitt 'Private sector voluntary initiatives on labour standards' (2013) Background Paper for the World Development Report 11. There has been considerable research on privately initiated codes of conduct, especially in the manufacturing sectors and their supply chains, but very little in the mining sector.

[101] I Martin 'Back to basics: Critically assessing CSR as work law in network firms through the principle of human dignity' (2013) Labour Law Research Network, Inaugural Conference Available at <http://www.labourlawresearch.net/content/back-basics-critically-assessing-csr-work-law-network-firms-through-principle-human-dignity> (accessed 29-02-2020) 8.

[102] A Sobczak 'Are codes of conduct in global supply chains really voluntary? From soft law

regulation of labour relations to consumer law' (2006) 16 *Business Ethics Quarterly* 167, 180.

[103] A Sobczak 'Codes of conduct in subcontracting networks: A labour law perspective' (2003) *Journal of Business Ethics* 225.

[104] K Amaeshi, OK Osuji & JP Doh 'Corporate social responsibility as a market governance mechanism: Any implications for corporate governance in emerging economies' (2011) in Third International Conference on Corporate Governance in Emerging Markets. The authors argue that despite the increase of CSR, it has remained a fuzzy concept.

6 Methodology

In answering the above research questions, this thesis adopts a desktop research study.[105] It relies on both primary and secondary sources, including the South African Constitution and legislation on labour law, codes of conduct from selected mining companies, ILO conventions and resolutions and case law.

Reliance is placed on literature emanating from the ILO and other international bodies focusing on codes of conduct.[106] This thesis further engages the work of civil society organisation and academics who have conducted studies on codes of conduct. Codes of conduct[107] by mining companies in the three mining sectors are selected from the biggest producers in the three sectors (gold, platinum and coal).[108] This selection is informed by the listing requirements expected of such mining companies.[109] The codes of conduct are analysed and measured against the ILO core labour standards and state regulation instruments regarding their content.

7 Outline of thesis

This chapter has introduced the research topic and highlighted the current challenges facing non-standard employees. It highlighted the various responses to the regulatory failure and proposed to explore the use of codes of conduct as complementary regulatory instruments. This chapter further identified the legal problem and highlighted the significance of the research. It raised the research questions, and highlighted the

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[105] S Thiel *Research methods in public administration and public management: An introduction* (2014) chapter 9. The author defines desktop research as the usage of data that has been collected or produced before by someone else.

[106] For example, The UN Global Compact Principles has four principles that directly deal with labour standards (obligations to ensure freedom of association, right to collective bargaining, elimination of forced labour, the elimination of discrimination in respect of employment and occupation; and the abolition of forced labour.)

[107] For example, Certification Schemes.

[108] Most of the biggest producers of coal, gold and platinum are listed on the JSE. Mining companies are required under section 12 (8) - 12 (11) of the JSE listing requirements to disclose certain information regarding their operations.

[109] Ibid.

significance of the research, particularly to the South African economy which relies heavily on the mining sector.

Chapter two elaborates on the research problem, focusing on the effects of externalisation of work in the mining industry and how the increase of non-standard work has weakened key pillars of labour regulation. Through addressing the legacy problems, the chapter demonstrates the complex nature of the problem.

Chapter three looks at some approaches to the concept of regulation. These approaches are explored with the aim of testing the viability and place of self-regulation mechanisms on labour standards. Central to this analysis is the idea that the state bears no monopoly in the regulation of labour standards, particularly in a global context.

Chapter four focuses on the international perspectives protecting the right to freedom of association, the right to collective bargaining and the right to an environment that is not harmful to one's wellbeing at the workplace. These rights are discussed with reference to a mine as the workplace. Central to this chapter is the need to show how the ILO conventions on these rights are finding a limited application on labour standards in national states.

Chapter five looks at the South African labour framework, highlighting the shortcomings of the framework particularly in advancing and protecting the rights of non-standard workers.

Chapter six looks closely on the content of codes of conduct, the incorporation of ILO standards and other normative instruments in the regulation of the selected enabling participation rights and the right of workers to an environment that is not harmful to well-being.

Chapter seven offers mechanisms of making codes of conduct stronger regulatory instruments. It addresses the gaps in the current codes of conduct, providing mechanisms to make codes meaningful regulatory instruments.

Lastly, chapter eight concludes the discussion by highlighting the significant findings concerning the raised research questions.

Chapter 2: Background and Context

1 Introduction

By providing a background, this chapter seeks to contextualise and motivate why the current labour framework needs complementary regulatory tools, such as codes of conduct. At the core of this research is the fact that labour relations, particularly in the South African mining sector have changed drastically over the years, leaving many workers unprotected.[110] Yet, despite the changes in how employers recruit workers, the main regulatory framework for labour relations has largely remained the same. This has created a large pool of workers who are not adequately protected by the labour framework.[111] In no industry is this phenomenon presented in starker terms than the mining sector.[112] This pool of workers cannot organise effectively given the nature of their work contracts; they cannot associate freely among themselves and with the rest of the permanent workforce and they tend to work in dangerous workplaces.

The current labour regulatory framework is premised on a standard employment relationship, which is characterised by long term employment, typically working for one employer, at a single workplace and the parties often have a contract of employment in place.[113] This model of employment, which is often the benchmark to compare to other forms of employment is in decline.[114] On the other hand, non-standard

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[110] WM Mokofe 'The regulation of non-standard employment in Southern Africa: The case of South Africa with reference to several other SADC countries' (2018) Unpublished PhD Thesis: University of South Africa 59.

[111] J Crush, T Ulicki, T Tseane & EJ van Veuren 'Undermining labour: The rise of subcontracting in South African gold mines' (2001) 27 *Journal of Southern African Studies* 5, 6.

[112] J Crush, T Ulicki, T Tseane & EJ van Veuren (2001) 27 *Journal of Southern African Studies* 6; B Kenny & A Bezuidenhout 'Contracting, complexity and control: An overview of the changing nature of subcontracting in the South African mining industry' (1999) *The Journal of the South African Institute of Mining and Metallurgy* 185, 185; B Kenny & E Webster 'Eroding the core: Flexibility and the re-segmentation of the South African labour market' (1998) 24 *Critical Sociology* 216.

[113] R le Roux 'The World of Work: Forms of Segmentation in South Africa' (2009) Institute of Development & Labour Law, Development and Labour Monograph Series 12; D du Toit & R Ronnie 'The necessary evolution of strike law' (2012) *Acta Juridica* 195, 201; ES Fourie 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 4 *PER* 23.

[114] R le Roux 'The World of Work: Forms of Segmentation in South Africa' (2009) Institute of Development & Labour Law, Development and Labour Monograph Series 13.

employment denotes ‘work that falls out of the realm of the “standard employment relationship”.[115] The challenges faced by non-standard workers,[116] often hired through subcontracting, as the chapter demonstrates, are entrenched in various causes including the effect of globalisation and the overall cost of mining production.[117] The challenges faced by non-standard workers, which form a central role in this research were summed up in the Australian context as follows:

> “Casual workers in the mining industry have less job security, poorer working conditions and less social protection, but perhaps the biggest problem is that casual workers tend not to speak up about safety issues, for fear of losing their jobs”.[118]

The above applies across many jurisdictions, with South African non-standard workers facing similar or far worse challenges. In the South African mining context, these challenges are further rooted in the historical exploitation and exclusion of black mineworkers from deriving meaningful benefits from the exploitation of mineral resources.[119] This, in turn, creates a highly militant labour force in the mining context.[120] With the rise of subcontracting[121] and casualisation of labour at mines, the result has been a ‘regulatory failure’ in which the existing legal framework is inadequate to protect non-standard workers.[122] Subcontracting of labour refers to a “form of casual

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[115] International Labour Organization *Non-standard employment around the world: Understanding challenges, shaping prospects* (2016) 7.

[116] R le Roux ‘The World of Work: Forms of Segmentation in South Africa’ (2009) Institute of Development & Labour Law, Development and Labour Monograph Series 13.

[117] S Dansereau ‘Globalization and mining labour: wages, skills and mobility’ (2006) 21 *Minerals and Energy* 1404.

[118] I Kirkwood ‘BHP Billiton cuts costs at Mount Arthur with contract workforce’ (2016) Available at <https://www.newcastleherald.com.au/story/4054233/the-casual-approach/> (accessed 11-01-2020).

[119] The 2018 *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry* GN 1002 in GG 41934 of 27-09-2018 (Mining Charter, 2018), Preamble; C H Feinstein *An economic history of South Africa: conquest, discrimination and development* (2005) 74, 98 and 109.

[120] D Massey ‘Class struggle and migrant labor in South African gold mines’ (1983) 17 *Canadian Journal of African Studies* 429, 446.

[121] B Kenny & A Bezuidenhout ‘Contracting, complexity and control: An overview of the changing nature of subcontracting in the South African mining industry’ (1999) *The Journal of the South African Institute of Mining and Metallurgy* 185, 185.

[122] N Misra ‘Strategic unionism: The political role of the Congress of South African Trade Unions (COSATU) in South African and what it means for Black workers’ (2008) PhD Thesis Massachusetts

employment that can take on a diverse number of formations".[123] It includes many forms of work that differ from the standard employment relationship. Unlike in other African jurisdictions, the labour challenges faced by South Africa are grounded in a long history of discriminatory labour practices that created a unique labour trajectory in South Africa.

2 Legacy problems

Much of the development of the South African economy and the subsequent industrial revolution occurred against the backdrop of a strong gold mining system in the late nineteenth century.[124] With the increase in the demand for labour in mines and farms, Black people lost tracts of land and were invariably forced to work in mines.[125] This system of disfranchisement created a class of poor Africans who had to sell their labour at mines. Gold mining generated jobs and revenue for the state and became the backbone of the apartheid system.[126] The gold sector is largely considered as having cushioned the South African economy from the period of wars and commodity fluctuations.[127] Despite the large deposits of gold, the gold ore was of low quality and deeply buried underground.[128] This meant that to be competitive globally, a system that produced more gold, using cheap labour had to be created.[129]

It was this system of extracting minerals, using cheap labour that created systematic patterns of poverty, inequality and unemployment that are still manifestly visible,

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Institute of Technology 17.

[123] B Kenny & A Bezuidenhout (1999) 185.

[124] F Wilson 'Minerals and migrants: How the mining industry has shaped South Africa' (2001) 130 *American Academy of Arts & Sciences* 99, 102; G Capps 'Labour in the time of platinum' (2015) 42 *Review of African Political Economy* 498.

[125] CH Feinstein *An economic history of south Africa: Conquest, discrimination and development* (2005) 47.

[126] N Nattrass 'The crisis in South African gold mining' (1995) 23 *World Development* 857.

[127] CH Feinstein (2005) 93.

[128] CH Feinstein (2005) 93.

[129] R Davies 'The 1922 Strike on the Rand: White Labour and the Political Economy of South Africa' *in* P Gutkind, R Cohen & J Copans (eds) *African labour history* (1978) 80.

particularly in the South African mines.[130] The creation of high levels of inequality within the mining sector has been pointed out as the for blueprint apartheid.[131] The apartheid system at the mines operated through reserving better jobs for white people, specifically to divide the workforce through the colour bar.[132] Together with other racial laws relating to land dispossession, mining created a significant population of black workers, who became highly dependent on mining for survival. The prosperous industry, however, began to face challenges, particularly with the decline of gold prices.[133] The effects on employment were devastating, with over twenty-one per cent of jobs lost by 1991 for mines operated by the Chamber of Mines (now the Minerals Council South Africa).[134]

Current challenges faced by the mining sector are partly a manifestation of over a century of exploitation and human rights abuses – what others have referred to as "mining legacies" and the effect of globalisation and commodity fluctuations.[135] These legacies were the bedrock of the mining sector and the effects of such policies are still prevalent in the mining industry. One area in which such legacies remain prevalent is the health and safety at mines. For example, Flynn, writing in 1992 on the South African mining safety and its threat to human life remarked that 'one human [being] died for every single ton of gold mined'.[136] In many cases, the system of apartheid which

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[130] F Wilson (2001) 130 *American Academy of Arts & Sciences* 102; TS Phakathi 'Worker agency in colonial, apartheid and post-apartheid gold mining workplace regimes' (2012) 39 *Review of African Political Economy* 279, 280.

[131] Truth and Reconciliation Commission of South Africa Truth and Reconciliation of South Africa Report (2003) 6 Available at <http://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf> (accessed 02 October 2019).

[132] S Dubow *Racial segregation and the origins of apartheid in South Africa 1919-36* (1989) 56-57; H Bhorat, K Naidoo & D Yu 'Trade unions in an emerging economy: The case of South Africa' (2014) Development Policy Research Unit (DPRU) Working Paper 201402, 3.

[133] F Wilson (2001) 130 *American Academy of Arts & Sciences* 113.

[134] F Wilson (2001) 130 *American Academy of Arts & Sciences* 114; P Richardson & J-J van Helten 'The development of the South African gold-mining industry, 1895-1918' (1984) 37 *The Economic History Review* 319, 320.

[135] T Humby 'Redressing mining legacies: The case of the South African mining industry' (2016) 135 *Journal of Business Ethics* 653; N Nattrass 'The crisis in South African gold mining' (1995) 23 *World Development* 857.

[136] L Flynn (1992) 3. This was a conclusion the author reached after analysing the number of mining deaths in the sector; see also T Ngcukaitobi (2013) 836 for a general discussion of human rights

created the current levels of inequalities and dispossession is still being experienced in many communities and by the mining workers.[137] Despite heavy regulatory interventions, the unsafe working conditions and human rights violations that characterised the mining sector during apartheid are still prevalent in the industry today, with no quick solutions in place.[138] Since the introduction of the constitutional framework, key stakeholders in the mining sector have acknowledged the need to break away from the disregard for human rights and to address the violations of the past.[139] Despite the commitments by the mining industry in addressing the legacy challenges, several indicators of regulatory failure in the mining industry are apparent. The Marikana tragedy sheds some light in understanding the mining legacies.

3 Marikana Massacre

The term 'Marikana massacre' has come to represent the killing of more than 34 striking mineworkers and some police officers in 2012 at Marikana, in the North West Province of South Africa.[140] The Marikana massacre epitomises the apex of the regulatory failure emanating from various sources, including the interplay of the mining legacies. As pointed above, the consequences of regulatory failure vary with forms of violent strikes, destruction of property, unlawful dismissal of striking workers, loss of income by mine workers, loss of income and production for the mining companies and in extreme cases, the loss of human life.[141] Importantly, the Marikana demonstrated these consequences.

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violations.

[137] C Rutledge 'Mining is the legacy of apartheid' (2016) *BusinessReport*

[138] L Flynn (1992) 3; Mine deaths, injuries, mine related diseases among other issues continue to affect the sector.

[139] K Crowley 'S. African mines must rectify past injustices, Sibanye CEO says' (2016) Bloomberg Available at <https://www.bloomberg.com/news/articles/2016-10-05/s-african-mines-must-rectify-past-injustices-sibanye-ceo-says> (accessed 16-09-2019).

[140] C Chinguno 'Marikana massacre and strike violence post-apartheid' (2013) 4 *Global Labour Journal* 160; IG Farlam, PD Hemraj & BR Tokota 'The Marikana Commission of Inquiry: Report on Matters of Public, National and International and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province' (2015), 1-2.

[141] T Ngcukaitobi (2013) 836; see also The Benchmarks Foundation 'A review of the corporate social responsibility programmes of the platinum, coal, gold and uranium mining sectors in South Africa'

The massacre occurred at the height of a strike by rock drill operators who were demanding a wage increase and who were using independent worker committees to negotiate terms and conditions directly with management, thereby bypassing trade union structures.[142] This massacre has further been linked to the fragmentation and the precariousness of workers, particularly in the mining sector amidst perceptions by workers that trade unions no longer serve workers interests.[143] While several factors were responsible for the massacre, it is now widely accepted that the dysfunctional working relationships, amid demands for higher wages were the core causes of the massacre.[144] The strike action that preceded the massacre was characterised by violence, intimidation and the destruction of property.[145] Despite the main grievance being concerned with the wage increases, the Marikana massacre demonstrates how the lack of social dialogue between mine workers and the employers or between their representatives is undermining meaningful collective bargaining.[146] Indeed, several scholars have pinpointed at the breakdown in collective bargaining as the cause for the strike.[147]

The Marikana massacre has been explained from various perspectives, including legal and sociological perspectives. A more nuanced understanding of the crisis has been from socio-legal perspectives, particularly perspectives that have endeavoured to explain the underlying social issues, leading to the crisis.[148] Webster argues that trade

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(2008) Available at <www.bench-marks.org.za> (accessed 07-05-2016).

142 C Chinguno 'Unpacking the Marikana Massacre' (2013) 124 *Global Labour Column* (no page number).

143 P Stewart, A Bezuidenhout & C Bischoff 'Safety and health before and after Marikana: Subcontracting, illegal mining and trade union rivalry in the South African mining industry' (2019) *Review of African Political Economy* 1, 3; C Chinguno (2013) 124 *Global Labour Column* (no page number).

144 J F Boëttger & M Rathbone 'The Marikana massacre, labour and capitalism: Towards a ricoeurian alternative' (2016) 81 *Bulletin for Christian Scholarship* 1.

145 R Sil & K Samuelson 'Anatomy of a massacre: The roots of heightened labour militancy in South Africa's platinum belt' (2018) 47 *Economy and Society* 403.

146 G Heald *Why is collective bargaining failing in South Africa? A reflection on how to restore social dialogue in South Africa* (2016).

147 IG Farlam, PD Hemraj, BR Batoka 'Marikana Commission of Inquiry Report' (2015) 45.

148 Several authors have provided seminal works on the issue, see G Hartford 'Labour relations after Marikana' in A Bernstein (ed) *Marikana and the future of South Africa's labour market* (2013) The

unions are not making full use of the various power dynamics they possess, resulting in less ability by the trade unions to resolve disputes without the use of violence.[149] In this instance, there is a huge disconnect between the use of associational power and institutional power by trade unions.[150] He concludes that the institutions created by the LRA to deal and to contain issues of mutual interest at the workplace are no longer working since they are disengaged from the organisations that created them.[151] This analogy is also illustrated by Ngcukaitobi, who documents how rock drillers were negotiating with management outside the trade union structures.[152]

Another analysis is offered by Hartford – who argues that the collapse of collective bargaining and the lack of meaningful dialogue at the plant level contributed significantly to the impasse leading to the tragedy.[153] The centralisation of collective agreements, while promoting orderly collective bargaining sacrifices voices at the plant level. Hartford narrates how the committees responsible for collective bargaining at the plant level were all made up of senior members of the NUM who had no immediate contact with shaft workers, further alienating the workers.[154]

Amidst the precariousness and a highly polarised environment between workers and mining management, the Marikana massacre or a similar event was almost inevitable

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Centre for Development and Enterprise 6-7 C Chinguno (2013) 4 *Global Labour Journal* 160; E Webster 'The shifting boundaries of industrial relations: Insights from South Africa' (2015) 154 *International Labour Review* 27, 28; E Webster 'Marikana and beyond: New dynamics in strikes in South Africa' (2017) 8 *Global Labour Journal* 139; L Sinwell & S Mbatha 'The spirit of Marikana: the rise of insurgent trade unionism in South Africa' (2018) 88 *Africa: The Journal of International African Institute* 426.

[149] E Webster (2017) 8 (2) *Global Labour Journal* 149.

[150] E Webster (2017) 8 (2) *Global Labour Journal* 141.

[151] E Webster (2017) 8 (2) *Global Labour Journal* 141.

[152] T Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ* 836.

[153] Other causes discussed by the author include the continuation of the labour migrant system.

[154] G Hartford 'The mining industry strike wave: what are the causes and what are the solutions? (2012) GroundUp Available at <https://www.groundup.org.za/article/mining-industry-strike-wave-what-are-causes-and-what-are-solutions/> (accessed 24-11-2019).

in the mining industry.[155] This is due to the clear indicators of the regulatory failure, amidst changes to employment figures.

4 Indicators of the regulatory failure in the mining sector

Once regarded as the engine of the apartheid system, the mining sector attracted labour from various countries, particularly the Southern African region.[156] In 1997 for example, the mining sector employed over 827 000 workers.[157] Of this figure, the gold sector employed about 553 000, nearly 67% of the total workers employed in the mining sector.[158] These employment figures translated to about 16% of the total national employment figures and accounted for about 18% of the Gross Domestic Product (GDP).[159] In stark contrast to this period, current figures show that the coal sector employs about 86 919 people and the gold sector employs about 101 085 people.[160] The decline in employment figures in the mining sector affects not only the retrenched workers but their families in homelands.[161] Yet, when compared to other economic sectors, the mining industry appears to be performing better, with an overall

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[155] See comments by B Magara 'Ben Magara opens up about his last time at Marikana' (2019) Available at <https://www.cnbcafrica.com/videos/2019/06/25/ben-magara-opens-up-about-his-time-at-lonmin/> (accessed 29-02-2020).

[156] F Wilson 'Minerals and migrants: How the mining industry has shaped South Africa' (2001) 130 *Daedalus* 99, 104; D Yudelman & A Jeeves 'New labour frontiers for old: Black migrants to the South African Gold Mines, 1920-85' (1986) *Journal of Southern African Studies* 101.

[157] Human Sciences Research Council (HSRC) 'South African Mining Sector Employment Forecast to 2025' Available at <https://docplayer.net/21149758-South-african-mining-sector-employment-forecast-to-2025.html> (accessed 09-06-2019) 8.

[158] Human Sciences Research Council (HSRC) 'South African Mining Sector Employment Forecast to 2025' 8.

[159] C Monaisa 'Organised labour and the minerals value chain: Should South African Trade Unions use National and Transnational Alliances to Ensure that Mining Commodities Benefit Progressive labour and Development Policies' (2015) Available at <https://www.global-labour-university.org/fileadmin/GLU_conference_2015/papers/Monaisa.pdf> (accessed 10-06-2019).

[160] Minerals Council South Africa 'Mining in SA' (2019) Available at <https://www.mineralscouncil.org.za/sa-mining> (accessed 21-06-2019).

[161] G Hartford 'Labour relations after Marikana' in A Bernstein (ed) *Marikana and the future of South Africa's labour market* (2013) The Centre for Development and Enterprise 6-7; The Federation for Sustainable Development 'The impact of mining on the South African economy and living standards' (2018) Available at <http://fse.org.za/index.php/item/593-the-impact-of-mining-on-the-south-african-economy-and-living-standards>, (accessed 18-11-2019).

employment record of 454 891 in 2019.[162] A critical issue relates to the quality of such jobs, with reports indicating that workers brought to mines through subcontracting work in poor conditions and are engaged in precarious work.

A further assessment of the employment figures reveals a worrying trend of the increasing use of contractors who bring their own workers to mines. Of the total number of employees employed in the gold, coal and platinum sector between January and June 2013, 25,32% were outside contractors. Several reasons account for this steep drop in employment, including commodity price fluctuations, policy uncertainty leading to companies relocating to other jurisdictions and unstable labour relations in the sector.[163] The gold sector is the most affected, continuously shedding more jobs than other sectors.[164] Challenges facing the mining industry, including job losses, are occurring in an industry with a dark past.[165] It has been argued that the industry blossomed at the expense of human rights.[166] In general, the industry was founded and sustained on a platform that exploited a huge percentage of its workforce.[167] Thus the indicators of the regulatory failure must be understood and analysed in the context of the sector's historically exploitative past. Before analysing dysfunctional labour relations and the weakened collective bargaining, the following part gives context to the growing levels of non-standard employment relationships.

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[162] Minerals Council South Africa 'Facts and Figures Pocket Book 2019' Available at <https://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures> (accessed 11-10-2020).

[163] A Lane, J Guzek & W van Antwerpen 'Tough choices facing the South African mining industry' (2015) 115 *The Journal of the Southern African Institute of Mining and Metallurgy* 471.

[164] Republic of South Africa 'National Treasury Budget Review 2019, Available at <www.treasury.gov.za/documents/national%20budget/2019/review/FullBR.pdf> (accessed 11-06-2019) 20; Minerals Council South Africa 'Facts and Figures' (2018) Available at <https://www.mineralscouncil.org.za> (accessed 11-06-2019) 6.

[165] F Wilson 'Minerals and migrants: How the mining industry has shaped South Africa' (2001) 130 *Daedalus* 99.

[166] L Flynn (1992) 3.

[167] L Flynn (1992) 3.

4.1 The rise of “non-standard employment”

The ‘standard employment relationship’ denotes employment that is of a full-time nature, which continues indefinitely at the employer’s place of business and performed under that employer’s supervision.[168] The Namibian Supreme Court defined the standard employment relationship as “a binary full-time employment relationship where the employee is engaged to work for an indeterminate period at the workplace of the employer”.[169] Given the high level of job stability and social protection, the standard employment relationship became the popular avenue of employment with the legal frameworks being designed around this form of employment.[170] This form of employment formed the basis of many legal systems across the globe.

Much of today’s debates on labour law are centred on the suitability of the current labour framework in meeting current challenges. Topical issues including ‘future of labour law’[171] or the need to ‘re-invent labour law’[172] have been prompted by the changes from the standard employment to non-standard forms of employment against the labour law framework.[173] Non-standard employment is often defined as ‘work that is not standard employment’.[174] Non-standard employment is now widely accepted as an umbrella term, covering employment that differs remarkably from the standard employment and includes temporary employment, part-time work and disguised

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[168] AL Kalleberg ‘Non-standard employment relations: part-time, temporary and contract work’ (2000) 26 *Annual Review of Sociology* 341, 341-342.

[169] *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* (2009) 2 NR 96 (SC), 620.

[170] D du Toit & R Blainpain ‘The necessary evolution of strike law’ (2012) *Acta Juridica* 195.

[171] B Hepple ‘The future of labour law’ (1996) 17 *Comparative Labor Law Journal* 626.

[172] M Weiss ‘Re-Inventing Labour Law’ *in* G Davidov & B Langille (eds) *The idea of labour law* (2011) 43.

[173] See B Hepple ‘The future of labour law’ (1996) 17 *Comparative Labor Law Journal* 626; H Arthurs ‘Who’s afraid of globalization? Reflections on the future labour law’ (2006) *Globalization and the Future of Labour Law* 51; HW Arthurs ‘Law without the state’ (1996) 46 *The University of Toronto Law Journal* 1; DR Craig & SM Lynk *Globalization and the future of labour law* (2011); D Brodie, N Busby & R Zahn *The future regulation of work* (2016) 9; C Thompson ‘The changing nature of employment’ (2003) 24 *ILJ* 1793.

[174] ILO *Non-standard employment around the world: Understanding challenges, shaping prospects* (2016) 7.

employment relationships.[175] Some have equated certain categories of non-standard work as 'precarious work' or as vulnerable work due to falling outside of the legal framework.[176] Despite the attempts in compartmentalising these categories of vulnerable work, it is also accepted that these labels can be misleading. For example, some forms of jobs that fall under the definition of standard employment are poorly remunerated, leading to similar effects with non-standard employment.[177] The accuracy of these descriptions is also dependent on the sector or industry in question.[178] It is safe to say that in the mining sector, many workers, including those in standard employment relationships can still be classified as falling in precarious work due to the low wages and the overall negative effect of mining on the health and safety system. In South African mines, work has been described as precarious with patterns of fragmentation.[179] Chinguno, for example, highlights the shifting of work at mines from permanent employment to third party employment arrangements which are linked to precarious work.[180]

South African mines however presented a different dynamic to the hiring of labour in that non-standard forms of work were the main mechanism of hiring labour. Black workers for example, were largely employed on fixed contracts that were periodically renewed over long periods of time before being brought within the scope of permanent employment.[181] Some of these non-standard forms of employment existed earlier since

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[175] ILO 'Non-standard forms of employment' Available at <https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm> (accessed 29-01-2020).

[176] D du Toit 'Should precarious work be the focus of labour law? (2018) 39 *ILJ* 2089.

[177] D du Toit (2018) 39 *ILJ* 2091.

[178] See for example B Kenny 'The regime of contract in South African retailing: A history of race, gender, and skills in precarious labor' (2016) 89 *International Labor and Working-Class History* 20 who explores precarious work in the South African retail.

[179] C Chinguno 'Marikana: Fragmentation, precariousness, strike violence and solidarity' (2013) 40 *Review of African Political Economy* 639, 640.

[180] C Chinguno (2013) 40 *Review of African Political Economy* 640.

[181] R Naidoo 'Labour broking: The smoke and mirrors industry' (1995) 19 *South African Labour Bulletin* 1.

the discovery of commercially viable minerals.[182] What is currently happening in the labour market is therefore a resurgence and a reconfiguration of prior forms of employment patterns and the development of some new forms in the era of globalisation.

Prompted by the urgent need to be flexible in allocating the costs of production, employers are increasingly opting to have a small core group of permanent, full-time employees and hiring the rest of their labour using various models that are flexible.[183] The need to have flexible labour at mines where the number of workers needed at a particular time is determined by demand in production has prompted the use of temporary employment services (TES), popularly known as labour brokers in a bid to cut labour costs and potential liabilities for mining houses.[184]

The negative effects associated with non-standard employment vary. First, non-standard employment is associated with poor working conditions, less job security and lower wages compared to standard employment.[185] The main negative effect of the non-standard employment relationship is the rendering of the applicable labour framework redundant. In particular, non-standard employees are less often unionised and may struggle to access key enabling and participation rights.[186] In addition, such workers struggle to participate effectively on issues that affect their health and safety

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[182] B Kenny and A Bezuidenhout 'Contracting, complexity and control: An overview of the changing nature of subcontracting in the South African mining industry' (1999) *The Journal of the South African Institute of Mining and Metallurgy* 185

[183] C Thompson 'The changing nature of employment' (2003) 24 *ILJ* 1796.

[184] A Bezuidenhout & S Buhlungu 'Old Victories, New Struggles: The State of the National Union of Mineworkers' *in* S Buhlungu, J Daniel, R Southhall & J Lutchman (eds) *State of the nation: South Africa* (2007) 255. In this thesis, TES and labour brokers are used interchangeably.

[185] AL Kalleberg, BF Reskin & K Hudson 'Bad jobs in America: Standard and non-standard employment relations and job quality in the United States' (2000) 65 *American Sociological Review* 256, 259; AL Kalleberg, BF Reskin & K Hudson 'Bad jobs in America: Standard and non-standard employment relations and job quality in the United States' (2000) 65 *American Sociological Review* 256, 259; AL Booth, M Francesconi & J Frank 'Temporary jobs: stepping stones or dead ends' (2002) 112 *The Economic Journal* 189; D du Toit 'What is the future of collective bargaining (And labour law) in South Africa? (2007) 28 *ILJ* 1405.

[186] V de Stefano 'Non-standard work and limits on freedom of association: A human rights-based approach' (2017) 46 *Industrial Law Journal* 185, 190; ES Fourie 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11 *PER/PELJ* 110, 111.

at the workplace.[187] Non-standard work takes many forms, including casualisation, informalisation and externalisation. The following part explains these forms further, focusing more on the externalisation of labour as it is the most widespread in the mining sector.

4.2 Casualisation, informalisation and externalisation

As globalisation continues to permeate across national borders, a key effect of this has been the increased preference by companies towards restructuring and reducing the cost of labour. Subcontracting allows companies particularly those in the commodities sector to adjust the cost of labour depending on the commodity price fluctuations.[188] Companies arrange work relationships in a manner that makes it easier to hire and fire their workers.[189] This form of subcontracting is designed to achieve employment flexibility as it allows the employer to adjust the size of the workforce cheaply and quickly without adhering to the labour legislation.[190]

Casualisation involves workers who are legally speaking in an employment relationship but whose employment status remains non-standard.[191] Casual workers either do not work full-time or they work on a fixed-term contract, thereby rendering certain legal protections under labour laws inapplicable or inaccessible.[192] These workers may for instance work only for a percentage of the time that full-time, permanent employees

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[187] See chapter five, part 3.5.

[188] B Kenny and A Bezuidenhout 'Contracting, complexity and control: An overview of the changing nature of subcontracting in the South African mining industry' (1999) *The Journal of the South African Institute of Mining and Metallurgy* 186.

[189] O Bodibe 'The extent and effects of casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe' (2006) Research Report for the Danish Federation of Workers: National Labour & Economic Development Studies 4.

[190] O Bodibe 'The extent and effects of casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe' (2006) 4.

[191] R le Roux 'The world of work: Forms of engagement in South Africa' (2009) Institute of Development & Labour Law, Development and Labour Monograph Series 14.

[192] R le Roux (2009) Institute of Development & Labour Law, Development and Labour Monograph Series 14.

work. Casual labour is highly associated with construction jobs and rock drilling at the mines.[193]

Another indicator of how the labour framework is failing to protect many workers is through the increased informalisation of work.[194] Bezuidenhout notes that casualisation and externalisation of work makes work informal through rendering labour and social security protection inapplicable to workers.[195] It is set into motion when an employer changes the dimension of work from permanent and full time to part time, fixed term or casual contract work. Informalisation of work in the formal sector is continuously growing, with subcontracting and casualisation having long term implications for labour relations.[196] At the individual employment level, these forms of work result in poor working conditions, insecure employment, less protection from the legal framework and poor social security.[197] On the other hand, collectively, these workers have a "lower propensity to unionise".[198] In addition to these forms, externalisation of work has emerged in the mining context as a serious threat not only to individual rights but to the collective rights of workers.

Externalisation 'involves the provision of services or goods in terms of a commercial contract instead of employment'.[199] Theron defines externalisation as a process where "employment is taking place via an intermediary or contractor who has a commercial

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[193] J Crush, T Ulicki, T Tseane & EJ van Veuren 'Undermining labour: The rise of subcontracting in South African gold mines' (2001) 14.

[194] E Webster, A Benya, X Dilata, C Joynt, K Ngoepe & M Tsoeu 'Making Visible the Invisible: confronting South Africa's Decent Work Deficit' (2008) Sociology of Work Unit, University of Witwatersrand, Research Report Prepared for the Department of Labour 8.

[195] A Bezuidenhout 'New Patterns of Exclusion in the South African Mining Industry' in A Habib and K Bentley (eds) *Racial redress and citizenship in South Africa* (2008) 187.

[196] E Webster, A Benya, X Dilata, C Joynt, K Ngoepe & M Tsoeu (2008) Sociology of Work Unit, University of Witwatersrand, Research Report Prepared for the Department of Labour 8.

[197] F Horwitz 'Flexible work practices in South Africa: Economic, labour relations and regulatory considerations' (1995) 26 *Industrial Relations Journal* 257, 264.

[198] F Horwitz (1995) 26 *Industrial Relations Journal* 264.

[199] R le Roux 'Dialogue concerning externalisation and multinational employment' (2010) 43 *De Jure* 129, 131.

contract with the employer".[200] The main distinguishing feature of externalisation is the introduction of another party or other parties to the employment relationship, resulting in what is now commonly referred to as triangular relationships or triangular contracts of employment.[201] Triangular employment relationships involve mainly three parties: the user firm which needs labour, the intermediary, which can either be a labour broker, or a subcontractor and lastly the employee, who performs the actual work.[202] The intermediary effectively provides labour to the client, thereby taking responsibility on aspects related to either hiring or dismissing the workers.[203]

Bezuidenhout and Fakier use the term 'externalisation' with reference to the structure of the apartheid economy and they argue that the new patterns of work arrangements are effectively externalising the cost of social production onto the households.[204] This, they maintain, was the central feature of the apartheid system.[205] With specific reference to the apartheid and mining industry, externalisation was used to maximise profits by transferring the costs of production at mines to the general public, particularly the rural areas.[206] These costs included health and safety costs that mine companies were under an obligation to pay, but retrenched and often sick former mineworkers had to rely on public hospitals and their households to fund the costs. For example, research in 2012 found that the mining companies transporting coal to the Kusile power station in eMalahleni were inflicting costs of over ZAR12 million to both the environment

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[200] J Theron 'Employment is not what it used to be: The nature and impact of work restricting in South Africa' in E Webster & K von Holdt *Beyond the apartheid workplace: Studies in transition* (2005) 298.

[201] G Davidov 'Joint employer status in triangular employment relationships' (2004) 42 *British Journal of Industrial Relations* 727, 727.

[202] J Theron 'Decent work and the crisis of labour in South Africa (2014) 35 *ILJ* 1829, 1831.

[203] A Bezuidenhout 'New Patterns of Exclusion in the South African Mining Industry' (2008) 187.

[204] A Bezuidenhout & K Fakier 'Maria's burden: Contract cleaning and the crisis of social reproduction in post-apartheid South Africa' (2006) 38 *Antipode* 462, 464.

[205] A Bezuidenhout & K Fakier (2006) 38 *Antipode* 464.

[206] A Bezuidenhout & K Fakier (2006) 38 *Antipode* 466.

and humans.[207] This transfer was mainly through water pollution and general human health effects.[208]

Current evidence demonstrates that the use of TES is widespread in the mining sector, with one out of three workers reportedly employed through TES in the platinum sector.[209] The externalisation of labour occurs mainly through the use of labour brokers, formally known as TES.[210] The most controversial agents of non-standard work are labour brokers and calls to ban them have been widespread, particularly from trade unions.[211] What has been controversial is whether they create real jobs or are simply insulating the mine owner from obligations created under the protective labour framework. The argument is that informalisation, casualisation and the externalisation of labour are all designed to undermine the functioning of the standard employment relationship.[212] Subcontracting undermines the effect and application of labour standards, particularly the right to organise, effective collective bargaining and full participation on health and safety matters at the mine.[213] In addition, workers brought to mines through subcontracting or by labour brokers, performing the same type of are often paid less than permanent workers employed directly by the mining company.[214]

These mechanisms are undermining the effective operation and application of labour laws. The externalisation of labour, for example, weakens the full participation of

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[207] NP Nkambule and JN Blignaut 'The external costs of coal mining: The case of the collieries supplying Kusile power station' (2012) 23 *Journal of Energy in Southern Africa* 85.

[208] NP Nkambule and JN Blignaut (2012) 23 *Journal of Energy in Southern Africa* 86.

[209] A Bezuidenhout 'New Patterns of Exclusion in the South African Mining Industry' (2008) 186.

[210] A Bezuidenhout 'New Patterns of Exclusion in the South African Mining Industry' (2008) 186.

[211] L Haste 'To ban or not to ban labour brokers in South Africa' (2011) Available at <https://www.polity.org.za/article/to-ban-or-not-to-ban-labour-brokers-in-south-africa-2011-03-24> (accessed 04-02-2020).

[212] A Bezuidenhout 'New Patterns of Exclusion in the South African Mining Industry' (2008)186.

[213] J Crush, T Ulicki, T Tseane & EJ van Veuren 'Undermining labour: the rise of sub-contracting in South African gold mines' (2001) 27 *Journal of Southern African Studies* 5, 29; A Benya 'Women, subcontracted workers and precarity in South African platinum mines: A gender analysis' (2015) 48 *Labour, Capital and Society* 68, 73.

[214] J Theron 'Intermediary or employer – labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 618, 642.

workers, thereby contributing towards the dysfunction of labour relations and increasing inequality at mines. Notably, non-standard work and the many forms discussed above often intersect and the distinction between them is often blurred. A holistic understanding of the various means discussed above used by companies to contract labour demonstrate that the net effect of these means is to disenfranchise the worker. Therefore, non-standard employment is wide enough to cover all temporary agency work, disguised employment, and dependent self-employment.[215]

4.3 Dysfunctional labour relations and inequality

Apart from the high levels of unemployment,[216] other effects of the changing nature of employment and regulation are apparent. Labour unrest and the prevalence of strikes characterised by violence and destruction of property remain a challenge for the South African mining sector.[217] The level of strike violence has become too extreme, leading some to question whether to remain legally protected, strikes must be functional to collective bargaining.[218] This argument is based on the idea that in certain circumstances, the levels of violence undermine the real objectives of strike action. On a larger scale, workplace relationships, particularly in the mining sector of South Africa, remain volatile.[219] In the mining sector, strikes are dominated by violence and a militant workforce.[220] This creates a challenge for the State to keep pace with the regulation of

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[215] ILO 'Non-standard forms of employment' Available at <https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm#:~:text=They%20include%20temporary%20employment%3B%20part,employment%20and%20dependent%20self%2Demployment.> (accessed 31-05-2019).

[216] Statistics South Africa Available at <www.statssa.gov.za/?p=11882> (accessed 31-05-2019).

[217] T Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana (2013) 34 *ILJ* 836; M Schutte & S Lukhele 'South Africa's culture if labour strife – Prolonged violent strikes are distorting a means of democratic expression and undermining social and economic security' (2015) *Africa Conflict Monitor* 71; R Baxter 'Mining in South Africa: The challenges and the opportunities' (2016) The South African Chamber of Mines 25.

[218] E Fergus 'Reflections on the (Dys)functionality of strikes to collective bargaining: Recent developments (2016) 37 *ILJ* 1537, 1538; *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel (BAWU)* (1993) 14 *ILJ* 963 (LAC), 927A-D.

[219] D Donovan & S Lukhele 'Fixing mining industry woes is essential for South African's domestic stability' (2013) *Africa Conflict Monthly Monitor* 69.

[220] IG Farlam, PD Hemraj, BR Batoka 'Marikana Commission of inquiry 'Report of the Tragic Incidents at the Lonmin Mine in Marikana' (2015) GN 699/38978; T Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ* 858.

labour relations.[221] Many changes have taken place within the labour market. Not surprisingly, it has been argued that labour law is in a regulatory dilemma[222] or has an "identity crisis".[223] Much of this crisis stems from the inability of labour law to protect the numerous employment arrangements that fall outside the scope of labour law, including workers in triangular employment relationships.[224]

One of the negative effects of changing employment relationships has been the continued undermining of collective bargaining.[225] This is because collective bargaining has traditionally built from the cumulative numbers of individual, standard employment relationships.[226] Any work arrangements that undermine the individual employment relationship has a direct effect on the institution of collective bargaining. The failure of collective bargaining, and the failure of the state to devise practical solutions to labour unrest in the mining sector, create the need, first, to re-examine the nexus between the current normative framework on the regulation of labour and to

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[221] For example, after numerous outcries from trade unions on how subcontracting was undermining protective labour laws, parliament responded through amending the Labour Relations Act 66 of 1995 as amended by the Labour Amendment Act 6 of 2014. The amendment Act sought among other things to provide for a wider protection for workers in non-standard employment relationships.

[222] E Tucker 'Renorming labour law: Can we escape labour law's recurring regulatory dilemmas? (2010) 39 *Industrial Law Journal* 99 - the author argues that regulatory dilemma arises when the legal framework that protects workers' rights comes at the expense of employer interests or efficiency. *See also* M Crain & K Matheny 'Labor's identity crisis' (2001) 89 *California Law Review* 1767.

[223] B Langille 'Labour Law's Theory of Justice' *in* G Davidov & B Langille (eds) *The idea of labour law* (2011) 101. The author argues that there is a general agreement that labour law faces an identity crisis. He argues that this crisis relates primarily to the empirical, conceptual and normative approaches to labour law.

[224] P Benjamin 'Labour law beyond employment' (2012) *Acta Juridica* 21; G Davidov & B Langille (eds) *Boundaries and frontiers of labour law: Goals and means in the regulation of wo*rk (2006) 2.

[225] LRA 66 of 1995, Chapter III; H Cheadle 'Collective bargaining and the LRA' (2005) 9 *Law, Democracy and Development* 147 who argues that the right to bargain collectively is an umbrella reference to certain key rights and freedoms including freedom to bargain and the right to use collective resources to further these objectives; on the core purpose of collective, O Kahn-Freund, PL Davies & MR Freedland *Kahn-Freund's labour and the Law* (1983) 18 summed up the imbalance inherent within the employment relationship that collective bargaining seeks to address as follows "the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power."

[226] LRA 66 of 1996. For example, the right to participate in collective bargaining is fully accorded to individual employees; see, S Godfrey, J Maree, D Du Toit & J Theron *Collective bargaining in South Africa: Past present and future?* (2010) 11.

assess its relevance in today's employment relationships.[227] Second, it necessitates the need to explore alternative or complementary mechanisms to the regulation of labour relations.[228]

Labour unrest and strikes that often turn violent have long been associated with the South African mining sector due to many reasons, including the system of apartheid.[229] The pith of the tension between workers and mineral right holders is the perception among workers and mining communities that proceeds from mineral wealth are not shared equitably.[230] The disparity in the distribution of wealth between the holders of mine rights and mine workers from mineral proceeds has created a highly polarised workforce in the mining sector.[231] Yet, perceptions of the unfair sharing of wealth from minerals are not unique to South Africa. There is a perception across Africa that mineral wealth has not translated into meaningful benefits for all citizens.[232] Mazalto's work highlights that 'in countries with fragile institutions, the mining sector is recognised by many to have produced more misery than wealth for local populations.'[233] This

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[227] *See* R Mitchell 'Where are we going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change' (2010) Working Paper No 16, The Workplace and Corporate Law Research Group where the author acknowledges how the current scholarship on the subject is yet to find a workable, practical way of regulating employment relationships.

[228] G Heald *Why is collective bargaining failing in South Africa? A reflection on how to restore social dialogue in South Africa* (2016) KR Publishing. The author argues that the failures of collective bargaining in South Africa are attributable to many aspects, including the incompatibility of the needs of both parties.

[229] H Marais *South Africa limits to change: The political economy of transition* (2001) 8. Apartheid was sometimes described as a form of "internal colonialism", but even that is a misnomer – Apartheid was not driven by the same imperialistic sentiments that drove colonialism. Maybe even the opposite. A drive to separate and close up.

[230] A Claassens 'Mining magnates and traditional leaders: The role of law in elevating elite interests and deepening exclusions 2002-2018' (2018) 20 *Mistra Conference Paper* 1.

[231] M Mazalto 'Governance, human rights and mining in the Democratic Republic of Congo' *in* B Campbell (ed) *Mining in Africa regulation and development* (2009) 190.

[232] M Mazalto 'Governance, human rights and mining in the Democratic Republic of Congo' *in* B Campbell (ed) *Mining in Africa regulation and development* (2009) 190; A Claassens 'Mining magnates and traditional leaders: the role of law in elevating elite interests and deepening exclusions 2002-2018' (2018) 20 *Mistra Conference Paper* 1; C Rutledge 'Mining in South Africa: Whose benefit and whose burden? (2019) 92 *New Agenda: South African Journal of Social and Economic Policy* 34.

[233] M Mazalto 'Governance, human rights and mining in the Democratic Republic of Congo' (2009) 190.

statement rings true for the average South African mine worker.[234] While legal reforms have been designed to transform the industry and free it from its dark past, the majority of workers are yet to benefit meaningfully from the impact of mining.[235] Recent research conducted in mining-affected communities has demonstrated an outright failure to meet the constitutional and statutory imperatives to promote equality and reduce high levels of inequality.[236]

The current dysfunctional labour policies must, therefore, be understood within a specific historical context that created a system of perpetual exploitation, based on the cheap supply of migrant labour to the mines.[237] Some scholars have pointed out how the past system of apartheid and the racial, exclusionary laws help to explain the undying trend of violence within the mining sector and the new South Africa in general.[238] The traditional institutions of labour law and conflict resolution which include trade unions, collective bargaining and full time, permanent employment have largely been weakened, and in some cases seriously eroded.[239] In addition to the dysfunctional labour policies, globalisation has further contributed to the changes taking place within labour relations.[240] In many ways, globalisation unlocks new ways of doing business that are often cheaper and faster, yet evasive of the existing state regulation.[241] In the process, globalisation weakens the minimum protective standards

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[234] C Rutledge (2019) 92 *New Agenda: South African Journal of Social and Economic Policy* 34.

[235] C Rutledge (2019) 92 *New Agenda: South African Journal of Social and Economic Policy* 34.

[236] C Rutledge (2019) 92 *New Agenda: South African Journal of Social and Economic Policy* 34; The Federation for a Sustainable Environment 'The Impact of Mining on South African Economy and Living Standards' (2018) Available at <http://fse.org.za/index.php/item/593-the-impact-of-mining-on-the-south-african-economy-and-living-standards> (accessed 08-01-2020)

[237] J Crush, T Ulicki, T Tseane & EJ van Veuren (2001) 27 *Journal of Southern African Studies* 29.

[238] F Wilson 'Minerals and migrants: How the mining industry has shaped South Africa' (2001) 130 *American Academy of Arts & Sciences* 99, 106.

[239] R Mitchell 'Where are we going in labour law? Some thoughts on a field of scholarship and policy in process of change' (2010) Workplace and Corporate Law Research Group, Working Paper No 16, 12.

[240] N Gaston 'The effects of globalisation on unions and the nature of collective bargaining' (2002) 17 *Journal of Economic Integration* 377, 378; J Braithwaite 'The globalisation of regulation' (2001) *The Journal of Political Philosophy* 103 where the authors discuss three distinct of regulation, namely the globalisation of firms, the globalisation of markets and the globalisation of regulation.

[241] T Cohen 'Placing substance over form – identifying the true parties to an employment relationship (2008) 29 *ILJ* 863, 872-873 where author argues that the rationale for some of the new employment

imposed by domestic governments.[242] Despite this general statement on the effect of globalisation, there is no consensus on its negative impact, particularly on labour standards.[243]

In 1995, the South African government's legislative framework to labour relations was grounded in regulated flexibility with a dual-layer of both standard and non-standard.[244] At the time, forms of non-standard employment were viewed as complementary to the standard employment relationships.[245] However, current employment trends in the mining sector demonstrate that mining companies are increasingly preferring non-standard workers over standard workers.[246] This enables the mining company to cut several employment-related costs, thereby maximising profits and remaining globally competitive.[247] Theoretically, temporary or non-standard workers should enjoy the same benefits enjoyed by standard workers.[248] However, in practice, they do not, with part of the problem being that many of them do not qualify as employees of the client. They are only employees of the contractor. The difficulty is less with the law than on the application, including on issues relating to lack of bargaining coverage; lack of job security; lack of interest by trade unions in organising them due to their temporary nature and lack of contractual relationship with the mining house, who is usually the client.

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mechanisms is simply to enable the client to bypass obligations arising from legislation; JA Scholte 'Globalisation, governance and corporate citizenship' (2001) *Journal of Corporate Citizenship* 15.

[242] M Waters *Globalization* (2001) (2nd ed) London: Routledge 3.

[243] K Thelen & C van Wijnbergen 'The paradox of globalisation: labor relations in Germany and beyond' (2003) 36 *Comparative Political Studies* 859, 859-860.

[244] P Carmody 'Between globalisation and (Post) apartheid: The political economy of restricting in South Africa' (2010) 28 *Journal of Southern African Studies* 255, 261.

[245] P Carmody (2010) 28 *Journal of Southern African Studies* 261.

[246] A Bezuidenhout 'New Patterns of Exclusion in the South African Mining Industry' (2008) 186; SM Rupprecht 'Owner versus contract miner – a South African update' (2015) 115 *The Journal of Southern African Institute of Mining and Metallurgy* 1022.

[247] D Budlender 'Private employment agencies in South Africa' (2013) International Labour Office, Sectoral Activities Working Paper 291, 43.

[248] J Theron 'Non-standard employment and labour legislation: the outlines of a strategy (2014) Institute of Development & Labour Law: Development and Labour Monograph Series 5.

Labour law in South Africa is premised on the concept of an employee working on a full-time basis, often for an indefinite period and working at the premises of the employer.[249] Through the employment relationship, reciprocal duties and obligations are created between parties. Employees often gain various forms of security, including job and employment security.[250] Most of the core benefits that an employment relationship brings about are underscored by ILO in the Decent Work agenda, namely full and productive employment, rights at work, social protection and the promotion of social dialogue.[251]

Emerging forms of employment often fall outside of the protective labour legislation.[252] There is, therefore, a disjuncture on what the law says and on what the employment realities are demonstrating. The immediate institution that is undermined by this disjuncture is collective bargaining.

4.4 Weakened collective bargaining institutions and worker participation

Collective bargaining as a tool for advancing the interests of workers is well entrenched in modern democracies and labour law.[253] Strong trade unions are often synonymous with better outcomes for workers relating to wages and working conditions.[254] In South

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[249] See J Theron 'The shift to services and triangular employment: Implications for labour market reform (2008) 29 *ILJ* 1, 7; T Cohen (2008) *ILJ* 873; In the Namibian context see *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* (2009) (2) NR 596 (SC) 664; the Labour Relations Act 66 of 1995 defines an employee as "*(a)* any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; and *(b)* any other person who in any manner assists in carrying on or conducting the business of an employer, and **'employed'** and **'employment'** have meanings corresponding to that of 'employee".

[250] G Standing 'The Decent Work Enterprise: Worker Security and Dynamic Efficiency (2003) The ILO, Geneva 26; The ILO 'The scope of the employment relationship' (2003) Report V, Fifth Item on Agenda, Geneva,

[251] ILO Manual Decent work indicators: Guidelines for producers and users of statistical and legal framework indicators (2013) International Labour Organization, Preface.

[252] M Weiss 'Employment versus self-employment: The search for a demarcation line in Germany' (1999) 20 *ILJ* 741, 749; A Bezuidenhout (2008) 184.

[253] BJ Fick 'Not just collective bargaining: The role of trade unions in creating and maintaining a democratic society' (2009) 12 *The Journal of Labour Law* 249.

[254] E Webster 'Work restructuring in post-apartheid South Africa' (2003) 30 *Work and Occupations* 194, 205-206.

Africa, trade unions have traditionally occupied several roles. First, they played a key role in advancing workers interests, including improving working conditions and wages at the workplace.[255] Secondly, trade unions were central in mobilising workers and other societal groups in fighting the apartheid system.[256] Thirdly, trade unions created some level of social solidarity among the workers.[257] Solidarity within the ranks of mineworkers was further fostered through the advancement of one union, one industry and one federation approach.[258] Cumulatively, these facets added to the strength of the most dominant trade union, the National Union of Mineworkers, which over the years has made significant gains for the workers.[259] The NUM has represented workers in several court cases and has continuously made significant submissions in key policy changes, including legislation affecting workers.[260]

In the platinum belt, the National Union of Mineworkers (NUM) has historically been responsible for organising most of the workers.[261] Its significance in the mining sector has been channelling resources towards improving the working conditions of workers.[262] It has also made key policy submissions that have influenced the current Mine Health and Safety Act.[263] Despite this well-established position within the mining

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[255] S Pillay 'The Marikana massacre: South Africa's post-apartheid dissensus' (2013) 48 *Economic and Political Weekly* 32, 33; F de Clercq (1979) 72; A Bezuidenhout & S Buhlungu 'Old Victories, New Struggles: the state of the National Union of Mineworkers' 245.

[256] S Pillay (2013) *Economic and Political Weekly* 33; F de Clercq (1979) 72.

[257] S Pillay (2013) *Economic and Political Weekly* 34.

[258] S Pillay (2013) *Economic and Political Weekly* 34.

[259] A Bezuidenhout & S Buhlungu 'Old Victories, New Struggles: the state of the National Union of Mineworkers' (2008) 33 *Labor Studies Journal* 262.

[260] See for example DW Stanton 'Report of the Commission of Inquiry into safety and health in the mining industry' (1995) NUM Press Statement 'NUM Amended Gazetted Mining Charter – Comprehensive Statement' (6 June 2017); PMG 'Mining industry challenges and opportunities: Input by NUM, AMCU, Solidarity, Chamber of Mines, South African Mining Development Association' Available at <https://pmg.org.za/committee-meeting/17412/> (accessed 03-03-2020).

[261] L Sinwell & S Mbatha *The spirit of Marikana: The rise of insurgent trade unionism in South Africa* (2016) ix.

[262] The Constitution of NUM, s 1.7 dealing with the aims and objectives of the trade union.

[263] See submissions by the NUM to the Leon Commission in D W Stanton, The South African OHS Commissions, 'Report of the Commission of Inquiry into Safety and Health in the Mining Industry' (1995) The South African OHS Commissions.

industry, the NUM began to lose members to a new union – the Association of Mineworkers and Construction Union (AMCU) that made strong inroads in recruiting members.[264] The loss of membership particularly in the platinum belt depicted structural weaknesses of the current collective bargaining structure.

The events leading to the Marikana massacre depicted the state of the weakened collective bargaining. For example, rock drill operators at the Marikana and Karee mine were largely represented by workers committees, thereby by-passing the organisational structures created under the LRA.[265] The main drive to the unprotected strike which was followed by the massacre was the demand for a living wage of about R12,500 by the striking workers.[266] Workers viewed the NUM as having sided with mine management at the expense of workers' demands.[267] In addition, the view that the NUM had shares in the mines was further viewed as compromising its resolve on workers issues.[268] Amid the demand for higher wages, and the perceived inaction by mine workers, the workers' committees organised the wildcat strikes in the platinum belt between 2012 – 2014.[269] These committees effectively took away trade unions from negotiations and attempted to negotiate their demands directly with the employers, thereby showing weakened collective bargaining.[270] The anti-democratic nature of trade unions has been widely documented and the view that once trade unions are formed and functional, they tend to ignore the voices of workers at the plant level.[271] This notion may explain the reasons why the workers decided to negotiate

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[264] L Sinwell and S Mbatha *The spirit of Marikana: The rise of insurgent trade unionism in South Africa* (2016) Pluto Press: London 48.

[265] L Sinwell and S Mbatha *The spirit of Marikana: The rise of insurgent trade unionism in South Africa* (2016) Pluto Press: London 285.

[266] L Sinwell and S Mbatha (2016) 48.

[267] L Sinwell and S Mbatha (2016) 54.

[268] L Sinwell and S Mbatha (2016) 304.

[269] L Sinwell and S Mbatha (2016) 303.

[270] L Sinwell & S Mbatha (2016) 63.

[271] S Buhlungu *A paradox of victory: COSATU and the democratic transformation in South Africa: COSATU and the democratic transition in South Africa* (2010) 17.

directly with the employer, by-passing the LRA institutions, particularly the trade unions.

The above description from the lenses from the mining sector gives some context on how the legal institutions designed in 1995 under the LRA are no longer adequate to contain new forces at the workplace. Built on voluntarism, collective bargaining has been the key institution through which workers have advanced rights and interests at mines and other workplaces.[272] The system creates no duty on the employer to bargain with employees or their representatives. To balance this gap, a series of organisational rights are granted to a registered trade union or to two or more registered trade unions acting jointly.[273] These rights include access of the trade union to a workplace, deduction of trade union subscriptions, trade union representatives, among others.[274] Of significance to the exercise of these rights is the reference to the rights of individual employees to freedom of association which include participating in trade union activities.[275]

The key ingredient to the creation of a strong collective bargaining system in the mining sector was the standard employment relationship, discussed above.[276] Through the standard employment relationship, parties engaged with each other for work.[277] This symbiotic relationship ensures that the employer has an experienced, steady workforce available at all times in return to remuneration, social protection and other benefits. In other words, it is a real relationship between the employer and the worker,

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[272] D du Toit & R Ronnie 'The necessary evolution of strike law' (2012) *Acta Juridica* 195, 201; S Harvey 'Labour brokers and workers' rights: Can they co-exist in South Africa' (2011) 128 *The South African Law Journal* 103.

[273] LRA, s 11.

[274] *See* LRA, ss 11 – 22.

[275] LRA, s 4.

[276] See for example *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* (2009) (2) NR 596 (SC), 620 where the court described the standard employment relationship as binary – where the employee works for an indeterminate time period at the workplace of the employer; J Theron 'The shift to services and triangular employment: Implications for the labour market reform' (2008) 29 *ILJ* 7.

[277] R Le Roux 'The regulation of Work: whither the Contract of Employment?: An Analysis of the Suitability of the Contract of Employment to Regulate the Different Forms of Labour Market Participation by Individual Workers' (2008) *Unpublished PhD Thesis*, UCT 114.

which develops and establishes certain degrees of trust between the parties. It is therefore important to understand the importance of the individual employment relationships to the overall functioning of the labour relations, particularly at mines.

Subcontracting and casualisation have been termed the 'employer weapons against trade unions'.[278] Similarly, Theron argues that labour broking represents perhaps 'the biggest manifestation of deregulation'.[279] What creates the dilemma is that the client who provides the work is not responsible for many conditions at the workplace – a position that differs greatly with how the labour framework was designed.[280] Sub-contracting has several effects on workers and their bargaining power viz the employer. The lack of a contractual nexus between the subcontracted workers and the client creates challenges on how to organise such workers.[281] Secondly, it limits such workers' ability to participate in issues relating to health and safety at mines, particularly as health and safety representatives, and in committees at mines.[282] This is due to the fact that full-time employment is often a pre-requisite for eligibility in these committees.[283] While there is nothing legally that can prevent subcontracted workers to organise, there are accounts to demonstrate that such workers are forced into joining sham trade unions by their employers – what Benya calls 'sweetheart unions'.[284] These trade unions do not represent the contracted workers holistically but are designed to weaken the full participation of these workers, with certain trade unionists reportedly doubling as employers or being closely related to the employers.[285] Stripped of the free

[278] K Von Holdt 'Casualisation and sub-contracting: Employer weapons against unions' (1991) 15 *South African Labour Bulletin* 25.

[279] J Theron 'Prisoners of a paradigm: Labour broking, the new services' and non-standard employment' (2012) *Acta Juridica* 58.

[280] J Theron (2012) *Acta Juridica* 58. The author further differentiates between subcontracting in which a triangle relationship is formed from other forms of non-standard employment.

[281] G Klerck (1991) 15 *South African Labour Bulletin* 46.

[282] Mine Health and Safety Act (MHSA) 29 of 1996, s 28(1)(a) and (2)(a).

[283] See for example the Mine Health and Safety Act (MHSA) 29 of 1996, s 28(1)(a) and (2)(a).

[284] A Benya 'Women, subcontracted workers and precarity in South African platinum mines: A gender analysis' (2015) 48 *Labour, Capital and Society* 74.

[285] A Benya 'Women, subcontracted workers and precarity in South African platinum mines: A gender analysis' (2015) 48 *Labour, Capital and Society* 74.

will to join a trade union of choice, the participation rights of such workers are severely undermined.

Undoubtedly, the above system excludes other workers in non-standard employment relationships from full participation in matters affecting their well-being at mines. In addition, since collective bargaining is 'a numbers game', a weakened collective bargaining system affects the ability of both workers and employers to resolve disputes amicably at the workplace.[286] The breakdown of dispute resolution mechanisms and collective bargaining more generally was manifest in the events that led to the Marikana massacre.

The changes in employment patterns, including the breakdown of collective bargaining, have prompted several responses from various key stakeholders. The following section looks at the responses from the government and mine companies.

5 Responses to the regulatory failure

As discussed in chapter one and for the purposes of this thesis, regulatory failure refers to the failure of the existing labour institutions, such as collective bargaining to protect workers falling outside the ambit of labour law.[287] Regulatory failure in the mining sector and the responses thereto are analysed with reference to three, interrelated rights, namely freedom of association, the right to bargain collectively and the right to a safe working environment.[288] These rights are interdependent and mutually reinforcing. The majority of workers brought to the mines through subcontracting struggle to access these rights. For example, as currently provided for under the MHSA, it is only the group of workers, with a designation of employees, in permanent employment that can exercise and enforce the full range of rights under the MHSA.[289] Only permanent

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[286] DC Subramanien & JL Joseph 'The right to strike under the Labour Relations Act 66 of 1995 (LRA) and the possible factors for consideration that would promote the objectives of the LRA' (2019) 22 *PER/PELJ* 1.

[287] See note 46 above.

[288] The LRA, s 4 guarantees employees the right to freedom of association, a right that encompasses other interrelated rights including the right to participate in the lawful activities of the trade union and the right to join a trade union. The MHSA places obligations on the employer of the mine, to provide a healthy, safe working environment.

[289] MHSA, s 28 read with s 25.

employees can qualify to serve as health and safety representatives – a position that excludes a substantial percentage of workers at the mines.[290]

Trade unions have called for the labour brokers and subcontracting practices to be banned. On the other hand, the government has responded to this regulatory failure with more regulation, largely through expanding the definition of those who qualify for protection. Not to be outmatched, companies have adopted codes of conduct, which purport to protect workers in supply chains. The following part provides some background to these responses.

5.1 State attempts to rescue the situation

The government's traditional response to regulatory failure has been two-fold. First, it has responded through parliament amending legislation to expand the meaning of employee.[291] Expanding the scope of who qualifies to be an employee under the law has been a key mechanism in addressing the challenges brought by subcontracting over time.[292] For example, the Labour Relations Amendment Act (LRAA) of 1983 incorporated provisions aimed at regulating labour brokers, through imposing the

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[290] MHSA, s 28 provides as follows:

"(1) To qualify to serve as a *health and safety representative* referred to in section 25 (1) an *employee* must-

(a) be employed in a full-time capacity in the designated *working place*; and

(b) be acquainted with conditions and activities at the designated *working place*.

(2) To qualify to serve as a full-time *health and safety representative* an *employee* must-

(a) be employed in full-time capacity at the *mine*;

(b) comply with any other qualifications which may be-

(i) agreed by a *health and safety committee*; or

(ii) *prescribed*."

[291] For example, The Labour Relations Act 66 of 1995 was amended by the Labour Relations Amendment Act 6 of 2014 aims among other things to provide greater protection to workers placed in temporary employment services.

[292] S Marshall 'A comparison of for experiments in extending labour regulation to non-standard and informal workers' (2018) 34 *International Journal of Comparative Labour Law* 281.

labour broker[293] as the employer of workers placed with a client.[294] Unlike the 1983 amendments, the LRAA of 2014 – with similar provisions[295] - were interpreted to mean that after the lapse of three months, the workers placed by the TES and who earn below a certain threshold automatically become the employees of the client and not the labour broker.[296] The 2014 LRAA was, among other things, designed to widen the definition of employee, to include such workers placed by TES after the passing of three months with a client.[297] Despite this amendment, the earning threshold, which is currently R205 433, 30 excludes a lot of workers from the intended protection.[298]

The government further passed the 2018 Mining Charter which, among others aims to transform the employment patterns in the mining sector.[299] The preamble to the 2018 Mining Charter speaks of the need to bring the Historically Disadvantaged Persons (HDP) into meaningful participation in the mining and minerals industry through various mechanisms, including employment.[300] Providing meaningful employment with decent working conditions is a mechanism of improving the conditions of the HDP. However, the increased participation of the HDP at mines through employment is not matched with advocacy for accessing participation rights and safe working conditions for such workers. In addition, declining employment and the new forms of labour relations are undermining the objectives of the Mining Charter. State regulation is therefore

[293] The LRAA 2 of 1983 defined a labour broker as ‘any business whereby a labour for reward provides a client with persons to render service to or perform work for the client or procures such persons for him, for which service or work such persons are remunerated by the labour broker’.

[294] Labour Relations Amendment Act 2 of 1983.

[295] 6 of 2014.

[296] *Assign services (Pty) Ltd v National Union of Mineworkers of South Africa and Others* 2018 (5) SA 323 (CC), para 84; the LRA defines a temporary employment service as “any person who, for reward, procures for or provides to a client other person-who perform work for the client; and who are remunerated by the temporary employment service.”

[297] LRA, s 198A (3).

[298] The earning threshold is provided for by the Minister of Labour in terms of the Basic Conditions of Employment Act 75 of 1997, s 6(3)

[299] The 2018 *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry* GN 1002 in GG 41934 of 27-09-2018 (Mining Charter, 2018).

[300] Mining Charter, 2018, Preamble.

inadequate and failing to achieve the intended results of providing wider protection to workers. Similarly, trade unions, have also adopted policy resolutions to address the situation.

5.2 Organised labour

With a continued dwindling membership base due to decline in employment, retrenchments and subcontracting practices, trade unions took the position that labour brokers were enemies of the working class and had to be banned.[301] The conflict between labour and business on the use of intermediaries is easy to see. On the one hand, trade unions are mainly about increasing membership base. On the other hand, business and corporations are constantly seeking mechanisms to reduce production costs, which include labour. What brings these seemingly extreme views together are common interests.

At its thirteenth national congress, the Congress of South African Trade Unions (COSATU) noted the increased preference by businesses for outsourcing and insourcing and the effects of such models of work arrangements on the ability of workers to access their LRA and health and safety right.[302] At the same time, it acknowledged the effect of the fourth industrial revolution on the current jobs and stressed the need for skills development of its members to meet future job demands.[303] On the use of labour brokers, COSATU resolved that:

a. "Companies must be forced to stop outsourcing. Rather employ workers directly with full benefits and all conditions of employment.

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[301] Mining Charter, 2018, ss s 2.4.8 and 2.4.8.1 – One mechanism of enabling this process is through the career progression which must be aligned with the social and labour plan. Notably, the obligations to implement a career progression plan are placed on the mining right holder. With the current increase non-standard workers at mines, it becomes difficult, if not impossible to implement and monitor the career progression plan.

[302] COSATU 'Composite Resolutions from Unions towards the COSATU 13th National Congress-Part Two' (2018) Available at <http://mediadon.co.za/13th-national-congress/> (accessed 04-02-2020) 25.

[303] COSATU 'Composite Resolutions from Unions towards the COSATU 13th National Congress-Part Two' (2018) Available at <http://mediadon.co.za/13th-national-congress/> (accessed 04-02-2020).

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b. For all outsourced jobs that are long term and permanent in nature companies across all sectors including mining; energy and construction sectors must be in-sourced.

c. Any short term projects and or jobs outsourced should be done with clear timeframes without undermining all labour relations regulations in particular Health and safety.

d. Reaffirm COSATU position to campaign for total ban of labour broking and not regulation."[304]

The above resolution to force companies to stop outsourcing is commendable, especially in cases where workers are turned into perpetual temporary or casual workers when in actual fact, they are in a permanent employment relationship. However, there are obvious flaws with the resolutions when viewed in the context of globalisation and its effect on labour relations. In the first case, globalisation and the fourth industrial revolution are changing the nature of jobs, with technology and robotics taking over. For example, many jobs in the mining sector are already at risk or at least threatened by increased automation.[305] The president of Cosatu acknowledged the impact of the fourth industrial revolution and mentioned skills development as a critical area for the current workers. Similarly, in the mining sector, the use of robotics to reach deep underground mineral deposits will ultimately impact current jobs.[306] The priority for the trade union must, therefore, be focused on intensive skills development in line with the Skills Development Act, in line with the various sector education and training authorities (SETA). Inasmuch as certain labour brokers have

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[304] COSATU 'Composite Resolutions from Unions towards the COSATU 13th National Congress-Part Two' Available at <http://mediadon.co.za/13th-national-congress/> (accessed 04-02-2020).

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[305] BusinessTech 'How many South Africans could lose their jobs to robots in the next 7 years – and which skills are safer' (2018) Available at <https://businesstech.co.za/news/technology/220583/how-many-south-africans-could-lose-their-jobs-to-robots-in-the-next-7-years-and-which-skills-are-safer/> (accessed 04-02-2020); Z Losi 'Fourth industrial revolution' ENCA interview with X Mngambi' Available at <cosatu.org.za> (accessed 04-02-2020).

[306] AngloAmerican 'Robotics for safer mining – A ground-breaking partnership' (2013) Available at <https://www.angloamerican.co.za/our-stories/robotics-for-safer-mining-a-ground-breaking-partnership.aspx> (accessed 04-02-2020).

not contributed meaningfully to workers' needs, adopting a resolution on banning labour brokers in no way solves the continued dwindling of trade union membership.

In addition to the call on banning intermediaries and various forms of non-standard work, trade unions have influenced legislative changes, particularly the amendments to the LRA. As noted earlier, companies and corporations have adopted various self-regulation mechanisms including codes of conduct that commit to upholding workers' rights.

5.3 Responses by mining companies: Codes of Conduct

In addressing the current responses by companies, some historical context on the development of codes of practice or conduct is warranted. The following section demonstrates how codes of conduct were first used in the mining industry to address the regulatory challenges of the time.

Initial developments of codes of conduct emanated from both national governments, non-governmental organisations and trade unions.[307] They, however, contained similar provisions, designed to advance the protection of workers in South African firms at the time.[308] In South Africa, labour unrest, particularly in the mining sector, has been a constant feature since the commencement of mining at a commercial level.[309] Because of apartheid policies that discriminated against black workers, a range of mechanisms were created largely by foreign governments with companies operating in South Africa, to hold businesses and individuals accountable for human rights violations.[310] Codes

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[307] PS Sethi & OF Williams 'European and other codes of conduct for the companies operating in South Africa' in PS Sethi & OF Williams (eds) *Economic imperatives values in global business: The South African experience and international codes today* (2001) 183.

[308] PS Sethi & OF Williams 'European and other codes of conduct for the companies operating in South Africa' in PS Sethi & OF Williams (eds) *Economic imperatives values in global business: The South African experience and international codes today* (2001) 183-219; R Marsden 'Codes of practice: The implications for job advancement' (1981) 12 *South African Journal of Business Management* 109-114.

[309] M Beittel 'labor unrest in South Africa, 1870-1990 (1995) 18 *Review (Fernand Braudel Center* 87, 88.

[310] BS Lyons 'Getting to accountability: Business, apartheid and human rights' (1999) 17 *Netherlands Quarterly of Human Rights* 135, 135.

of conduct were first used in South Africa during the apartheid era to regulate foreign businesses operating in South Africa at the time.[311]

The creation of codes of conduct as regulatory tools for corporations developed mainly under the direct influence of the British government, the American corporations and the International Confederation of Free Trade Unions.[312] Much of the pressure on developing these codes of conduct came after the refusal by the South African government to endorse the Convention on Freedom of Association and Protection of the Right to Organise (ILO C87).[313] The ILO C87 incorporates principles of non-discrimination that were in direct opposition to the policies of the apartheid government.[314]

While the development of CSR in the South African context is unique, such development coincided with the international prominence of self-regulation in various sectors, including the mining sector as a result of its potential hazards to host communities, workers and the environment.[315] The codes published by governments and business included the EEC Code,[316] the Sullivan Principles,[317] the Canadian Code, the Saccola Code or Urban Foundation Code and the Code of Conduct for

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[311] R Madvav ‘Corporate Codes of Conduct in the Garment Sector in Bangalore’ *in* J Fudge, S McCrystal & K Sankaran (eds) *Challenging the legal boundaries of work regulation* (2012) 267.

[312] M Murphy ‘Foreign Companies and Black Trade Unions: European companies and Black Workers’ in International Confederation of Free Trade Unions (ICFTU) *Codes of conduct for firms investing in South Africa?* (1980) 81-98; SA Aaronson ‘Corporate responsibility in the global village: The British role model and the American laggard’ (2003) 108 *Business and Society Review* 309, 318; on the Sullivan Business Principles, see S P Sethi & O F Williams ‘(2000) 105 *Business and Society Review* 169.

[313] Adopted at the 31st ILC session, 1948; R Madvav ‘Corporate Codes of Conduct in the Garment Sector in Bangalore’ (2012) 267.

[314] International Labour Conference ‘Special report of the Director-General on the application of the Declaration concerning action against apartheid’ (1993) International Labour Conference 80th Session, 83.

[315] R Hamann & P Kapelus ‘Corporate social responsibility in mining in Southern Africa: Fair accountability or just greenwash? (2004) 47 *Development* 85.

[316] A Akeroyd, F Ansprenger, R Hermle & CR Hill *European business and South Africa: An appraisal of the EC Code of conduct* (1981) 13. The Code was initiated by the European Commission Foreign Ministers and approved by the foreign Ministers in 1977.

[317] These Principles were drawn by Reverend Sullivan who at the time was a member of the Board of Directors of General Motors, after his trip to South Africa.

Transnational Corporations[318] had direct application to the South African apartheid context.[319] The major differences in these codes relate to the creators. The EEC and the Canadian Codes were sponsored by governments and the Sullivan Principles and the Saccola Principles were born out of corporations.[320] This divergence in actors shows the commitment that existed at the time from various stakeholders to offer protection to workers' in South Africa. These codes covered various aspects of employment, ranging from minimum wage, the security of employment and non-discrimination.

The American corporate influence on labour standards in South Africa came through a set of principles, now commonly referred to as the Sullivan principles.[321] The Sullivan Principles contained six sets of principles which targeted firms from the United States of America with affiliates or doing business in the Republic of South Africa at the time.[322] The principles covered non-segregation of all races at the workplace; equal and fair employment practices for all employees; equal pay for all employees doing the same job; focus on skills training for non-whites; increasing non-whites in management and supervisory positions and improving the living conditions of employees outside the working environment.[323] Twelve US-based corporations operating in South Africa agreed to implement these principles.[324]

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[318] BS Lyons 'Getting to accountability: Business, apartheid and human rights' (1999) 17 *Netherlands Quarterly of Human Rights* 135, 135; JR Bellace 'Hoisted on their own petard? Business and human rights' (2014) 56 *Journal of Industrial Relations* 442, 443.

[319] E Seidensticker 'EEC Code of Conduct and other Codes: General Introduction' Centre on Transnational Corporations in International Confederation of Free Trade Unions 'Codes of conduct for firms investing in South Africa?' (1981) 51.

[320] The EEC Code was adopted by the European Council of Ministers after widespread publications by the Guardian Newspaper of the lower wages and poor working conditions of black employees were subjected to by some companies of British origin.

[321] The principles were named after Reverend Leon Sullivan who was a director of General Motors. After visiting South Africa on business, he proposed these set of principles to apply to American companies operating in South Africa at the time.

[322] C McCrudden 'Human rights codes for transnational corporations: What can the Sullivan and MacBride principles tell us? (1999) 19 *Oxford Journal of Legal Studies* 167, 173-175.

[323] SP Sethi & OF Williams (2000) 105 *Business and Society Review* 169.

[324] SP Sethi & OF Williams (2000) 105 *Business and Society Review* 169.

With globalisation and the need to hold corporations and business accountable, new CSR instruments that use various mechanisms including persuading corporations to do the right thing have been created. The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) provides among other things guidance on corporations on sustainable workplace practices.[325] The MNE declaration places responsibility on the corporation to avoid causing harm and to prevent or mitigate such harm from occurring.[326] Similarly, the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework recognise the central role of corporations in society and the need by such corporations to comply with the applicable laws in respecting human rights.[327] Other initiatives include the OECD Guidelines for Multinational Enterprises[328] and the UN Global Compact Principles[329], which incorporate CSR guiding principles for various stakeholders, including governments and corporations on respecting fundamental rights at work.[330] The above-listed instruments (discussed further under chapter four, part 4) are part of the global movement to increase the penetration of labour standards in global corporations.[331]

Current company and corporations’ codes of conduct must be understood from the above influences and developments. Codes of conduct in the South African context were influenced by foreign governments who had companies and corporations operating in South Africa. Other influencers of these developments included

[325] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) Adopted by the Governing Body of the International Labour Office 204th Session (1977) Geneva as amended, para 10 (c).

[326] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) para 10 (c).

[327] United Nations ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework’ (2011) HR/PUB/11/04, 13-15.

[328] OECD, ‘OECD Guidelines for Multinational Enterprises’ (2011) OECD Publishing.

[329] UN Global Compact ‘The Ten Principles of the UN Global Compact’ Available at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 09-01-2020).

[330] HW Baade ‘The legal effects of codes of conduct for multinational enterprises’ (1979) 22 *German Yearbook of International Law* 11, 12.

[331] See chapter four, part 4.

international trade unions and non-governmental organisations. As demonstrated above, unilateral codes of conduct by companies are not the first instruments to privatise labour standards.

With the increased publicity on human and labour rights violations in companies and corporations, companies have adopted codes of conduct, committing to respecting human and labour rights in their operations.[332] Whereas during apartheid, codes of conduct were developed by external bodies, companies are currently developing their own regulatory instruments. Sethi, for example, notes that mining companies have responded to various pressures levelled against their operations through adopting codes of conduct with various commitments in their operations.[333] Such codes of conduct express commitments to ideals enshrined under both international conventions and domestic legislation.[334]

In the South African context, most mining companies listed on the Johannesburg Stock Exchange (JSE) have a code of conduct with commitments on various aspects, including respecting freedom of association, the right to collective bargaining and the right of workers to an environment that is safe and not harmful to health.[335] A key feature of current codes of conduct is the wider application of commitments to all workers, including non-standard workers.[336] Given the nature of the commitments within codes of conduct in respect of the right to freedom of association, the right to

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[332] J Levis 'Adoption of corporate social responsibility codes by multinational companies' (2006) 17 *Journal of Asian Economics* 50, 52-53; M Amengual 'Complementary labor regulation: The uncoordinated combination of state and private regulators in the Dominican Republic' (2010) 38 *World Development* 405; I Mamic *Implementing codes of conduct: How businesses manage social performance in global supply chains* (2004) International Labour Office, Greenleaf Publishing, United Kingdom 26; A Sobczak 'Codes of conduct in subcontracting networks: a labour law perspective' (2003) 44 *Journal of Business Ethics* 225, 226.

[333] S P Sethi 'The effectiveness of industry-based codes in serving public interest: The case of the International Council on Mining and Metals (2005) 14 *Transnational Corporations* 55, 61

[334] A Sobczak 'Are codes of conduct in global supply chains really voluntary? From soft law regulation of labour relations to consumer law' (2006) 16 *Business Ethics Quarterly* 167.

[335] For example, the listing requirements require mining companies to comply with the SAMREC Code and the SAMVAL Code, see s 12.2 of the JSE Limited Listings Requirements, Available at <https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf>, (accessed 19-10-2019).

[336] A Sobczak 'Codes of conduct in subcontracting networks: a labour law perspective' (2003) 44 *Journal of Business Ethics* 226.

collective bargaining and the right to a safe working environment these codes have the potential to protect non-standard workers, who are brought to work at mines through various arrangements, which are evasive to the labour law framework.[337]

Part of this thesis, therefore, seeks to explore mechanisms to strengthen the existing codes of conduct. From a cursory reading, private codes of conduct do not provide meaningful accountability and implementation mechanisms in the event of violations occurring.[338] For example, the Anglo-Ashanti Code of Ethics[339] only makes provision for the reporting of violations through the audit and corporate governance committee.[340] Secondly, most codes of conduct fail to separate between the management and the implementers of the code of conduct. The executive and senior management are in most cases tasked with the decision-making relating to all issues arising from the code.[341] Making management the principal implementers and the watchdogs create questions relating to their independence and objectivity.

The following section seeks to situate codes of conduct within the South African legal context.

6 Corporate governance and the current legal context

Broadly, private codes of conduct initiatives fall under a companies' corporate social responsibility (CSR) and corporate governance.[342] Principles of CSR are grounded in corporate governance – which is defined as 'the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes: ethical culture, good performance, effective control and

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[337] A Sobczak 'Are codes of conduct in global supply chains really voluntary? From soft law regulation of labour relations to consumer law' (2006) 16 *Business Ethics Quarterly* 167.

[338] H Arthurs 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' *in* J Conaghan, R Michael Fischl & K Klare (eds) *Labour law in an era of globalization: Transformative practices and possibilities* (2002) 486.

[339] AngloGold Ashanti, Code of Business Principles and Ethics 23.

[340] AngloGold Ashanti, Code of Business Principles and Ethics 23.

[341] AngloGold Ashanti, Code of Business Principles and Ethics 23.

[342] SP Sethi (ed) *Globalization and self-regulation: The crucial role that corporate codes play in global business* (2011) 5.

legitimacy'.[343] Both CSR and corporate governance are vehicles of achieving sustainable development.[344] A key pillar of sustainable development is the acknowledgement that all stakeholders are important to the organisation and as such, their needs, interests and expectations must be taken into account in decision making.[345] Business interests and the interests of workers and communities are often at variance and CSR has the potential to bridge this gap.[346]

Multinational corporations and companies are key players and agents of globalisation who, in many cases have been complicit in the declining social conditions in jurisdictions of their operations, particularly in developing countries.[347] Scandals by big corporations, including Enron, Nike's sweatshops, and the Lonmin Marikana massacre have all put into perspective the dangers of corporations when they pursue profits without accounting to other key stakeholders, including workers.[348] Without good corporate governance, corporations will continue to make large profits, while violating the rights of workers and increasing inequality in communities of their operations.[349]

In South Africa, mining companies are heavily regulated, with separate legislation applying to different mining sectors and minerals.[350] In addition to legislation, some

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[343] The Institute of Directors in Southern Africa 'King IV: Report on Corporate Governance for South Africa' (2016) 20.

[344] The Institute of Directors in Southern Africa 'King IV: Report on Corporate Governance for South Africa' (2016) 23.

[345] The Institute of Directors in Southern Africa 'King IV: Report on Corporate Governance for South Africa' (2016) 23.

[346] B Siyobi 'Corporate social responsibility in South Africa's mining industry: An assessment' (2015) SAIIA, Governance of Africa's Resources Programme, Policy Briefing 142.

[347] W Visser 'Corporate citizenship in South Africa: A review of progress since democracy' (2005) 18 *Journal of Corporate Citizenship* 29, 32.

[348] M Micheletti & D Stolle 'Mobilizing consumers to take responsibility for global social justice' (2007) 611 The Annals of the American Academy of Political and Social Science 157, 163;

[349] SA Aaronson 'Can corporations safeguard labor and human rights? (2004) *YaleGlobal Online*.

[350] The main instrument regulating mining companies include the Mineral and Petroleum Resources Development Act 28 of 2002; Mineral and Petroleum Resources Development Regulations GN R27, *GG* 26275 of 23 April 2004 (MPRDA Regulations 2004); Companies Act 71 of 2008; Diamonds Act 56 of 1986; Electricity Act 41 of 1987; Electricity Regulation Act 4 of 2006; Explosives Act 26 of 1956; Mine Health and Safety Act 29 of 1996; J Howard 'Half-hearted regulation: Corporate social responsibility in the mining industry' (2014) *SALJ* 13.

aspects of CSR which were once voluntary on the part of the mining companies are increasingly being incorporated within the legislation, thereby becoming binding.[351] The role and significance of CSR in the mining sector must be understood with reference to the history of exclusionary policies for the majority of workers – the mining legacies.[352] This calls for a brief examination of the concept of CSR.[353]

6.1 Corporate social responsibility and the mining sector

CSR conveys 'the intention to link business with wider societal concerns'.[354] A widely cited definition of CSR has been formulated by the World Bank and refers to CSR as "the commitment of business to contribute to sustainable economic development – working with employees, their families, the local community and society at large to improve the quality of life, in ways that are both good for business and good for development."[355] It, therefore, involves businesses going beyond profit-making and ensuring meaningful contributions to communities and workers in areas of their operations. More recently, CSR has been linked to sustainable development goals (SDGs) through the recognition of the importance of the businesses towards development.[356] This linkage further focuses on the provision of public goods by companies and corporations that governments across the globe are failing to meet.[357]

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[351] J Howard 'Half-hearted regulation: Corporate social responsibility in the mining industry' (2014) *SALJ* 13.

[352] Mining Charter, 2018 Charter, Preamble; T Humby (2016) 135 *Journal of Business Ethics* 653.

[353] M Kerr, R Janda & C Pitts *Corporate Social Responsibility: A legal Analysis* (2009) pp. 5-32. The authors consider CSR from different approaches with most definitions assessing CSR as an integration of the company's responsibilities towards the economics of the company, the social well-being of its workers and its responsibility towards the environment; see also The King Code of Corporate Governance for South Africa (The Institute of Directors in Southern Africa) September 2009.

[354] D Petkoski & N Twose 'Public Policy for Corporate Social Responsibility' (2003) *WBI Series on Corporate Responsibility, Accountability, and Sustainable Competitiveness* 1; L Miles & M Jones 'The prospects for good governance operating as a vehicle for change in South Africa' (2009) 14 (1) *Deakin LR* 71.

[355] H Ward, T Fox & B Howard 'Public sector roles in strengthening corporate social responsibility: taking stock' (2005) World Bank 3; 'sustainable development is viewed as development that meets the needs of the present, without compromising the ability of future generations to meet their needs'

[356] K Burhmann, J Jonsson & M Fisker 'Do no harm and do more good too: Connecting the SDGs with business and human rights and political CSR theory' (2019) 19 *Corporate Governance: The International Journal of Business in Society* 389.

[357] AG Scherer, A Rasche, G Palazzo & A Spicer 'Managing for political corporate social responsibility:

Corporations are thus increasingly taking on government responsibilities thereby increasing their legitimacy in the public views.[358]

CSR presupposes certain responsibilities are placed on corporations to be responsible corporate citizens.[359] Views differ, however, on what exactly corporations' responsibilities entail.[360] The meaning of CSR is geographically influenced with CSR referring to something substantially different in the developed and developing worlds.[361] This applies to South Africa where the country's past has influenced the content and nature of CSR. In South Africa, CSR is often linked to the need by companies to transform and redress past injustices that excluded the majority of Black people from meaningful participation in the economy.[362] That being said, there are some basic characteristics that seem to be universal to CSR.[363] These five characteristics are "integrated sustainable decision making, stakeholder engagement, community investment, transparency and accountability."[364] For a holistic approach to CSR, a mining company must incorporate these characteristics.

New challenges and directors for PCSR 2.0' (2016) 53 *Journal of Management Studies* 273, 275.

[358] AG Scherer, A Rasche, G Palazzo & A Spicer 'Managing for political corporate social responsibility: New challenges and directors for PCSR 2.0' (2016) 53 *Journal of Management Studies* 273, 275.

[359] IM Esser 'Corporate social responsibility: A company law perspective' (2011) *SA Merc LJ* 319-320. For a general discussion of CSR and corporate citizenry see J Schulschenk 'Interview summary report- corporate governance research programme' (2012) Albert Luthuli Centre for Responsible Leadership.

[360] For a discussion and evaluation of different definitions of CSR see M Kerr, R Janda & C Pitts (2009) 5-35.

[361] H Kloppers & W du Plessis 'Corporate social responsibility, legislative reforms and mining in South Africa' (2008) 26 *Journal of Energy & Natural Resources Law* 91, 94.

[362] R E Hinson & T P Ndhlovu 'Conceptualising corporate social responsibility (CSR) and corporate social investment (CSI): The South African context' (2011) 7 *Social Responsibility Journal* 332, 340; R Hamann, S Khagram & S Rohan 'South Africa's charter approach to post-apartheid economic transformation: Collaborative governance or hardball bargaining' (2008) 34 *Journal of Southern African Studies* 21.

[363] J Howard (2014) *SALJ* 12, 13 where the author provides basic characteristics of CSR which are 'integrated sustainable decision-making, stakeholder engagement, community investment, transparency and accountability'. These characteristics will be dealt with in chapter five.

[364] M Kerr, R Janda & C Pitts *Corporate social responsibility: A legal analysis* (2009) 5; J Howard (2014) *SALJ* 13.

Despite the influence of the state on CSR principles and the increasing mandatory obligations placed on corporations and companies, codes of conduct remain voluntary, with no clear linkage to enforceable legal instruments.[365]

A brief consideration of voluntary initiatives that are binding is thus warranted. The transformative aspect of direct legislative intervention incorporated aspects that were traditionally voluntary.[366] The Mineral and Petroleum Resources Development Act (MPRDA) which forms the bedrock of mining regulation has further entrenched CSR aspects within the legislation.[367] It makes provision for the promotion and development of communities affected by mining activities.[368] It compels mining companies to provide for social and labour plans, among others, as a pre-requisite for company registration.[369] In addition to the MPRDA's aspirations, it aims to promote employment and advance the social and economic welfare of South Africans, particularly the historically disadvantaged.[370] It seeks to ensure that 'holders of mining and production rights contribute towards the socio-economic development in areas of their operations'.[371] This speaks to the voluntary initiatives aimed at transforming the mining sector. The MPRDA lays the foundation for further development and regulation within the mining sector.[372] It places obligations on mining companies to go beyond the primary business of making a profit, and to contribute more to workers and communities within their operations.[373]

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[365] C Coumans 'Alternative accountability mechanisms and mining: The problems of effective impunity, human rights and agency' (2010) 30 *Canadian Journal of Development Studies* (31).

[366] B Siyobi 'Corporate social responsibility in South Africa's mining industry: An assessment' (2015) SAIIA, Governance of Africa's Resources Programme, Policy Briefing 142, 3.

[367] MPRDA 28 of 2002.

[368] MPRDA, Preamble.

[369] MPRDA, s 23(1)(e).

[370] MPRDA, s 100 (2) (a).

[371] MPRDA, s 2 (i); MPRDA Regulations, 2004, regulation (41) (c).

[372] MPRDA, s 100.

[373] MPRDA, s 2.

Similarly, the Mining Charter[374] expands on the principles contained in the MPRDA by targeting the inclusion of historically disadvantaged persons into meaningful participation in the mining industry.[375] It emphasises the need for the advancement of the social and economic welfare of mine communities, keeping in mind the need for the mine right holder to keep the social licence to operate.[376] A mining right holder is mandated to consult with the relevant local authorities and key stakeholders in identifying the developmental priorities of mine communities.[377] Other obligations on the mine right holder include providing decent housing, in conditions of dignity and healthcare services to mine workers.[378] The underlying goal of these provisions is to transform the mining sector through mandatory CSR on the part of the mining companies.

Similarly, the Regulations to the MPRDA aim, among others, to ensure meaningful contributions by mining companies towards the socio-economic development in the areas of their operations.[379] These regulations prescribe the content of the social and labour plans (SLP), which every mining company must develop, before commencing any operations.[380] Social and labour plans broadly cover the promotion of employment, the contribution to the transformation to the mining sector and ensure that holders of mining rights contribute towards the socio-economic development of mine communities.[381] A social and labour plan must include a local economic development

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[374] The 2018 *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry* GN 1002 in *GG* 41934 of 27-09-2018 (2018 Mining Charter).

[375] The mining charter derives its power from the MPRDA, s 100(2)(a); Mining Charter, Preamble.

[376] 2018 Mining Charter, s 2.5; J Prno & DS Slocombe 'Exploring the origins of social license to operate' (2012) 37 *Resources Policy* 346; see also H van Niekerk & G Mudimu 'Application and granting of rights to minerals: A trio of legal processes for the optimal exploitation and protection of right holders [An analysis of *Minister of Mineral Resources v Maweste (SA) Mining Corporation (Pty) Ltd* 2016 1 SA 306 (SCA)] (2019) 30 *Stell LR* 281.

[377] 2018 Mining Charter, s 2.5.1.

[378] 2018 Mining Charter, s 2.6 and 2.6.2.

[379] MPRDA Regulations, regulation 41(c).

[380] MPRDA Regulations, regulation 46 (a)(b).

[381] MPRDA Regulations, regulation 46.

plan and a human resource development programme.[382] These requirements were previously treated as voluntary aspects by the mining company.

The Companies Act[383] is another piece of legislation in which CSR provisions are expressly incorporated, placing direct obligations on companies.[384] This Act aims, among others, to 'encourage transparency and high standards of corporate governance' within companies.[385] There is an express recognition of the positive role that companies play in society, particularly as vehicles for achieving economic and social benefits.[386] It also aims to reaffirm the concept of the company as a means of achieving economic and social benefits.[387] There is, therefore, an acknowledgement of the role of companies in the general life of workers, beyond profit-making. In addition, the Companies Act provides for social and ethics committees (SECs), a position that represents a paradigm shift on CSR and corporate accountability.[388] The SECs are responsible for monitoring the company's activities on various aspects, including social and economic development, good corporate citizenship, the environment, health and labour and employment.[389] Despite the key role of the SECs towards enhancing accountability and transparency, the legislation does not make a mandatory requirement that key stakeholders, such as workers, are represented on the committee. This may result in the interests of workers being compromised and the continued regulatory failure.

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[382] MPRDA Regulations, regulation 46 (b) and (c).

[383] Act 71 of 2008.

[384] IM Esser (2011) 322; Other statutes directing companies to have CSR principles include the Labour Relations Act 66 of 1995; The National Credit Act 34 of 2005. The National Credit Act was discussed in relation to CSR in the case of *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) in which the HC pointed that "…the Bank, like most large corporations that invest in corporate social responsibility projects, had to be aware of the purposes of the CPA which was already in the public domain…".

[385] Companies Act 71 of 2008, s 7 (b) (ii).

[386] Companies Act, s 7(d).

[387] Companies Act, s 7 (d).

[388] Companies Act 71 of 2008, s 72(4) and Companies Act Regulations, regulation 43.

[389] Companies Act Regulations, regulation 43 (5); for a further discussion of the SECs, see chapter five, part 5.

While the abovementioned legal instruments are not exhaustive,[390] it is clear that companies are being directed by the State to incorporate meaningful CSR standards within their operations and on the minimum accepted content of such standards. Debates on whether codes of conduct are purely voluntary instruments are well documented, with some scholars arguing that codes of conduct may in certain circumstances bind the corporation.[391] The extent to which private codes are a response to State directives, or whether they are influenced by governmental or organised labour initiatives, is not clear. In addition, the incorporation of freedom of association, collective bargaining and health and safety provisions within these codes seems to suggest at a preliminary stage that such rights are considered important by mining companies. The nexus between the legislative directives, international drivers, reputational risks as well as shareholder influences on the voluntariness in adopting codes of conduct is also not clear. This blurred connection and the efficacy of such codes of conduct forms part of the enquiry undertaken in this study.

6.2 Understanding private codes

Different types of corporate social responsibility (CSR)[392] standards have been adopted by companies in general.[393] For the purposes of regulating labour standards, these types can be classified as follows: First, there are codes drafted and published by the industry for the benefit of companies in such an industry.[394] In such cases, all

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[390] For example, the Basic Conditions of Employment Act (BCEA) 75 of 1997 and the Code of Good Practice on the Arrangement of Working Time are also relevant.

[391] R Pearson & G Seyfang 'New hope or false dawn: Voluntary codes of conduct, labour regulation and social policy in a globalizing world' (2001) *Global Social Policy* 48; A Sobczak (2006) 16 *Business Ethics Quarterly* 167; RB Ferguson 'The legal status of non-statutory codes of conduct' (1988) 12 *Journal of Business Law* 12, 12-13.

[392] M Kerr, R Janda & C Pitts (2009) 5-32; C Coumans (2010) 30 *Canadian Journal of Development Studies* (31).

[393] Ibid; see also J Lopez, C Chacartegui & CG Canton 'From conflict to regulation: The Transformative Function of Labour Law' *in* G Davidov & B Langille *The idea of labour law* (2011) 356.

[394] For example, the Minerals Council South Africa (formerly Chamber of Mines South Africa) has a membership compact that applies to all its members. The Membership Compact addresses several issues including implementing ethical business practices; respecting fundamental human rights; contributing to the social and economic development of areas they do business. See Minerals Council South Africa, Membership Compact, Available at <https://www.mineralscouncil.org.za/special-features/158-membership-compact> (accessed 20-11-2019).

members are bound by the code of conduct. Secondly, there are codes of conduct that originate from national governments working with non-governmental institutions. The Kimberley Certification Process is an example of an instrument borne from the intervention of national governments and civic organisation.[395] Thirdly, there are codes that originate from third-party certification schemes and standard-setting-bodies.[396] Several certification schemes have developed over the years, particularly in supply chains and in agriculture. Such schemes are designed to ensure that companies respect and promote human and workers' rights in their operations.[397] Fourthly, some codes originate from non-governmental organisations[398] and from international bodies, such as the United Nations.[399] The Global Compact is an example of several institutions and key stakeholders that include governments, companies, non-governmental organisations among others coming together to share information on ten principles, covering human rights, labour, environment and anti-corruption.[400] Lastly, companies may adopt individual codes of conduct, applicable to their workplaces or operations across the globe.[401] Mining companies with several workplaces use the same code of conduct at different workplaces. Individual company codes of conduct form part of the enquiry in this thesis. The common feature of the above various codes

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[395] The Kimberly Process Certification, 2003; see also the UN General Assembly Resolution adopted by the General Assembly 'The role of diamonds in fuelling conflict: Breaking the link between illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts' (2018) A/RES/72/267.

[396] For example, The Kimberly Process Certification, 2003 and The International Financial Reporting Standards (IFRS). South Africa adopted these standards.

[397] S Brown & C Getz 'Privatizing farm worker justice: Regulating labor through voluntary certification and labeling' (2008) 39 *Geoforum* 1184.

[398] See International Organization for Standardization (ISO), Available at <https://www.iso.org/standards.html> (accessed 20-11-2019).

[399] Ibid; see also The United Nations Global Compact, Available at <https://www.unglobalcompact.org/> mining companies like Sibanye Gold, AngloGold Ashanti Limited and the Royal Bafokeng Platinum Limited are participants in the UN Global Compact Principles.

[400] UN Global Compact 'The ten principles of the UN Global Compact', Available at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 20-11-2019).

[401] See for example, The Lonmin Plc, Code of Business Ethics 2004.

is the inclusion of labour standards which are often drafted with reference to several ILO conventions.

These categories of codes and standards vary in many respects, including the aspects they seek to regulate; the degree of voluntariness in adoption; the level of sanction they impose for non-compliance; the nature of the enforcement mechanisms; the remedies in place and the scope of their application.[402] At their core, however, these codes, standards and certification schemes[403] regulate various matters including labour standards,[404] such as working conditions of workers; wages; prohibitions on child labour within companies and supply chains; working hours; leave regulations; freedom of association; anti-discrimination policies; and health and safety standards.[405]

7 Selected rights under codes of conduct

Having identified codes of conduct by mining companies as CSR instruments embracing participation rights and health and safety aspects, the following section seeks to introduce the selected rights contained in codes of conduct.

7.1 Freedom of association

Freedom of association is a fundamental human right, guaranteed both internationally and domestically. Internationally, Convention 87 remains one of the core ILO documents, which unpacks the obligations of member states in fulfilling the right to freedom of association.[406] The South African Constitution guarantees everyone the

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[402] SD Murphy 'Taking multinational corporate codes of conduct to the next level' (2005) *43 Columbia Journal of Transnational Law* 389.

[403] L Flynn (1992) 276-280. The author notes that as early as 1983, President Brand Gold Mine (now part of the Free State operations of Harmony Gold) in Welkom received five-star ratings from the International Mine Safety Rating System. This was despite the mining accidents and deaths that were taking place at the mine.

[404] DK Brown, AV Deardorff and RM Stern 'International labor standards and trade: A theoretical analysis' (1993) *Research Seminar in International Economics* Paper No. 3, 3.

[405] For example, the Lonmin Plc, Code of Business Ethics 2004, makes provision for all these listed labour standards; Glencore and Sasol Codes of Conduct guarantees freedom of association, prohibits forced and compulsory labour and makes pronouncements on health and safety issues of employees.

[406] International Labour Organization (ILO), *Freedom of Association and Protection of the Right to Organise Convention, C87*, (1948) Available at: <http://www.refworld.org/docid/425bc1914.html>

right to freedom of association.[407] In South Africa and in many other jurisdictions, freedom of association is closely associated with other rights including freedom of expression,[408] the right to demonstrate,[409] and political rights.[410] In relation to the workplace, freedom of association is an enabling right which provides a bridging gap for the exercise and enjoyment of other rights.[411] This right has been viewed in other jurisdictions as the "freedom to combine together for the pursuit of common purposes or the advancement of common causes".[412] In this regard, freedom of association is a foundational right that underpins the right to collective bargaining.[413] The right to freedom of association works hand in hand with the right to organise and to bargain.[414]

It is a recognition of the freedom by individuals to associate or dissociate from one another. The ILO Committee of Experts has linked freedom of association to the right of individuals to withhold labour in promoting social interests.[415] It entails the right to form and to join a trade union and to participate in the affairs of the trade union freely without coercion or harassment.[416] This right is further interpreted to mean that trade unions can recruit members at the workplace.[417] The so-called organisational rights

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(accessed 17-06-2018).

[407] Constitution of the Republic of South Africa 1996, s 18.

[408] Constitution of the Republic of South Africa, 1996 s 16.

[409] Constitution of the Republic of South Africa, 1996 s 17.

[410] Constitution of the Republic of South Africa, 1996 s 19.

[411] N Egels-Zandén 'Private regulation and trade union rights: Why codes of conduct have limited impact on trade union rights' (2014) *Journal of Business Ethics* 461, 462.

[412] *Reference Re Public Service Employee Relations Act (Alta)* (1987)1 SCR 313, 146.

[413] M Budeli 'Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order' (2007) Unpublished PhD Thesis 47.

[414] International Labour Conference 97th Session (2008) Report I (B) Report of the Director General Freedom of Association in Practice: Lessons learned' Global Report Under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work ix.

[415] See also *Business Unity SA v Congress of SA Trade Unions & Others* (2020) 41 *ILJ* 174 (LC), 1779.

[416] *PORCRU v SACOSWU and Others* (2019) (1) SA 73 (CC) paras 89-92; *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) and Another* (2003) (3) SA 513 (CC) para 31.

[417] *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) and Another* (2003)

that are given to a registered trade union enable or give effect to freedom of association.[418] The right is further linked to the requirement that such trade unions must be joined freely, without coercion.[419] As pointed earlier, freedom of association is an enabling right and is linked to other rights, particularly the right to bargain collectively.

7.2 Collective bargaining

Freedom of association enables workers to organise and to bargain collectively against their employer on matters of mutual interest.[420] The right to organise, the right to freedom of association and the recognition of the right to bargain collectively are often viewed as a bundle of rights that give effect to effective collective bargaining.[421] Internationally, the right to organise and to collective bargaining is elaborated under the ILO Convention 98.[422] This right has been given effect through the Constitution and the LRA.[423] Employees, in South African mines, have used collective bargaining as a mechanism to better their working conditions. In the certification judgment, it was pointed out that "…collective bargaining is based on the need for individual workers to act in combination to provide them collectively with sufficient power to bargain effectively with employers".[424]

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(3) SA 513 (CC) para 34.

[418] See the LRA, ss 11-22.

[419] See ILO Convention 87, Art 2.

[420] National Research Council *Monitoring international labour standards: Techniques and sources of information* (2004) 105.

[421] National Research Council *Monitoring international labour standards: Techniques and sources of information* (2004) 105; *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* (1996) (4) SA 744 (CC) para 69 "…collective bargaining is based on the need for individual workers to act in combination to provide them collectively with sufficient power to bargain effectively with employers.

[422] The International Labour Organisation (ILO) *Right to Organise and Collective Bargaining Convention 98,* 1949.

[423] The Labour Relations Act 66 of 1995 gives effect to this right by according a set or rights to both employees and employers. See the LRA chapter 3.

[424] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 69.

What makes freedom of association and collective bargaining crucial rights is the ability for workers to fight and advance their rights. Collective bargaining not only advances the interests of workers at the workplace but further enables the participation of workers on the affairs of the company.[425] As noted in chapter five, the increase in subcontracting of core functions within mining operations has made it extremely difficult for such workers to organise effectively.[426] The Marikana tragedy further demonstrates the failure of collective bargaining to resolve industrial disputes.[427]

Lastly and more relevant to the mining sector is the right of workers to an environment that is not harmful to health.

7.3 Health and safety

The Constitution of South Africa guarantees everyone the right to an environment that is not harmful to well-being.[428] The right to an environment that is not harmful has been interpreted to include first, the natural environment and secondly the working environment.[429] Du Plessis has interpreted this to include the 'socio-economic and cultural dimensions of the inter-relationships between people and the natural environment'.[430] The right contains key aspects, including having an environment that is not harmful and 'well-being'. The concept of 'well-being' is difficult to define, with some pointing out that it has no precise meaning.[431] Concepts such as a 'good life', 'feeling satisfied', 'happy', 'human development' and 'contribution to society' have been

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[425] J Schregle 'Collective bargaining and workers' participation: The position of the ILO' (1993) 14 *Comparative Labour Law Journal* 431, 436.

[426] See Chapter five, part 4.2.

[427] See chapter two, part 3.

[428] Constitution of the Republic of South Africa, 1996, s 24(a).

[429] See the National Environmental Management Act 107 of 1998 s 1(1) which defines the environment more broadly to include (i) the land. water and atmosphere of the earth: (ii) micro-organisms, plant and animal life: (iii) any part or combination of (i) and (ii) and the interrelationships among and between them: and (iv) the physical. chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

[430] A du Plessis 'South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty? (2011) 27 *SAJHR* 279, 293.

[431] R Dodge, AP Daly, J Huyton & LD Sanders 'The challenge of defining wellbeing' (2012) 2 *International Journal of Wellbeing* 222, 222-223.

used to define well-being.[432] Du Plessis has pointed out that the meaning of well-being is 'relative to people's environment'.[433] A holistic reading of the constitutional right leads to a broader interpretation which encompasses peoples' working environments and that such environments must not be harmful to the well-being. South Africa is also a party to the International Covenant on Economic, Social and Cultural Rights. Article 7 (b) places emphasis on the commitments by the State parties to the provision of a safe and healthy working condition. There is a clear right under both international and domestic legislation for the provision of a safe and a healthy working condition.

Closely linked to the right to an environment that is not harmful to well-being is the right of everyone to have access to health care services. This includes reproductive health care,[434] sufficient food and water;[435] social security, and appropriate social assistance for dependants.[436] These rights are expanded further in various specific pieces of legislation, including the MHSA – which applies to mines.[437] Despite the progressive elaboration of this right, South African mines remain dangerous with high rates of fatal accidents and compensable diseases.

The growth of the South African mining industry and its contribution to the economy occurred at a cost, with numerous related illnesses and the loss of human life.[438] Mineral extraction occurred with less attention to human beings, producing the

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[432] A du Plessis 'The promise of 'well-being' in section 24 of the Constitution of South Africa' (2018) 34 *SAJHR* 191, 193.

[433] A du Plessis 'The promise of 'well-being' in section 24 of the Constitution of South Africa' (2018) 34 *SAJHR* 191, 193.

[434] Constitution of the Republic of South Africa, 1996, s 27(1)(a).

[435] Constitution of the Republic of South Africa, 1996, s 27(1)(b).

[436] Constitution of the Republic of South Africa, 1996, s 27(1)(c).

[437] See chapter five, part 3.5.

[438] *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ) para 1; see also M Nicol & J Leger 'Reflections on South Africa's gold mining crisis: challenges for restructuring' (2011) 75 *Transformation* 173, 178. The authors argue that in 1990, for every ton of gold production in South Africa, one mineworker died, and fourteen others were seriously injured. These statistics do not take into account the long-term health problems that develop with mining like silicosis. See also L Flynn *Studded with diamonds and paved with gold: Miners, mining companies and human rights in Southern Africa* (1992) Bloomsbury: London, makes remarks on death statistics per every tonnage of gold produced.

minerals.[439] In addition, South African mines are regarded as the world's deepest and most dangerous.[440] Most deaths continue to occur in the gold and platinum sector.[441] In 1960, 435 mineworkers were trapped underground at Coalbrook mine and lost their lives.[442] Twenty-six years later, 177 mineworkers died at Kinross gold mine.[443] The exact figures of deaths from direct mining accidents vary, with some estimating that over 70 000 mineworkers to have died in the last century.[444] Flynn, puts this more vividly in the gold sector, stating that 'one human [being] died for every single ton of gold mined'.[445] Writing in 1961, Simons similarly pointed out that 36 000 mineworkers died in the gold mines since the beginning of the century.[446] In 2016, three mineworkers were trapped underground at Lily Mine in the Mpumalanga region and their bodies were never recovered.[447] These incidents provide an overview of the poor state of safety in mines. There has been a steady decline in the number of deaths and most of the accidents have occurred before the new constitutional dispensation. The fatalities nonetheless remain high and unacceptable.[448]

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439 L Flynn (1992) 3.

440 F Njini 'Mine Fatalities in South Africa rise first time in decade' 08 December 2017, Bloomberg.

441 D Msiza Mineral *Resources releases 2018 Mine Health and Safety Statistics* (2019) Available at <https://www.gov.za/speeches/mineral-resources-releases-2018-mine-health-and-safety-statistics-1-mar-2019-0000> (accessed 29-11-2019).

442 JN van der Merwe 'Beyond coalbrook: What did we really learn? (2006) 106 *The Journal of the Southern African Institute of Mining and Metallurgy* 857, 858.

443 Minerals Council South Africa 'We care and we remember Kinross, 16 September 1986' Available at <https://www.mineralscouncil.org.za/industry-news/we-care-we-remember/176-we-remember-kinross> (accessed 03-03-2020).

444 H Macmillan 'Plus ça change? Mining in South Africa in the last 30 years – an overview' (2017) 44 *Review of African Political Economy* 272, 273.

445 L Flynn (1992) 3. This was a conclusion the author reached after analysing the number of mining deaths in the sector; see also T Ngcukaitobi (2013) p. 836 for a general discussion of human rights violations.

446 HJ Simons 'Death in South African mines' (1961) 5 *Africa South* 41, 41.

447 F Cawood & A Ashraf 'Towards safer mining: The role of modelling software to find missing persons after a mine collapse' (2018) 12 *Mining of Mineral Deposits* 13, 14.

448 Cross reference chapter 1 and 2;

Closely linked to the safety of mineworkers is the issue of HIV/AIDS, tuberculosis and silicosis at mines. South Africa has more than 19% of its population living with HIV/AIDS.[449] The mining industry also boasts of the most contractable diseases, including tuberculosis, HIV/AIDS and silicosis. Studies on former mineworkers in South has shown that pneumoconiosis rates are between 26 to 36%.[450] The high levels of silica dust - and the exposure of mine workers to such dust - act as catalysts in the spreading of tuberculosis.[451] Not only does silica dust contribute to the high prevalence of tuberculosis, but its combination with other diseases like HIV/AIDS also remains a critical concern in mining areas. The combination of silica dust, HIV, and poor working conditions enable the easy spreading of TB in mines.[452] South African mines have also been linked to the HIV/AIDS prevalence in Swaziland and Lesotho due to the massive number of migrant mineworkers who worked in South African mines over the past century.[453] The above conditions undermine the right accorded to 'everyone' to an environment that is not harmful to health.

The DMR has issued a Guidance Note on strengthening HIV counselling and testing at mines which aim to assist the South African mining industry in achieving the 90-90-90 strategy. The strategy primarily sets out targets aiming for 90% of all people with HIV to know their status; 90% of those diagnosed with HIV infection to receive antiretroviral therapy (ART) and 90% of those receiving ART to have a suppressed viral load.[454] The Guidance note identifies gaps and challenges in achieving these

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[449] DMR Guidance Note on strengthening the HCT (HIV Counselling and testing) uptake in the South African mining industry in terms of the Mine Health and Safety Act, as set out in the schedule (2020) *GG* 42956, 165.

[450] RN Naidoo 'Mining: South Africa's legacy and burden in the context of occupational respiratory diseases' (2013) 6 *Global Health Action* 20512; J McCulloch 'Sleights of hand: South Africa's gold mines and occupational disease' (2016) 25 *New Solutions: A Journal of Environmental and Occupational Health Policy* 469.

[451] J McCulloch (2016) 25 *New Solutions: A Journal of Environmental and Occupational Health Policy* 470.

[452] D Stuckler, S Steele, M Lurie & S Basu 'Dying for gold: The effects of mineral mining on HIV, tuberculosis, silicosis and occupational diseases in Southern Africa' (2013) 43 *International Journal of Health Services* 639, 640-641.

[453] L Corno & D de Walque 'Mines, migration and HIV/AIDS in Southern Africa' (2012) 21 *Journal of African Economies* 465, 466.

[454] DMR Guidance Note on strengthening the HCT (HIV Counselling and testing) (2020) *GG* 42956,

targets namely the non-allocation of a budget for HIV programmes by the employer; lack of engagement of key stakeholders; lack of on-sight facilities offering HCT; inadequate HIV content during induction programmes; lack of adequate counselling, testing and treatment.[455] In addition, any meaningful HCT programme by a company must address policy issues related to HIV, allocate adequate resources and must have a monitoring, evaluation and reporting programme in place.[456]

Despite non-standard workers at mines qualifying for protection under the applicable legislation, the nature and precarity of their work make them more disposed to the above diseases and accidents. This is due to the fact that despite these workers being contracted to work on terms less favourable than the full-time employees, they nonetheless perform full-time work, in risky workplaces often with no adequate protective clothing. This is despite the fact that most mining companies have made commitments to respecting these sets of rights in their codes of conduct.

8 Codes of conduct in the mining sector

The above gives an overview of codes of conduct, focusing on their origin. While the term code of conduct is used in this thesis, they are also referred to as "codes of practice, codes of ethics, codes of honour, rules of conduct, voluntary agreements, guidelines, and recommendations".[457] First, most codes of conduct have incorporated at length key ILO conventions on human and labour rights, including the right of workers to freedom of association and the right to effective collective bargaining.[458] For example, the AngloGold Ashanti code of conduct places emphasis on its commitment to respecting international conventions and standards within its business operations.[459]

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[455] DMR Guidance Note on strengthening the HCT (HIV Counselling and testing) (2020) *GG* 42956, 166.

[456] DMR Guidance Note on strengthening the HCT (HIV Counselling and testing) (2020) *GG* 42956, 177.

[457] L Huyse & S Parmentier 'Decoding codes: the dialogue between consumers and suppliers through codes of conduct in the European community' (1990) 13 *Journal of Consumer Policy* 253, 255.

[458] Anglo Ashanti Code of Ethics 6.

[459] Anglo Ashanti Code of Ethics 6.

Secondly, unilateral codes of conduct recognise the right of workers to a healthy working environment and further incorporate other health programmes that target HIV/AIDS, tuberculosis, induced hearing loss and silicosis at the workplace. Thirdly, some of the codes of conduct seem to apply beyond the immediate full-time, permanent employees, thus purportedly proving protection to all workers at the mine.

The linkage of codes of conduct to workers, not directly employed by the mining company remains a key area that such codes of conduct can contribute towards offering key rights to non-standard workers. Yet despite this potential, codes of conduct have not yet been tested in the mining context on whether they are useful regulatory tools on labour standards and health and safety aspects. Evidence suggests that they have not been particularly successful in filling the regulatory gaps in the labour sphere.

To understand the regulatory failure, there is a need to look at the level of the firm and the interactions taking place. This justifies the need to assess the content of codes of conduct, unilaterally drafted by mining companies. Despite efforts from the government, organised labour and mining companies to arrest the situation, events such as the Marikana massacre have shown the deep-rooted crisis in the mining sector, including the inadequacy of the existing regulation.[460] In short, regulatory failure affects all stakeholders in the sector, including communities. Given the central importance of the mining sector to the South African economy, new, inclusive mechanisms to address the regulatory failure must be sought.[461] Hence, there appears to be a gap between what private codes regulate in theory and how effective they are in practice.

9 Conclusion

This chapter provided context and background to key challenges faced by non-standard workers in accessing and exercising key rights in South African mines. A combination of the legacy problems in the mining sector and effect of globalisation on

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[460] R Sil & K Samuelson 'Anatomy of a massacre: The roots of heightened labour militancy in South Africa's platinum belt' (2018) 47 *Economy and Society* 403.

[461] For some economic analysis on the impact of strikes, see HR Bohlmann, JH Van Heerden, PB Dixon & MT Rimmer 'The impact of the 2014 platinum mining strike in South Africa: An economy-wide analysis' (2015) 51 *Economic Modelling* 403.

employment is creating a challenge for the legal framework to protect workers who are brought to mines through the non-traditional premise of the standard employment relationship. The labour framework in South Africa is failing to protect adequately non-standard workers in the mining sector due to new arrangements of work, particularly those arrangements that involve third parties to the employment relationship. Governments across the globe are grappling with the regulation of labour relations, with the traditional models of regulation failing to adapt timeously to protect new categories of workers. South Africa continues to face unstable labour relations, which often turn violent, thereby impacting the mining sector negatively and by extension the economy. In addition, the chapter introduced codes of conduct and looked at the key components of the selected rights, namely freedom of association, collective bargaining and the right to an environment that is not harmful to well-being. The chapter made the proposal to assess the role of codes of conduct, drafted and implemented by mining companies with reference to the incorporated labour standards. The next chapter looks at the concept of regulation, with a view of assessing the role and place of self-regulation in regulation.

Chapter 3: Understanding the concept of regulation

1 Introduction

Regulation of labour standards in the South African mining sector at present is tantamount to putting the proverbial new wine in old wineskins: the legal framework is no longer able to support the emergence of new forms of employment in the sector.[462] The contemporary regulation of employment was drafted and premised on the idea of an employment relationship that is for an indefinite period, full time in nature and founded on a contract of employment.[463] The growth of the informal economy and the development of various forms of employment relationships have undermined this premise.[464] Similarly, the legal mechanisms to regulate such employment mechanisms are undergoing constant stress. An assessment of the premise of the concept of regulation is necessary to inform and situate the current gaps in regulation and the new approaches takes such space.

The dominant views on regulation have been the 'command-and-control model' on the one hand and 'self-regulation' on the other.[465] Command-and-control regulation refers

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[462] The 'old wine in new skins' adage was first used by J Theron in the labour law context (J Theron 'The shift to services and triangular employment: Implications for labour market reform' (2008) 29 *ILJ* 10); The New Kings James Version (NKJV), The Book of Matthew (1982) Chapter 9; J Muddiman & J Barton (eds) *The Oxford Bible commentary: The Gospels* (2001) 93; M Altman 'A review of labour markets in South Africa: Research Gaps – Labour market function and policy in South Africa' (2005) Human Sciences Research Council, Employment and Economic Policy Research Programme 3.

[463] E S Fourie 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 4 *PER* 110; R Dicks 'The growing informalisation of work: Challenges for labour – recent developments of atypical workers' (2007) Law Democracy and Development 39; N Smit & E Fourie 'Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries' (2009) *TSAR* 516; SW Mills 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility' (2004) 25 *Industrial Law Journal* 1203; E Fourie 'Exploring innovative solutions to extend social protection to vulnerable women workers in the informal economy' (2016) 37 *ILJ* 831. These scholars argue that there is an increase in employment forms that do not comply with a full-time employment, for an undefined period which is founded on the contract of employment; see also C Thompson 'The changing nature of employment (2003) *ILJ* 1793.

[464] SW Mills (2004) 25 *Industrial Law Journal* 1203.

[465] D Sinclair 'Self-regulation versus command and control? Beyond false dichotomies' (1997) *Law & Polic*y 529, 530.

to direct state regulation, carrying some form of sanction in the event of a breach.[466] The command-and-control approach has clear prescriptive rules on what happens in cases of breaches.[467] Several weaknesses have been levelled against the command-and-control model, namely its rigidity to changes; lack of anticipation in regulating, cumbersome and the ineffectiveness in shaping the desired outcomes from corporations.[468] Other scholars do not subscribe to the notion that command-and-control and self-regulation are distinct modes, which must be viewed from different perspectives.[469] Whereas the command and control mode of regulation demands the clear intention of the state to regulate, such intention is not a requirement under self-regulation.[470] As this chapter demonstrates, exclusive distinctions between the command-and-control model and self-regulation are increasingly being dismissed in favour of approaches that combine these models depending on the level of involvement of the state.[471]

This chapter first considers the concept of regulation and situates it within current labour relations. Through an understanding of what regulation entails, the chapter demonstrates how non-state involvement may be strengthened in the regulation of labour standards, particularly in a global context.[472] The chapter unpacks the concept of regulation by offering a nuanced understanding of the regulation of labour standards in an era marred by rising non-standard forms of employment and increased

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[466] W Harrington & RD Morgenstern 'Economic Incentives versus Command and Control: What's the Best Approach for Solving Environmental Problems? *in* GR Visgilio & DM Whitelaw (eds) *Acid in the environment: lessons learned and future prospects* (2007) 233;

[467] D Levi-Faur 'Regulation and Regulatory Governance' in D Levi-Faur (ed) *Handbook on the politics of regulation* (2011) 14.

[468] D Sinclair 'Self-regulation versus command and control? Beyond false dichotomies' (1997) 19 *Law & Policy* 529, 531.

[469] See for example D Sinclair (1997) *Law & Polic*y 529.

[470] C Koop and M Lodge (2017) *Regulation & Governance* 98.

[471] D Sinclair (1997) *Law & Order* 552.

[472] D Held & A McGrew "The Great Globalization Debate: An Introduction" in D Held & A McGrew (eds) *The global transformations reader: An introduction to the globalization debate* (2003) 4. Globalisation is defined as the 'expanding scale, growing magnitude, speeding up and deepening impact of interregional flows and patterns of social interaction'. The interaction further takes political, economic and social interaction form.

dominance of corporations. The main claim made under this chapter is that in practice, regulation must be viewed along a spectrum – with the models (command-and-control on the one hand and self-regulation on the other) working simultaneously to influence behaviour.

2 Origins and perspectives on regulation

The current conceptualisation of regulation as a discipline of study was borne from different academic disciplines, including psychology, sociology, legal theory and economic theories of supply and demand.[473] Regulation as an independent discipline of study followed changes in social and economic circumstances in modern states.[474] Following large-scale industrialisation and population growth, in the late 1760s, some form of control on the allocation of resources became imperative, particularly on the supply of basic services to the public.[475] Such utilities included water, public health, electricity and employment relationships.[476] In other jurisdictions, such as America, regulation as a field of study was formalised by the creation of various utility commissions, which provided a 'field of regulatory analysis'.[477] The growing population and the demand on certain basic services required some level of regulation from the government and the established government agencies to control the allocation and

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[473] C Scott 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' *in* J Jordana & D Levi-Faur (eds) *The politics of regulation: Institutions and regulatory reforms for the age of governance* (2004) 146; R Baldwin, M Cave & M Lodge *Understanding regulation: Theory, strategy and practice* (2012) 1.

[474] See also R Baldwin, M Cave & M Lodge *Understanding regulation: Theory, strategy and practice* (2012) 22 where the author argues that there are certain contexts in which regulation can be categorized as coming into effect before social relations.

[475] TS Ashton *The industrial revolution 1760-1830* (1997); GL Priest 'The origins of utility regulation and the "theories of regulation debate" (1993) 36 *The Journal of Law & Economics* 289; see also AI Ogus 'Regulatory law: Some lessons from the past' (1992) 12 *Legal Studies* 2.

[476] A Ogus *Regulation legal reform and economic theory* (2004) 8. The author, writing from the British perspectives acknowledges other earlier forms of regulation; R Baldwin, M Cave & M Lodge *Understanding regulation: Theory, strategy and practice* (2012) 4.

[477] GJ Stigler & C Friedland 'What can regulators regulate? The case of electricity' (1962) 5 *Journal of Law and Economics* 1; GL Priest 'The origins of utility regulation and the "theories of regulation" debate' (1993) 36 *Journal of Law & Economics* 289, 289. The view that regulation emerged with the rise of commissions is questioned by other scholars. *See* GP Miller 'Comments on Priest, 'The origins of utility regulation and the 'theories of regulation' debate' (1993) 36 *Journal of Law & Economics* 325; EL Glaeser & A Shleifer 'The rise of the regulatory state' (2003) 41 *Journal of Economic Literature* 401.

cost of resources.[478] As a result, the state-centric or public control has remained the dominant understanding of regulation.[479]

Despite the long history of existence, it has been argued that regulation as a discipline of study lacks a coherent understanding from different academic and policy fields.[480] There is no universal understanding of the meaning of regulation across professions or academic disciplines.[481] With the term used in different contexts – including social sciences, psychology, economics and in the legal field, finding a precise working definition is fraught with difficulties.[482] Baldwin thus concludes that it is impossible to formulate a single definition given the various approaches to the concept.[483]

The meaning of regulation ranges from all forms of social control used by either the state or non-state actors to specific forms of governmental intervention.[484] This open-ended definition creates challenges, particularly when attempting to find a working definition for specific disciplines, such as labour relations. For example, from a sociological perspective, regulation is viewed largely as any mechanism of social control.[485] Social control in this sense refers to the ability of a society or a group of

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[478] GL Priest 'The origins of utility regulation and the "theories of regulation debate" (1993) 36 *The Journal of Law & Economics* 289.

[479] A Shleifer 'Understanding regulation' (2005) 11 *European Financial Management* 439, 440.

[480] C Koop & M Lodge 'What is regulation? An interdisciplinary concept analysis' (2017) 11 *Regulation & Governance* 95. The authors cite the emergence of the economic theory of regulation as one of the 'key milestones in the field of regulation. See GJ Stigler (1971) 2 *The Bell Journal of Economics and Management Science* 3.

[481] BM Mitnick *The political economy of regulation* (1980); D Levi-Faur 'Regulation and Regulatory Governance' *in* David Levi-Faur (ed) *Handbook on the politics of regulation* (2011) 3; R Baldwin, M Cave & M Lodge *Understanding regulations: theory, strategy and practice* (2012) 3; J Jordana & D Levi-Faur (eds) *The politics of regulation: Institutions and regulatory reforms for the age of governance* (2004); D Levi-Faur *Handbook on the politics of regulation* (2001); P Selznick 'Focusing Organisational Research on Regulation' *in* R Noll (ed) *Regulatory policy and the social sciences* (1985) 363 who argue that regulation refers only to a 'sustained and focused control exercised by a public agency over activities that are valued by a community'; J den Hertog 'General Theories of Regulation' Book chapter 223

[482] A Ogus *Regulation legal reform and economic theory* (2004) 1.

[483] R Baldwin, M Cave & M Lodge *Understanding regulation: Theory, strategy and practice* (2012) 1.

[484] R Baldwin, M Cave and M Lodge *Understanding regulation: Theory, strategy and practice* (2012) 3.

[485] M Janowitz 'Sociological theory and social control' (1975) 81 *American Journal of Sociology* 82; A Giddens & PW Sutton *Essential concepts in sociology* (2017) 187.

people to control itself in accordance with established values and principles.[486] In the discipline of economics, on the other hand, some view regulation as a mechanism to exploitation, used by interest groups to further their agendas, particularly in the allocation of resources.[487] This approach is often referred to as the capture theory.[488] Thus according to this perspective, regulation is captured by interest groups, including the particular industry or markets for its own benefit. Other economists reject the 'capture theory' or 'interest theory' to regulation and argue that markets as opposed to direct government control are more suitable for the allocation of resources.[489] This perspective views markets as capable of resolving any anomalies without the involvement of government.

Positivist legal scholars by contrast, largely view regulation as encompassing those legal instruments promulgated by publicly elected bodies, including parliament and municipalities which are aimed at inducing a certain desired behaviour.[490] This means that regulation is only understood as incorporating instances where there is a public directive, which must be complied with or which non-compliance of such a directive, brings some form of sanction.[491] Positivist legal scholars separate law from other norms, primarily on the basis of the binding nature of law and its ability to impose sanctions in cases of violation.[492] Regulation is thus synonymous with hard law and

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[486] M Janowitz 'Sociological theory and social control' (1975) 81 *American Journal of Sociology* 82; RF Meier 'Perspectives on the concept of social control' (1982) 8 *Annual Review of Sociology* 35. The author describes social control as 'a mechanism to ensure compliance with norms'.

[487] RA Posner 'Theories of economic regulation' (1974) National Bureau of Economic Research (NBER) Working Paper No. 41; D Levi-Faur 'Regulation and Regulatory Governance' *in* David Levi-Faur (ed) *Handbook on the politics of regulation* (2011) 3.

[488] RA Posner (1974) National Bureau of Economic Research (NBER) Working Paper No. 41.

[489] HM Trebing 'The chicago school versus public utility regulation' (1976) 10 *Journal of Economic Issues* 97, 98. The author argues that this was the basis of the neoliberal approaches to regulation.

[490] MM Bigelow 'Definition of law' (1905) *Columbia Law Review* 1; A Ogus 'Enforcing regulation: Do we need the criminal law? *in* H Sjögren and G Skogh (eds) *New perspectives on economic crime* (2004) 42; JU Lewis 'Blackstone's definition of law and doctrine of legal obligation as a link between early modern and contemporary theories of law' (1986) *Irish Jurist* 336.

[491] R Baldwin, M Cave & M Lodge (2012) 10 and 106-107. The authors argue that viewed from this narrow lens, regulation is often a set of specific commands with a clear body responsible for executing the regulatory functions; second as all forms of state influence, designed to produce a certain directed outcome.

[492] G Shaffer & MA Pollack 'Hard and soft law: What have we learned? (2012) Legal Studies Research

by-laws which are backed by sanctions.[493] The state is at the core of this model of regulation. State-centric models view regulation from narrow perspectives of "sustained and focused control exercised by a public agency over activities that are valued by the community".[494] In regulation literature, such forms of regulation are referred to as 'command-and-control'.[495] This means there is a directive that must be complied with, and failure to do so results in some form of punishment or sanction.[496] On the other hand, natural law legal scholars recognise morality as intrinsically connected to what constitutes law and regulation.[497] This position takes into account many forms of social control as constituting regulation.

The above demonstrates the difficulty or rather the undesirability of attempting to develop a single definition. Koop and Lodge argue that this lack of agreement on what constitutes regulation emanates from a lack of common understanding of the key themes underlying regulation, which include the intention to regulate, the scope of regulation, the identity of the regulator, and the nature of the regulator and the regulated.[498]

Paper Series No 12 – 17, Available at <https://www.law.uci.edu/faculty/full-time/shaffer/pdfs/2012%20Hard%20and%20Soft%20Law.pdf> (accessed 03-12-2019) 2.

[493] R Baldwin 'Regulation: After 'command and control'' *in* Keith Hawkins (ed) *The humanface of law: Essays in honour of Donald Harris* (1997) 65.

[494] P Selznick 'Focusing Organizational Research in Regulation' *in* R Noll (ed) *Regulatory policy and the social sciences* (1985) 363; D Levi-Faur 'Regulation and Regulatory Governance' *in* D Levi-Faur (ed) *Handbook on the politics of regulation* (2011) 14.

[495] R Baldwin, M Cave & M Lodge (2012) 106-107; D Sinclair 'Self-regulation versus command and control? Beyond false dichotomies' (1997) *Law & Order* 529; J Black 'Critical reflections on regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; R Baldwin 'Regulation: After 'command and control'' *in* Keith Hawkins (ed) *The humanface of law: Essays in honour of Donald Harris* (1997) 65.

[496] D Sinclair 'Self-regulation versus command and control? Beyond false dichotomies' (1997) 19(4) *Law and Policy* 529; LA Alm 'A need for new approaches' (1992) 18 *EPA Journal* 7; DH Cole & Z Grossman 'When is command and control efficient? Institutions, technology, and the comparative efficiency of alternative regulatory regimes for environmental protection' (1999) *Wisconsin Law Review* 887.

[497] L Strauss *Studies in platonic political philosophy* (1983) 137.

[498] *See* C Koop & M Lodge 'What is regulation? An interdisciplinary concept analysis' (2017) 11 *Regulation & Governance* 97 – 100.

2.1 Intention to regulate

Koop and Lodge have formulated several conceptual questions across scholarly disciplines in an attempt to find common themes underlying regulation.[499] For them, the intention to regulate seems to mark separate modes of regulation – the 'command and control model' on the one hand and the 'self-regulation model' on the other.[500] First, there are debates on whether an express intention to regulate is a pre-requisite for that form of control to constitute a regulation.[501] Under the command and control model of regulation, there is an express intention to regulate by the government or the public agency.[502] The state uses its power either to restrict, permit, promote or to set requirements for certain aspects.[503] A breach of the conditions is often accompanied by a fine, imprisonment or some consequence, including losing a licence to operate.[504] Intention to regulate is, therefore, used as a screening mechanism to determine conduct that constitutes regulation from other forms of social control. Regulation is therefore only understood as the 'direct intervention' by the state.[505]

In fact, the intention to regulate remains one of the core aspects that separates various schools of regulation. If regulation is to be used as a distinct tool of governance, aspects that constitute regulation must be narrowed down to enable its application.[506]

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[499] C Koop & M Lodge 'What is regulation? An interdisciplinary concept analysis' (2017) 11 *Regulation & Governance* 97 – 100

[500] C Koop & M Lodge (2017) *Regulation & Governance* 97.

[501] C Koop & M Lodge (2017) *Regulation & Governance* 97.

[502] R Baldwin 'Regulation: After Command and Control' *in* K Hawkins (ed) *The human face of law: Essays in honour of Donald Harris* (1997) 66; J Black 'Critical reflections on regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1;

[503] C Koop & M Lodge (2017) 11 *Regulation & Governance* 97.

[504] J Black 'Critical reflections on regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; R Baldwin 'Regulation: After Command and Control' *in* K Hawkins (ed) *The human face of law: Essays in honour of Donald Harris* (1997) 66; see also G Stigler (1971) 2 *Bell Journal of Economics and Management Science* 3 who argues that the state has one main weapon which private citizens do not possess – the power to coerce compliance.

[505] C Koop & M Lodge (2017) *Regulation & Governance* 98.

[506] R Baldwin, C Scott & C Hood 'Introduction' *in* R Baldwin, C Scott & C Hood (eds) *A reader on regulation* (1998) 1-55; C Koop & M Lodge 'What is regulation? An interdisciplinary concept analysis' (2017) 11 *Regulation & Governance* 98.

In this sense, earlier writers on regulation who were influenced by the positivist school of thought limited regulation to direct interventions by the state.[507] From their perspective, regulation was considered from the narrow conceptions of hard law, carrying sanctions or punishment in cases of breach.[508] This, however, does not assist much in understanding and streamlining the concept of regulation.

Limiting regulation to intentional governmental intervention creates certain limitations. There are perspectives on regulation that ground all mechanisms capable of effecting change in social behaviour and which do not require intention as a pre-requisite to qualify as regulation.[509] Given the broadened nature of this approach, it is difficult (if not impossible) to demarcate the parameters of regulation. Second, not all self-regulation approaches to regulation lack the express intention to regulate.[510] Indeed, some of the contemporary self-regulation approaches emanate from a desire to fill the gaps inherent within the state-centric regulatory approaches.[511] The sole use of intention as a criterion to distinguish regulation from non-regulation fails to provide clarity. The inadequacy of intention has resulted in the use of another criterion – assessing the scope of regulation as a mechanism to define regulation.[512] Due to the inconclusiveness of the above perspectives, another criterion that uses the scope and identity of the regulator have also been used to shed some light on what constitutes regulation.[513]

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[507] RG Noll 'What is Regulation? (1980) California Institute of Technology: Social Science Working Paper 324; R G Noll 'Government Regulatory Behaviour: A Multidisciplinary Survey and Synthesis' in R G Noll (ed) *Regulatory policy and the social sciences* (1985) 9.

[508] RG Noll 'What is Regulation? (1980) California Institute of Technology: Social Science Working Paper 324; RG Noll 'Government Regulatory Behaviour: A Multidisciplinary Survey and Synthesis' in R G Noll (ed) *Regulatory policy and the social sciences* (1985) 9.

[509] C Koop & M Lodge (2017) 11 *Regulation & Governance* 98.

[510] C Koop & M Lodge (2017) *Regulation & Governance* 98.

[511] See for example certification schemes; Kimberley Certification Process; UN Global Compact;

[512] C Koop & M Lodge (2017) *Regulation & Governance* 98.

[513] C Koop & M Lodge (2017) 11 *Regulation & Governance* 98.

2.2 The scope and identity of regulator

Attempts to use the extent or scope of regulation as a mechanism to demarcate its meaning are common.[514] This approach attempts to distinguish what constitutes regulation based on the nature of the intervention – be it direct or indirect intervention.[515] Regulation as a direct intervention refers to the 'implementation of standards that directly apply to the target behaviour or characteristics of a specified population'.[516] Debates on whether regulation encompasses other indirect approaches, such as the use of incentives (for example, taxation relaxation) have not been conclusive resulting in the use of scope as another criteria for determining the meaning of regulation.[517]

In regulation literature, the question of whether the identity of the regulator and the regulated must be separate entities has so far received less academic attention, leaving the potential for entities to draft and implement their own regulatory instruments.[518] These debates divide scholars who view the state and its institutions as the sole regulators on the one hand and those who view both the state and self-regulation by the industry on the other as both forms of regulation.[519] Traditional perspectives on regulation separate the identity of the regulator and that of the regulated – arguing that enforcers of regulation and the subjects of regulation must be different.[520]

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[514] C Koop & M Lodge (2017) 98; R Boyer 'Introduction' *in* R Boyer & Y Saillard (eds) *Régulation theory: the state of the art* (1995)

[515] C Koop & M Lodge (2017) 11 *Regulation & Governance* 98.

[516] C Koop & M Lodge (2017) 11 *Regulation & Governance* 98.

[517] C Koop & M Lodge (2017) 11 *Regulation & Governance* 98.

[518] C Koop & M Lodge (2017) 11 *Regulation & Governance* 105.

[519] N Gunningham & J Rees 'Industry self-regulation: An institutional perspective' (1997) 19 (4) *Law & Policy* 363; P Selznick 'Focusing Organisational Research on Regulation' *in* R Noll (ed) *Regulatory policy and the social sciences* (1985) 363; J Black 'Understanding the role of regulation and self-regulation in a 'post-regulatory' world (2001) *Current Legal Problems* 103.

[520] C Koop & M Lodge 'What is regulation? An interdisciplinary concept analysis' (2017) 11 *Regulation & Governance* 98, 100; BM Mitnick *The political economy of regulation: Creating, designing and removing regulatory forms* (1980) 7.

Whatever the merits of the state-centric approach, there are emerging views that accept that regulation incorporates various actions of private bodies and corporations.[521] Baldwin understands regulation as 'all mechanisms of social control' – thereby bringing non-state actors within the realm of regulation.[522] In addition, the use of certification schemes and labelling schemes, which are largely set out and implemented by independent, private bodies are considered as emerging regulatory regimes.[523] Furthermore, the contentious codes of conduct in companies, which are the main subject of this thesis are often drafted, implemented and enforced by the same entities and which have been appraised in the apparel and garment industry as meaningful regulatory instruments.[524]

2.3 Compliance, enforcement and sanctions

Lastly, questions on whether to constitute regulation, the regulatory approach must be supported by enforcement mechanisms and strict sanctions have been raised.[525] For example, it has been argued that for self-regulation mechanisms to be meaningful, the state must set out enabling parameters to make voluntary compliance a habit.[526] Some early writers on the concept of self-regulation supported the notion that regardless of the nature of regulation, there must be a compliance program to ensure that the

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[521] D Sinclair 'Self-regulation versus command and control? Beyond false dichotomies' (1997) *Law & Policy* 529; J Braithwaite (1993) *Business Ethics and the Law* 85; I Ayres & J Braithwaite (1992) 101.

[522] R Baldwin, C Scott & C Hood 'Introduction' *in* R Baldwin, C Scott & C Hood (eds) *A reader on regulation* (1998) 1-55.

[523] See D Vogel 'Private global business regulation' (2008) 11 *Annual Review of Political Science* 261; S Brown & C Getz 'Privatizing farm worker justice: regulating labor through voluntary certification and labeling' (2008) *Geoforum* 1184; R Pearson & G Seyfang 'New hope or false dawn? Voluntary codes of conduct, labor regulation and social policy in a globalizing world' (2001) *Global Social Policy* 48; R Liubicic 'Corporate codes of conduct and product labeling schemes: The limits and possibilities of promoting international labor rights through private initiatives' (1998) 30 *Law and Policy in International Business* 111.

[524] D Vogel 'The private regulation of global corporate conduct: Achievements and limitations' (2010) 49 *Business & Society* 68.

[525] RA Booth 'Self-regulation in a democratic society' (1985) 50 (3 and 4) Journal *of Air Law and Commerce* 491, 502; RA Kagan 'Editor's introduction: Understanding regulatory enforcement' (1989) 11 *Law & Policy* 89, 90.

[526] AW Blumrosen 'Six conditions for meaningful self-regulation' (1983) 69 (9*) American Bar Association Journal* 1264, 1269.

regulatory approach becomes meaningful.[527] The main argument raised is that without clear binding mechanisms, self-regulation is merely a window dressing tool.[528] Yet drawing from other areas of law, environmental compliance programs have demonstrated that having deterrent sanctions is not enough to ensure compliance.[529] In fact, debates on whether having stringent laws in place assists in any way with compliance have again not been conclusive.[530]

Within the broader landscape of regulation, the use of self-regulation techniques on the one end of the spectrum has dominated discussions, with no conclusive proof of such instruments' efficacy.[531] Questions around enforcement and the proximity of the regulator to the regulated, lack of accountability mechanisms among others continue to cast doubt on whether such instruments can qualify as regulatory instruments.[532] Moreover, whether such instruments must be accompanied by clear sanctions to qualify as regulatory instruments is not clear.[533] In the background of these debates, there are strong arguments advancing a view that meaningful regulation must consist of a trio of components namely: the rule-making process, the monitoring and evaluation

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[527] AW Blumrosen (1983) 69 (9*) American Bar Association Journal* 1269.

[528] RA Booth (1985) 50 *Journal of Air Law and Commerce* 501; P Calcott 'Mandated self-regulation: the danger of cosmetic compliance' (2010) 38 *Journal of Regulatory Economics* 167, 168; C Doyle 'Self-regulation and statutory regulation (1997) 8 *Business Strategy Review* 35, 36; R Locke, T Kochan, M Romis & F Qin 'Beyond corporate codes of conduct: work organization and labour standards at Nike's suppliers' (2007) 146 *International Labour Review* 21, 34; I Mamic *Implementing codes of conduct: How businesses manage social performance in global supply chains* (2004) 149-224.

[529] CD Stone *Where the law ends: The social control of corporate behaviour* (1975) 362.

[530] N Gunningham 'Negotiated non-compliance: A case study of regulatory failure' (1987) 9 *Law & Policy* 69; GC Gray 'The regulation of corporate violations: Punishment, compliance and the blurring responsibility' (2006) 46 *British Journal of Criminology* 875; F Pearce & S Tombs 'Policing corporate skid rows – a reply to Keith Hawkins (1991) 31 *British Journal of Criminology* 415.

[531] A Doig & J Wilson 'The effectiveness of codes of conduct' (1998) 7 *Business Ethics: A European Review* 140; JB Singh 'Determinants of the effectiveness of corporate codes of ethics: An empirical study' (2011) 101 *Journal of Business Ethics* 385.

[532] J Murray 'Corporate codes of conduct and labor standards' (1998) Digital Commons ILR, Available at <https://digitalcommons.ilr.cornell.edu/codes/7/> (accessed 23-07-2019).

[533] Cross reference; C Koop & M Lodge (2017) 11 *Regulation & Governance* 100.

of such rules and the effective enforcement of such rules.[534] These components are viewed as distinct from each other but interconnected.[535]

The above discussion raised some of the contemporary issues relating to regulation as a discipline. In addition, an understanding of what constitutes self-regulation is important.

3 Defining self-regulation

There are many challenges that one encounters in attempting to define self-regulation. These challenges range from different terminology used but all referring to the same concept, depending for example on the industry in question, to the nature of self-regulation itself.[536] Another challenge relates to the different types of self-regulation that exist, leaving a single definition unrealistic.[537] The term 'self-regulation' has also been viewed as a misnomer and as largely misleading, insofar as it suggests that self-regulation can exist without some form of governmental involvement.[538] As will be shown, meaningful self-regulation involves the state in one form or another.[539]

A distinction is often made between self-regulation where an individual corporation regulates itself and self-regulation by a group, industry or sector.[540] Self-regulation at

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[534] C Hood, H Rothstein & R Baldwin *The government of risk: Understanding risk regulation regimes* (2001) 14.

[535] R Ong 'Self Regulation' *in Mobile communication and the protection of children* (2010) 240.

[536] R Ong 'Self-regulation' (2010) 239 – The author notes five types of self-regulation which are consensual self-regulation, enforced self-regulation, co-regulation, mandated self-regulation and sanctioned self-regulation.

[537] S Bernstein & B Cashore 'Can non-state global governance be legitimate? An analytical framework' (2007*) Regulations & Governance* 348. The author notes a wide range of terminology that has emerged describing the same aspect including corporate social responsibility; industry self-regulation; voluntary instruments among other terminologies; see also P Schiavi & F Solomon 'Voluntary initiatives in the mining industry: Do they work? (2006) 53 *Greener Management International* 27, 28. The author notes different terminologies that are often used interchangeably and inconsistently to refer to the same thing like voluntary initiatives, self-regulation, self-commitments, environmental accords, private agreements, industry initiatives and public voluntary schemes.

[538] R Ong 'Self-regulation' (2010) 247.

[539] See chapter three, part 3.1.

[540] N Gunningham & J Rees (1997) *Law & Policy* 364.

an industry level refers to a process in which an industry has the responsibility of setting rules and standards relating to the particular industry.[541] On the other hand, self-regulation at a firm or company level refers to the rules and standards, voluntarily adopted by the firm for the purposes of regulating its own processes and conducts.[542]

In many cases of industry self-regulation, such organizations or regulatory bodies are created by an Act of parliament.[543] Parliament confers regulatory powers on an independent body or professional body to execute regulatory functions. The independent body, however, retains the powers to regulate the affairs of their members as they deem fit, subject to the empowering Act.[544] This type of self-regulation is akin to the state delegating its law-making and regulatory functions to an independent body or organization.[545] For example, in South Africa, the Legal Practice Act establishes a Council with wide powers to regulate all legal practitioners in South Africa.[546] Similar bodies that are established from legislation are numerous and they possess powers to regulate the industry by imposing certain minimum standards that must be observed.[547] Another distinguishing feature of the statutory bodies is that their decisions are binding and reviewable by a court of law.[548] This undoubtedly strengthens these organizations regulatory position, as there are external enforcement mechanisms in place.

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[541] N Gunningham & J Rees (1997) *Law & Policy* 364.

[542] J Black 'Decentring regulation: Understanding the role of regulation and self-regulation in a post-regulatory' world' (2001) 54 *Current Legal Problems* 103, 116.

[543] Examples include the Health Professions Council of South Africa – which established in terms of section 2(1) of the Health Professions Act 56 of 1974; The South African Pharmacy Council (SAPC) which is established in terms of the Pharmacy Act 53 of 1974.

[544] Ibid.

[545] A Ogus 'Self-regulation' Encyclopaedia of Law and Economics (2000) 590.

[546] Legal Practice Act 28 of 2014. Chapter 2 of the Act establishes the Council with wide regulatory powers on all legal practitioners within South Africa including the power to develop norms and standards to guide the conduct of legal practitioners.

[547] The Pharmacy Act 53 of 1974 establishes the South African Pharmacy Council (SAPC) to regulate pharmacists, pharmacy support personnel and pharmacy premises in South Africa.

[548] *AMCU v Chamber of Mines*, 2017 38 *ILJ* 831 (CC) para 84.

In other cases, the organization may not be a statutory creation, yet heavily included in the regulation of an industry. An example is the Minerals Council South Africa (formerly Chamber of Mines) which is not a statutory creation.[549] One of its core functions involves the regulation of relations between its members and their employees.[550] It also enters into collective agreements on behalf of its members covering issues including wages, conditions of employment among others.[551] In *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA & others* (*AMCU v Chamber of Mines*) it was confirmed that these agreements are binding and reviewable.[552] The agreements, however, can only be extended beyond the parties if they meet certain statutory requirements. While the agreements are self-regulatory instruments, the involvement of the state in setting parameters for their extension is of crucial importance.[553] Of further significance is that the court pointed out how the Chamber of Mines and the representative trade unions were not governmental bodies but were performing a function with public consequences.[554]

Distinguishing between self-regulation at an industry level and self-regulation at a company or corporation level entails looking at the entity conferring the regulatory powers. This distinction, however, is blurred in circumstances where big corporations have more than one operation or product or service area. For example, Glencore is a mining company with several mining operations across mineral subsectors.[555] In such circumstances, the company may formulate a code of conduct that applies to all operations.[556] While such codes of conduct are not industry codes, the fact that their

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[549] Minerals Council South Africa Available at <https://www.mineralscouncil.org.za/special-features/158-membership-compact> (accessed 04-12-2019).

[550] Constitution of Chamber of Mines of South Africa, section 3 (b).

[551] Constitution of Chamber of Mines of South Africa, section 3 (b).

[552] (2017) 38 *ILJ* 831 (CC), para 84. Such a position confirms the uniqueness and importance of the Chamber of Mines in the regulation of the sector.

[553] LRA, s 23(1)(d).

[554] *AMCU v Chamber of Mines*, 2017 38 *ILJ* 831 (CC) para 82.

[555] Glencore Plc is widely regarded as one of the world's largest diversified resource companies.

[556] Glencore Plc Code of Conduct, Available at <https://www.glencore.com/dam/jcr:4607fa3c-5727-4c65-a5fe-7358f6ccce0a/Code-of-Conduct-2017-EN-Final.pdf> (accessed 03-12-2019).

application is done at numerous sites further position them as significant regulatory instruments.

Lastly, self-regulation is often categorized based on the aspects that are regulated.[557] In this sense, a common differentiation is made between economic self-regulation and social self-regulation.[558] Economic self-regulation primarily deals with the regulation or control of markets, including financial markets.[559] On the other hand, social self-regulation deals with the protection of the environment and people from harmful corporate practices.[560] Such regulation focuses on the human rights aspects of the workers and other stakeholders and generally puts in place measures and procedures that must be followed in cases of violations.[561]

3.1 Recent perspective on regulation: The regulation spectrum

Recent scholarship on regulation has largely abandoned attempts at understanding regulation from a single, unitary perspective.[562] Adopting rather an expansive approach, regulation is understood as an 'interplay between state regulation and private ordering' initiatives.[563] Hybrid models in understanding regulation emphasise the role of multidisciplinary approaches, thereby providing a wider understanding of how regulation works in practice.[564] Other scholars of regulation are infusing

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[557] N Gunningham & J Rees 'Industry self-regulation: an institutional perspective' (1997) *Law & Policy* 363, 365.

[558] N Gunningham & J Rees (1997) *Law & Policy* 365.

[559] N Gunningham & J Rees (1997) *Law & Policy* 365.

[560] K Hawkins & BM Hutter 'The response of business to social regulation in England and Wales: An enforcement perspective' (1993) 15 *Law & Policy* 199, 199.

[561] In line with the United Nations 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' Available at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (accessed 13-05-2017); see also DM Chirwa 'The long march to binding obligations of transnational corporations in international human rights law' (2006) 22 *SAJHR* 76.

[562] J Black 'Decentring regulation: Understanding the role of the regulation and self-regulation in a 'post-regulatory' world' (2001) 54 *Current Legal Problems* 54; M Moran 'Understanding the regulatory state' (2002) 32 *British Journal of Political Science* 391, 397; N Gunningham & J Rees 'Industry self-regulation: An institutional perspective' (1997) 19 (4) *Law and Policy* 363.

[563] I Ayres & J Braithwaite *Responsive regulation: Transcending the deregulation debate* (1992) 3.

[564] J Black 'Understanding the role of regulation and self-regulation in a 'post-regulatory' world (2001)

sociological approaches, primarily models of social control with self-regulation principles.[565] Regulation as an activity of social control thus encompasses both private initiatives, enforced by self-governing institutions and public regulatory agencies.[566] Thus, even compartmentalising perspectives on regulation within certain disciplines fails to clarify the meaning of what constitutes regulation.[567] The diversity of these approaches makes a unitary definition of regulation inappropriate and of limited practical use. Thus, extending the meaning of regulation to other forms of social control, emanating from private bodies, non-governmental organisations and companies provide a better framework for analysing the emerging regulatory approaches, particularly in employment relationships.[568] Instead of limiting regulation as originating from government or public agencies, regulation is viewed as encompassing many forms of social control that ultimately produce some public goods.[569] This perspective allows for various protective instruments to apply, even to workers who are not protected adequately by the state' legal framework.

Developments in the study of 'regulation' have brought regulation scholars from other disciplinary studies, including legal theory, sociology and political sciences.[570] These scholars have abandoned the singular, narrow conceptions to understanding

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Current Legal Problems 103; J Black 'Regulation as facilitation: negotiating the genetic revolution' (1998) *Modern Law Review* 621.

[565] I Ayres & J Braithwaite *Responsive regulation: Transcending the deregulation debate* (1992) 3; A Irwin, H Rothstein, S Yearley & E McCarthy 'Regulatory science – Towards a sociological framework' (1997) 29 *Futures* 17; M Janowitz 'Sociological theory and social control' (1975) *American Journal of Sociology* 82.

[566] A Ogus *Regulation legal reform and economic theory* (2004) 3; J Braithwaite 'Enforced self-regulation: A new strategy for corporate crime control' (1982) 80 *Michigan Law Review* 1466, 1467; D Graham & N Woods 'Making corporate self-regulation effective in developing countries' (2006) 34 (5) *World Development* 868.

[567] D Levi-Faur *Handbook on the politics of regulation* (2011) 3.

[568] D Levi-Faur *Handbook on the politics of regulation* (2011) 8.

[569] R Baldwin, M Cave & M Lodge *Understanding regulation: Theory, strategy and practice* (2012) Oxford University Press: Oxford

[570] See for C Koop & M Lodge (2017) 11 *Regulation & Governance* 95; C Parker 'The pluralization of regulation' (2008) 9 *Theoretical Inquiries in Law* 349; J Braithwaite 'Responsive regulation and developing economies' (2006) 34 (5) *World Development* 884.

regulation.[571] To them, mechanisms of social control cannot be explained from singular approaches but require a multi-disciplinary approach.[572] These scholars have proposed an understanding of regulation that focuses on the degree of the state's involvement in such regulation as opposed to an either 'self-regulation' or the 'command-and-control' approach.[573] It is viewed as the degree of absence of the command-and-control government regulation in the regulation of specific aspects or areas of the corporation or industry.[574] Viewing self-regulation in this manner puts it on a 'regulatory spectrum', with each point indicating the degree of the state's involvement.[575] Effectively, this approach to regulation ensures that both modes of regulation complement each other and are not in contradiction.[576] This regulatory spectrum was first formulated by Gunningham and Rees and later modified by Bartle and Vass.[577] The spectrum indicates the level of government involvement within regulation.

The main contribution of situating regulation along a spectrum is that it demystifies the clear forms of the 'command-and-control regulation' approach on the one hand and 'self-regulation' on the other.[578] Indeed some authors have lamented the tendency in the literature to present either a black or white picture of the distinction between the command-and-control approaches versus self-regulation.[579] The spectrum provides some understanding of the role of the state and other regulatory agents. Importantly,

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[571] R Baldwin, M Cave & M Lodge, *Understanding regulation: Theory, strategy and practice* (2012) 1.

[572] C Koop & M Lodge (2017) 11 *Regulation & Governance* 95; C Parker (2008) 9 *Theoretical Inquiries in Law* 349; J Braithwaite 'Responsive regulation and developing economies' (2006) 34 *World Development* 884.

[573] C Koop & M Lodge (2017) 11 *Regulation & Governance* 95.

[574] C Koop & M Lodge (2017) 11 *Regulation & Governance* 95.

[575] R Ong 'Self-regulation' (2010) 241.

[576] I Bartle & P Vass 'Self-regulation within the regulatory state: Towards a new regulatory paradigm' (2007) 85 *Public Administration* 885, 901.

[577] I Bartle & P Vass (2007) 901.

[578] D Sinclair 'Self-regulation versus command and control? Beyond false dichotomies' (1997) 19 *Law & Policy* 530, 531.

[579] D Sinclair (1997) 19 *Law & Policy* 531.

clear forms of the command-and-control regulation approach on the one hand and self-regulation on the other are not easily identifiable.[580] Similar perspectives to the analysis of the current regulatory approaches are advanced by Arthurs.[581] Emphasising the role of various actors on regulation, Freiberg puts this as follows:

> "[R]egulatory power is not held solely by governments but is dispersed throughout a number of bodies or groups such as firms…non-governmental and supra-governmental agencies, standard-setting organisations, credit-rating agencies, business and professional associations, trade unions, religious organisations, courts, tribunals, peer groups and others."[582]

The above acknowledges the multidimensional approach to regulation and how various actors are involved in the general scope of regulation.[583] The argument is that it is difficult to delineate between these regulatory types and compartmentalise them into strict modes that exclude the operation of the other.[584] The result is that regulation involves an interplay between these two approaches.[585]

The main contribution of the regulatory spectrum towards the understanding of regulation is that it managed to bring models of regulation in harmony and justified abandoning compartmentalising them into strict modes that exclude the operation or influence of another.[586] This is why self-regulation, as pointed above, has been viewed as a misnomer since pure forms of self-regulation without the influences of the state

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[580] D Sinclair (1997) 19 *Law & Policy* 531.

[581] H Arthurs 'Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law' (2008) 476. Reflexive law questions the central role of the state in the operation and application of law.

[582] A Freiberg *The tools of regulation* (2010) 18 – 19.

[583] D McCann & J Fudge 'A strategic approach to regulating unacceptable forms of work' (2019) *Journal of Law and Society* 4.

[584] D Sinclair (1997) 19 *Law & Policy* 532; B Bercusson & C Estlund *Regulating labour in the wake of globalisation: new challenges, new institutions* (2008) Bloomsbury Publishing, authors advocates for a position that infuses the different regulatory approaches.

[585] N Gunningham & Joseph Rees (1997) *Law & Policy* 366; D Kershaw 'Corporate Law and Self-Regulation' *in* JN Gordon & WG Ringe (eds) *The oxford handbook of corporate law and governance* (2018) 877.

[586] D Sinclair (1997) 19 *Law & Policy* 532.

are non-existent. Corporations regulate their own operations for many reasons, including pre-empting the state from regulating.[587] The fact that such regulation is influenced to some level by the fear of the state regulating justifies the use of the spectrum. Regulation, therefore, involves an interplay between these two approaches.[588]

3.2 A working definition of self-regulation

This thesis views self-regulation as measures undertaken at industry, sector or company level or external bodies, with either direct or indirect influence of the government to regulate various undertakings of the company or corporation. First, this definition acknowledges circumstances when the government officially delegates the regulation of an industry or a sector to a body or organization. This thesis is concerned with the self-regulation of labour standards by mining companies in three sectors, namely coal, platinum and gold.

4 Types of self-regulation

Based on the above discussion of self-regulation, different types of self-regulation can be identified. The following part seeks to explain the different types of self-regulation through situating them along the regulatory spectrum as discussed above. The different types of regulation, in essence, depict the level of involvement of government in the regulation matrix.

4.1 Consensual self-regulation

Under consensual self-regulation, compliance with the targeted regulatory objectives must be achieved through agreements.[589] Employers and employees, for example, consult and negotiate with one another to achieve the intended outcomes.[590]

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[587] R Espach 'Does private regulation work in developing countries? Private environmental regulatory programs in the Argentine and Brazilian chemical and forestry industries (2005) Institutional Mechanisms for Self-Regulation 3.

[588] N Gunningham & J Rees 'Industry self-regulation: an institutional perspective' (1997) *Law & Policy* 363, 366.

[589] R Ong 'Self-regulation' (2010) 247.

[590] A Ogus (1995) 15 *Oxford Journal of Legal Studies* 97, 101.

Negotiation occurs despite the general provisions which legislation may prescribe.[591] Under consensual self-regulation, all interested parties are involved in standard-setting and an agreement between the parties must be reached before implementation.[592] There is, therefore, a large degree of autonomy between the parties involved in setting mutually agreeable standards and goals.[593] In a labour relations context, this model works based on mutual understanding and agreement between the workers and employers.

The main advantage of consensual self-regulation lies in the ability of the involved stakeholders to make solutions, directly applicable to the needs of the company or corporation.[594] It works better in circumstances where the risk creator and the potential victims of such risk can bargain on policies with minimum costs.[595] In addition, it is an affordable mechanism to regulate. On the other hand, consensual self-regulation is often limited in producing the best form of regulation in cases where non-compliance can produce severe effects.[596] It does not work in industries or sectors where parties are not represented or where parties cannot organise effectively. This extends to cases where holders of power (for example mining companies) cannot negotiate with those who work in their companies, including non-standard workers. Lastly, consensual regulation "is aimed at the well-informed, well-intentioned and well-organized employer who would present few problems if left wholly to self-regulate".[597] The next type of self-regulation is enforced self-regulation.

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[591] A Ogus (1995) 15 *Oxford Journal of Legal Studies* 97, 101.

[592] A Ogus (1995) 15 *Oxford Journal of Legal Studies* 97, 101.

[593] A Ogus *Regulation: Legal forms and economic theory* (2004) 189.

[594] A Ogus (1995) 15 *Oxford Journal of Legal Studies* 101.

[595] A Ogus (1995) 15 *Oxford Journal of Legal Studies* 102.

[596] A Ogus (1995) 15 *Oxford Journal of Legal Studies* 101.

[597] A Ogus (1995) 15 *Oxford Journal of Legal Studies* 101; R Baldwin 'Health and Safety at Work: consensus and self-regulation' *in* R Baldwin & C McCrudden (eds) *Regulation and public law* (1987) 153.

4.2 Enforced self-regulation

Enforced self-regulation incorporates the flexibility of voluntary self-regulation, at the same time halting the inherent weaknesses of voluntarism in regulation.[598] At the core of enforced self-regulation is the idea of the government, enforcing privately drafted rules and publicly monitoring the private enforcement of such rules.[599] A company writes its own rules, which are approved or given oversight by the government.[600] Any violation of such rules becomes an offence. In essence, the government draws generally broad standards, which the regulated corporations are expected to comply with.[601] While government regulatory agencies oversee compliance, enforced self-regulation relies primarily on the regulatory capacity of the company or organisation.[602]

Enforced self-regulation is often viewed as a fine balance between the needs of the corporation and the government objectives in regulation.[603] In addition, the belief is that corporations are most likely to comply with the standards they devise themselves, without coercion from the public officials or the regulatory agencies.[604] There is no doubt that the success of this model is largely determined by the willingness and the commitment of the company to implement the imposed standards.[605] The threat of harsher sentences creates the need by individual firms to create regulatory standards,

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598 J Braithwaite 'Enforced self-regulation: a new strategy for corporate crime control' (1981-1982) 80 *Michigan Law Review* 1466, 1470.

599 J Braithwaite 'Enforced self-regulation: a new strategy for corporate crime control' (1981-1982) 80 *Michigan Law Review* 1466, 1483.

600 R Fairman & C Yapp 'Enforced self-regulation, prescription, and conceptions of compliance within small businesses: The impact of enforcement' (2005) 27 *Law & Policy* 491, 491.

601 BM Hutter 'Is enforced self-regulation a form of risk taking?: The case of railway and safety' (2001) 29 *International Journal of the Sociology of Law* 379, 380.

602 J Braithwaite (1981-1982) 80 *Michigan Law Review* 1483.

603 BM Hutter (2001) 29 *International Journal of the Sociology of Law* 381.

604 BM Hutter (2001) 29 *International Journal of the Sociology of Law* 381.

605 Ayres & Braithwaite (1992) *Michigan Law Review* 103.

which are acceptable to the state.[606] After drafting the proposed regulatory mechanisms, the public can comment on the proposed regulations.[607]

An independent compliance group does much of the enforcement of regulations and the primary function of government inspectors is to ensure the independence of the compliance group.[608] The role of the government is to ensure the independence of the compliance group.[609] Furthermore, the government has an obligation to assess the effectiveness of internal monitoring by the compliance group.[610] The state nonetheless possesses the power to impose sanctions on violators.[611] In most cases, enforced self-regulation levels the playing field between corporations since regulations are tailor-made to meet each corporation specific needs and each company is responsible for the costs of implementing regulation.[612]

There are notable disadvantages to this approach. First, rulemaking involves costs and such costs may increase when one looks at the multiplicity of such costs by every company involved in enforced self-regulation.[613] Again, enforced self-regulation can encourage corporations to be powerful and undemocratic since the checks and

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[606] J Braithwaite (1982) 80 *Michigan Law Review* 1483

[607] R Ong 'Self-regulation' 243.

[608] JP Mendoza, HC Dekker & JL Wielhouwer 'Industry self-regulation under government intervention' (2020) 36 *Journal of Quantitative Criminology* 183, 188; J Braithwaite (1982) 80 *Michigan Law Review* 1471.

[609] J Braithwaite 'Enforced self-regulation: a new strategy for corporate crime control' (1982) 80 *Michigan Law Review* 1466, 1471.

[610] JP Mendoza, HC Dekker & JL Wielhouwer (2020) 36 *Journal of Quantitative Criminology* 184; J Braithwaite (1982) 80 *Michigan Law Review* 1470. The author further notes that the government may have a direct monitoring and enforcement role in relation to small firms that cannot afford internal compliance group.

[611] R Fairman & C Yapp 'Enforced self-regulation, prescription, and conceptions of compliance within small businesses: The impact of enforcement' (2005) 27 *Law & Policy* 491, J Braithwaite (1982) 80 *Michigan Law Review* 1471.

[612] J Braithwaite (1982) 80 *Michigan Law Review* 1474-1475.

[613] J Braithwaite (1982) 80 *Michigan Law Review* 1490. However, as the author argues, government regulation also involves high costs.

balances on their power are limited.[614] Corporations may, therefore, write their regulations in a manner that undermines the spirit of the law.[615]

The advantages of enforced self-regulation include having tailor-made rules for the specific corporation needs, and such rules can be adjusted timely to changing business needs.[616] Giving companies the platform to regulate their own activities also ensures the development of new regulatory mechanisms. It ensures that companies become more innovative.[617] Furthermore, enforced self-regulation can ensure that rules are more comprehensive than the case under the traditional command-and-control approach.[618] Another reason in favour of enforced self-regulation is that companies will be more inclined to commit to the rules they make than those imposed on them.[619] Lastly, corporations can prevent the state from regulating, if they demonstrate that an aspect is adequately regulated. In addition to the above types, co-regulation is another common form of self-regulation.

4.3 Co-regulation

Whereas under enforced regulation, regulations emanate from the corporation, under co-regulation, the state is primarily responsible for setting up parameters for the regulation of the concerned industry.[620] On the other hand, the industry is responsible for the development of detailed regulations, depending on the needs of the corporation.[621] It presupposes the direct involvement of government, as the government may in certain instances provide some form of legislative backing to

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[614] R Fairman & C Yapp (2005) 27 *Law & Policy* 494; J Braithwaite (1982) 80 *Michigan Law Review* 1490.

[615] J Braithwaite (1982) 80 *Michigan Law Review* 1495.

[616] R Fairman & C Yapp (2005) 27 *Law & Policy* 516; J Braithwaite (1982), 1475.

[617] J Braithwaite (1982), 1476.

[618] J Braithwaite (1982), 1477. The author argues that governments often lack the resources, time and the political will to build consensus around comprehensive rules.

[619] R Ong 'Self-regulation' (2010) 243.

[620] R Ong 'Self-regulation' (2010) 244.

[621] R Ong 'Self-regulation' (2010) 244.

enforce any codes or regulations that industry would have developed.[622] While this form involves a heavy state presence, it is still considered a form of self-regulation as the industry has wide discretion to police itself.[623]

An example of co-regulation applicable to the mining industry is the use of codes of practice in the Mine Health and Safety Act.[624] The Chief Inspector of Mines is empowered to issue guidelines which guide mining companies in drafting a code of practice. An example of such a guideline is the Guideline for a Mandatory Code of Practice on the Minimum Standards of Fitness to Perform Work on a Mine.[625] The mining company must comply with such a guideline in drafting the standards of fitness, including following the guideline's template.[626] Other mandatory codes of practice guidelines issued cover areas such as safe use of conveyor installations, risk-based fatigue management, and occupational health program on thermal stress.[627]

As mentioned above, meaningful self-regulation in which the state has no input or influence hardly exist.[628] Even in circumstances where a company or corporation initiates a regulatory code of conduct, such a code will often make references to international standards and/or domestic legal instruments that inform the basis of regulation.[629] In other words, the corporation seeks to justify its self-regulation through the lenses of international instruments or government state regulations. Despite self-regulation dominating the regulatory discussions, it is not without weaknesses. The

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[622] L Senden 'Soft law, self-regulation and co-regulation in European Law: where do they meet? (2005) 9 *Electronic Journal of Comparative Law* 1, 12; R Ong 'Self-regulation' (2010) 244.

[623] R Ong 'Self-regulation' (2010) 244.

[624] 29 of 1996.

[625] Guideline for a Mandatory Code of Practice on the Minimum Standards of Fitness to Perform on a Mine GN R147 of 2016, *GG* 39656 of 05-02-2016.

[626] Guideline for a Mandatory Code of Practice on the Right to refuse Dangerous Work and leave dangerous working places GN R147 of 2016 *GG* 39656 of 05-02-2016.

[627] See Legislation Compliance Specialists 'MHSA: Mandatory Codes of Practice Register' (2016) Available at <http://www.legalcs.co.za/mhsa-mandatory-codes-practice-update/> (accessed 03-03-2020).

[628] See chapter three, part 3.1.

[629] See chapter six, part 0.

following part seeks to address some of the shortcomings and benefits of self-regulation.

5 Transcending the controversy around self-regulation

Having dealt with the perspectives on regulation and the various types of self-regulation, the following section seeks to identify some of the challenges that are often levelled against self-regulation. It then addresses the benefits that self-regulation mechanisms can offer to the regulation of labour standards in the selected mining sectors.

5.1 Weaknesses of self-regulation

Whether self-regulation is a legitimate mechanism for achieving public policy goals is a contentious matter.[630] A lot of research has been done, attempting to document the significance of self-regulation or its weaknesses.[631] Much of this work has focused on the importance of self-regulation within supply chains, environmental protection and the apparel or garment industries.[632] Notwithstanding this, self-regulation appears to face the same criticisms and is subject to the same weaknesses across industries and sectors. A basis for criticism can be easily found within the nature of self-regulation.[633] Despite the degree of government influence or involvement, self-regulation remains largely a voluntary initiative by corporations.[634] Voluntariness creates both operational and accountability challenges that are problematic when assessing the effectiveness

[630] V Haufler *A public role for the private sector: industry self-regulation in a global economy: Industry self-regulation in a global economy* (2001) 1.

[631] R Jenkins 'Corporate codes of conduct: self-regulation in a global economy' (2001) United Nations Research Institute for Social Development, Technology Business and Society Programme Paper 2, iv. The author cites the limitations of codes of conduct including the limitations on aspects they address, their application and challenges in their implementation;

[632] A Sobczak (2006) 16 *Business Ethics Quarterly* 167; B Jiang 'Implementing supplier codes of conduct in global supply chains: Process explanations from theoretical and empirical perspectives' (2009) 85 *Journal of Business Ethics* 77; R Locke, T Kochan, M Romis & F Qin 'Beyond corporate codes of conduct: Work organisation and labour standards at Nike's suppliers' (2007) 146 *International Labour Review* 21.

[633] D Wells 'Too weak for the job: corporate codes of conduct, non-governmental organizations and the regulation of international labour standards' (2007) 7 *Global Social Policy* 51

[634] [634] R Ong 'Self-regulation' (2010) 24.

of such standards and are often used to discredit its effectiveness as a regulatory mechanism.[635]

Moreover, delegating the regulation of certain aspects to the industry is regularly viewed as part of the modern corporatism in which companies and corporate giants evade public scrutiny or contempt of their actions.[636] Further fears of modern corporatism are directed at the increased business influence in designing standards which are viewed as weakening democratic channels of public participation.[637] The perception is that self-regulation serves the interests of private business as opposed to the public.[638] Furthermore, private bodies or organizations regulating certain sectors or industries are often accused of stifling competition since they can restrict the entrance of other players to the field.[639]

The most considerable criticism of self-regulation, however, relates to its lack of sanctions, unclear or ill-defined enforcement mechanisms and a general lack of accuracy in the description of the applicable standards.[640] Self-regulation is also criticized for lacking credibility and uncertain public accountability.[641] In addition, the process of making self-regulatory instruments, such as codes of conduct, is often undemocratic, with the risk of key stakeholders' interests being side-lined.[642] On a

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[635] S Prakash Sethi 'Self-Regulation Through Voluntary Codes of Conduct' *in* S Prakash Sethi (ed) *Globalization and self-regulation: The crucial role that corporate codes of conduct play in global business* (2011) 5.

[636] A Ogus (2005) 97 *Oxford Journal of Legal Studies* 98.

[637] P Schiavi & F Solomon 'Voluntary initiatives in the mining industry: Do they work? (2006) 53 *Greener Management International* 27, 38.

[638] N Philipsen 'Regulation of professions: A European perspective' *in* M Faure & F Stephen (eds) *Essays in the law and economics of regulation: In honour of Anthony Ogus* (2008) 101.

[639] N Philipsen 'Regulation of professions: A European perspective' *in* Michael Faure and Frank Stephen (eds) *Essays in the law and economics of regulation: In honour of Anthony Ogus* (2008) 101.

[640] D Wells (2007) 7 *Global Social Policy* 54; D Vogel 'The private regulation of global corporate conduct: Achievements and limitations' (2010) 49 *Business & Society* 68, 80.

[641] P Schiavi & F Solomon 'Voluntary initiatives in the mining industry: Do they work? (2006) 53 *Greener Management International* 27, 29; R Locke, T Kochan, M Romis & F Qin 'Beyond corporate codes of conduct: Work organisation and labour standards at Nike's suppliers' (2007) 146 *International Labour Review* 21, 23;

[642] A Sobczak (2003) 44 *Journal of Business Ethics* 226.

related note, some (possibly even many) would argue that collective bargaining and/or relying on the collective autonomy of workers (i.e permitting workers to act as a collective against their employers) is a more effective way to regulate employment relationships and ensure that workers' rights and interests are protected.[643] Thus, unless self-regulation is informed by the collective autonomy, it may not truly serve the needs of those it purports to. This, in turn, may lead to further industrial conflict rather than resolving such conflicts. Despite these challenges, voluntary regulatory instruments are on the rise and they indicate the expansion of legitimate authority that companies across the globe are entrusted with.[644] Moreover, self-regulation mechanisms are suggested to add at least some value, particularly when seen as complementary mechanisms, existing alongside other forms of regulation, including traditional state regulation.

5.2 Benefits of self-regulation

While there is no consensus on the actual value of self-regulation, from both theoretical and empirical research, it is accepted that self-regulation has the potential to address some of the gaps of state regulation.[645] Public regulation often adopts a one size fits all approach to regulation, ignoring the specific needs of companies or corporations.[646] This makes it difficult for small companies or corporations to meet the high costs of regulation. As discussed above, self-regulation can be tailor-made to meet the specific needs of a company or organisation.[647] It can bring an increase in compliance since companies and corporations are more likely to enforce standards and rules which they

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[643] HW Arthurs 'Labour law without the state' (1996) 46 *University of Toronto Law Journal* 1, 3; M Regini 'The Dilemmas of labor market regulation' in G Esping & M Regini (eds) *Why deregulate labour markets* (2000)11.

[644] D Vogel 'Private global business regulation' (2008) 11 *Annual Review Political Science* 261, 261.

[645] H Arthurs 'Private ordering and workers' rights in the global economy: corporate codes of conduct as a regime of labour market regulation' (2008) 487; SP *Sethi Globalization and self-regulation: The crucial role that corporate codes of conduct play in global business* (2011) 12.

[646] See chapter three, part 5.1.

[647] Chapter three, part 6.1; J Braithwaite (1982) 80 *Michigan Law Review* 1474.

have developed themselves.[648] Such advantages include flexibility, cost benefits, and fostering social cohesion between management and the workers.[649]

Whether the above benefits of self-regulation can easily be achieved remains unclear. The following section briefly considers some of these advantages.

5.2.1 The argument for 'Flexicurity'

'Flexicurity' refers to the need for making employment relationships and labour markets more flexible while at the same time providing job security to workers.[650] One of the often-cited reasons in support of self-regulation relates to its flexibility in reacting to changes within the market and market failures of the day. [651] It involves the "capacity of employers to adapt their workforces to changes in the economy and the capacity of a society to maintain the living and working conditions of its workforce."[652] In essence, employers seek the need to adjust their workforce (either increasing or reducing) depending on the production demands.[653] There are wide calls for companies and governments to be flexible, whilst simultaneously providing security to workers in relation to labour laws.[654] Many of the flexicurity advocates are from the developed economies, particularly the European Union where greater market freedom is promoted.[655] While encompassing many aspects, flexicurity is often assessed based

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[648] J Braithwaite (1982) 1478.

[649] C Estlund 'Rebuilding the law of the workplace in an era of self-regulation' (2005) 105 *Columbia Law Review* 319, A Kolk & RV Tulder 'The effectiveness of self-regulation: Corporate codes of conduct and child labour' (2002) 20 *European Management Journal* 260; A Ogus 'Rethinking self-regulation' (1995) 15 *Oxford Journal of Legal Studies* 97, 98; JC Miller III 'The FTC and voluntary standards: Maximizing the net benefits of self-regulation' (1984) 4 *Cato Journal* 897, 897-898.

[650] T Wilthagen & F Tros 'The concept of 'flexicurity': a new approach to regulating employment and labour markets' (2004) 10 *European Review of Labour and Research* 2, 167.

[651] D Vogel Private global business regulation (2008) *Annual Review of Political Science* 264.

[652] Le Roux & A Rycroft *Re-inventing labour law: Reflections on the first 15 years of the Labour relations Act future challenges* (2012) 34; P Vandenberg 'Is Asia adopting flexicurity? A survey of employment policies in six countries' (2008) ILO Economic and labour Market Papers, iii.

[653] P Vandenberg (2008) ILO Economic and labour Market Papers, iii.

[654] T Wilthagen & F Tros 'The concept of 'flexicurity': a new approach to regulating employment and labour markets' (2004) 10 *European Review of Labour and Research* 166, 167.

[655] European Expert Group on Flexicurity 'Flexicurity Pathways: Turning hurdles into stepping stones' (2007) Report by the Expert Group on Flexicurity Available at

on the degree of how easy or difficult it is in hiring and firing workers – a notion commonly referred to as external flexibility.[656] The argument is that self-regulation as a regulatory model is flexible to adapt to the needs of the company or industry while at the same time securing jobs for the workers.[657] However, when one looks at recent employment models, including the increase of sub-contracting in the mining sector, it can be argued that this concept of flexicurity focuses more on the ease of hiring or firing workers as opposed to offering job security, with decent working conditions to the workers.[658] Many mining companies have now resorted to subcontracting the labour force as it reduces the costs involved in the hiring and firing of workers or the costs incurred during retrenchments.[659]

Nonetheless, self-regulation by companies and corporations is often viewed as having the added advantage of being less bureaucratic and more dynamic than government regulation, thus being more capable of easily adjusting to market changes and challenges.[660] Adapting to new demands, technology and innovation is considered easier for companies than public regulatory institutions, as more often the industry or

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<https://ec.europa.eu/social/BlobServlet?docId=9445&langId=en> (accessed 04-03-2020); Directorate-General for Employment, Social Affairs and Equal Opportunities 'Employment in Europe 2007' (2007) Available at <http://ec.europa.eu/social/main.jsp?catId=89&langId=fr&newsId=542&furtherNews=yes> (accessed 11-04-2017). The term flexicurity is reported to have been first coined in Netherlands in the 1990's; See also PK Madsen 'Flexicurity: A new perspective on labour markets and welfare states in Europe' (2007) 14 *Tilburg Law Review* 57, 58.

[656] E Viebrock & J Clasen 'Flexicurity and welfare reform: A review' (2009) 7 *Socio-Economic Review* 305, 324; For an analysis of internal versus external flexibility see J-N Grenier, A Giles & J Bélanger 'Internal versus external labour flexibility: A two-plant comparison in Canadian manufacturing' (1997) 52 *Industrial Relations* 683; G Standing 'Globalization, labour flexibility and insecurity: The era of market regulation' (1997) 3 *European Journal of Industrial Relations* 7.

[657] D O'Rourke 'Outsourcing regulation: Analyzing non-governmental systems of labor standards and monitoring' (2003) 31 *The Policy studies Journal* 3.

[658] A Bezuidenhout 'New Patterns of exclusion in the South African Mining Industry' (2008) 190.

[659] P Benjamin, H Bhorat & H Cheadle 'The cost of "doing business" and labour regulation: The case of South Africa (2010) 149 *International Labour Review* 77. The case of *Association of Mineworkers and Construction Union ("AMCU") and Others v Buffalo Coal Dundee (Pty) Ltd and Another* (2016) 37 *ILJ* 2035 (LAC) best illustrates the level of flexibility that mining companies want, especially when retrenchments are involved. This case will be discussed below.

[660] G Standing 'Globalization, labour flexibility and insecurity: The era of market regulation' (1997) 3 *European Journal of Industrial Relations* 7.

companies have mechanisms in place to deal with such eventualities.[661] Self-regulation is also a mechanism of regulating corporations that operate in several jurisdictions, particularly those operating in countries with weaker national laws.[662] Such regulatory initiatives can be designed to go beyond jurisdictions.[663]

5.2.2 Cost benefit

Another argument for adopting self-regulation relates to a comparison of cost and benefit.[664] Public regulation is generally considered costly[665] and, often, governments lack the expertise or resources (or both) to regulate the dynamics of corporations, including modern workplace relations.[666] Self-regulation has the potential of reducing public costs by offering faster, more flexible and cost-effective enforcement mechanisms.[667] In the regulation of labour relations, implementation and enforcement costs are absorbed by the company or the industry involved.[668] Where this works, it may demonstrate a wider commitment by the relevant company or corporation to contribute meaningfully to the welfare of workers and the host countries of their

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661 N Philipsen 'Regulation of professions: A European perspective' (2008) 101.

662 P Schiavi & F Solomon 'Voluntary initiatives in the mining industry: Do they work? (2006) 53 *Greener Management International* 27, 29.

663 D Graham & N Woods 'Making corporate self-regulation effective in developing countries' (2006) 34 *World Development* 868.

664 N Stoeckl 'The private costs and benefits of environmental self-regulation: Which firms have most to gain? (2004) 13 *Business Strategy and the Environment* 135.

665 P Benjamin, H Bhorat & H Cheadle 'The cost of "doing business" and labour regulation: The case of South Africa (2010) 149 *International Labour Review* 77.

666 A Renda, L Schrefler, G Luchetta & R Zavatta 'Assessing the costs and benefits of regulation' (2013) Brüssel: Centre for European Policy Studies. Available at: <https://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf> (accessed 04-03-2020) 161-162. This report, whilst it is Eurocentric explores the costs of public regulation and suggests the adoption of self-regulation as an alternative.

667 P Verbruggen 'Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation' (2013) 7 *Regulation & Governance* 523.

668 J Braithwaite (1982) 1474.

operations more meaningfully. Corporations and most companies can easily assume the public burden involved in regulation without affecting their operations.[669]

5.2.3 Fostering social cohesion and reducing conflicts

Depending on the type of self-regulation, regulation mechanisms that are adopted through consensus are considered powerful mechanisms to foster social cohesion between workers and employers.[670] Some scholars have argued that when industries are given the space to self-regulate their own affairs, there is potential for internalizing responsibility which can ensure high compliance levels.[671] In this sense, through wider participation of those involved, self-regulation is perceived as a more democratic regulatory mechanism in contrast to the command-and-control approach.[672]

Importantly, however, as the tragedy at Marikana in 2012 shows, when seeking consensus, it is vital to ensure the input of all relevant stakeholders and workers' representatives.[673] Making assumptions about the legitimacy of workers' representatives (traditionally in the form of majority trade unions) without interrogating their credibility has the potential to aggravate industrial conflict rather than mitigate it.

6 Regulation in the labour context

This section brings the perspectives discussed above within the South African perspective on labour standards. This part makes the claim that for the regulation of labour standards to be effective in an increasingly globalised economy, with

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[669] J Braithwaite (1982) 1471.

[670] S Godfrey, J Maree, D du Toit & J Theron *Collective bargaining in South Africa: Past, present and future* (2010) 1. Authors argue that collective bargaining tends to be associated with democratic forms of government and relative social stability.

[671] N Gunningham & J Rees (2009) 19 *Law & Policy* 366; see also K Calitz 'Violent, frequent and lengthy strikes in South Africa: Is the use of replacement labour part of the problem? (2016) *South African Mercantile Journal* 436. The author suggests that banning replacement labour during strikes may contribute to peaceful industrial action, thereby strengthening social cohesion.

[672] D O'Rourke 'Outsourcing regulation: Analyzing non-governmental systems of labor standards and monitoring' (2003) 31 *The Policy studies Journal* 3.

[673] See chapter two, part 3.

subcontracting emerging as the preferred manner of bringing workers to mines, both modes of regulation must be ascertained as complementary to each mode.

The above approaches to understanding regulation are crucial to how the regulation of labour standards is conceptualised in the current globalised world of work. As demonstrated above, the command-and-control approach to the regulation of employment relationships is not working.[674] This is partly because the premise and the social circumstances on which such laws were designed, drafted and implemented has shifted over the years, leaving many workers without adequate protection.[675]

Despite the change in circumstances, it is still widely accepted that the primary purpose of labour regulation is to secure justice for workers.[676] The ILO envisions that effective regulation should provide 'opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.'[677] Kahn-Freund's seminal passage on the purpose of labour law should also be kept in mind; where he maintained that:

> '[T]he main purpose of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[678]

Some authors have critiqued the accuracy of this protective view, arguing that the protective position was not universal, even from the conception of the discipline of labour law.[679] Yet despite such assertions, advancing the interests of workers in an

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[674] M Aalders & T Wilthagen 'Moving beyond command-and-control: Reflexivity in the regulation of occupational safety and health and the environment' (1997) *Law & Policy* 415.

[675] R Mitchell 'Where are we going in labour law? Some thoughts on a field of scholarship and policy in process of change' (2010) Workplace and Corporate Law Research Group, Working Paper No. 16, 6; H Arthurs 'Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law' (2008) 14-15.

[676] H Arthurs 'Labour Law After Labour' *in* G Davidov & B Langille (eds) *The idea of labour law* (2011) 23-27.

[677] International Labour Organisation Decent Work, Report of the Director General of the ILO to the 87th Session of the International Labour Conference, Geneva, 1999.

[678] O Kahn-Freund *Labour and the law* (1977) 6.

[679] W Creighton, W Ford & R Mitchell (eds) *Labour law: Materials and commentary* (1983) 5.

environment that affords workers their right to dignity, equality, non-discrimination and other participatory rights must remain at the core of labour law and any regulatory approaches.[680] It also follows that any approach to regulation must incorporate these fundamental principles. Many labour law scholars and policymakers seem to agree on at least certain aspects of the role of labour law in modern economies.[681] Labour law is still viewed as having a protective role concerning both the procedural and substantive rights of workers.[682]

The challenges facing the mining sector are deeply entrenched and embedded in the historical developments of the mining in general.[683] The current South African labour framework developed and was shaped by events in the mining sector.[684] The apartheid system was based on the exploitation of cheap labour and the segregation of black people within employment relationships.[685] This also helps to explain why many developing countries, including African countries, do not have as militant a labour workforce as that of South Africa.[686] Interventions by the government to reverse the

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680 The ILO 'Decent Work: Report of the Director-General, Decent Work International Labour Conference 87th Session 1999.

681 TA Kochan 'Labour and employment policies for a global economy' (1994) 15 *Industrial Law Journal* 689. According to the author, the purpose of labour policy: "…in any democratic society must protect workers' substantive and procedural rights at the work-place, support orderly negotiations and conflict resolution among parties in employment relationships when their interests differ and encourage effective pursuit of joint gains where the potential for cooperation exists."

682 R Mitchell 'Where are we going in Labour Law? Some thoughts on a field of scholarship and policy in process of change' (2010) Workplace and Corporate Law Research Group, Working Paper No 16, 9-13.

683 B Kenny & E Webster 'Eroding the core: Flexibility and the resegmentation of the South African labour market' (1998) 24 *Critical Sociology* 216; J Crush, A Jeeves & D Yudelman *South Africa's labor empire: A history of black migrancy to the gold mines* (1991) 1.

684 J Crush; A Jeeves & D Yudelman (1991) 1; TS Phakathi 'worker agency in colonial, apartheid and post-apartheid gold mining workplace regimes (2012) 39 (132) *Review of African Political Economy* 279; On skills shortages see The Minerals Council South Africa 'Skills Development' Available at <https://www.mineralscouncil.org.za/work/skills-development> (accessed 06-04-2019); F Rasool & C J Botha 'The nature, extent and effect of skills shortages on skills migration in South Africa'(2011) *SA Journal of Human Resource Management* 1; RC Daniels 'Skills shortages in South Africa: A Literature Review' (2007) Development Policy Research Unit (DPRU), Working Paper 07/121.

685 H Wolpe 'Capitalism and cheap labour-power in South Africa: from segregation to apartheid' (1972) *Economy and Society* 425.

686 IG Farlam, PD Heraj & BR Tokota 'Marikana Commission Report' 209; P Alexander 'Marikana, turning point in South African history' (2013) 40 *Review of African Political Economy* 138.

legacy of the past, particularly in the mining sector have not produced the intended results.[687] Other policy interventions aimed at transforming the skills of the mining workforce have similarly not been successful.[688]

South Africa, like other developing countries, is grappling with high unemployment and the lack of skills development in key sectors, including mining.[689] Hartford cites gross inequality, poverty and unemployment as key aspects affecting the country, particularly the mining sector.[690] In addition, some have argued that the current labour framework is dysfunctional for several reasons, including rigidity and stifling global competition.[691] However, claims that the South African labour market is rigid have been refuted by others.[692] These arguments have been rejected by some, who contend that the historical past of South Africa is the main reason why labour standards and other policy designs must be implemented, in an attempt to correct the unjust social consequences of Apartheid.[693]

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[687] A range of laws promulgated post 1994 are considered protective in nature including the Labour Relations Act 66 of 1995; the Employment Equity Act 55 of 1998; Basic Conditions of Employment Act 75 of 1997; The Minerals and Petroleum Resources Development Act 22 of 2002; Broad Based Black Economic Act 53 of 2003.

[688] Skills Development Act 97 of 1998.

[689] Stats SA 'Quarterly Labour Force Survey – QLFS Q1: 2019' (2019) Available at <www.statssa.gov.za/?p=12115> (accessed 23-07-2019); IV Aardt 'A review of youth unemployment in South Africa, 2004 to 2011' (2011) *36 South African Journal of Labour Relations* 54; FCVN Fourie 'The South African Unemployment Debate: Three Worlds, Three Discourses? (2011) A Southern Africa Labour and Development Research Unit Working Paper, Working Paper No 63, University of Cape Town.

[690] G Hartford 'The mining industry strike wave: what are the causes and what are the solutions? (2012) GroundUp Available at <https://www.groundup.org.za/article/mining-industry-strike-wave-what-are-causes-and-what-are-solutions/> (accessed 24-11-2019); P Nkoane 'Time for the tide to change for rules of engagement in labour law: A proposal for effective wage dispute resolution' (2018) 22 *Law Democracy & Development* 48, 52.

[691] See M Soko & N Balchin 'Breaking the deadlock: Tackling the South African labour market crisis' (2014) *GSB Business Review* Available at <http://www.gsbbusinessreview.gsb.uct.ac.za/breaking-the-deadlock-tackling-the-south-african-labour-market-crisis/> (accessed 06-04-2019).

[692] B Hepple 'Is South African labour law fit for the global economy? (2012) *Acta Juridica* 1; G Standing, J Sender & J Weeks *Restructuring the labour market: The South African challenge* (1996) International Labour Office; JG Archibald 'Labour Market Rigidities and Unemployment: Lessons for South Africa from European Experience' (2002) Unpublished Thesis: UKZN.

[693] D Tajgman 'Reflections on labour market deregulation in South Africa' (1996) 23 (7) *International Journal of Social Economics* 57, 65; on similar debates within European countries, *see* G Esping-Anderson & M Regini (eds) *Why deregulate labour markets* (2000) on European -27 perspectives

One of the effects of the regulatory failure as depicted above is the re-creation of a labour force that typifies the concept of 'commodity'.[694] The ILO has over time driven the idea that labour is not a commodity.[695] This approach informed many legal systems.[696] Labour is not a commodity primarily entails that, unlike other factors of production, labour cannot be purchased or exchanged on the market, freely from the bearer of such labour.[697] New forms of employment are effectively re-igniting the commodification of labour.[698] Stripped of the protective legislation and other social benefits that workers traditionally received from the standard employment relationship, labour is commodified.[699] This also means that the current labour relations framework continues to protect a narrower group of workers, leaving some outside its reach.

6.1 The limited reach of state regulation

The challenges facing labour law are often considered a reflection of the narrow conceptions of the discipline of labour law as it emerged.[700] Some argue that labour law developed with a limited focus on formal employment relationships and largely over-looked informal work arrangements.[701] Across many African countries, there is an

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regarding the deregulation debate.

[694] I Greer 'Welfare reform, precarity and the re-commodification of labour' (2016) 30 *Work, Employment and Society* 162; G Standing 'Understanding the precariat through labour and work' (2014) 45 (5) *Development and Change* 963.

[695] International Labour Organisation (ILO) *ILO Declaration of Philadelphia – Declaration Concerning the aims and Purposes of the International Labour Organisation* 1944, Art 1(a).

[696] See for example L Swepston 'Child labour: Its regulation by ILO standards and national legislation' (1982) 121 (5) *International Labour Review* 577.

[697] E Stein 'Labour is not a commodity: Reappraising the origins of the Maxim' (2013) 4 *European Labour Law Journal* 222; B Langille 'Labour law is not a commodity' (1998) 19 *Industrial Law Journal* 1002.

[698] I Greer (2016) 30 *Work, Employment and Society* 162; G Standing 'Understanding the precariat through labour and work' (2014) 45 *Development and Change* 963; N Smit 'Labour is not a commodity: Social perspectives on flexibility and market requirements within a global world' (2006) *Journal of South African Law* 152.

[699] *See* G Robinsons 'Labour as commodity' (1996) 71 (275) *Philosophy* 129.

[700] B Hepple 'Factors Influencing the Making and Transformation of Labour Law in Europe' G Davidov & B Langille (eds) *The idea of labour law* (2011) 32.

[701] C Fenwick & E Kalula 'Law and labour law market regulation in East Asia and Southern Africa: Comparative perspectives' (2004) Working Paper No. 30, 33; G Davidov & B Langille (eds)

increasing number of workers in the informal economy, resulting in labour law offering less protection to such workers.[702] Most workers, particularly in Southern Africa, do not benefit from the enacted labour laws since such laws primarily target the formal employment sector.[703] The informal employment sector keeps growing.[704] Chen has identified several categories of employees hired without social protection and concluded that such categories are most likely to be informal than others.[705] The informal economy refers to "all economic activities by workers and economic units, in law or practice, not covered or insufficiently covered by formal arrangements."[706] These categories include employees in informal enterprises, casual or day labourers, temporary or part-time workers, paid domestic workers, contract workers, unregistered or undeclared workers and industrial outworkers or homeworkers.[707]

In light of these informal arrangements, the traditional tools used to regulate labour relations are not effective.[708] Collective bargaining has historically played a key role in the regulation of labour markets.[709] However, where collective bargaining (effectively

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Boundaries and frontiers of labour law: Goals and means in the regulation of work (2006) 4.

[702] See the SADC 'Employment and Labour Protocol: Draft Implementation Plan' (2017) Available at <https://www.sadc.int/themes/social-human-development/employment-labour/> (accessed 11-12-2019); C Fenwick & E Kalula 'Law and labour law market regulation in East Asia and Southern Africa: Comparative perspectives' (2004) The University of Melbourne Faculty of Law, Legal Studies Research Paper No 106, 33; MA Chen 'The Informal Economy: Definitions, Theories and Policies' (2012) WIEGO Working Paper 1, 7-8.

[703] C Fenwick & E Kalula 'Law and labour law market regulation in East Asia and Southern Africa: Comparative perspectives' (2004) 33; P Bamu (2011) Unpublished PhD Thesis, University of Cape Town, 133.

[704] C Fenwick & E Kalula (2004) 33.

[705] MA Chen 'The Informal Economy: Definitions, Theories and Policies' (2012) WIEGO Working Paper 1, 7-8; MA Chen 'The informal economy: Recent trends, future directions (2016) 26 *New Solutions: A Journal of Environmental and Occupational Health Policy* 155.

[706] ILO Resolution concerning decent work and the informal economy (2002) Available at <https://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf> (accessed 04-03-2020) para 3.

[707] MA Chen 'The Informal Economy: Definitions, Theories and Policies' (2012) WIEGO Working Paper 1, 7-8.

[708] R Mitchell (2010) The Workplace and Corporate Law Research Group, Working Paper no 16, 3; K Ewing 'The death of labour law? (1988) *8 Oxford Journal of Legal Studies* 293.

[709] S Godfrey, J Theron & M Visser 'The State of Collective Bargaining in South Africa An Empirical and Conceptual Study of Collective Bargaining' (2007) DPRU Working Paper. The authors note that in

a form of self-regulation) exists, it has at times failed to resolve disputes between the parties.[710] Secondly, in most contexts, collective bargaining as a mechanism of resolving disputes has been largely weakened by the existence and rise of non-standard work.[711] Traditionally, trade unions have been pivotal in highlighting non-compliance of labour standards by employers.[712] Collective bargaining also works most effectively when a trade union membership is high.[713] However, this key institution is under threat from the sharp increase in non-standard workers, who find it difficult to organise effectively.[714] Rapid globalisation and easy capital mobility highly affect organized labour.[715] The organization of the global economy, particularly in developing countries is centred on insecure and informal employment, which creates new challenges for unions to organize.[716] The overall impact of this decline in unionization is the creation of an unprotected workforce who cannot organize collectively, or at least not effectively.[717] Despite the weaknesses of the state's approach to regulation, there remains a consensus that by virtue of its coercive powers, the state must remain the dominant actor in labour regulation and enforcement.[718]

South Africa, the LRA promotes a voluntary approach to bargaining instead of imposing a duty to bargain on the parties.

[710] IG Farlam, PD Heraj & BR Tokota 'Marikana Commission Report' paras 1.1(a) and 4.6.

[711] P Bamu (2011) Unpublished PhD Thesis, University of Cape Town; R Mitchell (2010) The Workplace and Corporate Law Research Group, Working Paper No 20.

[712] E Córdova 'From full-time wage employment to atypical employment: A major shift in the evolution of labour relations' (1986) 125 *International Labour Review* 652-654.

[713] E Córdova (1986) 125 *International Labour Review* 653.

[714] South Africa Department of Labour, Green Paper on Labour 'Minimum standards directorate policy proposals for new employment standards statute green paper' (1996) chapter C.

[715] R Blanpain 'Work in the 21st century (217) 38 *ILJ* 742.

[716] AL Kalleberg 'Precarious work, insecure workers: employment relations in transition' (2009) 74 *American Socio-logical Review* 3.

74(1): 1–22

[717] P Benjamin 'Labour law beyond employment' (2012) *Acta Juridica* 27.

[718] D McCann, S Lee, P Belser, C Fenwick, J Howe & M Luebker *Creative labour regulation: Indeterminacy and protection in an uncertain world* (2014) 28.

6.2 Corporations and labour standards

Having linked codes of conduct by mining companies as a form of CSR regulatory instruments, it is important to understand the growing trend of privatisation of labour rights, particularly within labour standards. Unlike Social and Labour Plans,[719] codes of conduct do not generally emanate from mandatory or binding obligations on the employer, right holder or the owner of the mine.[720] This non-binding nature of codes of conduct explains why their effectiveness in regulating labour standards is often viewed with scepticism.[721]

CSR mechanisms have attracted divergent views regarding their significance and even their suitability in regulating labour standards.[722] Arthurs, responding to why there has been a sudden proliferation of codes of conduct, has observed that:

> "Opinions vary: codes represent the principled acceptance by corporations of their social obligations; they are a fig leaf used to conceal corporate exploitation; they fill a regulatory gap caused by the inability of states to regulate the actions of corporations outside their own boundaries; they signal an innovative shift in the modalities of market regulation from a pure state-based command model to new hybrid models involving a mix of public and private initiatives; they are a concession wrung from governments and corporations as a result of pressures generated by political and social actors concerned about exploitation and abuse; and – perhaps – they are evidence of the existence of autopoietic systems and of the ubiquity of reflexive law".[723]

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[719] The Mineral and Petroleum Resources Development Act 28 of 2008, s 41 requires the holder of mining right to develop a social and labour plan that promote employment and advance the social and economic welfare of all South Africans. The social and labour plan must further contribute to the transformation of the mining industry.

[720] MPRDA, s 41.

[721] SP Sethi 'The effectiveness of industry-based codes in serving public interest: the case of the international Council on Mining and Metals (2005) 14 *Transnational Corporations* 55.

[722] From Australian perspectives see S Kaine & CF Wright 'Conceptualising CSR in the context of the shifting contours of Australian employment regulation' (2013) 23 *Labour & Industry: A journal of the Social and Economic Relations of Work* 54.

[723] H Arthurs 'Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law' (2008) 21; see also D Vogel 'The private regulation of global corporate conduct: Achievements and limitations' (2010) 49 *Business & Society* 68, 73 who argue that the power of global companies and markets has created challenges for the State to police and regulate their operations. There is room for further theoretical research that focuses on the concept of reflexive law. See T Gunther 'Substantive and reflexive elements in modern law' (1994) 17 *Law and Society Review* 239; P

The above not only captures the divergent views that currently exist on codes of conduct but is reflected in a way by the content of the codes of conduct discussed in chapter six.[724] It also demonstrates both the scepticism and faith in their ability to offer meaningful solutions to the changing world of work. Despite the weaknesses expressed on CSR mechanisms and codes of conduct, there is some consensus that their usage must not be understood as rendering public regulation redundant.[725] Codes of conduct remain complementary to public regulation.[726] They do not trump the need for public regulation.[727] Ruggie has summed this up by stating that "…private governance arrangements, no matter how successful, can take us only so far. They will remain relatively small islands of progress unless their achievements are rooted in, and generalised through, the sphere of public authority".[728] This position depicts the prevailing understanding that such mechanisms can meaningfully contribute towards regulation if there are binding norms already present. In certain circumstances, the human rights violations of corporations and their subsequent codes of conduct have brought state regulation to the forefront.[729] Codes of conduct must be viewed as mechanisms aimed at fulfilling and complementing state regulation.[730]

Zumbansen 'Law after the welfare state: Formalism, functionalism, and the ironic turn of reflexive law' (2008) *American Journal of Comparative Law* 769).

[724] See chapter six, part 2.

[725] A Sobczak 'Codes of conduct in subcontracting networks: A labour law perspective' (2003) 44 *Journal of Business Ethics* 225; J Diller 'A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives (1999) 138 *International Labour Review* 99, 111.

[726] A Sobczak (2003) 225; J Diller (1999) 111.

[727] R Locke, T Kochan, M Romis & F Qin 'Beyond corporate codes of conduct: work organization and labour standards' (2007) 146 *International Labour Review* 21, 35.

[728] J Ruggie 'The Global Compact and the Challenges of Global Governance' (2002) Annual Meeting Global Compact. Available <https://www.unglobalcompact.org/docs/news_events/9.6/ruggie_berlin.pdf> (Accessed 01-10-2019).

[729] F Scamardella 'Law, globalization, governance: Emerging alternative legal techniques' (2015) 47 *The Journal of Legal Pluralism and Unofficial Law* 76. The author notes that before the Nike scandal in Pakistan, there was a clear legal framework that protected children from child labour. However, it was only after the scandal occurred that attempts were made to enforce the existing legal framework.

[730] A Sobczak (2003) 225; J Diller (1999) 111; SC Gilman 'Ethics codes and codes of conduct as tools for promoting ethical and professional public service: Comparative successes and lessons' (2005) PREM: World Bank Available at <https://www.oecd.org/mena/governance/35521418.pdf> (accessed

6.3 Regulatory failure in practice

In a bid to remain globally competitive, mining companies are restructuring their labour requirements.[731] The restructuring has two major effects. On the one hand, it allows the mining company to remain globally competitive through cutting labour costs. On the other hand, it undermines or limits the operation of labour law to workers who have been affected by restructuring who, in many cases are rehired through various means, including employment services.[732] The net effect is the creation of a workforce that is not unionised, earns low wages and lacks job security.[733] To illustrate the regulatory failure in practice, a case study by Bezuidenhout is considered. Khumo Bathong Holdings was created as a black empowerment company, with aims to fulfil the aspirations of the transformative legislative framework, including the MPRDA and the Mining Charter.[734] However, it soon became a platform for the exploitation of workers, with the externalisation of labour becoming the main avenue of employment. The author narrates how the mining company employed a large percentage of its workforce through subcontracting workers to avoid paying mine workers the industry wages.[735] Subcontracting permits companies to hire and to dismiss workers, without adhering to the Labour Relations Act.[736] Ironically, Khumo Bathong Holdings was created to empower the historically disadvantaged, and was largely black-owned, yet it failed to adhere to the LRA resulting in a large part of the workforce lacking job security, the protection of collective bargaining and becoming economically vulnerable.[737]

30-09-2019) 23.

[731] M Di Paola & N Pons-Vignon 'Labour market restructuring in South Africa: Low wages, high insecurity' (2013) 40 (138) *Review of African Political Economy* 628.

[732] See chapter five, part 4.1; A Bezuidenhout 'The New Patterns of Exclusion in the South African Mining Industry' (2008) 184-186.

[733] M Di Paola & N Pons-Vignon (2013) 40 (138) *Review of African Political Economy* 628.

[734] A Bezuidenhout 'The New Patterns of Exclusion in the South African Mining Industry' (2008) 184.

[735] A Bezuidenhout 'The New Patterns of Exclusion in the South African Mining Industry' (2008) 184.

[736] 66 of 1995; A Bezuidenhout 'The New Patterns of Exclusion in the South African Mining Industry' (2008) 184-186.

[737] A Bezuidenhout 'The New Patterns of Exclusion in the South African Mining Industry' (2008) 184-186; N Nizami & N Prasad *Decent work: Concept, theory and measurement* (2017) 4; AL Kelleberg 'Precarious work, insecure workers: Employment relations in transition' (2009) 74 *American*

Similarly, the case of *Association of Mineworkers and Construction Union and Others v Buffalo Coal Dundee (Pty) Ltd and Another* (AMCU v Buffalo Coal Dundee)[738] highlights attempts by mineral rights holders to reduce labour costs through contracting out, the entire mining operation to a third party.[739] The Labour Appeal Court had to decide what duties, if any, a mining right holder who is not an employer has, in the event of a retrenchment process.[740] Briefly, Zinoju (Pty) Ltd was the mining right holder in terms of the Mineral and Petroleum Resources Development Act (MPRDA).[741] Zinoju, however, outsourced the operations of the mine, including labour, to Buffalo Coal (Pty) Ltd.[742] Buffalo Coal initiated retrenchment proceedings and accordingly issued a notice to the recognised trade unions, as required under the Labour Relations Act.[743] The main issue related to the requirement by the Association of Mineworkers and Construction Union (AMCU) to have Zinoju (the mining right holder) attend the retrenchments meetings.[744] In response, Zinoju argued that it was not the employer of the workers affected and therefore was not legally required to attend such meetings.[745] The court held that as the mining right holder, Zinoju had a duty to be part of the retrenchment process.[746] The MPRDA imposes certain procedural and substantive requirements on the mining right holder in cases of changes in the financial situation of the company that affect the profitability of the mine, which may result in retrenchments.[747] The case demonstrates how triangular relationships are often used

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[738] (2016) 37 *ILJ* 2035 (LAC).

[739] For an analysis of the case, see H Mostert & V Ncube ‘Effects of outsourced labour’ (2016) *South African Annual Survey* 1034 – 1038.

[740] *AMCU v Buffalo Coal Dundee*, para 1.

[741] 28 of 2002.

[742] *AMCU v Buffalo Coal Dundee*, para 5.

[743] LRA, s 189(3).

[744] *AMCU v Buffalo Coal Dundee*, para 12.

[745] *AMCU v Buffalo Coal Dundee*, para 12.

[746] *AMCU v Buffalo Coal Dundee*, para 58.

[747] MPRDA, s 52 obliges the mining right holder to consult with the any registered trade union or the

to insulate the mining right holder from prescribed obligations in law.[748]

The lack of adequate protection for the majority of workers is not only affecting mineworkers but cuts across sectors of the economy. The case of *Pretorius v Transport Pension Fund*[749] demonstrates how current labour laws are failing to protect emerging employment relationships.[750] The Constitutional Court (CC) made the following remarks on the new employment relationships versus the mismatch in regulation:

> "…Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the 'twilight zone' of employment as supposed 'independent contractors' in time-based employment subject to faceless multinational companies who may operate from a web presence…".[751]

The CC further highlighted the need for a wider perspective on fair labour practices since a substantial percentage of workers is no longer covered by the applicable laws.[752] The above captures the current flawed premise of labour regulation. The critical issue then relates to how current and future regulatory frameworks of employment relationships should be structured.[753] Current labour laws are not protecting most of the workers, particularly in the mining sector due to the misalignment of the traditional labour regulation with the realities of new employment relationships.[754]

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affected employees in cases where the financial situation of the company may result in retrenchments.

[748] A Bezuidenhout 'The New Patterns of Exclusion in the South African Mining Industry' (2008) 187; G Davidov 'Joint employer status in triangular employment relationships' (2004) 42 *British Journal of Industrial Relations* 727.

[749] *Pretorius & Another v Transport Pension Fund & Others* (2018) 39 *ILJ* 1937 (CC), para 48.

[750] *Pretorius & Another v Transport Pension Fund* para 48.

[751] *Pretorius & Another v Transport Pension Fund* para 48.

[752] *Pretorius & Another v Transport Pension,* para 48.

[753] See R Mitchell (2010) Working Paper No 16; K Ewing 'The death of labour law? (1988) 8 *Oxford Journal of Legal Studies* 293; C Estlund 'The death of labour? (2006) 2 *Annual Review of Law and Social Science* 6.

[754] See also G Davidov & B Langille *Boundaries and frontiers of labour law: Goals and means in the regulation of work* (2006) 4 sum up this position accurately when they state that "…numerous rights are currently tied to the employment relationship throughout the world. One must be considered an 'employee' to enjoy protective employment standards, the right to bargain collectively with other employees, and often also rights concerning health and safety, equality at work, and various welfare

These challenges are global. Secondly, in a bid to broaden the protection of most workers, key institutions such as the ILO are advocating for reconsideration and configuration of new regulatory approaches to labour law.[755]

7 Conclusion

This chapter has dealt with various perspectives in understanding the concept of regulation including on how the state no longer holds a monopoly in the sphere of regulation, owing to globalisation and the rise of new patterns of labour relations. Such employment relationships do not always fall within the parameters of state laws, thereby necessitating that companies play a substantial role in regulation. New perspectives to the study of regulation reveal that there is no single theoretical approach that explains regulation, but rather a hybrid one, involving both self-regulation and the state. The chapter argues that given the failure by the state to protect workers in non-standard employment relationships, self-regulation mechanisms must be strengthened to complement the state regulatory approaches. A reconfiguration of regulatory approaches to labour relations must be alert to the changing world of work. Such regulatory approaches must continuously aim to protect both the substantive and procedural rights of workers.

Many private regulatory approaches have emerged – with some backed and supported by the ILO, the UN, national governments, worker representatives and non-governmental organisations. Progressively, many scholars of labour law are advancing new innovative ways to regulate employment relationships, supporting some of the self-regulatory approaches.[756] These innovative ways, including privately initiated

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entitlements."

[755] See some ILO sponsored research D McCann, S Lee, P Belser, C Fenwick, J Howe & M Luebker (eds) *Creative labour regulation: Indeterminacy and protection in an uncertain world* (2014); S Lee & D MacCann *Regulating for decent work: New dimensions in labour market regulation* (2011); M Urminsky 'Self-regulation in the workplace: Codes of conduct, social labelling and socially responsible investment' (no year) International Labour Office, Management and Corporate Citizenship Programme Job Creation and Enterprise Development Department.

[756] S Lee & D McCann *Regulating for decent work: New dimensions in labour market regulation* (2011) Palgrave Macmillan 9; H Arthurs 'Private Ordering and workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' (2002); SP Sethi *Globalization and self-regulation: The crucial role that corporate codes of conduct play in global business* (2011) 1.

platforms, are meant to complement the gaps within national legislation. This increase in private governance was prompted by the need to implement international standards across the entire value chain, where labour standards could not find an application.[757] Building on the above perspectives on regulation, the following chapter looks at the international perspectives on the regulation of labour standards. It assesses the role played by the ILO and how the ILO can still lead the discussion on the regulation of non-standard employment, partly using self-regulation.

[757] A Marx & J Wouters 'Redesigning enforcement in private labour regulation: Will it work? (2016) 155 *International Labour Review* 435, 436.

Chapter 4: International labour framework - focussing on non-standard work

1 Introduction

This chapter focuses on the international regulatory framework protecting the right to freedom of association, the right to collective bargaining and the right to an environment that is not harmful to one's wellbeing at the workplace. These rights are discussed with reference to a mine as the workplace. This chapter makes two claims: first, that the International Labour Organisation (ILO), and the UN human rights regime while not abandoning the main focus of protecting a narrow group of workers in standard employment relationships have embarked on non-binding initiatives to widen protection to workers falling outside the ambit of labour standards. Through pursuing decent work in both formal and informal sector, the ILO is repositioning itself to the current realities in the world of work. The second claim is that the international instruments and voluntary approaches and recommendations endorsed or advocated by the ILO and the UN are manifesting at corporation levels through codes of conduct. This makes codes of conduct important instruments, capable of complementing state regulation. The focus of the chapter while referring to the ILO conventions and their limitations, is primarily to the non-binding initiatives brought or supported by the ILO or other UN human rights organisations.

This chapter begins with a brief history of the ILO and South Africa, assessing the influence that the international body had on South African domestic legislation. It then looks at the key components of the right to freedom of association, the right to collective bargaining and the right to an environment that is not harmful to one's wellbeing at the workplace through the international lenses. An assessment of the weaknesses of the ILO labour standards is undertaken, with a view to show the gaps in the regulation and implementation of the selected labour standards. The chapter then focuses on various ILO and UN non-binding initiatives dominating and shaping the regulation of labour standards. The chapter concludes by linking codes of conduct to the international non-binding instruments on labour standards.

2 South Africa and the International Labour Organisation

The International Labour Organisation (ILO) (as the only United Nations agency with a tripartite governing body consisting of representatives from governments, employers' and workers) has significantly influenced both the structure and content of labour regulation in South Africa.[758] However, prior to 1994, its influence on labour institutions in South Africa was indirect.[759] South Africa became a member and an active participant of the ILO from 1919 when the organisation was formed until its withdrawal in 1964.[760]

South Africa was re-admitted to the ILO in 1994, following its withdrawal from the international body in 1964.[761] The system of apartheid violated core values of the ILO, including the Declaration of Philadelphia, which is based on principles inter alia of non-discrimination, freedom, dignity and equality.[762] As such, the ILO supported certain movements, including trade unions that were opposed to the system of apartheid.[763] Since its readmission, South Africa has ratified 27 conventions, including the eight fundamental conventions.[764] Broadly speaking, the rights protected by fundamental

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[758] International Labour Organisation (ILO) 1919, 15 UNTS 40, Article 7 provides that the governing body consists of fifty-six persons made up of twenty-eight governments representatives, fourteen employers representatives and fourteen employees representatives.

[759] C Mischke 'The significance and practical effect of ILO standards – A view from outside' (1993) 14 *ILJ* 63; NE Wiehahn Report of the commission of inquiry into labour legislation (1981).

[760] R Grawitzky 'From workplace rights to constitutional rights in South Africa: The role and actions of the tripartite ILO constituency in the challenge to apartheid and the transition to democracy' (2013) ILO Working Paper 2; The ILO *Declaration Concerning the Policy of "Apartheid" of the Republic of South Africa'* (1964); R Grawitzky 'The role of the ILO during and ending apartheid' (2013) Available at <https://www.ilo.org/wcmsp5/groups/public/---africa/documents/meetingdocument/wcms_214906.pdf> (accessed 25-11-2019) 3.

[761] The ILO *Declaration Concerning the Policy of "Apartheid" of the Republic of South Africa'* (1964); R Grawitzky 'The role of the ILO during and ending apartheid' (2013) 3.

[762] ILO Declaration of Philadelphia, Article II (a). The Declaration of Philadelphia now forms part of the ILO Constitution.

[763] M Hermanus, S Phakathi, N Coulson & P Stewart 'The achievements and limitations of statutory and non-statutory tripartism in South African mining' (2019) 11 *International Development Policy* 59.

[764] The core fundamental conventions are Convention 29 of Forced Labour; Convention 87 on Freedom of Association and Protection of the Right to Organize; Convention 98 on the Right to Collective Bargaining; Convention 100 on Equal Remuneration; Convention 105 on Abolition of Forced Labour; Convention 111 on Discrimination; Convention 138 on Minimum Age and Convention 182 on the Worst Forms of Child Labour. ILO 'Ratifications for South Africa' Available at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888

conventions are the right to freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the abolition of child labour and the elimination of all forms of discrimination.[765] All these rights are important in addressing contemporary challenges to labour relations. However, as pointed out in chapter one, this thesis focuses on the right to freedom of association and the effective recognition of the right to collective bargaining and the right to an environment that is not harmful to health and well-being.[766] This selection is primarily informed by the significance of these participation rights and the overall well-being of workers at mines.

At its core, the ILO promotes the notion of tripartism – a recognition of the importance of government, business and labour in advancing social justice and decent work.[767] While the governance structure of the ILO has influenced the labour regime in many countries, the composition of the tripartite governing body excludes non-standard representatives from the formal structures.[768] Despite the widening of this gap in protection, it is still largely recognised that through the imposition of minimum binding obligations on member states, the ILO has played a major role in improving workers' rights globally.[769]

> (accessed 26-06-2017).

[765] ILO *Declaration on Fundamental Principles and Rights at Work* (1998) Adopted at its 86th Session, Geneva.

[766] See chapter one, part 3.

[767] E Webster 'The promise and the possibility: South Africa's contested industrial relations path' (2013) 81/82 *Transformation: Critical perspectives on Southern Africa* 208, 209. The ILO is the United Nations (UN) agency that is governed by a tripartite composition of governments, employers and worker representatives.

[768] See ILO 'The benefits of international labour standards' Available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm> (accessed 04-03-2020)

[769] P van der Heijden 'The ILO stumbling towards its centenary anniversary' (2018) 15 *International Organization Law Review* 203; P Alston 'Facing up to the complexities of the ILO's core labour standards agenda' (2005) 16 *The European Journal of International Law* 467, 470; B Langille 'The future of ILO law, and the ILO' (2007) *American Society of International Law Proceedings* 394; JR Bellace 'The ILO declaration of fundamental principles and rights at work' (2001) 17 *The International Journal of Comparative Labour Law and Industrial Relations* 269; International Labour Organization (ILO) Constitution of the International Labour Organisation (1919) Article, 19 (8).

3 Labour framework

The Universal Declaration of Human Rights (UDHR) recognises the right of 'everyone' to work in conditions that are favourable.[770] Favourable conditions include an environment that is free for human development and that is not harmful to health and well-being.[771] It further recognises the right of everyone to favourable remuneration that sustains the worker and other social protection.[772] In the same spirit of providing effective protection to the worker, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[773] requires state parties to recognise the right to work and to implement measures aimed at protecting and safeguarding the right.[774] Similarly, the International Covenant on Civil and Political Rights (ICCPR) prohibits forced or compulsory labour.[775] It is also apparent from these international instruments that the right to work is contextualised with reference to other rights, namely the right to dignity, non-discrimination, equality and the right to freedom of association.[776] The significance of the broad inclusion of the right is that notwithstanding the nature of the contract – whether part-time, full-time, standard or non-standard work, all workers are accorded the right to favourable working conditions.[777]

Despite ratifying 27 Conventions, South Africa faces many challenges in realising these fundamental rights and domesticated within its Constitution. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has

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770 UN General Assembly, *Universal Declaration of Human Rights*, (1948) Art 23.

771 OB Alli *Fundamental principles of occupational health and safety* (2008) The International Labour Organisation 20.

772 UDHR, Articles 23 and 24.

773 General Assembly resolution 2200A (XXI) of 16 December 1966

774 ICESCR, Article 23.

775 General Assembly resolution 2200A (XXI) of 16 December 1966, Art 8(3).

776 N Chirtoaca & A-P Larion 'The right to work and its corollaries – Fundamental human rights in the light of the international regulations' (2015) 2 *European Journal of Labour and Public Administration* 45.

777 UN Economic and Social Council Committee on Economic, Social and Cultural Rights, General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), s 4.

expressed concerns on strikes that are persistent and that often turn violent.[778] The CEACR further cautioned the government to exercise restraint in using force during strikes.[779] More relevant to this thesis, the CEACR expressed its views on the allegations by the International Trade Union Confederation (ITUC) that non-standard workers are finding it difficult to exercise their right to freedom of association and to organise.[780] While acknowledging parliament's efforts in amending the LRA, and the potential of provisions aimed at advancing the rights of non-standard workers, the lack of communication by the government on the effect of the provisions remains worrisome.[781] The following section looks at freedom of association as a right under the international instruments.

3.1 Freedom of association

Lord Denning delivering a speech to the American Bar Association remarked that "if men are ever to be able to escape from the servitude and oppression, they must be able to meet together to discuss their grievances and to form themselves in unison to make a plan for their well-being".[782] In many ways, this quotation depicts the essence of freedom of association as a key right for workers as provided under international law. Freedom of association as a right has been well documented in international law and international labour law. The 1919 Versailles Peace Treaty which created the ILO

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[778] ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 – Observation (CEACR) – adopted 2018, published 108th ILC session (2019) Available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3964945> (accessed 25-11-2019.

[779] ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 – Observation (CEACR) – adopted 2018, published 108th ILC session (2019) Available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3964945> (accessed 25-11-2019).

[780] ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 – Observation (CEACR) – adopted 2018, published 108th ILC session (2019) Available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3964945> (accessed 25-11-2019).

[781] ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 – Observation (CEACR) – adopted 2018, published 108th ILC session (2019) Available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3964945> (accessed 25-11-2019).

[782] Lord Justice Denning 'The price of freedom: We must be vigilant within the law' (1955) 41 *American Bar Association Journal* 1011, 1012.

listed freedom of association as a guiding principle of the ILO.[783] The Universal Declaration of Human Rights (UDHR), which recognises the “inalienable rights of all members of the human family” provides that “everyone has the right to freedom of peaceful assembly and association”.[784] Other international instruments including the ICCPR and ICESCR expand on this fundamental right through directing state parties to put in place laws that enable the realization of the right.[785]

Under the ILO, the Freedom of Association and the Protection of the Right to Organise Convention (C87)[786] recognizes the right of workers and employers to join organisations of their own choosing without prior authorisation.[787] Similarly, the Right to Organise and Collective Bargaining Convention (C98)[788] seeks to give effect to the right to freedom of association through affording workers protection from any forms of discrimination emanating from the exercise of the right.[789] These conventions are complementary to each other and the realisation of one right is dependent on the other.[790] Key to these conventions is the requirement on member states to establish a voluntary system of collective bargaining in which the parties to the system are free to engage in collective bargaining.[791]

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[783] The Treaty of Peace of Versailles, Part XIII, section 1.

[784] UDHR, Article 20; see H Hannum ‘The status of the Universal Declaration of Human Rights in national and international law (1995) *Georgia Journal of International & Comparative Law* 287.

[785] UN General Assembly *International Covenant on Civil and Political Rights* (ICCPR) (1966), Articles 21-22; UN General Assembly *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966).

[786] International Labour Organization (ILO) *Freedom of Association and Protection of the Right to Organise Convention*, C87, 1948.

[787] ILO C87, Article 2.

[788] ILO Right to Organise and Collective Bargaining Convention, C98, 1949.

[789] ILO C98, Article 1.

[790] K Boyle & S Shar ‘Thought, Expression, Association, and Assembly’ *in* D Moeckli, S Shah & S Sivakumaran (eds) *International human rights law* (2014) 217-218.

[791] P Benjamin & H Cheadle ‘South African labour law mapping changes – Part 1: The history of labour law and institutions (2019) 40 *ILJ* 2189, 2201.

Having discussed the right, a brief consideration of the nature of the right is thus warranted. Freedom of association is an enabling right in that it facilitates the participation of workers and business on furthering social and economic aspects.[792] When defined with reference to workers, freedom of association entails a combination of both moral and legal rights of workers to form and to join trade unions of their choice.[793] Alexander defines freedom of association as "the liberty a person possesses to enter into relationships with others – for any and all purposes, for a momentary or long-term duration, by contract, consent, or acquiescence."[794] Central to these approaches is the liberty of an individual to choose and to determine the organisations of their choice without compulsion. It also entails the right not to associate.[795] Despite this interpretation, the ILO's instruments are designed to facilitate the positive aspect of the right – to associate.[796] Freedom of association embodies notions of self-determination both individually and collectively. In *Lavigne v Ontario Public Service Employees Union*,[797] the Supreme Court of Canada reiterated the following as core tenets of the right to freedom of association:

> "While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals,

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792 M Budeli 'Workers' right to freedom of association and trade unionism in South Africa: An historical perspective' (2009) 15 *Fundamina: A Journal of Legal History* 57; V de Stefano 'Non-standard work and limits on freedom of association: A human rights-based approach' (2017) 46 *Industrial Law Journal* 185, 190; ILO 'Freedom of Association and collective bargaining' Available at <https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang--en/index.htm> (accessed 15-01-2020).

793 MP Olivier 'Statutory Employment Relations in South Africa' *in* JA Slabbert, JJ Prinsloo, BJ Swanepoel & W Backer (eds) *Managing employment relations in South Africa* (1999) 79-80.

794 L Alexander 'What is freedom of association, and what is its denial? (2008) 25 *Social Philosophy Policy* 1.

795 T Kleven 'On the freedom to associate or not to associate with others' (2004) *Tennessee Journal of Law and Policy* 69; M Harcourt, G Gall, RV Kumar & R Croucher 'A union default: A policy to raise union membership, promote the freedom not to associate and progress union representation' (2019) 48 Industrial Law Journal 66, 67; see also the European Court of Human Rights in Sorensen & Rasmussen v Denmark, Application nos. 52562/99 and 52620/99).

796 T Madima 'Freedom of association and the concept of compulsory trade union membership' (1994) *Journal of South African Law* 545, 546; M Budeli 'Freedom of association and trade unionism in South Africa: from apartheid to the democratic constitutional order' (2007) Unpublished PhD Thesis, University of Cape Town 48.

797 [1991] 2 S.C.R 211, 128.

> through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes."'[798]

Its significance is the expression of one's freedom, through a combination with others.[799] It is an integral feature of democracy and ensures that individuals participate effectively in matters of common interest.[800] Freedom of association triggers other rights, particularly civil and political rights.[801] This partly explains the inclusion of the right in the founding ILO Constitution and in the Declaration of Philadelphia.[802] Similarly, the South African Constitutional Court has linked the right to form and join a trade union as an expression and guarantee of freedom of expression.[803]

3.2 Right to organise and collective bargaining

The freedom to associate enables the workers to exercise collective rights against the employer in that workers are afforded the right to organise and to bargain with the employer. The following section analyses the right to organise and collective bargaining from international lenses. The C98 directs state parties to put in place enabling mechanisms for workers to organise.[804] Once workers are able to associate, they may not be targeted or unfairly discriminated against.[805] Collective bargaining remains one of the most popular forms of worker participation in the workplace.

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[798] *Lavigne v Ontario Public Service Employees Union* 128, citing LJ MacFarlane, *The theory and practice of human rights* (1985) 82.

[799] *Lavigne v Ontario Public Service Employees Union* 128.

[800] *Lavigne v Ontario Public Service Employees Union* 151.

[801] M Budeli (2007) Unpublished PhD Thesis, University of Cape Town 62-64.

[802] ILO Constitution, Preamble.

[803] *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 CC, para 31; similar interpretations have been repeated in *PORCRU v SACOSWU and Others* 2019 (1) SA 73 (CC), paras 89-91.

[804] C98, Article 3; see also JR Bellace 'ILO fundamental rights at work and freedom of association' (1999) 50 *Labor Law Journal* 191, 194.

[805] C98, Art 1.

Workers can form and join trade unions, participate in the running of trade unions and be elected in positions of leadership among others.[806] The main goal is the ability of workers to negotiate with the employer or the employer representative on issues of mutual interest in an orderly manner.[807]

It is the ability or the threat of workers, acting collectively to withhold their labour that counterbalances the economic power of the employer.[808] The right to strike is not expressly stated in many ILO Conventions and recommendations[809] except in the Abolition of Forced Labour Convention.[810] The ILO Resolution concerning the Abolition of Anti-Trade Union Legislation in the Member States of the International Labour Organisation[811] directs member states to adopt "laws ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by workers".[812] In the same spirit of advancing and protecting the right to strike, the ILO Resolution Concerning Trade Union Rights and their Relation to Civil Liberties further placed some light on the need to ensure that the role of trade unions across the globe is respected and the right to strike is not undermined.[813]

There is, therefore, a consensus that the underlying force behind the right to organise and collective bargaining is the ability of the trade unions to represent the interests of the workers and if necessary to withdraw their labour.[814] The right to organise, the right

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[806] M Budeli (2007) Unpublished PhD Thesis, University of Cape Town, 141.

[807] LRA, s 1 (c)(i) and (d)(i).

[808] DC Subramanien & JL Joseph 'The right to strike under the Labour Relations Act 66 of 1995 (LRA) and possible factors for consideration that would promote the objectives of the LRA' (2019) 22 *PER/PELJ* 1, 23.

[809] JR Bellace '(1999) 50 *Labor Law Journal* 194; B Gernigon, A Odero & H Guido *ILO principles concerning the right to strike* (1998) International Labour Office 7.

[810] Convention 105 of 1957, Article 1; B Gernigon, A Odero & H Guido (1998) International Labour Office 7.

[811] See B Gernigon, A Odero & H Guido (1998) International Labour Office on the Resolution Submitted by the Resolution Committee, (1957) 7.

[812] ILO 1957, 783.

[813] ILO, 1970, 735-736.

[814] DC Subramanien & JL Joseph (2019) 22 *PER/PELJ* 23.

to bargain collectively are thus reinforced by the right to strike and without it, these rights will be redundant.[815]

It seems that at the time if drafting the international instruments and conventions, the immediate threat to the attainment of these rights were the member states.[816] The rapid political changes that were occurring particularly in Europe meant that governments often felt threatened when workers exercised these rights. This thesis argues that despite the limitation of the right to associate freely in several countries by member states, currently the major threat on the enjoyment of this right is coming from corporations and companies. This is occurring primarily through the arrangement of work that bypasses the applicable labour framework. As a result, corporations are undermining the attainment of this right within national states. A third right that is of fundamental importance is the right to a safe working environment.

3.3 The right to a safe working environment

The ILO estimates that about 2, 78 million work-related deaths are recorded annually. Of this figure, 2.4 million are related to occupational diseases. The economic costs of occupational health and safety on nation-states and on corporations are huge.[817] The ILO Constitution makes provision that workers must be protected from all forms of sickness, disease and injury emanating from their employment.[818] As such, several conventions, recommendations and protocols on occupational health and safety have been passed. In addition, the ILO recognised specific sectors of economic activities that needed tailor made instruments due to the specific risk or harm emanating from such areas. This right is thus discussed with specific reference to the mine as the workplace.

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[815] M Budeli (2007) Unpublished PhD Thesis, University of Cape Town 59.

[816] ICCPR, Article 22(3) directs state parties not to take any measures that would limit the application of these rights and the ICESCR contains similar provisions, Article 8(3).

[817] S Niu 'Ergonomics and occupational safety and health: An ILO perspective' (2010) 41 *Applied Ergonomics* 744.

[818] ILO Declaration of Philadelphia, Article III (g).

Although South Africa only ratified the Safety and Health in Mines Convention in 2000,[819] it incorporated the provisions in the Mine Health and Safety Act of 1996.[820] Key institutions recommended by the Convention to member states including the designation of a competent authority responsible for monitoring aspects relating to health and safety; appointment of inspectors; mine rescue and first aid provisions; responsibilities, obligations and duties of employers; rights and duties of workers and their representatives are reflected in the Act.[821] These provisions are all mirrored in the MHSA, albeit that the MHSA is limited to employees as defined. Like other ILO Conventions, C176 uses the term 'worker' and not 'employee' when conferring both rights and duties, resulting in a wider application than domestic legislation.[822] While all employees are workers, not all workers are employees – a distinction which affects accessing several other key rights and social benefits.[823]

The Safety and Health in Mines Convention (C176)[824] addresses occupational health at mines[825] through unpacking the obligations of governments,[826] outlining the responsibilities of employers and employees;[827] outlining the key elements of the supervision of safety and health at mines;[828] establishing a competent authority[829] and

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[819] ILO Convention 176 of 1995, ratified 09 June 2000.

[820] 29 of 1996. One of its aims include giving effect to the public international law obligations of South Africa on health and safety at the mines.

[821] Convention 176 of 1995.

[822] Convention 176, Articles 2, 3, 7, 12. It is also noted that the ILO Convention regime generally uses the term 'worker' and not 'employee'.

[823] See for example in the United States of America context C J Muhl 'What is an employee? The answer depends on the Federal law' (2002) 125 *Monthly Labor Review* 3 4.

[824] ILO Safety and Health in Mines Convention 176, 1995.

[825] C176, Article 2(1).

[826] C176, Articles 4 – 5).

[827] C176, Part III (A) (Articles 6 – 12)

[828] C176, Article 5(e).

[829] C176, Article 5(b).

unpacking the rights and duties of workers and their representatives.[830] The C176 Convention promotes tripartism through the participation of representatives of workers and employers in the decision making on health and safety aspects at the mines.[831] It is clear that the vision during the drafting of the C176, was that workers at mines are organised, and capable of forming representative organisations.

Similarly, the Safety and Health in Mines Recommendation supplement the C176 and must be applied together with the C176. The Recommendation focuses on the competent authority and requires the competent authority to be properly trained, qualified with appropriate skills.[832] The Recommendation places importance on the role of research, sharing of information, fostering a culture of cooperation, consultation and an emphasis on training.[833] Other measures that member states must incorporate in national legislation relate to the regulation of equipment, training of workers on health and safety issues, establishing of an effective system to give warning in cases of danger, the establishment of mine rescue and escape routes and periodic medical assessments.[834] Importantly, the requirement to train workers on health and safety issues does not limit such training to permanent workers but applies to all workers at the mine.

Other ILO instruments include codes of practice that target specific problematic issues at mines. For example, the ILO code of practice on HIV/AIDS brings key stakeholders together in drafting a sound workplace policy for addressing HIV/AIDS for workers in both formal and informal workplaces.[835] The code of practice addresses both the formal and informal workers and brings other stakeholders on board, who are not part of the tripartite governance structure in fighting HIV/AIDS. The significance of this policy and

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[830] C176, Article 13.

[831] C176, Article 2(2).

[832] R 183, General Provisions I, recommendation 1(4).

[833] R 183, General Provisions I, recommendation 5.

[834] ILO R 183, General Provisions I, recommendation 8.

[835] ILO 'An ILO code of practice on HIV/AIDS and the world of work' (2001) Available at <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/publication/wcms_113783.pdf> (accessed 05-03-2020).

its strength are that it is a comprehensive HIV/AIDS policy which is grounded in a human rights approach and covers practical information on the implementation of results-focused HIV/AIDS policy.[836] Similar to the HIV/AIDS code of practice, the Safety and health in underground coalmines provides guidelines to governments, workers and employers on the international best practices in addressing specific coal-related occupational hazards.[837]

Under the ILO Convention regime, the liability and obligations of the employer or the owner of the mine are primarily based on the employment relationship.[838] Despite the employer or the owner of the mine having duties towards other persons at the mine, the main bearers of such rights are employees. With the increase in the externalisation of work and the new work arrangements, there is a need to realign regulatory approaches to protect the non-standard workers, who may not have access to other rights reserved for standard employees. The international instruments are important in measuring the level of compliance of domestic instruments in regulating health and safety at mines.

Despite the influence of the ILO on domestic legislation, it is not without limitations. The following section discusses some of the limitations of the ILO framework, with reference to the protection of non-standard workers.

3.4 Limitation of the framework

There is no doubt that ILO and its conventions influenced the development of South African labour law.[839] However, its continued relevance and influence in a globalised

[836] ILO 'An ILO code of practice on HIV/AIDS and the world of work' (2001) 3-44.

[837] ILO Safety and health in underground coalmines (2009) International Labour Organization, ILO Code of Practice.

[838] P Bamu-Chipunza 'Extending occupational health and safety law to informal workers: The case of street vendors in South Africa' (2018) *Oxford Human Rights Hub* 61 66.

[839] Maupain 'Introduction: Whither the ILO's Second Century? Persuasion at its Limits in the Global Economy' *in* F Maupain (ed) *The future of the international labour organisation in the global economy* (2013) Hart Publishing 16.

world have been questioned.[840] The following quotation is from the ILO 2020/21 budget and it captures the pertinent issues facing the world of work:

> "...Social dialogue institutions have come under pressure and struggle to generate consensus on how to confront complex, multifaceted issues. In many countries, these institutions are poorly resourced and ineffective. In addition, the legitimacy of the social partners and the credibility of tripartism and social dialogue are weakened when employers' and workers' organizations have difficulties in retaining existing members and engaging new ones, especially from under-represented categories of enterprises and workers. Reaching out to enterprises and workers in the informal economy represents a particular challenge."[841]

Moreover, even reaching out to workers in the formal economy is also proving to be difficult. Therefore, it is not only workers in the informal work arrangements who needs protection. Contemporary challenges faced by workers in non-standard employment relationship include the ability to associate freely and to organise for the purposes of collective bargaining with the employer.[842] The institutions of the ILO were designed to protect workers in standard employment relationships.[843] Cooney argues that "[t]he structure, goals, and priorities of the ILO have not been set by reference to the experiences of the "peoples of the world" as a whole.[844] They have been determined largely by men whose views were shaped by their location in industrialized countries…"[845] The universalism terminology used by the ILO did not reflect the realities in other economies across the globe. Recent scholarship on the role of the ILO however demonstrates that the ILO is increasingly recognising various social

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[840] *See* F Maupain 'Introduction: Whither the ILO's Second Century? Persuasion at its Limits in the Global Economy' (2013) 16; G Carbonnier & C Gironde 'The ILO@100: in search of renewed relevance (2019) 11 *International Development Policy* 3, 3.

[841] ILO 'Programme and Budget for 2020-21: Programme of work and results framework' (2019) ILO Governing Body GB.337/PFA/1/1, 1.

[842] ILO 'Programme and Budget for 2020-21: Programme of work and results framework' (2019) ILO Governing Body GB.337/PFA/1/1, 1.

[843] S Cooney 'Testing times for the ILO: Institutional reform for the new international political economy' (1999) 20 *Comparative Labor Law and Policy Journal* 365, 370.

[844] S Cooney (1999) 20 *Comparative Labor Law and Policy Journal* 367.

[845] S Cooney (1999) 20 *Comparative Labor Law and Policy Journal* 367.

actors in advancing the rights of workers.[846] Member states, therefore, developed their labour frameworks from this ideal lens, leaving many workers in the informal economy outside the reach of the labour framework.

In other words, the views and perspectives of certain sectors of the population, particularly women, the non-industrialising countries at the time were not adequately incorporated in the making of ILO conventions. In addition, the tripartite institutions of the ILO do not formally include representatives of workers in the informal sector which is problematic in the case of developing countries with large informal employment and where domestic legislation focuses largely on workers in formal employment.[847] These workers operate in less regulated environments, with less job security and given the fragmentation of these workplaces, they are difficult to organise and to unionise.[848]

The ILO fundamental conventions were thus not shaped with reference to the developing countries at the time, to the exclusion of many states, particularly in Africa.[849] Jeffrey has argued that "the labour force of these developing countries bore no resemblance to the foundational concepts of the ILO, which was based on workers in the industry and employed in agriculture".[850] The period of mass production, commonly referred to as 'Fordism' which was characterised by unionised, full-time employees, has long gone, leaving many workers in non-standard employment relationships and without the full protection offered by labour regulation.[851] In

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[846] P O'Donovan, S Marshall and K Mbongo 'The role of civil society in promoting decent work: Lessons from innovative partnerships in Ireland, New Zealand and South Africa' (2000) *International Institute for Labour Studies* 124.

[847] E Kalula, N Okorafar & P Bamu 'Towards an Effective Regulatory Framework for Labour Rights and Social Protection in Southern Africa' *in* D Banik (*ed*) *The legal empowerment agenda: Poverty, labour and the informal economy in Africa* (2011).

[848] B Hepple 'Is South African labour law fit for the global economy? (2012) *Acta Juridica* 1, 11.

[849] S Cooney (1999) 20 *Comparative Labor Law and Policy Journal* 367.

[850] H Jeffrey 'The International Labour Organisation and the world labour force: From "peoples of the world" to "informal sector"' (2008) 10, Available at <https://www.scribd.com/document/2389635/The-International-Labour-Organisation-and-the-World-Labour-Force-From-Peoples-of-the-World-to-Informal-Sector> (accessed 08-11-2017). As demonstrated in chapter five, the approach within the ILO of focusing on the narrow category of the employees is also reflected within national legislation

[851] M Berenberg 'Democracy and domination in the law of the workplace cooperation: From bureaucratic to flexible production' (1994) 94 *Columbia Law Review* 879-928; R Blanpain 'Work in the 21st century' (2017) 38 *ILJ* 744.

recognising the current limitations, the ILO is exploring alternative regulatory mechanisms to provide more comprehensive protection to workers in non-standard work relationships. Whereas the ILO regulatory instruments were built around command-and-control regulatory mode, the new forms of regulation are emerging, which include voluntary approaches. The idea is centred on promoting decent work without a distinction on the nature or status of the worker.

4 Regulating non-standard work: International approaches

Within the ILO, there is a clear recognition that its ILO conventions are no longer affording protection to a substantial percentage of workers. While still advancing the rights of workers in standard employment relationships, the ILO is widening its regulatory scope to include workers in non-standard employment relationships.[852] Various key stakeholders, including the UN and the ILO, are developing complementary regulatory approaches to their traditional regulatory approaches and the international human rights instruments.[853] These new approaches do not seek to abandon the traditional premise of regulation but are rather based on cooperation and information sharing between the parties.

The ILO faces many challenges, particularly in remaining relevant to the needs of the constantly changing global economy and the dynamic composition of workers.[854] These challenges have been grouped by Bronstein into four categories, namely the coverage of labour law; the ability of labour law to adapt to newer technologies and to emerging work arrangements; the scope of labour law and the ideological underpinnings of labour law.[855] To this end, the ILO without abandoning the traditional premise of labour law has invested in supporting alternative mechanisms to regulate labour standards.[856] Realising the need to protect more workers (and ultimately all

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[852] See for example ILO Employment Relationship Recommendation, 2006 (R198).

[853] See the discussion below from part 4.1 – 4.6.

[854] A Bronstein *International and comparative labour law: Current challenges* (2009) 11; M Weiss 'International labour standards: A complex public-private policy mix' (2013) *The International Journal of Comparative Labour Law and Industrial Relations* 7, 9.

[855] A Bronstein (2009) 11.

[856] For ILO sponsored research projects on finding alternative regulatory mechanism see note 768

workers), who for various reasons fall outside the purview of most domestic legislation, the ILO has since embarked on issuing recommendations, codes of practice and soft law to address the aforementioned gaps.[857] These measures seek to encourage member states to improve the conditions of the workers, particularly those not fully covered by national legislation.

The ILO has adopted several initiatives and recommendations, designed to improve the penetration of labour normative instruments to non-standard workers.

4.1 ILO conventions and recommendations

The ILO issued the Recommendation Concerning the Transition from the Informal to the Formal Economy[858] (R204) which acknowledges problems created by the growing informal sector and calls upon member states to facilitate the transition of workers from the informal to formal economy.[859] It also aims to prevent the continued erosion of formal jobs into informality.[860] One of its aims is ensuring respect for fundamental rights and income security of workers operating in the informal sector.[861] The R204 further calls upon member states to ensure that workers in the informal sector enjoy core rights, including freedom of association and the effective recognition of the right to collective bargaining,[862] the right to collective bargaining[863] and effective occupational safety and health policies.[864] Recommendation 204 deals with the challenges faced by workers operating in the informal sector towards accessing health and safety and calls

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above.

[857] ILO *Private Employment Agencies Convention*, 1997; ILO Part-time work recommendation 182 (1994); S Kuruvilla & A Verma 'International labor standards, soft regulation, and national government roles' (2006) 48 *Journal of Industrial Relations* 41.

[858] International Labour Organization (ILO), *Recommendation Concerning the Transition from the Informal to the Formal Economy*, 12 June 2015, R204.

[859] ILO R 204, Preamble.

[860] ILO R 204, recommendation 1(a).

[861] The ILO Transition from the Informal to the Formal Economy Recommendation 204 (2015).

[862] ILO R 204, recommendation 16(a).

[863] ILO R 204, recommendation 31.

[864] ILO R 204, recommendation 11(p).

upon member states to address the unsafe working conditions faced by workers in the informal economy.[865] The recommendation is viewed as a positive development since it offers discretion to state parties to implement policies giving wider protection to workers in the informal sector depending on specific country and sector needs.[866]

The traditional criticisms levelled against the ILO recommendation system is that it remains a recommendation with no binding mechanisms on member states.[867] Secondly, with reference to R204, it is uncertain how member states must implement the recommendation in practice. This thesis argues that the mere fact that R204 is non-binding should not be used to discredit its relevancy and application. In the South African context, the success of R204 will depend on the interplay between the existing legislation, government initiatives, including the provision of financial assistance to small businesses, efforts from both the business and organised labour. A national task force was established in 2015 to monitor the implementation of the R204 and it brings key stakeholders together, including representatives of various informal sector in an effort to make R204 effective.[868] According to the WIEGO, South Africa is an interesting case study because the "informal workers across a number of sectors are relatively well organized".[869] Despite some interests by the leading trade unions in mines, non-standard workers at mines remain largely unorganised, unlike in other sectors of the economy.

Other approaches by the ILO have focused on regulating TES, commonly known as labour brokers – who are often accused of contributing to the increasing non-standard

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[865] ILO R 204, recommendation 17 (a) and (b).

[866] A Osiki 'Property rights as a pathway to labour law protection in the Nigerian in the Nigerian informal economy' (2018) 34 *International Journal of Comparative Labour Law and Industrial Relations* 457, 462.

[867] See P van der Heijden 'The ILO stumbling towards its centenary anniversary' (2018) *International Organizations Law Review* 203, 207.

[868] WIEGO 'Interview: How South Africa could become a model for formalising the informal sector' Available at <https://www.wiego.org/blog/interview-how-south-africa-could-become-model-formalizing-informal-economy> (accessed 13-02-2019).

[869] WIEGO 'Interview: How South Africa could become a model for formalising the informal sector' Available at <https://www.wiego.org/blog/interview-how-south-africa-could-become-model-formalizing-informal-economy> (accessed 13-02-2019).

jobs.[870] The ILO responded to the growing TES by adopting the Private Employment Agencies Convention[871] – with the purpose of allowing the operation of private employment at the same time protecting workers using such services.[872] The Convention defines private employment agencies broadly and includes agencies who match employers and employees, without any further role in such an employment relationship.[873] The second category of private employment agencies is defined with reference to the provision of actual employment with a view of making such workers available to a third party.[874] This means the agency assumes the position of the employer. In the third case, the agency may be involved in offering various services to jobseekers, providing information, conducting research, working with governments, employers and organised labour.[875] The Convention which applies to all employment agencies directs member states to put in place frameworks to prevent the abuse of workers and the discrimination against such workers, working with employment agencies.[876] In particular, it recognises 'the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue as necessary components of a well-functioning industrial relations system'.[877] In addition to these participation rights, the Convention directs state parties to ensure that workers

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[870] The ILO Private Employment Agencies Convention 181 of 1997 Available at < https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326> (Accessed 22 November 2019).

[871] The ILO Private Employment Agencies Convention 181 of 1997. In addition, the ILO developed a monitoring and technical document which seeks to give technical guidance to member states when aligning domestic legislation with Convention 181 (ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement (1997) ILO Office).

[872] ILO Private Employment Agencies Convention 181, Art 2(3).

[873] ILO C181, Art 1 (1) (a).

[874] ILO C181, Art 1 (1) (b).

[875] ILO C181, Art 1 (1) (c).

[876] ILO C181, Art 5.

[877] ILO C181, Preamble; Articles 11 (a) and (b).

engaged through employment agencies are adequately protected on occupational health and have recourse to compensation in cases of injuries occurring at work.[878]

The Convention is supplemented by the ILO Private Employment Agencies Recommendation 188 (R188).[879] The R188 recommends member states to involve all stakeholders when implementing the Convention, particularly the involvement of the tripartite institutions.[880] Part II of the R188 focuses on the protection of workers engaged through private agencies and directs state parties to take measures to eliminate unethical practices by private employment agencies through imposing fines or other appropriate sanctions in cases of any breach.[881] Workers engaged through such employment agencies must be given employment contracts with terms and conditions of employment.[882] In addition, it prohibits agencies from providing workers to an enterprise, when the enterprise' employees are on strike – a position that undermines collective bargaining and places such workers in danger of violence.[883] The R188 places emphasis on effective regulation through requiring national laws and regulations to be supplemented by the use of technical standards, guidelines, self-regulatory mechanisms and other mechanisms.[884] This can be interpreted as requiring a comprehensive inclusion of such agencies in codes of conduct. The R188 is progressive, particularly in acknowledging the importance of self-regulation and other models that can protect workers engaged through employment agencies. However, the singling out of tripartite organisations in the formulation and implementation of the R188, leaving out non-tripartite organisations may create the impression that the input of such organisations is not valued.

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[878] ILO C181, Art 11 (g) and (h) and Art 12 (f).

[879] ILO Private Employment Agencies Recommendation 188, 1997.

[880] ILO R188, recommendation 2(1).

[881] ILO R188, Part II, recommendation 4.

[882] ILO R188, Part II, recommendation 5.

[883] ILO R188, Part II, recommendation 6.

[884] ILO R188, Part II, recommendation 2 (2).

Despite South Africa not having ratified this Convention, it has nonetheless taken the route of regulating employment agencies and not banned their operation.[885] In addition to efforts by the ILO in formulating conventions and recommendations addressing circumstances that may create non-standard work and take away the labour protections to certain categories of workers, the ILO adopted the Decent Work Agenda.

4.2 The ILO decent work agenda and labour regulation

The ILO stresses how certain fundamental rights, including the right to freedom of association which works hand in hand with the right to collective bargaining, must be exercised by all workers regardless of the nature of their work arrangements.[886] These fundamental rights are important in that they assist workers in regulating their relationships collectively against the employers.

In 1998, the ILO launched the 'decent work' agenda, which focuses on employment creation, social protection, worker's rights and standards and social dialogue.[887] At the core of the decent work agenda is a reaffirmation that social justice is critical to universal peace.[888] Commitment to social justice and universal peace is not new and were pillars of the founding documents of the ILO – the Treaty of Versailles.[889] Despite the seemingly obvious components of the decent work agenda, it remains difficult to

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[885] See *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & Others (Casual Workers Advice Office as Amicus Curiae)* (2018) 39 ILJ 1911 (CC) para 3.

[886] International Labour Organization *Non-standard employment around the world: Understanding challenges, shaping prospects* (2016) 249.

[887] ILO Declaration on Fundamental Principles Rights at Work (1998) International Labour Conference, 86th Session, Geneva; see also The ILO 'Report of the Director-General: Decent work' (1999); C Fenwick, J Howe, S Marshall & I Lindau 'Labour and labour related laws in micro and small enterprises: Innovative regulatory approaches (2007) International Labour Organization, Legal Studies Research Paper No 322, 14.

[888] ILO Declaration on Fundamental Principles Rights at Work (1998) International Labour Conference, 86th Session, Geneva, Preamble.

[889] The Treaty of Peace of Versailles, Part XIII, section 1.

define.[890] This is particularly so due to the difficulty in understanding the standards set out by the decent work agenda.[891] According to the ILO, decent work:

> "involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men".[892]

It is a reformulation of the ILO's commitment to the majority of workers who are either in standard or non-standard forms of employment to work in better conditions with a guaranteed minimum of certain rights.[893] It can be seen that the decent work agenda focuses on participation rights of workers, including the freedom for workers to express and raise issues that affect them and the right to organise and to participate in the affairs of the company or corporation that affect them. The concept of decent work is based on the integral importance of work in one's lifetime.[894] In addition, it calls upon member states to promote and realise the principles enshrined in the ILO core labour standards.[895] As such, working conditions must be centred on creating dignified workers.[896]

Finding ways to protect workers in non-standard relationships must feed into the broader context of striving to create decent work for all workers. To make work

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[890] LF Vosko 'Decent work' The shifting role of the ILO and the struggle for social justice' (2002) 2 *Global Social Policy* 19, 26.

[891] LF Vosko (2002) 2 *Global Social Policy* 26.

[892] ILO 'Responding to globalization: The decent work agenda' (2018) Available at <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_655738/lang--en/index.htm> (accessed 15-02-2020).

[893] ILO 'Responding to globalization: The decent work agenda' (2018) Available at <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_655738/lang--en/index.htm> (accessed 15-02-2020).

[894] The ILO 'Report of the Director-General: Decent work' (1999); T Cohen and L Moodley 'Achieving "decent work" in South Africa? (2012) 15 *PER* 320, p. 320. It is linked to other concepts like economic growth, dignity, and to one's feeling of worthiness.

[895] ILO Declaration on Fundamental Principles Rights at Work (1998) International Labour Conference, 86th Session, Geneva, Art 2; see chapter one, part 2.

[896] T Cohen & L Moodley 'Achieving "decent work" in South Africa? (2012) 15 *PER* 320, 320.

arrangements in the mining sector decent, it requires an intervention of various normative instruments including appropriate legislative responses, clear formulation of labour policies and CSR mechanisms that can enable workers to exercise their rights.[897]

The decent work agenda, however, fails to identify clear alternative or complementary models to the regulation of labour relations, placing more emphasis on the role of the state than on other actors.[898] Similarly, the ILO Employment Relationship R 198 places obligations on member states and does not target firms and transnational corporations in the regulation of employment relationships.[899] The argument here is not to suggest that private actors must be treated and given the same obligations as member states. However, an express recognition of the role of corporations and the negative effects of their operations could pave the way for their meaningful role in the regulation of labour standards. The ILO has several normative documents that target firms and corporations more directly. For example, the ILO Private Employment Agencies Convention 181 of 1997 addresses private employment agencies and directs member states to ensure that workers engaged through such agencies receive adequate protection.[900] This thesis argues that one of the weaknesses of the decent work drive is the failure to incorporate the main actors of globalisation to be at the centre of forging a complementary regulatory framework. The ILO has so far offered piecemeal incorporation of the agents of globalisation in the regulation matrix.[901]

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[897] ILO R 198; ILO *Non-standard employment around the world: Understanding challenges, shaping prospects* (2016) 248.

[898] See the ILO R 198, recommendations 5-7.

[899] ILO R 198, recommendation 19-22.

[900] ILO Convention No 181 Concerning Private Employment Agencies (1997) ILC 85th Session, Geneva, Art 11.

[901] B Bercusson & C Estlund (eds) *Regulating labour in the wake of globalisation: New challenges, new institutions* (2008) 2 – where the authors argue that globalisation has its agents, chiefly the multinational corporations and the global production networks; H Mund & K Priegnitz 'Soft law – second best solution or a privatization of social rights? Some pointers for a future discussion' (2007) 13(4) *Transfer* 671, 672 – where the authors argue that some companies possess higher financial power and revenue than many states. See also V Vara 'The top ten metals and mining companies by revenue in 2018' (2019) *Mining Technology* Available at <https://www.mining-technology.com/features/the-top-ten-metals-mining-companies/> (accessed 03-05-2019).

International labour law incorporates various models of social regulation, originating from both public and private actors.[902] This includes 'soft law' instruments which remain largely voluntary. Soft law refers to "normative processes, framing relations between actors without legal constraints".[903] The understanding of soft law or self-regulation as lacking sanctions is inaccurate since not all soft law approaches to regulation lack sanctions.[904] Thus the popular position in the literature that the main differentiating theme between self-regulation and hard law is the backing of legal sanctions in cases of breach fails is an incomplete position of these forms of regulation.[905] It is more accurate to state that while the command-and-control regulatory model relies on the use of sanctions in the event of non-compliance, self-regulation models are largely based on mutual goals and beneficial outcomes. As such, it has been argued that the lack of binding mechanisms within soft law mechanisms must not be construed as a weakness.[906]

The significance of the decent work agenda is reflected in how the UN has linked it to Sustainable Development Goals (SDGs).[907]

4.3 Labour standards and sustainable development goals (SDGs)

In 2015, the United Nations General Assembly adopted the 2030 Agenda for sustainable development, which embraces three aspects of human life, namely, economic, environmental and social.[908] The Agenda seeks to eradicate poverty and

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[902] I Duplessis 'Soft international labour law: The preferred method of regulation in a decentralized society' in International Institute for Labour Studies *Governance, international law & corporate social responsibility* (2008) Research Series 116, 7.

[903] I Duplessis 'Soft International Labour Law: The Preferred Method of Regulation in a Decentralized Society' in (no editor) Studies *Governance, international law & corporate social responsibility* (2008) 7.

[904] See AT Guzman & TL Meyer 'International soft law' (2010) 2 *Journal of Legal Analysis* 171, 173. The authors argue that a better understanding of soft law is through viewing it along a continuum with different levels of sanctions at each level – what this thesis referred to as the regulatory spectrum.

[905] See chapter three, part 3; I Duplessis *Governance, international law & corporate social responsibility* (2008) ILO Research Series 116, 10.

[906] KW Abbott & D Snidal 'Hard and soft law in international governance' (2000) 421 *International Organisation* 421, 423.

[907] UN General Assembly Resolution adopted by the General Assembly (2015) A/RES/70/1, (see Goal 8 'Decent work and sustainable development').

[908] United Nations General Assembly Resolution adopted by the General Assembly (25 September

extreme poverty.[909] The Agenda consists of seventeen goals and 169 targets, which all improve upon the weaknesses of the Millennium Development Goals (MDGs).[910] The significance of the Sustainable Development Goals (SDGs) is that they are integrated and indivisible across the economic, social and environmental dimensions of development.[911] Goal eight of the SDGs is particularly relevant as it seeks to promote sustained, inclusive economic growth, full, productive employment and decent work for all.[912]

Only recently has there been an attempt to link sustainable development to mining activities.[913] With the high rate of poverty in African countries, mining companies operating in Africa have the potential to bring meaningful contribution through generating employment and economic growth.[914] This thesis argues that the centrality of human beings within the SDGs and the need to uplift human beings' ties into the role of companies to make meaningful self-regulatory frameworks particularly in cases where the state fails or lacks the capacity. Some mining companies have been contributing towards various SDGs through the construction of schools, clinics, funding local projects among others in areas of their operations. Mining companies can create decent jobs, operate safe workplaces[915] and can implement comprehensive health

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2015) A/RES/70/1. Sustainable development has been defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. See The Sustainable Development Agenda, Available at <https://www.un.org/sustainabledevelopment/development-agenda/> (accessed 06-12-2018).

[909] UN Resolution A/RES/70/1.

[910] UN Resolution A/RES/70/1, 2.

[911] UN Resolution A/RES/70/1, 2.

[912] UN Resolution A/RES/70/1, 14.

[913] G Hilson & B Murck 'Sustainable development in the mining industry: Clarifying the corporate perspective' (2000) 26 *Resources Policy* 227, 228.

[914] United Nations 'How can mining contribute to the sustainable development goals? Available at <https://www.un.org/africarenewal/news/how-can-mining-contribute-sustainable-development-goals> (accessed 15-02-2020).

[915] Columbia Centre on Sustainable Investment Mapping Mining to the Sustainable Development Goals: An Atlas' Available at <http://www.indiaenvironmentportal.org.in/files/file/Mapping_Mining_SDGs_An_Atlas.pdf> (accessed 15-02-2020), SDG 3 'Good health and well-being' 6.

policies.[916] Through vigorous health and safety campaigns, and directing sufficient resources, mining companies can prevent the spreading of TB, silicosis and HIV/AIDS.[917] SDGs are also important in that they are interlinked, making their contribution more rounded and inclusive.

4.4 The tripartite declaration of principles concerning multinational enterprises

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) brings key stakeholders together, namely governments, worker organisations and employers in addressing issues relating to labour rights and health and safety.[918] The declaration acknowledges the importance of the multinational companies in providing employment, at the same time drawing the attention of corporations to respect international standards and national laws in countries of their operations.[919]

The MNE Declaration directs national governments to ensure that multinational enterprises provide adequate health and safety standards and to create healthy working environments.[920] A key approach of the MNE Declaration is the need by MNEs to combat workplace violence against women and men.[921] For example, sexual violence against women at mines remains a problem and it undermines the full realisation of their rights at the workplace.[922] In addition, the MNE Declaration directs corporations to cooperate fully with the competent authority responsible for ensuring health and safety and to incorporate the provisions directed at securing health and

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[916] Columbia Centre on Sustainable Investment Mapping Mining to the Sustainable Development Goals: An Atlas'.

[917] Columbia Centre on Sustainable Investment Mapping Mining to the Sustainable Development Goals: An Atlas'.

[918] International Labour Organization 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) 2.

[919] ILO 'Tripartite Declaration' para 8.

[920] ILO 'Tripartite Declaration' para 43.

[921] ILO 'Tripartite Declaration' para 43.

[922] D Botha 'Women in mining still exploited and sexually harassed' (2016) *14 South African Journal of Human Resource Management* 1, 4.

safety within collective agreements.[923] Collective agreements can play a key role towards ensuring the health and safety of workers. However, the weakening of collective bargaining threatens the effectiveness of such agreements.

On labour relations, the MNE Declaration calls upon multinational enterprises to observe industrial relations throughout their operations and to ensure that all workers, without a distinction enjoy the right to freedom of association and the right to collective bargaining through joining any representative organisations of their choice, with no consequences.[924] Multinational organisations must provide workers with information to realise the right to collective bargaining and must consult with workers or their representative organisations on matters of mutual interest.[925] All workers, without a distinction, have the right to organise and must be protected from any acts of anti-union discrimination.[926] Incentives by governments to attract foreign investments should not include any limitation of the right to associate, the right to organise and the right to collective bargaining.[927] Lastly, the MNE Declaration places emphasis on using collective agreements to negotiate terms of employment and to settle disputes.[928]

Realising that corporations sometimes violate human rights in their operations, the MNE Declaration directs corporations to remedy harm in cases of violations.[929] Any worker or workers acting collectively can submit their grievances and such grievances must be processed without prejudice to the workers involved.[930] This is more important in cases where corporations act in countries where the ILO conventions are not adequately acknowledged, particularly the rights to freedom of association and the

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[923] ILO ‘Tripartite Declaration’ para 46.

[924] ILO ‘Tripartite Declaration’ paras 48 and 50.

[925] ILO ‘Tripartite Declaration’ para 63.

[926] ILO ‘Tripartite Declaration’ para 48.

[927] ILO ‘Tripartite Declaration’ paras 52 & 55.

[928] ILO ‘Tripartite Declaration’ paras 56 & 60.

[929] ILO ‘Tripartite Declaration’ para 64.

[930] ILO ‘Tripartite Declaration’ para 66.

right to effective collective bargaining.[931] Undoubtedly, while the instrument is not binding, the rights contained mirror those contained within the ILO Conventions and within domestic legislation. In addition, the document serves as an important benchmark for evaluating the activities of corporations.[932]

Other initiatives to address human and labour rights within companies and corporations are emanating from the United Nations. The United Nations Guiding Principles on Business and Human Rights is a set of principles, directed at national governments and corporations to prevent human rights violations in their operations.

4.5 United Nations guiding principles on business and human rights

The UN Guiding Principles on Business and Human reiterates the duty of State parties to respect, protect and fulfil human rights, within their respective jurisdictions.[933] Under international law, states have an obligation to protect everyone within their national borders.[934] Recognising this obligation, the Guiding Principles go a step further in asserting the distinct but complementary role of states and business in respecting human rights.[935] The UN Guiding Principles further directs businesses to respect the international bill of rights and ILO Conventions and to remedy any violations in their operations.[936] Such an obligation to respect and protect human rights arises independently of the obligations of state parties.[937] State parties are also directed to ensure that when human rights violations occur, appropriate remedies are provided.[938]

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[931] ILO 'Tripartite Declaration' para 66.

[932] KP Sauvant 'Emerging Markets and the International Investment Law and Policy Regime' *in* R Grosse & KE Meyer (eds) *The Oxford handbook of management in emerging markets* (2019) 133.

[933] UN Human Rights 'Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) 3.

[934] UN Guiding Principles 3.

[935] UN Guiding Principles 4.

[936] UN Guiding Principles, 13, and 24.

[937] UN Guiding Principles, 13.

[938] UN Guiding Principles, 27.

Lastly, state parties must not make business concessions that include limiting the rights of workers.

The UN Guiding Principles remains an important document in raising awareness on the negative impacts of corporations when operating across the globe. Furthermore, seeking partnerships and cooperation between member states and corporations can be effective, if it is complemented by strong institutions. However, like the ILO MNE Declaration, it remains a non-binding instrument. Apart from calling upon states to exercise oversight on the activities of corporations, the UN Guiding principles do not provide in detail how this can be achieved. South Africa is failing to monitor both labour standards across sectors of the economy and health and safety at mines.[939] This means that despite efforts directing state parties to monitor the activities of corporations, it is difficult to do so in practice. The UN Guiding Principles fails to address specific rights of workers, including freedom of association, effective collective bargaining and health and safety in detail. In addition, the monitoring and implementation of the guideline is left to the state, who in most cases lack the capacity. Despite these weaknesses, the efforts in creating a legally binding instrument to regulate the activities of transnational corporations and business enterprises is a step in the right direction.[940]In addition to the UN Guiding Principles, in 1999, the UN Secretary-General launched the Global Compact as a new initiative to address the negative effects of businesses and corporations was launched.[941]

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[939] W Utembe, EM Faustman, P Matatiele & M Gulumian 'Hazards identified and the need for health risk assessment in the South African mining industry' (2015) 34 *Human and Experimental Toxicology* 1212, 1215.

[940] UN General Assembly, Human Rights Council Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' G.A Res. 26/9 Available at https://documents-ddsny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement (accessed 27 March 2021); see also S McBrearty 'The proposed Business and Human Rights Treaty: Four challenges and an opportunity' (2016) 57 Online Symposium.

[941] S Deva 'Global compact: A critique of the UN's public-private partnership for promoting corporate citizenship (2006) 34 *Syracuse Journal of International Law & Commerce* 107.

4.6 The global compact and labour standard

Giving a speech at the World Economic Forum, the then UN Secretary-General, Kofi Annan made the following remarks which gave birth to the UN Global Compact (UNGC):

> "…the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles, which will give a human face to the global market."[942]

He further acknowledged the challenge of globalisation and the inability of national states to shape the course of globalisation, leading to undesired outcomes.[943] The proposal was the formation of a 'compact', with shared values on three aspects namely, human rights, labour rights and environmental standards.[944]

The UNGC calls upon companies and corporations to align their strategies to universal principles, largely taken from the Universal Declaration of Human Rights,[945] and from the ILO conventions.[946] It is a purely voluntary initiative which does not police or enforce the activities of firms or corporations – a position that has attracted criticism, with some calling it 'corporate blue washing' in the name of the UN.[947] It is based on

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[942] Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in address to World Economic Forum in Davos (1999) SG/SM/6881 Available at <https://www.un.org/press/en/1999/19990201.sgsm6881.html> (accessed 17-02-2020).

[943] Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in address to World Economic Forum in Davos (1999) SG/SM/6881 Available at <https://www.un.org/press/en/1999/19990201.sgsm6881.html> (accessed 17-02-2020).

[944] Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in address to World Economic Forum in Davos (1999) SG/SM/6881 Available at <https://www.un.org/press/en/1999/19990201.sgsm6881.html> (accessed 17-02-2020).

[945] UN General Assembly Universal Declaration of Human Rights (1948); see also JG Ruggie 'The theory and practice of learning networks: corporate social responsibility and the global compact' (2002) 5 *Journal of Corporate Citizenship* 27, 31.

[946] On the formation of the Global Compact see JG Ruggie 'The theory and practice of learning networks: corporate social responsibility and the global compact' (2002) 5 *Journal of Corporate Citizenship* 27; WH Meyer & B Stefanova 'Human rights, the UN global compact, and global governance' (2001) 34 *Cornell International Law Journal* 501; See UN General Assembly 'Towards global partnerships: A principle-based approach to enhanced cooperation between the United Nations and all relevant partners' A/RES/73/254 (2019) Resolution Adopted by the General Assembly on the 20th December 2018 (the recognition of the UN Global Compact principles.

[947] G Standing 'Decent Workplaces, Self-regulation and CSR: Puff or Stuff' (2007) DESA Working Paper 62, 4; S Soederberg 'Taming corporations or buttressing market-led developments? A critical

ten principles, which are spread across human rights, labour, environment and anti-corruption.[948] Under human rights, it calls upon businesses to support and respect international principles on human rights and to ensure that while conducting operations, businesses are not complicit in human rights violations.[949] Under the principle on labour, businesses are called upon to uphold the right of all workers to freedom of association and to collective bargaining.[950] Businesses must also eliminate all forms of forced labour and discrimination.[951] As noted in chapter two, the adoption of these principles by companies and corporations while largely voluntary is often done in conditions of pressure from consumers and other pressure groups.[952]

Several South African companies, including mining companies, are participants in the global compact.[953] The significance of these principles towards informing the self-regulation policies of participating companies remains unclear. However, the increase in the number of participants and the ability of the UNGC to bring the traditional tripartite alliance and other non-governmental organisations together makes these principles and the platform an innovative way of bringing labour rights into the limelight.[954] With over ten thousand companies, and participants ranging from academic institutions, NGOs, trade unions, national governments, among others, it is

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assessment of the global compact' (2007) 4 *Globalization* 500.

[948] UN General Assembly, A/RES/73/254 (2019); See the UN Global Compact, Available at <https://www.unglobalcompact.org> (accessed 27-04-2019).

[949] UN Global Compact, Principle 1 and 2.

[950] UN Global Compact, Principle 3.

[951] UN Global Compact, Principles 3 and 6.

[952] See Chapter two, part 6; I Hurd 'Labour standards through international organisations: The global compact in comparative perspective' (2003) 11 *Journal of Corporate Citizenship* 99, 100; C Wright & A Rwabizambuga 'Institutional pressures, corporate reputation, and voluntary codes of conduct: An evaluation of the equator principles' (2006) 111 *Business and Society Review* 89; D Murphy 'Taking multinational corporate codes of conduct to the next level' (2005) 43 *Columbia Journal of Transnational Law* 389.

[953] For example, Sibanye Gold Ltd, Royal Bafokeng Ltd and AngloGold Ashanti Ltd are participants. See the UN Global Compact, Available at <https://www.unglobalcompact.org> (accessed 27-04-2019).

[954] UN Global Compact 'Our Participants' Available at <https://www.unglobalcompact.org/what-is-gc/participants/search?utf8=%E2%9C%93&search%5Bkeywords%5D=&search%5Bper_page%5D=50&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc> (accessed 17-02-2020).

a large platform with a wider reach.[955] Some scholars have argued that the UNGC occupies an innovative, unique position, which makes it an important regulatory platform.[956] Others have argued that the UNGC was not designed to be a regulatory platform, but rather an initiative for information sharing and geared towards advancing global social responsibility.[957] The UNGC is not a standard-setting initiative and it has weak monitoring and implementation mechanisms.[958] Submitting statements of compliance does not in any way show that a company or corporation has complied with the principles.[959] It has also been criticised for largely focusing on increasing the membership base than focusing on finding innovative ways to entrench meaningful accountability mechanisms.[960] Whichever direction one adopts, it is clear that the global compact has increased awareness on the challenges faced by workers across the globe and some companies are responding to such challenges.[961] When one considers the effect of globalisation on work arrangements, particularly on key participation rights, platforms such as the UNGC can be applauded for bringing key stakeholders under one roof.

The above instruments address the participation of workers and the health and safety aspects of such workers in non-binding international instruments. A key question is to what extent these non-binding instruments are reflected at a company or corporation

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[955] UN Global Compact 'Our Participants' Available at <https://www.unglobalcompact.org/what-is-gc/participants/search?utf8=%E2%9C%93&search%5Bkeywords%5D=&search%5Bper_page%5D=50&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc> (accessed 17-02-2020).

[956] See C Voegtlin & AG Scherer 'Responsible innovation and the innovation of responsibility: Governing sustainable development in a globalized world' (2017) 143 *Journal of Business Ethics* 277 where the authors argue that soft law initiatives can complement existing international and domestic legal frameworks in innovative ways.

[957] JG Ruggie 'The theory and practice of learning networks: corporate social responsibility and the global compact' (2002) 5 *Journal of Corporate Citizenship* 31.

[958] SP Sethi & DH Schepers 'United Nations global compact: The promise performance- gap' (2014) 122 *Journal of Business Ethics* 193, 194.

[959] TA Hemphill 'The United Nations Global Compact: The business implementation and accountability challenge' (2005) 4 *International Journal Business Governance & Ethics* 303, 307.

[960] TA Hemphill 'The United Nations Global Compact: The business implementation and accountability challenge' (2005) 4 *International Journal Business Governance & Ethics* 307.

[961] JG Ruggie (2002) 5 *Journal of Corporate Citizenship* 31.

level? As demonstrated in chapter six, companies and corporations have invariably committed themselves towards upholding these instruments in codes of conduct.[962] Due to the wide-ranging instruments to which codes of conduct express commitment, codes of conduct are therefore the ultimate synthesis at firm or corporation level to CSR standards.[963]

5 Conclusion

The ILO and UN remain key actors in addressing the challenges faced by workers across the globe. This is so, despite the challenges these institutions face in securing labour rights for all workers, regardless of the nature of their work or working relationships. One of the ILO's achievements is in its ability to influence companies across the globe in internalising labour standards within their operations. Similarly, the UN, through the UNGC has managed to bring the largest platform of corporations, with shared values on transforming and cultivating a culture of human rights within corporations. Whether through this internalisation mining companies are meaningfully regulating labour standards remains to be examined. There is no universal understanding of the value that these instruments bring in the regulation of labour standards and occupational health within these corporations. The various CSR and voluntary approaches to the regulation of labour standards are useful in that they increase the awareness of the challenges faced by workers, particularly in global companies. The overall aim of these instruments is to encourage corporations and governments to create decent jobs, in conditions that respect human dignity, freedom, equality and non-discrimination. In addition, the significance of these initiatives lies in their ability to bring together various participants, including governments, companies and non-governmental organisations – thereby bridging the information gap through learning. Creating workable social pacts remains a much-needed aspect in the South African context where the social dialogue between the government, workers, employers and their respective representatives while present, is highly polarised and

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[962] See chapter six, part 2.

[963] International Labour Organisation *International Instruments and Corporate Social Responsibility* (2007) A Booklet to Accompany Training on Promoting labour standards through Corporate Social Responsibility 36.

dysfunctional. This chapter has given an overview of the international perspectives on regulating selected labour standards. The following chapter takes a more direct approach, looking at the regulation of labour standards in South Africa, focusing on the gaps in the legal framework.

Chapter 5: The legal framework regulating labour relations in South Africa

1 Introduction

This chapter seeks to demonstrate how the rapid changes in employment patterns were not envisioned under the current South African labour regulatory framework with reference to the mining sector. It makes the claim that the labour framework is failing to provide adequate protection to a sizeable percentage of mineworkers, who work at mines through various mechanisms, including subcontracting and labour brokering arrangements. This claim is assessed with reference to three key rights – namely the right to freedom of association; the right to collective bargaining and the right to an environment that is not harmful to health or wellbeing.[964]

In 2016, approximately 30% of the total workforce in the mining sector were engaged through subcontractors or other third party intermediaries.[965] The figures are higher in the coal and platinum sectors.[966] This figure creates the need to assess the extent to which such workers are protected by the labour framework. The standard employment relationship – characterised by full-time employment, for an indefinite period, to one employer and working at a single workplace is often no longer the preferred model of work, particularly in the mining sector.[967] Externalisation of work through the use of

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[964] The Constitution of the Republic of South Africa, 1996 ss s23; 24(a); The Labour Relations Act 66 of 1995, s 6; Mine Health and Safety Act 29 of 1996, s 1(a).

[965] P Stewart, A Bezuidenhout & C Bischoff 'Safety and health before and after Marikana: Subcontracting, illegal mining and trade union rivalry in the South African mining industry' (2019) *Review of African Political Economy* 1, 7.

[966] P Stewart, A Bezuidenhout & C Bischoff (2019) *Review of African Political Economy* 7.

[967] N Smit & E Fourie 'Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries' (2009) *TSAR* 516; R le Roux 'The world of Work: Forms of Engagement in South Africa (2009) Institute of Development & Labour Law: Development and Labour Monograph Series 12; J Theron 'Employment is not what it used to be' (2003) 24 *Industrial Law Journal* 1247, 1249; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* 2009 (2) NR 620; J Theron 'Prisoners of a paradigm: Labour broking, the 'new services' and non-standard employment' (2012) *Acta Juridica* 58, 78; See also S Cooney 'Testing times for the ILO: Institutional reform for the new international political economy' (1999) 20 *Comparative Labor Law*

TES as well as subcontracting in the mining sector continues to limit the reach of the protective labour laws.

The development of the South African labour law framework is closely linked to the discovery of minerals, particularly gold.[968] Before the development of the mining sector, agriculture was the main economic activity.[969] Working arrangements were largely regulated by the Master and Servant Act[970] which provided few rights and little if any protection to the majority of black workers.[971] With the development and growth of the mining sector, there was a need to formulate suitable legal instruments to regulate labour relations.[972] The size of the workforce created the need to regulate diverse interests and tensions within the sector.

Labour law in South Africa was an "offspring of the social and political action of the working-class movement" in the mining sector.[973] This was particularly so for a number of reasons. First, the large number of workers who were employed by the gold mining sector created an urgent need for regulation.[974] Secondly, the contributions to the economy as compared to other sectors enabled the mining industry to influence government policies.[975] The mining industry thus shaped the supply and demand for labour.[976] Thirdly, the growing tensions emanating from constant clashes between

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and Policy Journal 365, 365.

[968] F Wilson *Labour in the South African gold mines* 1911-1969 (1972 16; AC Basson, MA Christianson, A Dekker, C Garbers, PA K le Roux, C Mischke & EML Strydom *Essential labour law* 5 ed (2009) 4.

[969] A Govindjee & A van der Walt (eds) *Labour law in context* (2017) 4.

[970] 15 of 1856.

[971] Govindjee & Van der Walt (eds) *Labour law in context* 4.

[972] U Bhoola 'National labour law profile: South Africa' (2002) International Labour Organization, Available at <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm> (accessed 22-05-2019).

[973] H Spector 'Philosophical foundations of labour law' (2006) 33 *Florida State University Law Review* 1119, 1119.

[974] AH Jeeves *Migrant labour in South Africa's mining economy* (1985) 3.

[975] AH Jeeves *Migrant labour in South Africa's mining economy* (1985) 3.

[976] AH Jeeves *Migrant labour in South Africa's mining economy* (1985) 3.

workers and employers in the mining sector in the 1920s meant that the labour regulatory system had to be constantly amended and developed to accommodate the changing developments.[977] This resulted in the passing of the Industrial Conciliation Act[978] which introduced the foundations underpinning the current labour framework.[979] The basis on which labour law and its enforcement mechanisms were founded have survived over time, with amendments invariably coming into play to strengthen the common law position by extending protection and social security primarily to the employees.[980]

Traditionally, at the core of 'labour law'[981] as a regulatory branch of law is the 'contract of employment'[982] entered into between the employer and the employee.[983] In its simplest form, the employment contract underlying this relationship outlines the rights and obligations between the parties.[984] This employment relationship, in turn, forms the unit on which other labour institutions and relationships develop or may develop.[985] For example, due to rising standard employment figures in the mining sector, trade unionism became strong and highly influential.[986]

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[977] Bhoola 'National labour law profile: South Africa' (2002) International Labour Organization, Available at https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm (Accessed 22-05-2019).

[978] 11 of 1924.

[979] Section 1 of the Act applied to every industrial and public utility undertaking, trade or occupation and to every 'employer' and 'employee' doing any of the listed undertaking. It exempted certain sectors like the Agriculture or farming subject to the provisions of s 2; AC Basson, MA Christianson, A Dekker, C Garbers, PA K le Roux, C Mischke & EML Strydom *Essential labour law* 4.

[980] T Cohen 'Placing substance over form – identifying the true parties to an employment relationship' (2008) *ILJ* 863; R le Roux "The regulation of work: whither the contract of employment?: An analysis of the suitability of the contract of employment to regulate the different forms of labour market participation by individual workers" (2008) Unpublished PhD Thesis 1; H Cheadle 'Reception of international labour standards in common-law legal systems' (2012) *Acta Juridica* 348.

[981] R le Roux 'The new unfair labour practice' (2012) *Acta Juridica* 44.

[982] Kahn-Freund "Legal framework" *in* Flanders and Clegg (eds) *The system of industrial relations in Great Britain* (1954); S Vettori *The employment contract and the changed world of work* (2007) vii.

[983] R Le Roux 'The new unfair labour practice' (2012) *Acta Juridica* 44.

[984] T Cohen 'The relational contract of employment' (2012) *Acta Juridica* 84 84.

[985] T Cohen (2012) *Acta Juridica* 84.

[986] J Maree 'Trends in collective bargaining: Why South Africa differs from global trends' (2009) *IIRA*

Yet, the effects of globalisation, technological advancement and the new emerging forms of work have led to this foundation disintegrating for many workers, often disrupting the core aspects underlying the employment relationship.[987] In this regard, one of the most commonly cited difficulties is that work and labour have seemingly evolved too rapidly, leaving the institutions that were created to protect and empower workers outdated and failing to catch up with the changes.[988] Through examining current South African labour law with reference to freedom of association; the right to collective bargaining and the right to an environment that is not harmful to health or wellbeing, this chapter seeks to show how the current South African labour framework is inadequate to deal with the new challenges inherent in the world of work today. This is particularly so within the mining sector as a result of high levels of subcontracting and labour brokering which are increasing non-standard work at mines.[989]

The chapter begins with a brief overview of South African labour policy, informing the current regulatory framework. It looks at the main legal instruments regulating labour relations and health and safety at mines, with an analysis of the limitations of such instruments to the changing relations at mines. The chapter then assesses the participation rights analysed in this thesis, demonstrating the limitations in practice. Finally, the chapter links government regulatory approaches and self-regulation initiatives. The primary basis for pursuing self-regulation is that companies and corporations have, in varying degrees incorporated most of the self-regulation instruments at the international level in their own codes of conduct.

2 Government labour approach in South Africa

After the first democratic elections in 1994, the new government was faced with many challenges, emanating from a long history of apartheid and social injustice.[990] One area

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World Congress 4.

[987] F Henderickx 'Foundations and functions of contemporary labour law' (2012) 3 *European Labour Law Journal* 108.

[988] S Hayter 'Introduction: What future for industrial relations? (2015) 154 *International Labour Review* 3.

[989] See A Bezuidenhout 'New patterns of exclusion in the South African mining industry' *in* A Habib and K Bentley (eds) *Racial redress and citizenship in South Africa* (2008) 184.

[990] See H Bhorat & H Cheadle 'Labour reform in South Africa: Measuring regulation and a synthesis of

that needed immediate attention was the need to gain equality through remedying the injustices of the past, including within the workplace.[991] The economy as it existed (and still exists) was divided largely into two segments, namely the formal and the informal economy – a status that Thabo Mbeki described as a 'structural fault'.[992] Deeply entrenched in a cycle of poverty, the informal sector needed state intervention which included micro-financing and policy intervention, targeted at transforming the informal workers into the formal economy.[993] Given the number of unskilled workers post-apartheid, a conscious policy intervention of regulating non-standard work had to be adopted.[994] This is not to say the informal sector is only comprised of unskilled workers. Many skilled workers also work in the informal sector and vice versa, but the unskilled workers struggle the most in accessing key rights. Non-standard forms of employment were allowed to exist largely as complementary to the standard employment and were treated as transitionary forms of employment towards the 'ideal' standard employment. Kenny and Webster note that the long-term unintended consequence of this policy was the sharp increase of subcontracting, labour brokers and weakened collective bargaining.[995] This meant that the regulation of non-standard work employment was not viewed seriously or taken as a long-term plan since the ultimate goal was to transform these forms of employment into standard employment.

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policy suggestions' (2007) Development Policy Research Unit, Available at <http://www.labour.gov.za/DOL/downloads/documents/research-documents/Labour%20Reform%20in%20South%20Africa-%20bhorat%20-%20cheadle%202.pdf> (accessed 25-06-2019); N Nattrass & J Seekings '"Two nations"? Race and economic inequality in South Africa today' (2001) 130 *Daedalus* 51.

[991] The National Economic Development and Labour Council (NEDLAC) Founding Documents and Protocols (1995) 5; see also National Economic Development and Labour Council Act 35 of 1994.

[992] E Webster, A Benya, X Dilata, C Joynt, K Ngoepe & M Tsoeu 'Making Visible the Invisible: confronting South Africa's Decent Work Deficit' (2008) Sociology of Work Unit, University of Witwatersrand, Research Report Prepared for the Department of Labour 6.

[993] E Webster, A Benya, X Dilata, C Joynt, K Ngoepe & M Tsoeu (2008) Sociology of Work Unit, University of Witwatersrand, Research Report Prepared for the Department of Labour 6.

[994] E Cottle 'Introduction' *in* E Cottle & T Elsley (eds) Bargaining indicators 2016: A collective bargaining omnibus – celebrating new victories in the labour movement (2016) 16 *Labour Research Service* 17.

[995] B Kenny & E Webster 'Contracting, complexity and control: An overview of the changing nature of subcontracting in the South African mining industry' (1999) 99 *The Journal of the South African Institute of Mining and Metallurgy* 185, 187.

The key labour legislation created post-1994, undertook to incorporate binding international labour standards.[996] The platform for social dialogue between organised labour, business and the government mirrored the ILO tripartite governance structure.[997] This was reflected through the creation of the National Economic Development and Labour Council (NEDLAC) – a creature of statute established in terms of the National Economic Development and Labour Act.[998] That Act followed the ILO tripartite model of bringing government, organised labour and business together.[999] The NEDLAC governance structure goes beyond tripartism to incorporate the members who represent the organised community and development interests.[1000]

Since 1994, the government regulatory approach to employment was premised on the need to address social injustices of the apartheid era, including regulating non-standard employment.[1001] The first democratic government advocated among other things for the creation of real jobs, characterised by full employment, development of skills, maintenance of peace within labour relations, workplace safety, social security for all employees, promotion of orderly collective bargaining and advocating for social justice.[1002] This remains the labour approach of the current government. The following section is a discussion of the legal framework governing selected labour rights in the South African mining industry.

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[996] P Benjamin & Carole Cooper South African Labour Law: A twenty-year assessment' (2016) 6 R4D Working Paper Available at <http://www.cth.co.za/wp-content/uploads/2016/09/South-African-Labour-Law-A-Twenty-Year-Review.pdf> (accessed 18-11-2017).

[997] For the structure of NEDLAC, see National Economic Development and Labour Council Act 35 of 1994, s 3.

[998] 35 of 1994.

[999] The National Economic Development and Labour Council (NEDLAC) Founding Documents and Protocols (1995) 5; see also National Economic Development and Labour Council Act 35 of 1994.

[1000] NEDLAC Act, s 3 (c).

[1001] See for example the LRA, Preamble which is premised on giving effect to the constitutional right to fair labour practices, thus addressing injustices of the past.

[1002] These objects are reflected in the LRA, s 1; MS Vettori 'Alternative means to regulate the employment relationship in the changing world of work' DPhil Thesis University of Pretoria (2005) 57-58.

3 An overview of legislation regulating labour law

Underpinning and informing the government's stance is the Constitution of the Republic of South Africa which "recognises the need to establish a society based on democratic values, social justice and fundamental rights."[1003] In South Africa, labour law is grounded in the Constitution and labour legislation is designed in one way or another to advance the "constitutional values of equality, non-discrimination, fair labour practices and the right to strike".[1004] It makes a complete break with the past laws that were hinged on racism, segregation and discrimination. Section 23 of the Constitution introduces the concept of fair labour practices – which lays the basis of all labour legislation and regulations.[1005] Other fundamental rights enshrined in the Constitution and which must be read with the section 23 right include the right to dignity,[1006] the right to equality,[1007] non-discrimination[1008], freedom of association and the right to an environment that is not harmful to health or wellbeing.[1009]

The above constitutional underpinnings are reflected within the main legal instruments regulating labour rights namely – the Labour Relations Act,[1010] the Basic Conditions of Employment Act,[1011] the Employment Equity Act[1012] and the Skills Development

[1003] M McGregor 'Globalization and decent work (part 2)' (2007) 15 *Juta Business Law* 2.

[1004] Constitution of the Republic of South Africa, 1996, s 23; A Rycroft & R le Roux 'Decolonising the labour law curriculum (2017) 38 *ILJ* 1173, 1475; see also M McGregor 'Globalization and decent work (part 2)' (2007) 15 *Juta Business Law* 2.

[1005] M McGregor 'Globalization and decent work (part 2)' (2007) 15 *Juta Business Law* 2.

[1006] Constitution of the Republic of South Africa, 1996 s 10.

[1007] Constitution of the Republic of South Africa, 1996 s 9.

[1008] Constitution of the Republic of South Africa, 1996 s 9(3); T Cohen 'Understanding fair labour practices – NEWU v CCMA (2004) 20 *SAJHR* 482, 483.

[1009] Constitution of the Republic of South Africa, 1996 s 24(a).

[1010] 66 of 1995.

[1011] 75 of 1997.

[1012] 55 of 1998.

Act.[1013] In addition, the Mine Health and Safety Act[1014] and the Occupational Diseases in Mines and Works Act[1015] give effect to the right to an environment that is not harmful to wellbeing at mines.[1016] While the above is not an exhaustive list, it demonstrates the wide ambit of protection offered. It has been argued that labour law is one of the most overregulated areas in South Africa, with about fifteen statutes.[1017] This is further extended in the mining sector where several regulations apply, including the MPRDA regulations governing Social and Labour Plans (SLPs) and the Mining Charter. Whereas the intention of these laws may be sound, they largely offer protection to a small percentage of those who are employees, in an employment relationship, leaving the vast majority of workers in various other working arrangements beyond their reach.[1018] Yet as stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1019] the protection of vulnerable workers remains a core function of labour law.[1020] The following part gives an overview of some of the key pieces of legislation regulating labour relations in South Africa, highlighting the shortcomings of such in protecting all workers at mines.

[1013] 9 of 1999.

[1014] 29 of 1996.

[1015] 78 of 1973.

[1016] Constitution of the Republic of South Africa, 1996 s 24(a).

[1017] *See* A Rycroft & R le Roux 'Decolonising the labour law curriculum (2017) 38 *ILJ* 1475.

[1018] Rochelle le Roux 'The New Unfair Labour Practice" *in* R le Roux, A Rycroft & J Glazewski (eds) *Reinventing labour law: Reflecting on the first 15 years of the labour Relations Act and future challenges* (2012) 41; There are exceptions to the limited reach of labour law. For example, the National Minimum Wage Act 9 of 2018, s 3(1)(2) applies to all workers, with the exception of the national security members.

[1019] 2007 28 *ILJ* 2405 (CC).

[1020] 2007 28 *ILJ* 2405 (CC) para 72. The judgment also cited the famous passage from Kahn-Freund where in characterising the inherent inequality embedded within the employment relationship stated the following: [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment.' The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."

3.1 The Constitution of the Republic of South Africa, 1996 (The Constitution)

The inclusion of the right to fair labour practices within the Constitution has been labelled "unusual"[1021] and it has no precise definition.[1022] The Constitutional Court has stated that the inclusion of the right to fair labour practices is unique and the right itself is incapable of a precise definition.[1023] Its main thrust is the recognition of equity and fairness at the workplace, particularly the idea that what may be lawful may be unfair.[1024]

The Constitution provides that:

> "(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; and
>
> (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 form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

[1021] H Cheadle 'Labour relations'; H Cheadle & D Davis 'Structure of the Bill of Rights' *in* H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2 ed) issue 1 (2005) 18-1, 18-8 and 18-10.

[1022] R le Roux "The new unfair labour practice" *in* Re le Roux, A Rycroft & J Glazewski (eds) *Reinventing labour law: reflecting on the first 15 years of the labour Relations Act and future challenges* (2012) 41.

[1023] *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) para 33.

[1024] *National Entitled Workers' Union v Commission for Conciliation, Mediation & Arbitration & Others* (2003) 24 ILJ 2335 (LC) 2339.

> (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1)."[1025]

The Constitutional Court (CC) has interpreted 'everyone' in section 23 to apply to both workers and employers whether juristic or non-juristic.[1026] On a broader interpretation of section 23 read with the Bill of Rights, the reference to 'everyone' applies to 'all people in the country' without discrimination.[1027] In *Kylie v Commission for Conciliation and Arbitration and Others*,[1028] the Labour Appeal Court (LAC) cited *Khosa v Minister of Social Development*[1029] where the CC held that "[t]he word everyone is a term of general import and unrestricted meaning and it means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system."[1030] Yet the right is not open-ended in its application. Many of the rights in the Constitution are given effect to by legislation which limits the application of those rights to employees.[1031] Despite this limitation, all workers can theoretically claim the rights and protections under section 23, excluding independent contractors and agencies.[1032] In this regard, the concept of 'fair labour practices' under section 23 of the Constitution applies to all workers. Where, for example, a worker is not protected under the LRA, such a worker may directly rely on the constitutional provision for protection.[1033] This

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[1025] Constitution of the Republic of South Africa, 1996 s 23.

[1026] *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 2003 (24 *ILJ* 95 (CC), paras 36-40.

[1027] The Constitution of the Republic of South Africa, s 7 (1) provides that "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

[1028] 2010 (4) SA 383 (LAC) para 17.

[1029] 2004 (6) SA 505 (CC), para 111.

[1030] *Kylie v CCMA*, para 17.

[1031] This position is true, although there are exceptions. For example, the National Minimum Wage Act 9 of 2018, s 3(1)(2) applies to all workers, excluding the national security members.

[1032] *Kylie v CCMA*, para 17; *Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration and Others*, para 39.

[1033] For an expansive meaning of 'everyone' *see National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (3) SA 1 CC, paras 33 – 40; *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC), para 41 where the LAC held that the LRA is designed to safeguard the rights of *employees* who are vulnerable to exploitation. However, as a general rule, a

is much easier theoretically, but much onerous in practice since the labour dispute resolution system is not available to workers who are not employees. Thus, they would have to go to court to enforce their rights which is potentially very expensive, time consuming and intimidating. In addition, this interpretation does not assist workers who are not members of a trade union, since trade unions have the right to engage in collective bargaining as provided under the LRA.

The Constitutional provision sought to remedy the inadequacy of common law in protecting workers and the inherent limitation in dealing with modern employment relationships.[1034] Yet common law remains relevant and applicable to modern employment relationships. The following section seeks to give a brief overview of how the common law distinguishes the bearers of rights the true nature of the underlying relationship on whether a person is an independent contractor or an employee.

3.2 Common Law

Defining the bracket of workers who can claim protection under labour law has been a preoccupation of labour law. The contract of employment developed as the main vehicle through which the employer and the worker accessed rights and obligations.[1035] Due to the difficulties in establishing the existence of this relationship, courts are often faced with the question of who qualifies as an employee.

Given the importance of the label of an 'employee' in claiming rights under the LRA, and the BCEA for example, a particular pre-occupation of labour law has been defining the true claimants of these rights. The control test,[1036] the organisation or integration

litigant must rely on subsidiary legislation and not the directly on the Constitution, if that is possible. See *S v Mhlungu and Others* 1995 (3) 867 (CC) para 59 where it was stated that '…where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.

[1034] R le Roux 'The regulation of work: Whither the contract of employment?: An analysis of the suitability of the contract of employment to regulate the different forms of labour market participation by individual workers' (200) Unpublished PhD Thesis: University of Cape Town

[1035] M van Staden & N Smit 'The regulation of the employment relationship and the re-emergence of the contract of employment' (2010) *Journal of South African Law* 702, 703.

[1036] First used in *Colonial Mutual Life Association v McDonald* 1931 AD 412 where the court held that as a result of the absence of the right to control and supervise the agent, the Colonial Mutual was not vicariously liable for his negligence. For some weaknesses of the test, see R Le Roux 'The evolution of the contract of employment in South Africa' (2010) 39 *ILJ* 139, 149; J Grogan *Workplace law* (2011)

test,[1037] the economic realities test and the dominant impression test have all been used to determine the existence of an employment relationship.[1038] The dominant impression test as affirmed in *Smit v Workmen's Compensation*[1039] was once the test used to determine the existence of the employment relationship, it was criticised for several reasons. Mureinik criticizes the test as follows:

> "It seems plain that while the notion of employment may have sufficient content to enable an employee to be identified in simple (non-penumbral) cases, the 'dominant impression' test offers no guidance in answering the (legal) question whether the facts are of such a nature that the *propositus* may be held to be a servant within the meaning of the common law in difficult (penumbral) cases. Indeed, it is no test at all. To say that an employment contract is a contract which looks like one of employment sheds no light whatsoever on the 'legal nature' of the relationship between a master and his servant."[1040]

It thus fails to clarify with certainty the relationship between an employer and employee, particularly when independent contractors are involved. In addition to the above, Benjamin argues that "…the criticism of the organisation test in Smit must now be tempered by the fact that the statutory definition of an employee requires a court to consider whether the employee is assisting the employer conduct its business, an issue to which the "organisation" test addresses itself."[1041]

17-18; see further *The State v AMCA Services (Pty) Ltd* 1962 (4) SA 537 (A) where the court interpreted the judgment by Schreiner J *R v AMCA Services Ltd & Another* 1959 (4) SA 207 as not laying down a hard test, but merely as listing several considerations on whether a person is within or without an organisation.

[1037] The test has been used in *R v AMCA Services Ltd & Another* 1959 (4) SA 207 where the court based its decision on the idea that the members were part of the organisation. The organisation test was held to be inconclusive and not helpful in *The State v AMCA Services (Pty) Ltd* 1962 (4) SA 537 (A).

[1038] The test as used in *Ready Mixed Concrete v Minister of Pensions* (1968) 2 QB 497 in essence recognises the deficiencies in adopting a singular approach. In the South African context, the test was used in *Smit v Workmen's Compensation* 1979 SA 51 (A); The test has been critiqued, for example E Mureinik 'The contract of service: An easy test for hard cases' (1980) 97 *SALJ* 246, 258; P Benjamin 'An accident in history: Who is (and who should be) an employee under South African labour law' (2004) 25 *ILJ* 787.

[1039] 1979 SA 51 (A).

[1040] E Mureinik 'The contract of service: An easy test for hard cases' (1980) 97 *SALJ* 258.

[1041] P Benjamin 'An accident of history: Who is (and Who should be) an employee under South African

While based on the freedom of the persons involved to contract, the contract of employment under common law demonstrates several imperfections, particularly the power imbalances of the parties.[1042] It is partly due to the deficiencies innate within a contract of employment under common law that prompted the promulgation of the labour statutes, including the LRA of 1995. Although courts are mandated to develop the common law in light of the Constitution, it remains the role of the legislature to protect the weaker party in an employment relationship.[1043]

Currently, the "reality test" is used to determine whether a person is an employee.[1044] The test focuses on the 'substance of the relationship rather than form'.[1045] The reality test takes the following factors into account namely the employer' right of supervision and control; whether the employee forms part of the organisation and the extent to which the employee is economically dependent on the employer.[1046] Benjamin sums up the reality test as follows:

> "It is suggested that the presence of any of these should, in normal circumstances, indicate that the person is an employee. The presence of a right of control should point to an employment relationship covered by labour legislation, unless the employer can show aspects of the relationship that make this inappropriate. It will be for the courts to delineate those factors that indicate that an employment relationship does not exist despite the presence of control. Where this is not the case, the courts could utilize the presence of economic dependence or the person's integration into the employer's organization to determine whether they should receive the protection of labour law."[1047]

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labour law' (2004) 25 *ILJ* 787, 803-804.

[1042] R le Roux (2008) Unpublished PhD Thesis 1.

[1043] *Martin v Murray* (1995) 16 *ILJ* 589 (C) 601E.

[1044] See *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* (2008) 29 *ILJ* 2234 (LAC) para 14.

[1045] *Workforce Group (Pty) Limited v CCMA and Others* (2012) 33 *ILJ* 738 (LC) para 6.

[1046] *Protect A Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) para 53.

[1047] P Benjamin 'An accident of history: Who is (and Who should be) an employee under South African labour law' (2004) 25 *ILJ* 804.

This is the position that sums up the current test in determining whether a person is an employee or not. In most cases, it is often easier to determine whether a person is an employee or not when they are in low skilled forms of employment which renders them economically dependent on the employer.[1048] Despite this, new work arrangements often make it difficult to determine the existence of the employment relationship. Through the use of legislation such as the LRA, some of the common law limitations have been addressed.

3.3 The Labour Relations Act 66 of 1995

The Labour Relations Act (LRA) was enacted with broad objectives, including fulfilling section 23 rights to fair labour practices in the Constitution.[1049] Other objectives of the LRA include regulating the rights of trade unions, regulating the right to strike, promoting employee participation in decision making and giving effect to the international obligations of South Africa.[1050] It was drafted with certain parties, institutions and end goals in mind. Regarding parties, the LRA and the institutions it creates are largely aimed at creating rights and obligations between the employer, the employee, trade unions, employers' organisations and the state.[1051] When giving effect to the wider constitutional right to fair labour practices, the LRA narrows down the bearers of these rights to employees, employer, trade unions and employer organisations.[1052] The meaning of what constitutes an unfair labour practice is also defined with reference to an employer and an employee.[1053] Yet, despite the LRA and other labour laws providing for the definition of employee, it remains a complex exercise to determine who qualifies to claim rights and benefits under the LRA in reality.

[1048] *Protect A Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) para 57.

[1049] LRA, Preamble.

[1050] LRA, Preamble.

[1051] LRA, s 1.

[1052] LRA, s 185.

[1053] LRA, s 186 (2).

The LRA defines an 'employee' as:

> "(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer."[1054]

Notwithstanding the seemingly straightforward definition, it remains a challenge for several workers to prove their status, particularly when trying to claim rights under the LRA.[1055] To assist workers with the complexity of proving that they are employees the LRA provides a presumption as to who qualifies as such.[1056] It lists several factors and if one or more of these factors are present, the worker is deemed to be an employee.[1057] The presumption as to whether a person is an employee kicks in if a person proves one of the following: the manner of doing work is controlled by another;[1058] the person's hours are subject to control by another person;[1059] the person forms part of an organisation;[1060] the person has worked for that person for an average of at least 40 hours per month in the last three months;[1061] the person is economically dependent;[1062] the person is provided with tools of trade or work equipment by the

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[1054] LRA, s 213.

[1055] J Theron 'Non-standard employment and labour legislation: The outlines of a strategy' (2014) The Institute of Development and Labour Law, Monograph 1/2014, 4-9.

[1056] LRA, s 200A.

[1057] Some of the factors include whether the manner in which the person works is subject to the control or direction of another person; the person's hours of work are subject to the control or direction of another; the person has worked for another person for an average of 40 hours a month in the last three months among other factors.

[1058] LRA, Code of Good Practice: Who is an Employee GenN 1774 in GG 29445 of 1 December 2006, 18 (a).

[1059] LRA, GenN 1774 in *GG* 29445 of 1 December 2006, 18 (b).

[1060] LRA, GenN 1774 in *GG* 29445 of 1 December 2006, 18 (c).

[1061] LRA, GenN 1774 in *GG* 29445 of 1 December 2006, 18 (d).

[1062] LRA, GenN 1774 in *GG* 29445 of 1 December 2006, 18 (e).

other person;[1063] and the person only works for one person.[1064] The presumption may be rebutted by the alleged employer and it only applies if the worker earns less than the annual salary threshold.[1065] Currently, the stipulated earning threshold is R205 433,30 per annum. In addition, in circumstances where the presumption is not applicable, due to the person earning above the threshold, the common law test will apply and the factors above may still be used as a guide.[1066] Defining the set of workers who fall under the definition of 'employee' is significant as it spells out those who can claim protection from the LRA.[1067] In addition, it acts as a building unit on those who are given access to membership of registered trade unions who in turn may acquire organisational rights under the statute, and ultimately bargain with employers.[1068]

The LRA aims among other things to promote orderly collective bargaining.[1069] Whereas the employment relationship defines the rights, duties and obligations of parties, collective labour law governs the relationships between the representatives of workers (employees under the LRA only) and employers/and/or their representatives. Most of the parties and the relationship they establish presuppose the existence of an employment relationship. The definition of a trade union which is "an association of employees whose primary purpose is to regulate relations between employees and employers" is expressly premised on the employee status.[1070] Furthermore, organisational rights which are accorded to a representative registered trade union,

[1063] LRA, GenN 1774 in *GG* 29445 of 1 December 2006, 18 (f).

[1064] LRA, GenN 1774 in *GG* 29445 of 1 December 2006, 18 (g).

[1065] Basic Conditions of Employment Act 75 of 1997, Determination of Earning Threshold in terms of s 6 of BCEA, is currently R205 433,30 per annum.

[1066] LRA, GenN 1774 in *GG* 29445 of 1 December 2006, 20.

[1067] MJ Rapatsa 'Who is (should) be covered by labour law? Lessons from Kylie v CCMA' (2014) 3 *Journal of Business Management & Social Sciences Research* 105. The important distinction is that all employees are workers, but not all workers are employees. *See* PH Bamu 'Contracting work out to self-employed workers: Does South African law adequately recognise and regulate this practice' (2011) Unpublished PhD Thesis, University of Cape Town 196.

[1068] Consider the definitions of trade union and collective agreement in s 213, as well as Chapter III of the LRA.

[1069] LRA, s 1(d).

[1070] LRA, s 213.

and include access to the workplace,[1071] deduction of trade union subscriptions,[1072] trade union representatives,[1073] leave for trade union representatives[1074] and access to information presuppose the existence of an employment relationship.[1075] Being an employee is therefore a key pre-requisite for joining a trade union. In short, it is the employee status which forms the basis for accessing most of the rights under the LRA.[1076]

Yet, standard employment upon which the LRA's provisions were originally premised is declining.[1077] There is overwhelming evidence that most mining companies are increasingly subcontracting core functions of their operations to third parties who in turn bring their own workforce.[1078] The result is often the creation of a workforce which is not adequately protected under the existing labour laws, including the LRA.[1079] Functions that are often contracted out to third parties at mines include rock drilling,

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[1071] LRA, s 12.

[1072] LRA, s 13.

[1073] LRA, s 14.

[1074] LRA, s 15.

[1075] See LRA, ss 11 – 22; J Theron, S Godfrey & E Fergus 'Organisational rights through the lens of Marikana' (2015) 36 *ILJ* 853. The LRA s 213 defines a trade union as an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations.

[1076] The LRA also protects job seekers. See LRA, s 5 which protects job seekers.

[1077] ES Fourie 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 4 *PER* 23.

[1078] B Kenny & A Bezuidenhout 'Contracting, complexity and control: An overview of the changing nature of subcontracting in the South African mining industry' (1999) *The Journal of The South African Institute of Mining and Metallurgy* 185; B Kenny & E Webster 'Eroding the core: Flexibility and the re-segmentation of the South African labour market' (1998) 24 (3) *Critical Sociology* 216; K Forest 'Rustenburg's labour recruitment regime: shifts and new meanings (2015) 42(146) *Review of African Political Economy* 508; E Webster & R Omar 'Work restructuring in Post-Apartheid South Africa' (2003) 30 (2) *Work and Occupations* 194; SW Mills 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility?' (2004) 25 *ILJ* 1203.

[1079] A Bezuidenhout 'New patterns of exclusion in the South African mining industry' (2008) 184; ES Fourie 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 4 *PER* 23; *Association of Mineworkers and Construction Union (AMCU) and Others v Buffalo Coal Dundee (Pty) Ltd and Another* (2016) 37 *ILJ* 2015 (LAC).

blasting, loading of ore, water inflows, day works and hauling of the fleet.[1080] Given the increase of subcontracting at mines of these core mining operations, and the difficulty of such workers to unionise, trade unions are no longer representing all workers at mines.[1081]

The above does not mean that the LRA has not been interpreted in the past to protect persons who at common law would ordinarily not be protected.[1082] Courts have intervened to protect certain workers, including undocumented migrants, sex workers and employees in the national security forces.[1083] However, workers who fall outside the traditional employment relationship[1084] typically referred to as 'non-standard workers or people in atypical forms of work obtain minimal protection under the labour laws.[1085] In the global context, Cordova sums up their precarious position by stating that:

[1080] B Kenny & A Bezuidenhout 1999) *The Journal of The South African Institute of Mining and Metallurgy* 188-189; J Crush, T Ulicki, T Tseane & EJ van Veuren (2001) 27 *Journal of Southern African Studies* 9; see also JSF Duncan 'Contract versus owner mining – an update on Australasian open pit mining practice' (2004) 113 *Mining Technology* 17.

[1081] J Theron 'Decent work and the crisis of labour law in South Africa' (2014) 35 *ILJ* 1829, footnote 9. The author using data from Lonmin and Implats websites notes high percentages of contract labour used by the respective mining companies.

[1082] See for example *Discovery Health Ltd v Commissioner for Conciliation, Mediation and Arbitration & Others* (2008) 29 *ILJ* 1480 (LC) where the protection was extended to a foreign national, who worked without required documents under the Immigration Act 13 of 2002; *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC) where protection was extended despite the illegal nature of the work relationships.

[1083] See D Viviers & D Smit 'A labor law perspective on the protection of persons in a vulnerable employment relationship in South Africa' (2014) 4(5) *International Journal of Business and Social Research* 59.

[1084] E Cordova 'From full time-time wage employment to atypical employment: A major shift in the evolution of labour relations' (1986) 125 *International Labour Review* 641, 643.

[1085] MA Forere 'From exclusion to labour security: To what extent does section 198 of the Labour Relations Act of 2014 strike a balance between employers and employees' (2016) *SA Merc LJ* 375; For an American perspective see Patricia Ball 'The new traditional employment relationship: An examination of proposed legal and structural reforms for contingent workers from perspectives of involuntary impermanent workers and those who employ them' (2003) 43 *Santa Clara Law Review* 901, 902. The author argues that the term 'contingent worker' is a catch all phrase for persons employed through non-traditional mechanisms to the full-time workers.

> "[F]or not only do atypical variants differ in form from full-time wage employment, they fall outside the scope of regulatory and protective provisions which labour law and trade union action have established".[1086]

The mechanisms through which employers now contract labour vary, creating several categories of non-standard or atypical forms of work.[1087] Categories of atypical forms of work include part-time work, self-employment, seasonal work, casual work and workers supplied through an intermediary among others.[1088] In spite of the variance in the manner of contracting labour, the net effects tend to be similar. These include job insecurity, unfair dismissals, less comprehensive labour protection and fewer worker benefits.[1089] An increase in the use of non-standard labour in South Africa prompted the government to amend the LRA to widen protection to various categories of non-standard workers.

3.3.1 Extending protection of non-standard workers (LRAA 5 of 2014)

The legislature has attempted to address the challenges of the inadequate protection of workers in various non-standard forms of employment. Among other specific changes, the amendments conferred clear employee status on workers whose coverage by law was previously uncertain. The amendments remove the tag of 'worker' and replace it with 'employee' to enable such workers to access rights under the labour framework. The categories include employees employed through TES, employees employed in part time work and employees employed on fixed-term contracts.[1090]

[1086] E Cordova (1986) 125 *International Labour Review* 643.

[1087] A Bezuidenhout 'New patterns of exclusion in the South African mining' (2008) 185.

[1088] ES Fourie 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11 *Potchefstroom Electronic Law Journal* 4, 1; see also P Marcadent 'Non-standard employment around the world: Understanding challenges, shaping prospects' (2016) International Labour Organisation: Geneva 2 – narrating the ILO categorisation of non-standard employment which includes temporary employment, part time and on call work, multi-party employment relationship and disguised employment relationships.

[1089] Stripped of the core protections including the right to dignity and benefits afforded to other employees under labour laws, it can be argued that these workers are viewed similarly as commodities.

[1090] Labour Relations Amendment Act 6 of 2014.

Various forms of non-standard workers are also included in the determination for the extension of a collective agreement.[1091] The following sections demonstrate the nature of TES and the various categories of workers in non-standard employment relationships who are offered protection by the LRAA of 2014.

3.3.2 Temporary employment services (TES)

One of the aims of the Labour Relations Amendment Act 6 of 2014 (LRAA) was to provide greater protection for employees placed at a client by a TES.[1092] The LRA defines a TES as any "person who, for reward, procures for or provides to a client other persons who perform work for the client and who are remunerated by the TES".[1093] The LRA had always stipulated that any person whose services have been procured for or provided to a client by the TES is the employee of that TES and the TES is the employer.[1094] In addition, both the TES and the client are considered jointly and severally liable in respect of the employees, if the TES violates collective agreements; a binding arbitration order; the BCEA and/or a sectoral determination made in terms of the BCEA.[1095] The above section was designed to give protection to employees placed by TES. This basis was expanded upon by the LRAA of 2014, with the addition of section 198A which is only applicable to employees earning below R205 433,30 per annum. The effect of this section is best illustrated by the case law below.

Employees hired through TESs face many challenges, including the challenges of identifying the employer, restraint of trade clauses within their contracts, lower wages as compared to standard employees performing the same jobs, unfair dismissals and the uncertain duration of their contract of employment.[1096] There are cases that

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[1091] LRA, s 32 (5a) read with (5A).

[1092] *See* the LRAA 6 of 2014 which aims among other things to provide greater protection for workers in temporary employment services.

[1093] LRA, s 198 (1).

[1094] LRA, s 198 (2).

[1095] LRA, s 189 (4).

[1096] MA Forere 'From exclusion to labour security: To what extent does section 198 of the Labour Relations Amendment Act of 2014 strike a balance between employers and employees? (2016) *SA Merc LJ* 376-381.

illustrate the externalisation of work and the challenges faced by workers in triangular employment relationships including *Dyokhwe v De Kock NO and Others*.[1097] There, an employee, after working for Mondi (the original employer) for two years was instructed by management to sign a document with Adecco (the labour broker/TES).[1098] After signing the document, Mr Dyokhwe continued to perform the same work for the same company (Mondi) for five and a half years.[1099] The difference was that he was now earning less than previously, despite performing the same work. In addition, his permanent employment with Mondi was changed to a fixed-term contract with Adecco, which provided among other things that on termination of the contract, there were no severance benefits.[1100]

In this case, the employer purportedly dismissed the employee and subsequently re-hired the same through a labour broker to perform the same functions at a lower cost.[1101] The Labour Court (LC) analysed the true nature of the relationship of the parties and concluded that Mondi (the 'client') remained the employer and the new contract was in *fraudem legis*.[1102] The LC pointed out that:

> "To the extent that the employment through a TES as opposed to a former employer – while the employee carries (*sic*) doing the same job, but at a lower rate – may threaten employment security and other aspects of the constitutional right to fair labour practices, s 198 must be interpreted strictly in order to protect workers governed through s 198."[1103]

[1097] (2012) 33 ILJ 2401.

[1098] Under the new contract, he was now earning R10 per hour as opposed to R12,56 per hour with Mondi; *Dyokhwe*, para 11.

[1099] *Dyokhwe*, para 12.

[1100] *Dyokhwe*, para 10; T Cohen 'Debunking the legal fiction – Dyokhwe v De Kock NO & Others (2012) 33 *ILJ* 2318.

[1101] *Dyokhwe v de Kock & Ohers*, paras 11 – 12.

[1102] *Dyokhwe v de Kock & Ohers*, para 49; see also T Cohen (2012) 33 *ILJ* 2318.

[1103] *Dyokhwe v de Kock & Ohers*, para 25; The Dyokhwe judgment was referred to in *FMW Admin Services v Stander & Others* (2015) 36 *ILJ* 1051 (LC) and was considered in *Ismael v Bt/a Harvey Travel Northcliff* (2014) 35 *ILJ* 696 (LC).

The amendments were thus designed to protect workers in precarious circumstances from exploitation. Similar to the *Dyokhwe* case, in *Nape v INTCS Corporate Solutions (Pty) Ltd*[1104] an employee who was employed through fixed-term contracts by a labour broker, working at a client was dismissed from work, at the request of the client.[1105] The labour broker argued that in terms of its contract with the client, the client was not acting lawfully to demand the dismissal of an employee since such work arrangements involve three parties namely the labour broker, the client and the employee.[1106] As such, labour brokers and clients were not at liberty to structure employment arrangements in a manner that disregarded the rights of the employee.[1107] The court found that the dismissal of the employee was procedurally fair, but substantively unfair and ordered the payment of compensation.[1108] In coming to this conclusion, the court cautioned labour brokers to uphold employees' rights and avoid agreeing with the client terms that undermine rights, including job security.[1109]

The challenge faced by persons in similar position like Mr Dyokhwe is more about the fear that such a worker will be dismissed for trying to exercise the rights. The challenge relates to the dilemma that the worker has one employer but another person (with whom the worker does not have a contractual nexus) controls the working environment.

The LRAA amended Chapter IX of the LRA to deal among others with the regulation of non-standard employment.[1110] It addresses the proliferation of temporary employment service agencies by placing a registration requirement on such services – a similar position found under the Employment Services Act.[1111] The LRAA further

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[1104] (2010) 31 *ILJ* 2120 (LC).

[1105] *Nape v INTCS Corporate Solutions (Pty) Ltd,* para 4.

[1106] *Nape v INTCS Corporate Solutions (Pty) Ltd,* para 58.

[1107] *Nape v INTCS Corporate Solutions (Pty) Ltd*, paras 62-63.

[1108] *Nape v INTCS Corporate Solutions (Pty) Ltd,* paras 111-112.

[1109] *Nape v INTCS Corporate Solutions (Pty) Ltd,* para 106.

[1110] LRA, s 198-214.

[1111] LRA, s 198 (4F); Employment Services Act 4 of 2014.

offers protection to employees contracted through TES by ensuring that their terms and conditions of employment are in line with all employment laws, any sectoral determination or collective bargaining.[1112] In addition, contracts of employment of the TES employees may not waive collective agreements or arbitration awards.[1113]

While extending protection to workers placed by a TES, the LRAA also seeks to balance genuine business needs which require temporary workers.[1114] This is done through ensuring that TES remain operative provided they supply workers to engage in genuinely temporary work, while not compromising the rights of workers contracted through such services.[1115] In cases where the work is no longer temporary, and no justifiable reason exists to engage workers on a temporary basis, the LRAA cuts the duration of TES contracts to three months, after which the employee "must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for the treatment".[1116] The client is also deemed to be the employer of the employee once the three month period has passed and there is no genuine need for the employment to be temporary in nature.[1117] The employee can institute legal proceedings against the client of a TES and such a client is deemed to be the employer.[1118] The LRAA further extended protection to workers, engaged through fixed-term contracts.

[1112] LRA, s 198 (4C).

[1113] LRA, s 199.

[1114] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others*, CC para 66.

[1115] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others*, CC para 65; see also the Department of Labour 'Memorandum of Objects: Labour Relations Amendment Bill 2012, Available at <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf> (accessed 17-05-2019) 21.

[1116] LRA, s 198A (5); see also other permissible grounds for permissible continuation of temporary work status LRA s 198A.

[1117] LRA, s 198A (3)(b)(i).

[1118] LRA, s 198 (4A and 4B); see also interpretation in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others*, CC para 62.

3.3.3 Fixed-term contracts

Another category of non-standard employees who are given protection under the LRAA is that of fixed-term contract employees.[1119] A fixed-term contract refers to a contract of employment that terminates on a specified event,[1120] on completion of a specified task or on a fixed date,[1121] except the employee's retirement age.[1122] Similar to section 198A, section 198B does not prohibit the use of fixed-term contracts but seeks to stop the abuse of such contracts for employees earning below R205, 433 per annum (the annual salary threshold).[1123] An employer can use fixed-term contracts if the nature of work is of limited duration or if the employer can justify the reason for fixing the contract.[1124] Several justifiable reasons for employing employees through fixed-term contracts are listed, including replacing another employee who is temporarily absent from work,[1125] responding to a temporary increase in work which is not expected to go beyond 12 months,[1126] and seasonal work.[1127] When a fixed-term contract is used, in violation of the justifiable grounds, such employees are deemed to be employed for an indefinite duration. In addition, any offer to employ a person using a fixed-term contract must be in writing[1128] and must state the reason for the fixed term contract.[1129]

To prevent discrimination against workers employed through fixed-term contracts, the LRA provides that employees, employed through a fixed-term contract may not be

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[1119] LRA, s 198B.

[1120] LRA, s 198B (1)(a).

[1121] *Rademeyer v Aveng Mining Ltd and Others* JR322/2015 (2017).

[1122] LRA, s 198B (1)(c).

[1123] LRA, s 198B; BCEA, s 6 (3).

[1124] LRA, s 198B (3).

[1125] LRA, s 198B (4) (a).

[1126] LRA, s 198B (4) (b).

[1127] LRA, s 198B (4) (f).

[1128] LRA, s 198B (6) (a).

[1129] LRA, s 198B (6) (b).

treated less favourably than those employed on a permanent basis. This applies after three months of employment unless there is a justifiable reason.[1130] Further protective mechanisms are incorporated, including paying a severance package, for an employee who works over 24 months on a fixed-term contract.[1131] In addition to temporary and fixed-term employees, the LRAA seeks to extend protection to employees who are employed on a part-time basis.

3.3.4 Part-time employment

In an attempt to offer protection to employees working part-time, the LRAA included the regulation of part-time employment.[1132] A part-time employee is "an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee."[1133] The LRA requires an employer to treat a part-time employee on conditions which are not less favourable than those of full-time employees, including in the provision of training and skills development.[1134] The requirement to treat part-time employees on conditions which are not less favourable when compared to full-time employees applies after three months of the commencement of the LRAA to part-time employees, who were employed before the amendments took effect.[1135]

Provisions such as section 198C were designed to stop the continued employment of persons on less favourable conditions than those offered to full-time employees when the nature of work being performed is not temporary in nature. Despite the clear differentiation of various forms of non-standard employment under the LRAA, in certain cases the distinctions are blurry. As discussed under collective bargaining below, these forms of employment were not envisioned as the primary forms of employment during the drafting of the LRA, resulting in employees engaged in these forms of work

[1130] LRA, s 198B (8) (a).

[1131] LRA, s 198B (10).

[1132] LRA, s 198C.

[1133] LRA, s 198C (1).

[1134] LRA, s 198C (3).

[1135] LRA, s 198 (4) and (5).

sometimes falling outside the legal framework. Despite these helpful advances in the law, they remain inadequate (e.g they do not cover all subcontracted workers). What is required is to deal with the root causes of their growth (to the extent that that is possible) and/or the impact thereof on workers through casting the net even wider.

3.3.5 Limitations of the LRAA

Despite the above attempts to protect workers in non-standard employment relationships, the LRAA was enacted with exemptions and exclusions which limit the extent of the protection. First, section 198A does not apply to employees earning in excess of the stipulated threshold prescribed by the Minister under the BCEA.[1136] The same exclusion is found in section 198B of the LRA in relation to fixed-term contracts and in section 198C of the LRA in relation to part-time employment.[1137] Currently, employees who earn above R205 433.30 per year are excluded from much of the protection offered by the LRAA.[1138] In 2016, the average salary for a South African mineworker was about R243 600 per annum, leaving some mineworkers inadequately protected.[1139] It must be noted that the R205 433.30 is the gross amount before any permissible deductions. Some applicable deductions include income tax, pension, medical aid payments, contributions to the unemployment insurance fund (UIF) among other compulsory deductions.

Another contention regarding the LRAA related to what happens to the employee after the three months. More accurately, the question of who becomes the employer after the lapse of three months between the TES or the client was clarified by the Constitutional Court in *Assign Services (Pty) Ltd v National Union of Metals Workers of South Africa (NUMSA)*.[1140] The case dealt with the proper interpretation of the deeming provision in section 198A of the LRA on whether after the lapse of the three

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[1136] LRA, s 198A.

[1137] LRA, s 198B and 198C.

[1138] GN 531 in *GG* 37795 of (01-07-2014).

[1139] A Jeffery 'Is DMR deliberately sabotaging mining industry? – IRR' (2017) Politics Web Available at <https://www.politicsweb.co.za/politics/is-dmr-deliberately-sabotaging-mining-industry--ir> (accessed 11-03-2020).

[1140] 2018 (5) SA 323 (CC).

months, a dual employment relationship is created between the employee on the one hand and the client and the TES on the other.[1141] In other words, the court had to determine whether the employee continued to be employed by the TES after the lapse of three months, while simultaneously acquiring a second employer, the client. The CC held that the preferable interpretation is the sole employer interpretation.[1142] The CC held that the LRAA was enacted to offer not only legal protection to the employees but certainty regarding their status and employment conditions in addition to fair labour practices.[1143] Therefore, the most logical interpretation of section 198A(3)b)(i) is that after the lapsing of three months, the client becomes the sole employer of the workers.[1144] The court further concluded that the dual employment relationship creates challenges relating to the enforcement of employees' rights, since there are two sets of disciplinary codes, ascertaining the employer in dismissal cases may be difficult, and the difficulties that arise when the employees' plan to embark on strike action.[1145] However, the CC was silent on what happens to the contractual obligations created between the TES and the worker.

The minority judgment came to a different conclusion, asserting that workers have more protection with two or more employers as opposed to the preferred interpretation in the majority decision.[1146] The reasoning behind this interpretation is that both the client and the TES have obligations towards workers – thereby giving such workers more protection.[1147] Other adverse implications for the sole employer interpretation include the employee losing accrued benefits from the TES, such as the annual bonus

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[1141] *Assign Services case,* para 3.

[1142] *Assign Services case,* para 84.

[1143] *Assign Services case,* para 84.

[1144] *Assign Services case,* para 83; See also MA Forere 'From exclusion to labour security: To what extent does section 198 of the Labour Relations Amendment Act of 2014 strike a balance between employers and employees? (2016) *SA Merc LJ* 392-393; A Botes 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *SA Mercantile Law Journal* 110.

[1145] *Assign Services case,* paras 81 – 82.

[1146] *Assign Services case,* para 94.

[1147] *Assign Services case,* para 95.

and pension.[1148] While in theory, these arguments seem to work for the benefit of the workers, in practice many workers employed by a TES do not have many accrued benefits with the TES. Moreover, there is nothing that can stop the transferring of the accrued benefits to the new, sole employer. The dual employer approach thus creates challenges when exercising rights under the LRA.

The above section demonstrated attempts at protecting non-standard employees through the LRA. The gaps in the protection of non-standard workers are also visible in the Basic Conditions of Employment Act (BCEA).

3.4 The BCEA and the National Minimum Wage Act

The BCEA was enacted to advance economic development and social justice through fulfilling the objects of fair labour practices under section 23(1).[1149] The BCEA sets out minimum standards or terms and conditions of employment with which employers must comply, including in relation to working time,[1150] leave days,[1151] particulars of employment and remuneration,[1152] termination of employment,[1153] the variation of basic conditions of employment through agreements or Ministerial orders[1154] and enforcement of the BCEA.[1155] The BCEA, like the LRA, was crafted to offer protection to workers in an employment relationship. It adopts the same definition as the LRA.[1156] The BCEA must also be read with the Minimum Wage Act[1157] which defines a worker as "any person who works for another and who receives, or is entitled to receive, any

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[1148] *Assign Services case,* paras 100 – 101.

[1149] BCEA, s 2.

[1150] BCEA, Chapter Two.

[1151] BCEA, Chapter Three.

[1152] BCEA, Chapter Four.

[1153] BCEA, Chapter Five.

[1154] BCEA, Chapter Seven and Chapter Eight.

[1155] BCEA, Chapter Ten.

[1156] BCEA, s 1.

[1157] 9 of 2018.

payment for that work whether in money or in kind."[1158] The Minimum Wage Act defines an employer as "any person who is obliged to pay a worker for the work that that worker performs for that person".[1159] The definition is laudable as it is wide enough to cover workers, working for an independent contractor.

Some of the gaps in the protection of these workers are shown in starker terms when one analyses the Mine Health and Safety Act (MHSA) and the Occupational Diseases in Mines Act (ODIMWA).

3.5 MHSA Act 29 of 1996 and ODIMWA Act 78 of 1973

Mining as an economic activity is inherently dangerous and relies on relatively large numbers of workers.[1160] With some of the deepest mines in the world, mining in South Africa creates further risks to persons at mines and to host communities.[1161] The Mine Health and Safety Act (MHSA) is the Act that regulates the health and safety aspects of mine workers.[1162] The MHSA defines an 'employee' as 'any person who is employed at a mine'.[1163] The definition is wide enough to protect non-standard forms of employment, working at the mines. The MHSA is one of the few pieces of legislation that defines an employer. An employer is defined as an 'owner' who in turn is defined as follows:

> "(*a*) in relation to a *mine*, means—
>
> (i) the holder of a *prospecting* permit or mining authorisation issued under the *Mineral and Petroleum Resources Development Act*;

[1158] National Minimum Wage Act 9 of 2018, s 1.

[1159] National Minimum Wage Act 9 of 2018, s 1.

[1160] JN van der Merwe 'Future of the South African mining industry and the roles of the SAIMM and the universities' (2011) 111 *Journal of the Southern African Institute of Mining and Metallurgy* 581, 587-588.

[1161] R Boyko, S Darby, RC Goldberg & Z Milin 'Fulfilling broken promises: Reforming the century-old compensation system for occupational lung disease in the South African mining sector' (2013) Yale Global Health Justice Partnership, Policy Paper 2/2013, 10.

[1162] 29 of 1996.

[1163] MHSA, s 102.

(ii) if a prospecting permit or mining authorisation does not exist, the person for whom the activities contemplated in paragraph (b) of the definition of "mine" are undertaken, but excluding an independent contractor; or

(iii) if neither (i) or (ii) is applicable, the last person who worked the *mine* or that person's successor in title; and

(*b*) in relation to a *works*, means the person who is undertaking the activities contemplated in the definition of "works", but excluding an independent contractor…".[1164]

In essence, the MHSA equates an employer with the holder of any mining authorisation including a prospecting permit issued under the Mineral and Petroleum Resources Development Act (MPRDA).[1165] In cases where such an authorisation does not exist, an owner/employer refers to a person undertaking mining activities, including any excavation or the prospecting of mineral deposits.[1166] This definition is crucial as the MHSA allocates duties and responsibilities relating to health and safety of persons at mines to the employer or the owner of the mine.

The MHSA aims to provide protection to persons at the mines, particularly employees.[1167] In doing so, it makes provision for the participation of employees towards decisions that affect their health and safety at the mine.[1168] Chapter two of the MHSA deals specifically with health and safety at mines through the allocation of duties between the employer and the employees.[1169] These duties and obligations are designed and couched with the 'employer' and the 'employee' in mind. For example, it is the duty of the employer to ensure that the mine being worked is designed, constructed and equipped to provide safe conditions and a healthy working

[1164] MHSA, s 102; see also the definitions under the Occupational Diseases in Mines and Works Act 78 of 1973.

[1165] 28 of 2002.

[1166] MHSA, s 102.

[1167] MHSA, s 1.

[1168] MHSA, s 1.

[1169] MHSA, Chapter 2.

environment.[1170] Further employer duties relate to the identification of health hazards, assessing these health hazards, eliminating the health hazards and providing employees with health equipment.[1171] The employer is also obliged to provide training to employees, to establish a medical surveillance system and to write annual reports on health and safety among other listed obligations.[1172]

Similar to duties placed on the employer, the MHSA places certain obligations on employees, relating to health and safety.[1173] While at the mine, an employee has the duty of care to protect their own health and safety.[1174] Employees are required 'to protect the health and safety of other persons who may be affected by an act or omission of that person'.[1175] Other duties placed on employees include the duty to co-operate in the enforcement of the MHSA and the duty to comply with prescribed health and safety measures.[1176] A key right emanating from international law and enshrined under the MHSA is the right of employees to leave a dangerous workplace.[1177] This right is linked to the constitutional right to an environment that is not harmful to health or wellbeing.[1178]

Similarly, the Guideline for the Compilation of a Mandatory Code of Practice on the Right to Refuse Dangerous Work and Leave a Dangerous Working Place aims to provide assistance to the employer, who in consultation with the health and safety committee at the mine must draft a procedure to be followed by the employees, health

[1170] MHSA, s 6.

[1171] MHSA, ss 11, 12.

[1172] MHSA, ss 10, 15, 16.

[1173] MHSA, s 22.

[1174] MHSA, s 22 (a).

[1175] MHSA, s 22 (b).

[1176] MHSA, s 22 (d) and (e).

[1177] ILO C176, Art 13(1)(e) provides that "…workers shall have the following rights:

…(e) to remove themselves from any location at the mine when circumstances arise which appear, with reasonable justification, to pose a serious danger to their safety or health…"; MHSA, s 23.

[1178] Constitution, s 24 (a).

and safety representatives and employers in exercising the right to leave a dangerous working environment.[1179] As argued in this thesis, a large percentage of non-standard workers at mines cannot exercise full rights due to their status. For example, one prominent feature of the Mine Health and Safety Act[1180] is the establishment of health and safety representatives and committees.[1181] In the South African context, the importance of these committees must be understood from a historical perspective in which most workers were denied certain fundamental rights, including the right to leave a dangerous workplace.[1182] In *National Union of Mineworkers and Others v Driefontein Consolidated Ltd*,[1183] for example, workers were dismissed for leaving a dangerous working environment.[1184] In ordering the reinstatement of the workers, the court emphasised how in understanding the right to leave a dangerous working environment, it was critical to have reference to the dangerous nature of mining and the depth of the mines.[1185]

To qualify as a health and safety representative, a worker must be in full-time employment (and therefore qualify as an employee) and working at a designated workplace.[1186] Secondly, such employees must be acquainted with the conditions and activities at the designated working place.[1187] In other words, the employee must be sufficiently familiar with the work environment to qualify as a health and safety representative. While the MHSA makes a distinction between full-time and part-time health and safety representatives, the explicit qualification to the committee is

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[1179] GN R148 in *GG* 39656 of (05-02-2016).

[1180] 29 of 1996.

[1181] MHSA, s 29.

[1182] See *National Union of Mineworkers and Others v Driefontein Consolidated Ltd* 1984 (5) *ILJ* 101 (IC) 125, a case which illustrates the challenges Black workers faced when trying to leave a dangerous workplace.

[1183] 1984 (5) *ILJ* 101 (IC).

[1184] *National Union of Mineworkers and Others v Driefontein Consolidated Ltd,* 137.

[1185] *National Union of Mineworkers and Others v Driefontein Consolidated Ltd,* 137-138 and 149.

[1186] MHSA, s 28(1)(a).

[1187] MHSA, 28(1)(b).

employment in a full-time capacity.[1188] This means that temporary workers cannot qualify to the health and safety committees. Health and safety representatives play a critical role in the realisation of health and safety at mines.[1189] The main duty of the health and safety representatives and committees is to represent 'employees' in all aspects of health and safety at the mine.[1190] In addition, their duties include *inter alia*:

a) "representing employees on all aspects of health and safety;
b) directing employees to leave a dangerous working environment;
c) making representations to the employer on health and safety issues;
d) inspecting working places with regard to the health and safety of employees at the agreed intervals with the employer; and
e) examining the causes of accidents."[1191]

These rights and duties are, however, limited to the specific working places.[1192] Limiting the participation of health and safety representatives to specific working places is well intentioned, particularly in the mining sector where each working place has its unique health and safety challenges. In addition, the provision was drafted with a steady workforce, working at one working place.

However, it was not envisioned that mines will ultimately be workplaces where several employers bring their respective workers and move from one workplace to another. First, the full-time employment requirement automatically excludes such workers in non-standard employment relationships that are not permanent. Secondly, the nature of some forms of subcontracting results in workers, working at different workplaces, thereby creating a gap in exercising such rights. Lastly, since health and safety committees can be established through a collective agreement with a representative trade union, unrepresented workers (accepting that these workers are less often

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[1188] MHSA, s 28.

[1189] MHSA, s 28.

[1190] Mine Health and Safety Act 29 of 1996.

[1191] MHSA, s 30.

[1192] MHSA, s 30(2).

organised in unions than standard employees) will have limited participation rights.[1193] The express limitation of the beneficiaries of these rights to 'employees' and to those working full-time excludes a significant percentage of the workforce at the mines. The above does not mean to suggest that all workers must form part of the committees established under the MHSA. The argument advanced here is that all workers must have a reasonable opportunity to elect and to be elected to such committees to advance the democratic principles entrenched under the MHSA.

Closely related to the MHSA is the Occupational Diseases in Mines and Works Act (ODIMWA)[1194] which deals with the payment of compensation for certain diseases and injuries contracted by mineworkers. Statutory compensation is governed by two main pieces of legislation, namely the Compensation for Occupational Injuries and Diseases Act (COIDA)[1195] and the ODIMWA.[1196] The ODIMWA is only applicable in the mining sector and creates a compensation fund to which mining companies pay levies for employees undertaking risk work.[1197] The two pieces of legislation create an uneven compensation landscape, with the COIDA offering a relatively more comprehensive compensation regime than ODIMWA. Due to the limited application of COIDA in the mining industry, this section discusses the ODIMWA.

Employees who encounter an accident resulting in either disablement or death can claim benefits in their capacity or their dependants may claim the benefits.[1198] These benefits are capped depending on the nature and degree of the injury or disease.[1199]

[1193] MHSA, s 25 – 40.

[1194] 78 of 1973, Preamble.

[1195] 130 of 1993.

[1196] 73 of 1973.

[1197] Occupational Diseases in Mines and Works Act 78 of 1973: Adjustment of Levies paid by Controlled Mines and Works 2019 GN 1385 in *GG* 42793 of 24 October 2019; R Boyko, S Darby, RC Goldberg & Z Milin 'Fulfilling broken promises: Reforming the century-old compensation system for occupational lung disease in the South African mining sector' (2013) Yale Global Health Justice Partnership, Policy Paper 2/2013, 11.

[1198] ODIMWA, s 44.

[1199] For example, the current lump-sum payment for second degree silicosis is R140 506 and for first degree is R63 100.

In addition, the levies that mining companies are required to pay are low, with estimates that the ODIMWA fund is R10 billion below the required funds to cover liabilities.[1200] The ODIMWA lists certain diseases as 'compensatable diseases' including pneumoconiosis; the joint condition of pneumoconiosis and tuberculosis; any permanent disease of the cardio-respiratory organs or any disease that the Minister may declare as a compensatable disease; permanent obstruction of the airways and progressive sclerosis.[1201] The underlying qualification for the claim to succeed is that the committee must be satisfied that the compensatable disease arose from the performance of work.

With an understanding that some mines are operated by contractors, the ODIMWA places obligations on contractors. In many instances, the ODIMWA places obligations on the owner of a controlled mine and the contractor in protecting the rights of workers at the workplace. However, given the lack of permanency of most of the non-standard workers relating to their place of work, most of the provisions of ODIMWA do not fully apply. Despite the numerous amendments to the ODIMWA, it remains an old piece of legislation with roots in legislation dating back to 1911. It was crafted without a genuine commitment to redress the social and economic needs of the workers.

3.6 The Mineral and Petroleum Recourses Act 28 of 2002

The MPRDA was enacted to give effect to several objectives, including expanding the opportunities and participation for the historically disadvantaged persons in the exploitation of mineral resources.[1202] In addition, it aims to promote employment and to advance the economic welfare for all South Africans.[1203] A key feature of the MPRDA is ensuring that holders of mining and production rights make meaningful socio-economic contributions in developing the areas of their operations.[1204] Of all the aims

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[1200] A Jeffery 'Is DMR deliberately sabotaging mining industry? – IRR' (14-12-2017) PoliticsWeb Available at <https://www.politicsweb.co.za/politics/is-dmr-deliberately-sabotaging-mining-industry--ir> (accessed 05-03-2020).

[1201] ODIMWA, s 1.

[1202] MPRDA, s 2(d).

[1203] MPRDA, s 2(g).

[1204] MPRDA, s 2(i).

of the MPRDA, promoting employment and advancing the economic welfare of South Africans, particularly mineworkers is of paramount significance as its effects are easily spread across thousands of households. As such the MPRDA creates a mechanism to ensure that only those mining right applicants who have social and labour plans in place, which are designed to meet the above objectives are granted the mining right.[1205] The transformative objectives of the MPRDA are further elaborated through requiring the Minister to develop a code of practice for the mining industry and developing a broad-based socio-economic empowerment Charter.[1206]

The MPRDA defines an employee broadly as:

> "…any person who works for the holder of a reconnaissance permission, prospecting right, mining right, mining permit, retention permit, technical corporation permit, reconnaissance permit, exploration right and production right, and who is entitled to receive any remuneration, and includes any employee working at or in a mine, including any person working for an independent contractor…"[1207]

One of the areas that the MPRDA addresses is the use of contractors by mineral right holders, which in some cases is designed to bypass the applicable labour laws. The MPRDA attempts to offer protection to workers who come to mines through the appointment of contractors, by providing that the holder of a right remains responsible for compliance with the Act as far as the status of those workers is concerned.

4 Collective bargaining and the role of trade unions

The above discussion on selected legislation helps to demonstrate the limited reach of legislation in giving protection to non-standard workers at mines, but who, through the nature of their engagement either find it difficult or impossible to access rights key rights. Externalisation of work through subcontracting of core mining business weakens collective bargaining institutions. Collective bargaining as an institution for advancing the interests of workers gathers its power from the individual standard

[1205] MPRDA, s 23(e) and (h).

[1206] MPRDA s 100.

[1207] MPRDA s 1.

employment relationship (SER). Thus, the decline in the use of the standard employment relationship has affected the strength and the role of collective bargaining. To understand the effect of the dwindling pool of workers finding protection under the legal framework, the following section analyses these gaps with reference to collective bargaining.

One of the main aims of the LRA is to promote and facilitate orderly collective bargaining in the workplace, particularly at the sectoral level.[1208] Collective bargaining has been described as the joint regulation of matters of mutual interest between the employer (or the employer's representative) and employees (through a trade union).[1209] Collective bargaining has been pivotal in containing the tension between employers and employees, especially in the mining sector.[1210] It involves employers or their representatives, negotiating with employee representatives with the intention of reaching agreement on matters of mutual interest.[1211] Trade unions as employee representatives seek to advance the interests of their members, including wage increases and the betterment of conditions of employment.[1212] It is the cumulative numbers of individual employees that makes collective bargaining functional.[1213] Where a sizeable component of the workforce is contracted or hired through a TES or a subcontractor, trade unions may struggle to organise sufficient numbers of employees of the employer to engage in effective collective bargaining. One of the effects of the increase in atypical or non-standard work relationships is accordingly the decline of trade unions' representativeness.[1214]

[1208] LRA, s 1(d); J Grogan *Collective labour law* (2014) 2.

[1209] H Cheadle 'Collective bargaining and the LRA' (2005) 9 *Law, Democracy & Development* 147.

[1210] KJ Selala 'The right to strike and the future of collective bargaining in South Africa: An exploratory analysis' (2014) 3 *International Journal of Social Sciences* 120.

[1211] A Steenkamp, S Stelzner & N Badenhorst 'The right to bargain collectively' (2004) 25 *Industrial Law Journal* 943.

[1212] A Steenkamp, S Stelzner & N Badenhorst 'The right to bargain collectively' (2004) 25 *Industrial Law Journal* 945; see also J Grogan C*ollective labour law* (2003) 1-2.

[1213] M-S Vettori 'Alternative Means to Regulate the Employment Relationship in the Changing World of Work' (2005) Unpublished PhD Thesis, University of Pretoria.

[1214] See B Scully (2016) 43 (148) *Review of African Political Economy* 296.

4.1 Challenges in practice

Collective bargaining as a self-regulatory mechanism has been under tremendous scrutiny for its failure to deal with the twenty-first-century workplace challenges.[1215] Calitz has noted the following concerning collective bargaining in South Africa:

> "It is a sad state of affairs that South Africa's advanced collective bargaining system as codified in the Labour relations Act (LRA) has not lived up to the promise of creating functional industrial relations that support economic prosperity".[1216]

In a normal functioning labour environment system, the right to strike or the recourse to lock-out are meant to assist the parties involved in furthering their interests on mutual terms.[1217] The high level of violence that often characterises many strikes is clear evidence of the dysfunctionality that exists within the collective bargaining system.[1218] Other scholars have echoed the unacceptable levels of violence that characterise strikes or industrial action in South Africa, particularly from the mining sector.[1219] Strikes are often marred with violence, intimidation, destruction of property, loss of life and when protracted have a direct negative effect on the economy.[1220] Regrettably, the high levels of violence during industrial action do not necessarily translate into solutions or meaningful benefits for the aggrieved workers.[1221] High levels of violence tend to distract the parties from addressing issues of mutual interests. In addition to

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[1215] T Humby 'Redressing mining legacies: The case of the South African mining industry' (2016) *Journal of Business Ethics* 653, 658.

[1216] K Calitz 'Violent, frequent and lengthy strikes in South Africa: Is the use of replacement labour part of the problem' (2016) *SA Merc LJ* 436, 438.

[1217] On strikes and lockouts, see LRA, Chapter IV.

[1218] E Fergus 'Reflections on the (dys)functionality of strikes to collective bargaining: Recent developments (2016) 37 *ILJ* 1537.

[1219] T Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *ILJ* 836, 836.

[1220] K Calitz 'Violent, frequent and lengthy strikes in South Africa: Is the use of replacement labour part of the problem' (2016) *SA Merc LJ* 436, 436-438; IG Farlam, PD Hemraj, BR Batoka 'Marikana Commission of Inquiry Report' (2015) 42; E Webster 'The shifting boundaries of industrial relations: Insights from South Africa' (2015) 154 *International Labour Review* 27, 28.

[1221] P Nkoane 'Time for the tide to change for rules of engagement in labour law: A proposal for effective wage dispute resolution' (2018) 22 *Law Democracy & Development* 48.

loss of direct income, protracted strikes affect the ability of mineworkers to meet their immediate financial needs.[1222]

In addition to the dysfunctional levels of violence, new forms of employment relationships are also directly affecting collective bargaining.[1223] Despite collective bargaining being relatively strong in the mining sector, it is nonetheless in a state of decline.[1224] Thus, "collective bargaining as an institution is in poorer health than it was when the LRA was introduced".[1225] With the increase of atypical employment relationships, partly due to the use of TES, it is becoming more difficult for workers to unionise and to be protected under the same voice.

As the recent trends explained above show, mining companies are increasingly acquiring their workforce through subcontracting and/or TES, and/or the running of mining activities to third parties in a bid to cut costs.[1226] Bezuidenhout clarifies the root of the deepening crisis by noting that the rampant use of non-standard forms of employment in the mining sector is often designed to circumvent contracts of employment. The aim as he puts it is to "make regulations that are premised on standard employment contracts obsolete".[1227] In addition, most workers hired through a TES are not unionised.[1228] These workers generally work in unsafe working conditions, they often have more than one workplace and are uncertain of their true

[1222] P Nkoane (2018) 49.

[1223] E Fourie 'Exploring innovative solutions to extend social protection to vulnerable women in the informal economy' (2016) 37 *ILJ* 831.

[1224] D Du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper GS Giles, C Bosch & J Rossouw *Labour Relations Law* 42 – 43.

[1225] S Godfrey, J Maree, D Du Toit & J Theron *Collective bargaining in South Africa: Past, present and future* (2010) 221.

[1226] A Bezuidenhout 'New Patterns of exclusion in the South African Mining Industry' (2008) 183.

[1227] A Bezuidenhout 'New Patterns of exclusion in the South African Mining Industry' (2008) 183.

[1228] J Theron 'Prisoners of a paradigm: Labour broking, the 'new services' and non-standard employment' (2012) *Acta Juridica* 58, 62; P Benjamin 'Decent work and non-standard employees: Options for legislative reform in South Africa: A Discussion Document' (2010) 31 *ILJ* 845, 845. See also an American perspective on the challenges of organizing "contingent workers", P Ball 'The new traditional employment relationship: An examination of proposed legal and structural reforms for contingent workers from perspectives of involuntary impermanent workers and those who employ them' (2003) 43 *Santa Clara Law Review* 901, 911.

employer.[1229] The presence of one or more of these factors affects the effective functioning of collective bargaining. The Marikana tragedy further illustrates some of the dysfunctional aspects of collective bargaining in South Africa.

4.2 The Marikana tragedy: Amplifying the problem

The Marikana tragedy as discussed earlier was an unprotected strike by thousands of mine workers – primarily rock drill operators (RDOs) – and ultimately 44 people died, 34 of them at the hands of the police.[1230] It has become a point of reference for the dysfunctional state of collective bargaining in South Africa.[1231] The Marikana tragedy exhibited the effect of the mismatch between collective bargaining institutions created under the LRA and the growing discontent of mineworkers who believe the proceeds from mineral wealth are not being shared equitably.[1232] These sentiments are supported by Cooke and Wood who argue that:

> "This growing inadequacy of the traditional institutional actors (e.g. the state and national unions) in defending workers' rights has created both the space and the need for "new" actors to fill the gap…"[1233]

The Marikana incident was not an isolated event but must be understood through the broader lens of the labour framework.[1234] Many reasons have been put forward for the

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[1229] N Smit and E Fourie 'Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries' (2009) *TSAR* 516; SW Mills 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility' (2004) 25 *Industrial L.J.* 1203; for a European perspective see T Kohler 'Labour law and labour relations: Comparative and Historical Perspectives' Autumn (1996) *International Journal of Comparative Law and Industrial Relations* 213, 231.

[1230] See chapter two, part 3 above.

[1231] See chapter two, part 3 above.

[1232] G Hartford 'The mining industry strike wave: what are the causes and what are the solutions? (10 October 2012) *GroundUp* Available at <https://www.groundup.org.za/article/mining-industry-strike-wave-what-are-causes-and-what-are-solutions/> (accessed 23-11-2019); E Webster 'The shifting boundaries of industrial relations: Insights from South Africa' 154 (2015) *International Labour Review* 27, 29.

[1233] FL Cooke & G Wood 'Introduction to a symposium or employment relations and new actors in emerging economies' (2011) 66 *Industrial Relations* 3, 3.

[1234] C Chinguno 'Marikana massacre and strike violence post-apartheid' (2013) 4 *Global Labour Journal* 160, 160.

tragedy and numerous causes were interwoven. However, it is now widely agreed that the collapse of the bargaining system in place was a significant factor in the tension leading up to the tragedy.[1235] For example, prior to the tragedy, there was a growing perception by mineworkers, particularly the rock drill operators (RDOs), that their trade union representatives were not representing their demands.[1236] This led to an attempt by the RDOs to negotiate directly with management, through by-passing the collective bargaining structures. Direct negotiation between management and the RDOs outside union structures, had however previously occurred without resulting in a complete breakdown of the collective bargaining system.[1237] This means that by-passing union structures cannot alone explain the tragedy. Hartford gives a compelling analysis of the cause of the tragedy, arguing that the untransformed migrant labour system; the perceptions that the National Union of Mineworkers (NUM) leadership no longer cared for issues affecting the mine workers (RDO); the removal of shop floor stewards; the professionalisation of the human resource management; and the deeply entrenched social and economic challenges facing mine workers invariably led to the collapse of the collective bargaining.[1238]

This widening social distance between the union representatives and the workers[1239] resulted in the (NUM) becoming organizationally distant in representing the needs of

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[1235] T Ngcukaitobi (2013) 34 *ILJ* 852; D du Toit 'The extension of bargaining council agreements: Do the amendments address the constitutional challenge? (2014) 35 *ILJ* 2637, 2639; M Anstey 'Marikana – and the push for a new South African pact': forum section (2013) 37 *South African Journal of Labour Relations* 133; Tracy-Lynn Humby 'Redressing mining legacies: The case of the South African Mining Industry' (2016) 135 *Journal of Business Ethics* 653, 657-658; G Hartford 'The mining industry strike wave: what are the causes and what are the solutions? (10-10-2012) *GroundUp*.

[1236] M Anstey (2013) 37 *South African Journal of Labour Relations* 138; M Brassey 'Labour law after Marikana: Is institutionalized collective bargaining in SA wilting? If so, should we be glad or sad' (2013) 34 *Industrial Law Journal* 823, 834; G Hartford 'The mining industry strike wave: what are the causes and what are the solutions? (10-10-2012) *GroundUp*.

[1237] P Stewart 'Kings of the mine': Rock drill operators and the 2012 strike wave on South African mines' (2013) 44 *South African Review of Sociology* 42, 52. The author notes that there was a brief timeline in 1988, 1992, 1993 and 1995 in which rock drillers in the platinum sector engaged directly with management before the National Union of Mineworkers gained organisational rights.

[1238] G Hartford 'The mining industry strike wave: what are the causes and what are the solutions? (10 October 2012) *GroundUp*.

[1239] S Friedman & S Groenmeyer 'A nightmare on the brain of the living?: The endurance and limits of the collective bargaining regime' (2016) 91 *Transformation*: *Critical Perspectives on Southern Africa* 63, 75.

the workers.[1240] In the midst of this, the Association of Mineworkers and Construction Union (AMCU), an emerging trade union, was gaining the support of the workforce.[1241] The growing number of non-standard workers, who are engaged by mining companies on a temporary basis (whether by TES's or otherwise) and the fragmentation of the workforce through sub-contracting further contributed to the tragedy.[1242] For example, 26% of Lonmin's workforce and 30% of Implats were employees of contractors or other third parties.[1243] This seems to depict the general trend in the mining industry, particularly in the platinum sector. Webster argues that the presence of the TES and employment agencies also created conditions for the strike.[1244] There are reports indicating that former retrenched full-time permanent employees were being rehired through labour brokers to do their previous jobs at a fraction of their previous salaries and benefits, in a similar fashion to the *Dyokhwe* matter above.[1245] Undoubtedly, this increased the animosity of the workers towards the mining house. This state of affairs resulted in furthering the tensions for miners who were already disgruntled about their wages.

Despite the above limitations, labour remains one of the most extensively regulated areas in South Africa.[1246] One of the cited disadvantages of statutory regulation is that it is often rigid and incapable of adapting to the emerging needs and to new legal

[1240] H Bhorat & M Oosthuizen 'Is Marikana a forerunner of national labour market instability and disruption'? (2012) DPRU, Available at <http://www.econ3x3.org/sites/default/files/articles/Bhorat%20%26%20Oosthuizen%202012%20Marikana%20FINAL2.pdf> (accessed 04-05-2017); G Hartford 'The mining industry strike wave: what are the causes and what are the solutions? (10-10-2012) (accessed 23-11-2019); S Friedman & S Groenmeyer 'A nightmare on the brain of the living?: The endurance and limits of the collective bargaining regime' (2016) 91 *Transformation*: *Critical Perspectives on Southern Africa* 63, 75.

[1241] D Matlou 'Understanding workplace social justice within the constitutional framework' (2016) *SA Merc LJ* 544, 558; C Chinguno (2013) 40 *Review of African Political Economy* 645.

[1242] C Chinguno (2013) 40 *Review of African Political Economy* 640;

[1243] J Theron (2014) 35 *ILJ* 1829, note 9.

[1244] E Webster 'The shifting boundaries of industrial relations: Insights from South Africa' 154 (2015) *International Labour Review* 27, 29.

[1245] COSATU 'Join Decent Work Marches' (2016) Available at <https://www.bibc.co.za/attachments/article/174/COSATU%20Flyer.pdf> (accessed 15-08-2017).

[1246] See chapter five, part 3 above.

challenges.[1247] As such, statutory regulation is incapable of anticipating all future challenges that may require further regulation. Statutory regulation can be complex and those regulated may need to rely on others to interpret the rules.[1248] The current labour law has been criticised for its inability to keep pace with the rapidly changing nature of employment relationships.[1249] While the solution to the dwindling pool of those who qualify for protection within legislation has been to continuously expand the definition of employee, the real effect of the LRAA of 2014 to employees is yet to be seen. Furthermore, there is a lack of capacity by the Department of Labour to enforce these provisions.[1250]

Given the importance of companies and corporations in the lives of many people, a key role for the legislature was thus to ensure that these companies and corporations are more transparent and accountable for their actions. The Companies Act brings a new approach to the regulation of companies which may provide a basis for better regulation of mining companies. The creation of the SECs is one of the more innovative aspects of the 2008 Companies Act. The following section considers the role and possible impact of the SECs in promoting labour rights on the mines.

5 The Companies Act and Social and Ethics committees

The Companies Act[1251] established a governance paradigm, characterised by transparency and high standards of corporate governance.[1252] The Act positions companies as "significant institutions within the social and economic life of the

[1247] G Standing *Global labour flexibility: Seeking distributive justice* (1999) 41.

[1248] LM du Plessis 'The jurisprudence of interpretation and the exigencies of a new constitutional order in South Africa' (1998) *Acta Juridica* 8.

[1249] SW Mills 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility?' (2004) 25 *ILJ* 1203, 1203-1204.

[1250] Section 63 of the Basic Conditions of Employment Act 75 of 1997 empowers the Minister of Labour to appoint labour inspectors whose functions include the monitoring and enforcing compliance of an employment law. The then Minister of labour alluded to the incapacity of the labour department in the enforcement of existing laws as the department only has 1081 labour inspectors countrywide. Justice Malala 'In conversation with Mildred Oliphant' eNCA (02-05-2017) Available at <https://www.enca.com/media/video/in-conversation-with-mildred-oliphant> (accessed 12-05-2017).

[1251] 71 of 2008.

[1252] Companies Act 71 of 2008, s 7 (b) (iii).

nation".[1253] It represents a disruption in the way in which shareholders' interests were protected, through placing another layer of accountability which looks beyond the immediate interests of shareholders.[1254] The Act empowers the designated Minister to make regulations prescribing categories of companies that require the SECs.[1255] Under the regulations made pursuant to the Companies Act,[1256] the Minister determined that SEC were compulsory in all state-owned companies, listed companies, or any other company that scored above 500 points in any two of the previous five years.[1257] This calculation of 500 base points is dealt with under regulation 26.[1258] The above criteria is broad and most mining companies fall into one of the categories required to establish these committees. In addition, companies that are not legally required to establish the SECs may nonetheless do so voluntarily.

The SECs must be made up of not less than three directors or prescribed officers of that company, and at least one of those directors must not be involved in or have been

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[1253] Companies Act 71 of 2008, s 7 (b) (iii).

[1254] MM Botha 'Evaluating the social and ethics committee: Is labour the missing link? (2016) 79 *THRHR* 580, 583-584.

[1255] Section 72(4).

[1256] Companies Act, section 72(4).

[1257] Companies Regulations GN R351 in *GG* 34239 of (26-04-2011), regulation 43(1)(c).

[1258] Companies Regulations 2011, regulation 26 (2) provides as follows:

For the purposes of regulations 27 to 30, 43, 127 and 128, every company must calculate its 'public interest score' at the end of each financial year, calculated as the sum of the following-

(a) a number of points equal to the average number of employees of the company during the financial year;

(b) one point for every R1 million (or portion thereof) in third party liability of the company, at the financial year end;

(c) one point for every R1 million (or portion thereof) in turnover during the financial year; and

(d) one point for every individual who, at the end of the financial year, is known by the company-

> (i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities; or
>
> (ii) in the case of a non-profit company, to be a member of the company, or a member of an association that is a member of the company.

involved in the day-to-day management of the company's business for the past three financial years.[1259] There is thus no requirement that the SECs must have a worker representative. The main duty of social ethics committees is to monitor a company's activities, having regard to legislation, legal requirements applicable to the company and codes of best practice.[1260] These activities include social and economic development, good corporate citizenship, the environment, health and safety and labour and employment.[1261] The scope of these duties are wide and deal directly with the key principal areas of interest – health and safety, labour, employment and corporate good citizenship. One of the significant inclusions is the requirement to monitor the company's standing in terms of the ILO Decent Work Agenda and working conditions.[1262] The decent work agenda of the ILO, as discussed, incorporates all the rights addressed in this thesis.[1263] Furthermore, the committee must monitor the company's employment relationships and the contributions the company makes towards the educational development of its workers.[1264] The SEC can attend the annual shareholders general meetings and can be heard on any matters that affect its functions.[1265] It operates by making recommendations to the board. In addition, the board of a company can delegate its authority to any committee to the extent permissible under the Memorandum of Incorporation which includes delegation to the SEC.[1266] Given the degree of its independence from the company and the nature of its duties, it has the potential to improve various aspects of the company, including workers' rights.

[1259] Companies Regulations 2011, regulation 43(4).

[1260] Companies Regulations 2011, regulation 43 (5)(a).

[1261] Companies Regulations 2011, regulation 43 (5).

[1262] Companies Regulations 2011, regulation 43 (5)(a)(v)(aa).

[1263] See chapter four, part 4.2.

[1264] Companies Regulations 2011, s 43 (5) (a)(v) (bb).

[1265] Companies Act, s 72 (8).

[1266] Companies Act, s 72 (1)(b).

Some have labelled the SEC 'controversial and problematic'.[1267] The reasons for this assessment vary and may include the fact that while the SEC is appointed by the shareholders, it does not form part of the board.[1268] It only makes recommendations to the board, to which the board may accept or reject such recommendations. In this sense, the board can refuse to implement recommendations from the committee, at least from the text of the legislation. Nonetheless, there is some consensus that these committees may play a critical role in the implementation of meaningful CSR.[1269]

6 Conclusion

This chapter discussed the outdated premise of the current labour framework to emerging challenges in the world of work, focusing on the mining sector. For example, only those who are defined as employees under labour legislation are afforded the full protection and full participation rights of the LRA and MHSA. As the discussion above notes, in the mining sector, there is an increase in sub-contracted labour, the use of TESs, and a simultaneous decline in standard employment at the mines. This has had a direct negative effect on the effectiveness of key labour law pillars, such as collective bargaining. In the quest for flexibility and reducing labour costs, various pseudo-employment relationships that allow a mining company to escape the duties imposed on employers by the current labour and health and safety legislation continue to be created.

The Marikana tragedy demonstrates the failure of the labour framework, particularly of collective bargaining to address the current employment challenges. Yet the Marikana tragedy is only the tip of the iceberg to the mismatching laws and the employment trends. The net effect of these new patterns of work is to undermine key participation and enabling rights, including freedom of association, the right to collective bargaining and the right to a safe working environment. The above limitations of the current

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[1267] MM Botha 'Evaluating the social and ethics committee: Is labour the missing link? (2016) 79 *Journal for Contemporary Roman-Dutch Law* 580, 583; IM Esser & P Delport 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 2' (2017) *De Jure* 221, 231.

[1268] MM Botha (2016) 79 *Journal for Contemporary Roman-Dutch Law* 589.

[1269] IM Esser & P Delport (2017) *De Jure* 231.

regulatory framework, including the failure of collective bargaining necessitate the need to explore other regulatory approaches. Collective bargaining as a regulatory institution has been largely premised on the abilities of business and labour to regulate their own affairs with limited state intrusion.[1270] In the absence of this ability however, a degree of consensus is growing about the ability of self-regulation mechanisms to regulate labour standards.[1271] By using codes of conduct that are adopted through consultation with multiple stakeholders in the workplace and benchmarked against core labour standards, both mining companies and worker representatives may be able to regulate their operations more effectively. This can complement existing labour legislation and common law. The use of self-regulation mechanisms to fill this gap forms the focus of the next chapter looking at self-regulation as a regulatory mechanism that can complement the current legal framework.

[1270] *Macsteel (Pty) Ltd v National Union of Metalworkers of SA & Others* 1990 11 *ILJ* 995, 1006; B Jordaan 'Collective bargaining under the new Labour Relations Act: The resurrection of freedom of contract' (1997) *Law, Democracy & Development* 2.

[1271] H Arthurs 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as Regime of Labour Market Regulation' (2002) 476; A Kolk & R van Tulder 'The effectiveness of self-regulation: Corporate codes of conduct and child labour' (2002) *European Management Journal* 260; R Jenkins, R Pearson & G Seyfang (eds) *Corporate responsibility and labour rights: Codes of conduct in the global econom*y (2002) 6.

Chapter 6: An analysis of selected codes of conduct from South African mining companies

1 Introduction

Chapter four and five assessed the international and domestic frameworks for the protection of the right of workers to freedom of association, the right to collective bargaining and the right to an environment that is not harmful to health. These chapters concluded that despite attempts at further state regulation, non-standard workers continue to face challenges in accessing these rights, particularly in the mining sector. This chapter looks at the content of selected codes of conduct incorporating labour standards by mining houses in the coal, platinum and gold sectors. Through an analysis of commitments that give effect to the right of workers to freedom of association; to effective collective bargaining and to an environment that is not harmful to health, this chapter seeks to demonstrate the potential of these instruments in complementing existing labour framework in regulating labour standards.

The major platinum mining companies in South Africa are Anglo American Platinum, Impala Platinum Holdings, Royal Bafokeng Platinum Limited; Sibanye-Stillwater through its acquisition of Lonmin.[1272] Despite Lonmin being acquired by Sibanye-Stillwater, the Lonmin code of conduct will be assessed individually.[1273] This is due to the content covered in its code of conduct and its role in the Marikana massacre. The major coal producers in South Africa are Sasol Mining, Anglo American Thermal Coal, Exxaro, Xstrata Coal, and Glencore.[1274] Similar to Sibanye-Stillwater and Lonmin, Glencore and Xstrata codes will be assessed individually and combined where necessary. Lastly, the largest gold producers include AngloGold Ashanti, Gold Fields,

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[1272] Minerals Council South Africa, Available at <www.mineralscouncil.org.za> (accessed 03-07-2018). Lonmin was acquired by Sibanye-Stillwater. However, for the purposes of this thesis, its code of conduct is analyzed individually due to its unique code of conduct and the Marikana massacre.

[1273] Sibanye-Stillwater ‘Lonmin Acquisition’ Available at <https://www.sibanyestillwater.com/news-investors/news/transactions/lonmin/> (accessed 22-02-2020).

[1274] Minerals Council South Africa, Available at <www.mineralscouncil.org.za> (accessed 03-07-2018).

Sibanye Gold, Harmony Gold, Pan African Resources.[1275] The selected codes are a mixture of both international and local companies – which further seeks to establish patterns between the codes of conduct of such companies.

The chapter begins with an analysis of the content of the selected codes of conduct. It analyses the content of the rights with reference to three rights, namely freedom of association, collective bargaining and provisions relating to health and safety at mines. Secondly, it assesses the extent to which these companies' codes of conduct make reference to both international and domestic regulatory instruments, particularly reference to the UN Global Compact, ILO conventions and any other international instruments regulating labour standards. The main aim of the analysis is to demonstrate the level to which the selected codes of conduct incorporate international standards towards improving the rights of non-standard employees. Lastly, this chapter analyses the limitations of the codes relating to the protection of the selected rights.

2 Selected codes of conduct

The table below shows the content of the selected codes, focusing on provisions that deal with freedom of association, the right to collective bargaining and the right of workers to an environment that is not harmful to health. The selected companies aim to give an overview of these instruments across the three sectors, without being exhaustive. The examination of codes of conduct also looks at mechanisms entrenched within codes that can potentially give workers, particularly non-standard workers, a voice or increase their participation in the decision-making processes at the company or corporation level.

[1275] Minerals Council South Africa, Available at <www.mineralscouncil.org.za> (accessed 03-07-2018).

Table 1: An overview of content of codes relating to freedom of association, collective bargaining and health and safety at mines

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
Gold	AngloGold Ashanti[1276]	No information	The provisions of the code apply to all directors, employees (both full and part-time) of AngloGold Ashanti, all subsidiaries, managed joint ventures, service organisations, representatives and, as much as practicable, our business and social partners.	We are committed to upholding the Fundamental Rights Conventions of the International Labour Organisation. Accordingly, we seek to ensure implementation of fair employment practices by prohibiting forced, compulsory and child labour.	Recognise and respect workers' right to establish and to join organisations of their own choosing … and to engage in collective bargaining	We encourage people at all levels in the organisation, including our suppliers, contractors, visitors and the community, to report potential risks and incidents. We listen to all contributions and make decisions based on facts.	UDHR ILO Conventions; Global compact	Managers and supervisors ensure compliance Anonymous reporting procedures in place
Gold	Harmony[1277]	iThemba Governanc e & Statutory solutions	The Code applies to all directors, officers and employees (including contract employees) of the Harmony	No express mention under the code Harmony abides by the human rights conventions of	Harmony abides by the human rights conventions of the ILO as contained within the	At Harmony, we recognise the fact that the future of mining depends on responsible social and	UN Global Compact Bill of Rights (Constitution of RSA); MHSA MPRDA;	Protected Disclosures Act, 26 of 2000 no employee may be victimised

[1276] AngloGold Ashanti Code of Ethics, Available at <http://www.aga-reports.com/13/download/AGA-code-of-ethics.pdf.> (accessed 21-02-2020).

[1277] Harmony Code of Conduct, Available at <https://www.harmony.co.za/component/jdownloads/send/155-ethics/241-code-of-conduct> (accessed 21-02-2020).

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
			group, its board of directors (collectively referred to as "employees" in this Code) and its associates.	the ILO as contained within the South African Constitution.[1278]	South African Constitution.	environmental conduct. As such, we have an ethical obligation, and employees have a duty…		
Gold	Sibanye-Stillwater[1279]	No information	The code of Ethics is binding on every employee (full-time and part-time), director and officer of Sibanye-Stillwater and on every employee (full-time and part-time), director and officer of any entity globally, without exception which is owned and controlled by	We respect workers' rights, including freedom of association[1280]	We respect workers' rights, including…the right to peaceful protest and assembly and engagement in collective bargaining. Formal employee engagement structures are in place at all our operations – from shaft and operational	Nothing is more important than the safety, health and well-being of our workforce. We believe that everyone has the right to a safe working environment and that every employee should go home safely, every single day[1281]	No information	Protected whistle-blower on reporting violations

[1278] Contained under the human rights policy; Harmony Code of Conduct Available at <https://www.harmony.co.za/assets/sd/reports/2010/labour.htm> (accessed 21-02-2020).

[1279] Sibanye-Stillwater Code of Ethics, Available at <https://thevault.exchange/?get_group_doc=245/1559312418-sibanye-stillwater-code-ethics-30nov2018.pdf> (accessed 21-02-2020).

[1280] Policy contained in different policy documents <https://www.sibanyestillwater.com/sustainability/people/> (accessed 21-02-2020).

[1281] Sibanye-Stillwater, 'Health and Safety', Available at <https://www.sibanyestillwater.com/sustainability/safety-health/> (accessed 21-02-2020).

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
			Sibanye-Stillwater		levels to those at the management level.			
Gold	Gold Fields[1282]	No information	No information	No express mention of FOA We respect human rights and are committed to respecting all the rights, dignity and freedoms of all. Gold Fields supports the United Nations Universal Declaration of Human Rights.	No express mention of the right to organise We respect human rights and are committed to respecting all the rights, dignity and freedoms of all. Gold Fields supports the United Nations Universal Declaration of Human Rights.	No express mention of health and safety Our activities impact the environment directly and indirectly. In all our activities we strive to identify, understand and manage the potential and real impact our activities may have	UDHR	No information Anonymous reporting procedures
Gold	Pan African Resources	No information	No information	No information	No information	No information	UN Global Compact	No information
Platinum	Anglo American Platinum Limited[1283]	No information	This Code aims to be a single point of reference	We are committed to the ILO's core	We are committed to the ILO's core	We believe that all injuries are	No information	No information

[1282] Goldfields Code of Conduct, Available at <https://www.goldfields.com/pdf/suppliers/south-africa/code-of-conduct.pdf> (accessed 21-02-2020).

[1283] Anglo-American Code of Conduct, Available at <https://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/approach-and-

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
			for everyone associated with the Anglo-American Group – as well as the departure point for a fuller understanding of our ethical policies and procedures.	labour rights, covering the right to freedom of association and collective bargaining,	labour rights, covering the right to freedom of association and collective bargaining,	preventable – our aim is that 'zero harm' comes to those who work within and around our operations All employees and contractors should be able to return home fit, well at the end of each shift, and remain so during the course of their working lives.		
Platinum	Impala Platinum Holdings[1284]	No information	The Code of Ethics is binding on every employee, officer and director of Implats and on all officers, directors, contractors and suppliers of any	Employees have the right to freedom of association	No express mention Right contained in the human rights policy Recognising and upholding the rights of	Implats is committed to adhering to the best contemporary practice to ensure a safe work environment	No information	No information

policies/sustainability/our-code-of-conduct-english.pdf> (accessed 21-02-2020).

[1284] Implats Code of Ethics, Available at <http://www.implats.co.za/pdf/sustainable-key-development-documents/implats-code-of-ethics-19-november-2015.pdf> (accessed 21-02-2020).

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
			entity which is owned or controlled by Implats as well individuals or entities we do business with.		employees to freedom of association and collective bargaining.[1285]	for all employees as more fully described in the Policy statements on Health and Safety.		
Platinum	Sibanye Still-water	No information	The code of Ethics is binding on every employee (full-time and part-time), director and officer of Sibanye-Stillwater and on every employee (full-time and part-time), director and officer of any entity globally, without exception which is owned and controlled by Sibanye-Stillwater	We respect workers' rights, including freedom of association[1286]	We respect workers' rights, including…the right to peaceful protest and assembly and engagement in collective bargaining. Formal employee engagement structures are in place at all our operations – from shaft and operational levels to those at the	Nothing is more important than the safety, health and well-being of our workforce. We believe that everyone has the right to a safe working environment and that every employee should go home safely, every single day[1287]	No information	Protected whistle-blower on reporting violations

[1285] Implats Human Rights Policy, Available at <http://www.implats.co.za/downloads/2009/annual_report/SD/f/human_rights_policy.pdf> (accessed 21-02-2020).

[1286] Policy contained in different policy documents <https://www.sibanyestillwater.com/sustainability/people/> (accessed 21-02-2020).

[1287] Sibanye-Stillwater, 'Health and Safety', Available at <https://www.sibanyestillwater.com/sustainability/safety-health/> (accessed 21-02-2020).

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
					management level.			
Platinum	Lonmin[1288]*	No information	Application to contractors	uphold the freedom of association and the effective recognition of the right to collective bargaining	uphold the freedom of association and the effective recognition of the right to collective bargaining	Promoting the safety, health and wellbeing of employees and their families, contractors and the communities in which we operate underpins our vision and strategy and is aimed at improving their quality of life.	No information	No information
Platinum	Royal Bafokeng Platinum Group Ltd[1289]	No information	Royal Bafokeng Platinum Limited, employees, directors, contractors, subsidiaries, associates	No express mention of FOA Group committed to fair labour practices…comply with applicable laws	No express mention of CB Group committed to fair labour practices…comply with	Zero harm to all workers Recognition of HIV/AIDS; TB; silicosis	No information	No information

[1288] Lonmin Code of Ethics, Available at <http://sd-report.lonmin.com/2012/people-planet-profit/people> Lonmin was acquired by Sibanye-Stillwater on the 10th of June 2019.

[1289] Royal Bafokeng Platinum Group Ltd, Available at <https://www.bafokengplatinum.co.za/pdf/our-business/policies-charters/code-of-ethics.pdf> (accessed 21-02-2020).

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
				and industry standards	applicable laws and industry standards.			
Coal	BHP Billiton Energy Coal SA[1290]	No information	When we refer to 'you' this includes employees, directors and Board members. We also expect contractors, consultants and others who may be temporarily assigned to perform work or services for our Company to follow Our Code in connection with their work for us.	We expect our suppliers to apply our human rights related to zero tolerance requirements in relation to … freedom of association,	No express mention	We are committed to providing healthy and safe working conditions All workplaces should be free from the use of alcohol and illegal drugs, and the misuse of other substances.	UDHR UN Guiding Principles on business and human rights	No information
Coal	Anglo American Thermal Coal[1291]	No information	This Code aims to be a single point of reference for everyone	We are committed to the ILO's core labour rights,	We are committed to the ILO's core labour rights,	We believe that all injuries are preventable –	No information	No information

[1290] BHP Billiton Energy Code of Conduct, Available at <https://www.bhp.com/-/media/documents/ourapproach/codeofconduct/code-of-conduct---english.pdf> (accessed 21-02-2020).

[1291]Anglo-American Code of Conduct, Available at <https://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/approach-and-policies/sustainability/our-code-of-conduct-english.pdf> Anglo American uses the same code of conduct across mineral sectors <https://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/approach-and-policies/sustainability/our-code-of-conduct-english.pdf> (accessed 21-02-2020).

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
			associated with the Anglo-American Group – as well as the departure point for a fuller understanding of our ethical policies and procedures.	covering the right to freedom of association and collective bargaining,	covering the right to freedom of association and collective bargaining,	our aim is that 'zero harm' comes to those who work within and around our operations All employees and contractors should be able to return home fit, well at the end of each shift, and remain so during the course of their working lives.		
Coal	GlencoreXstrata [1292]	No information	It applies to all permanent and temporary employees, directors and officers as well as contractors (where they are under a relevant contractual obligation).	We uphold the rights of all our workers to freedom of association	We uphold the rights of all our workers' to…collective representation.	Glencore Xstrata believes in the possibility of a zero-harm operation. We believe that all occupational diseases and injuries can be prevented and that therefore	No information	Procedures for reporting violations

[1292] GlencoreXstrata Code of Conduct, Available at <http://www.tenderlink.com/tenderers/2744.482/resources/Code%20of%20conduct.pdf> (accessed 21-02-2020).

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
						we must all take responsibility for avoiding occupational diseases and injuries.		
Coal	Exxaro Resources[1293]	No information	Suppliers are obliged to live up to this code.	Implementing sound and internationally recognised labour standards such as… the freedom of association…	implementing sound and internationally recognised labour standards such as…effective recognition of the right to collective bargaining	Exxaro is committed to enforcing compliance with the requirements of the relevant safety, occupational health and hygiene regulations. Suppliers are obliged to ensure adequate compliance with safety, health and hygiene legislation and implement best practices to protect the safety, health and hygiene of	Domestic legislation UN Global compact ILO conventions OECD Guidelines	No information

[1293] Exxaro Resources Supplier Code of Conduct Available at <https://www.exxaro.com/assets/files/81782_Exx_SUPPLIER_SD_CODE_FA.pdf> (accessed 21-02-2020).

SECTOR	COMPANY	DRAFTING	APPLICATION	FREEDOM OF ASSOCIATION	RIGHT TO ORGANISE	HEALTH AND SAFETY	EXTERNAL INSTRUMENTS	ENFORCEMENT & REPORTING
						their workforce and stakeholders.		
Coal	Sasol Mining[1294] -	No information	No information	We respect and value human rights and avoid being part of any human rights abuses…, …commitment to respecting human rights means that we:…freedom of association and the right to collective bargaining We apply labour and employment practices that are in line with local legal requirements, and the core conventions of the International Labour Organization.	rights and avoid being part of any human rights abuses…, …commitment to respecting human rights means that we:…freedom of association and the right to collective bargaining	We provide safe and healthy working conditions at our workplaces for all our employees and service providers	No information	No information

[1294] Sasol Code of Conduct Available at <https://www.sasol.com/sites/sasol/files/15874%20SASOL_Code%20of%20Conduct%20(MS_20).pdf> (accessed 21-02-2020).

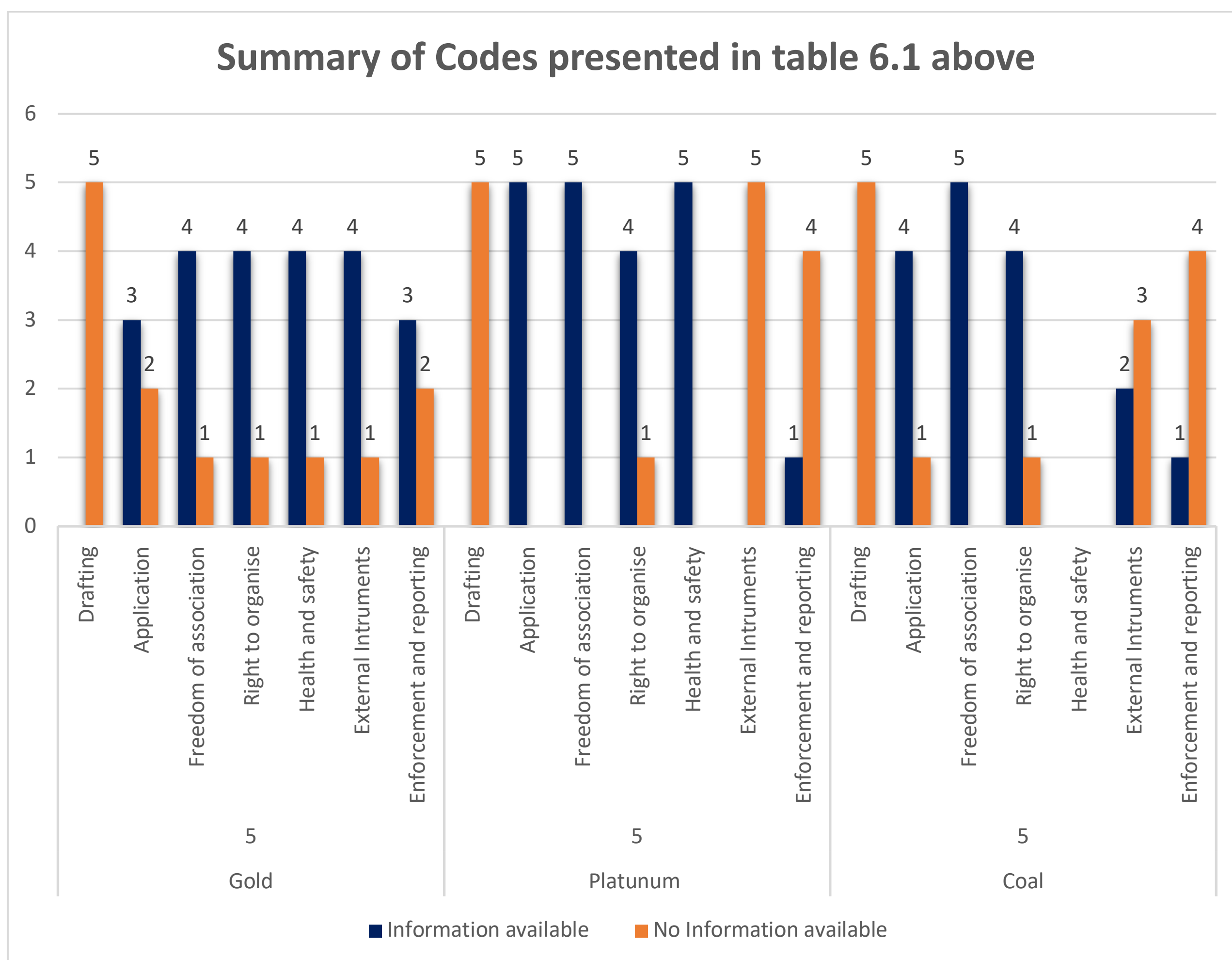

Figure 1 Summary of codes of conduct in table 6.1 above

3 Rights enumerated under the selected codes of conduct

Before discussing the content of codes of conduct in relation to rights under discussion in this thesis, this part seeks to give an overview of what these codes provide. A synopsis of codes of conduct, as shown above, demonstrates a diverse approach on issues relating to their scope, the drafters, application and the rights covered. In addition, the depth of the issues covered differs, with some codes providing in-depth coverage of the rights and commitments and others barely mentioning the rights.

The codes also differ on their aims, with some expressly mentioning commitment of the company towards the advancement of labour standards and others barely mentioning any rights. First, some codes of conduct make commitments to various international conventions and to other soft law instruments as key instruments in their

operations.[1295] Secondly, some codes make direct reference to certain rights, including freedom of association, right to collective bargaining, right to a safe working environment.[1296] Thirdly, other codes of conduct do not expressly mention commitments to specific rights, but they make commitments to fair labour practices, which may be interpreted to include several labour standards.

It is against this background that the limitations of the ILO conventions and domestic legislation can be bridged through the use of codes of conduct. As Alston argues, about half of the world's workers are not protected by the major ILO conventions. [1297] These challenges are global and therefore not unique to South Africa. This calls for an in-depth consideration of some the content of some of the rights as contained within codes of conduct. The primary enquiry in all cases is whether the scope of the right provided for in the relevant codes is wide enough to protect workers who are not direct employees of the mining company concerned.

3.1 Scope and application of rights

A key consideration is whether the commitments expressed in a code of conduct apply to a defined group or category of workers. This is a significant aspect, bearing in mind the sentiments expressed by Alston that half of the world's workers are not protected by the major ILO conventions.[1298] Again, the analysed codes of conduct vary on this aspect.

By looking at the table above, one can easily view three clear categories in relation to the application. The first category relates to codes that adopt a wider application of the

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[1295] See for example, AngloGold Ashanti Fundamental Labour Rights Policy (2015) read together with the AngloGold Ashanti Human Rights Policy (2013) available at <www.AngloGoldAshanti.com> (accessed 21-02-2020); Harmony and Pan African Resources code of conduct makes commitments to the UN Global Compact; Gold Field to the Universal Declaration of Human Rights; Exxaro Code of conduct makes commitments to the UN Global Compact, ILO Conventions, OECD Guidelines and to specific domestic legal instruments.

[1296] Lonmin 'Sustainable Development Report' Available at <http://sd-report.lonmin.com/2012/people-planet-profit/people/employees-and-contractors> (accessed 21-02-2020).

[1297] P Alston (2004) 15 *European Journal of International Law* 514. Despite the importance of this right and of the ILO Convention 182, about half of the world's workers are not protected by the two conventions.

[1298] P Alston (2004) 15 *European Journal of International Law* 514.

expressed commitments to include not only the permanent employees but various non-standard workers who are brought to mines through different work arrangements. The AngloGold Ashanti code applies to all directors, employees (both full and part-time), all subsidiaries, joint ventures and to all business and social partners.[1299] Similar wider application is found under the Harmony code of conduct which includes contract employees; Sibanye-Stillwater applies to every employee (full-time and part-time); Impala Platinum applies to all employees, including contractors; Lonmin applies to employees, including contractors; the Royal Bafokeng Platinum applies to employees, subsidiaries and associates and the GlencoreXstrata code applies to permanent and temporary employees and to contractors.

The second category expressly mentions the application to suppliers and no other specific groups. For example, the Exxaro code of conduct only provides that the code applies to supplies without any mention of other categories. Lastly, some codes do not expressly provide the subjects of their parties. The Gold Fields, the BHP Billiton Energy and the Sasol codes of conduct do not mention the scope of their application.

The above differences are critical for several reasons. Whereas codes of conduct in the 1970s had limited application only to employees, the current codes of conduct apply largely to workers in supply chains, part-time workers and workers brought to mines through subcontracting.[1300] Coincidentally, the extension of the application to non-standard workers remains a contribution which codes of conduct can offer in the regulation of labour standards. Sobczak has pointed out that through this extension of the application of codes of conduct, companies and corporations are re-establishing a linkage between the economic power of the main companies and their CSR to the activities of other companies within the networks. In the mining context, this would include the activities of all contractors and their respective workers. As pointed above, some codes of conduct make reference to both full and part-time employees.

The drafting and the enforcement of codes of conduct are key aspects central to the effectiveness of codes in advancing the rights of workers discussed below. Most codes

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[1299] AngloGold Ashanti *Code of business principles and ethics* Available at <http://www.aga-reports.com/13/download/AGA-code-of-ethics.pdf> (accessed 23-01-2020).

[1300] See chapter two, part 5.3; A Sobczak (2013) 44 *Journal of Business Ethics* 226.

of conduct do not provide information on the parties that drafted the code, with the Harmony code being the exception. The Harmony code of conduct is unique in that it outlines the drafters of the code, followed by information on the various stages in the approval of the code.[1301] The iThemba Governance and Statutory Solutions prepared the first code in 2013.[1302] It was then reviewed by the Social & Ethics Committee and approved by the board.[1303] The Legal Governance and Ethics Department and the Exco and SEC prepared subsequent revisions of the code and updates.[1304] The company secretary is tasked with keeping the code of conduct in a current form.

Across many codes of conduct, there is an allocation of duties and responsibilities on who the codes apply to, who enforces the code among others. Closely related to the drafting are the mechanisms for enforcing any rights or of reporting any violations of the rights and commitments.

In most cases, codes of conduct are silent on how employees can enforce rights and commitments outlined therein. Few codes address the enforcement and the parties responsible for enforcing the code. In such few instances, management is tasked with the responsibility of ensuring compliance. For example, the AngloGold Ashanti[1305] directs managers and supervisors to ensure compliance with the code. Other codes place emphasis on anonymous reporting in cases of violations. Thus, the Glencore-Xstrata, the Gold Fields, Sibanye-Stillwater, Harmony and AngloGold Ashanti codes of conduct provide for anonymous reporting when violations occur. In particular, the Harmony code makes reference to the Protected Disclosures Act, emphasising that employees may not be victimised or harassed for reporting violations with the code. There is, therefore, a lack of separation between management and the enforcement of the code. The following section assesses the content of the selected rights under codes of conduct.

[1301] Harmony Code of conduct 1.

[1302] Harmony code of conduct 1.

[1303] Harmony code of conduct 1.

[1304] Harmony Code of conduct 1.

[1305] AngloGold Ashanti Code of conduct.

3.2 Freedom of association

When it comes to conferring certain participation rights (freedom of association and collective bargaining), codes of conduct vary. Some codes of conduct expressly confer these rights and explain their application while others state the rights through reference to the right to fair labour standards. Lastly, some codes of conduct make no reference to these rights at all. Most codes of conduct make reference to the right of employees to freedom of association. As noted above, there is often no differentiation between categories of employees on the application of codes of conduct. The AngloGold Ashanti code expresses commitment to upholding fundamental rights of the ILO, including recognising and respecting the right of workers in joining organisations of their choosing.[1306] The Sibanye-Stillwater code of conduct respects the right of workers to freedom of association.[1307] Similarly, the codes of conduct of Anglo American,[1308] Impala Platinum Holdings,[1309] Lonmin,[1310] BHP Billiton,[1311] Xstrata/Glencore,[1312] and Sasol[1313] all expressly recognise the right of employees to freedom of association. The

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[1306] AngloGold Ashanti *Code of business principles and ethics* Available at <http://www.aga-reports.com/13/download/AGA-code-of-ethics.pdf> (accessed 23-01-2020).

[1307] Sibanye-Stillwater 'Code of ethics: labour relations' Available at <https://www.sibanyestillwater.com/sustainability/people/> (accessed 22-01-2020).

[1308] Anglo American 'Code of Conduct' Available at <https://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/approach-and-policies/sustainability/our-code-of-conduct-english.pdf> (accessed 22-01-2020).

[1309] Impala Platinum Holdings Code of Ethics (2015) Available at <http://www.implats.co.za/pdf/sustainable-key-development-documents/implats-code-of-ethics-19-november-2015.pdf> (accessed 02-05-2018), 11.

[1310] Lonmin 'Human rights and labour relations' Available at <http://sd-report.lonmin.com/2012/people-planet-profit/people/human-rights-and-labour-relations> (accessed 22-01-2020).

[1311] BHP Billiton 'Code of conduct: The guide to bringing our charter values to life' Available at <https://www.bhp.com/-/media/documents/ourapproach/codeofconduct/code-of-conduct---english.pdf> (accessed 22-01-2020) 18.

[1312] Glencore Xstrata 'Code of conduct' Available at <http://www.tenderlink.com/tenderers/2744.482/resources/Code%20of%20conduct.pdf> (accessed 22-01-2020) 16.

[1313] Sasol 'Code of conduct' Available at <http://www.sasol.com/sites/sasol/files/15874%20SASOL_Code%20of%20Conduct%20%28MS_20%29.pdf> (accessed 22-01-2020) 24.

Exxaro Resources code of conduct, while making commitments to respecting freedom of association, makes this commitment specifically to suppliers.[1314]

Other codes of conduct do not specifically mention the right of employees to freedom of association but refer to either international conventions or to the right to of workers to fair labour practices. The Harmony Code of conduct makes no express mention of the right to freedom of association but provides that it abides by the 'human rights conventions of the ILO as contained within the South African Constitution'.[1315] Similarly, the Gold Fields code of conduct expresses respect and commitment to rights, dignity and freedoms of all, in addition to supporting the UDHR.[1316] The Royal Bafokeng code of conduct expresses commitment to fair labour practices.[1317]

The inclusion of the right to freedom of association in codes of conduct can offer wider coverage to workers who are not protected adequately by the provisions of LRA and other applicable legislation. However, simply restating the right without giving more content does not provide meaningful protection to these workers or to employees. In addition to the right of employees to freedom of association, another key participation right contained in codes of conduct is the right to collective bargaining.

3.3 Collective bargaining

Similar to the right of employees to collective bargaining as explained above, commitments by mining companies to the right of employees to collective bargaining are expressed in diverse terms. There is, therefore, no uniform inclusion of employees right' to collective bargaining. Some codes of conduct make direct reference to the right, while others refer to fair labour standards or to ILO and UN instruments on labour

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[1314] Exxaro 'Supplier code of conduct' Available at < https://www.exxaro.com/assets/files/81782_Exx_SUPPLIER_SD_CODE_FA.pdf> (accessed 22-01-2020) 4.

[1315] Harmony 'Labour practices and human rights' Available at <https://www.harmony.co.za/assets/sd/reports/2010/labour.htm> (accessed 22-01-2020).

[1316] Gold Fields Code of Conduct Available at < https://www.goldfields.com/code-of-conduct/pdf/code-of-conduct/code-of-conduct-english.pdf> (accessed 22-01-2020).

[1317] Royal Bafokeng Platinum Ltd 'Code of conduct' Available at <https://www.bafokengplatinum.co.za/pdf/our-business/policies-charters/code-of-ethics.pdf> (accessed 22-01-2020).

standards. The Sasol code of conduct stipulates that the company respects and values human rights, in addition to preventing human rights violations.[1318] It commits to respecting the right of employees to collective bargaining.[1319] The Exxaro code commits to implementing 'sound and internationally recognised labour standards', including the right to collective bargaining.[1320] Similarly, the Anglo American,[1321] the Lonmin,[1322] and AngloGold Ashanti[1323] make express commitments to the right of employees to collective bargaining.[1324] This right is expressed with reference to fundamental ILO conventions and to the South African Constitution.[1325]

Other codes of conduct do not address rights directly but incorporate such rights through reference to other company human rights policy documents. The Harmony code of conduct does not deal with labour rights. Such rights are contained in the human rights policy document that expresses the company's commitment to human rights and to the ILO core Conventions.[1326] The Impala commitments to collective bargaining are expressed within the human rights policy document.[1327] On the other hand, the Xstrata code of conduct, without specifically mentioning the right to collective bargaining commits to the adoption of collective representation.[1328] Collective representation covers social interactions between individuals, including collective

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[1318] Sasol 'Code of conduct' 24.

[1319] Sasol 'Code of conduct' 24.

[1320] Exxaro 'Supplier code of conduct' 4.

[1321] Anglo American 'Code of Conduct' 11.

[1322] Lonmin 'Human rights and labour relations'

[1323] AngloGold Ashanti *Code of business principles and ethics* Available at <http://www.aga-reports.com/13/download/AGA-code-of-ethics.pdf> (accessed 23-01-2020).

[1324] See AngloGold Ashanti *Code of business principles and ethics* Available at <http://www.aga-reports.com/13/download/AGA-code-of-ethics.pdf> (accessed 23-01-2020).

[1325] See Harmony code of conduct.

[1326] Harmony 'Labour practices and human rights' Available at <https://www.harmony.co.za/assets/sd/reports/2010/labour.htm> (accessed 22-01-2020).

[1327] Impala 'Human rights policy'.

[1328] Glencore Xstrata 'Code of conduct' 16.

bargaining.[1329] Thus by extension, the code commits to principles of collective bargaining. Lastly, there are codes of conduct that make no mention of the right to collective bargaining. BHP Billiton makes no mention of labour rights.

Of the codes of conduct analysed with reference to collective bargaining, the Lonmin code of conduct outlines the rights in elaborate detail and such, warrants a more detailed discussion. Apart from the express provision and reference to collective bargaining, the code makes reference to other human rights instruments and is premised on the significance of internalising internationally recognised standards and human rights.[1330] It uses various international instruments to inform its human rights and labour relations policy. It makes commitments to the Voluntary Principles on Security and Human Rights, UDHR, the ILO Conventions, the South African Constitution and reference to domestic legislation.[1331] It makes particular reference to the UNGC Principles and commits to supporting internationally proclaimed human rights and upholding freedom of association and the effective recognition of the right to collective bargaining.[1332] Similarly, the company's human rights policy which was developed in 2009 reiterates commitments to the right of workers to freedom of expression and to fair labour practices.[1333]

The Lonmin code of conduct goes a step further in outlining how workers can realise the stipulated rights. Trade unions represent workers in negotiating terms and conditions of employment and union members are involved in formal forum meetings, held monthly to discuss various aspects including transformation, skills development and housing.[1334] In addition, trade unions are permitted access to the workplace for

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[1329] V Descombes 'The philosophy of collective representations' (2000) 13 *History of Human Sciences* 37.

[1330] Lonmin Available at <http://sd-report.lonmin.com/2012/people-planet-profit/people/human-rights-and-labour-relations> (accessed 27-11-2019).

[1331] Lonmin Available at <http://sd-report.lonmin.com/2012/people-planet-profit/people/human-rights-and-labour-relations> (accessed 27-11-2019).

[1332] Lonmin Available at <http://sd-report.lonmin.com/2012/people-planet-profit/people/human-rights-and-labour-relations> (accessed 27-11-2019).

[1333] Lonmin Available at <http://sd-report.lonmin.com/2012/people-planet-profit/people/human-rights-and-labour-relations> (accessed 27-11-2019).

[1334] Lonmin Available at <http://sd-report.lonmin.com/2012/people-planet-profit/people/human-rights-

the purposes of recruiting and organising members. Lonmin further undertakes to negotiate with representative trade unions in a responsible manner. Lastly, it gives percentages of various trade union representations.

It is not clear how much of these commitments were already in place before the Marikana tragedy occurred, as the code was amended in 2012. An understanding of the commitments by Lonmin in place before the tragedy might have assisted in shedding light on the gaps between the mining company's commitments and practice.

One can conclude that there is no uniformity on the commitments made by mining companies to the right of workers to freedom of association and collective bargaining. Ranging from total silence to a detailed inclusion of these rights, codes of conduct vary across all the sectors. In addition to rights discussed above, codes of conduct deal at length with health and safety aspects at mines and make commitments to upholding such standards. The following section analyses the content of these commitments with reference to health and safety.

3.4 Health and Safety

Codes of conduct across the three sectors commit to the protection of employees, suppliers and contractors working at the mines. The MHSA places the duty of ensuring the health and safety at the mine on the employer or the owner.[1335] On the other hand, it places a duty of 'reasonable care' on employees to protect their health and safety and of others.[1336] This means that while the employer or owner has the primary responsibility to ensure health and safety at mines, employees must play their part towards realising these rights. Of the three rights analysed, references to health and safety are by far the most diverse in content, with no uniformity. There are no standardised components of what constitutes 'the right to an environment that is not harmful to health'. Moreover, whereas under freedom of association and collective bargaining the commitments are expressed with reference to key ILO conventions and

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and-labour-relations> (accessed 27-11-2019).

[1335] See generally MHSA, s 2.

[1336] MHSA, s 22 (a).

other labour instruments, this level of clarity is absent in relation to health and safety provisions.

To show the diverse commitments and provisions, a consideration of some of the codes of conduct is warranted. The AngloGold Ashanti code encourages people at all levels in the organisation, including suppliers, contractors to report potential risks and accidents found at operations.[1337] Similarly, the Harmony code of conduct expresses commitment towards taking precautions in providing a healthy and safe working environment for all employees.[1338] It further calls upon all employees to comply with the health and safety legislation.[1339] There is however no linkage between these commitments to any legal instruments underlying these rights and commitments.

A major theme in occupational health at mines has been the commitments to the 'zero harm' at mines for employees, service providers and suppliers.[1340] The Anglo American Platinum,[1341] the Glencore Xstrata[1342] and the Royal Bafokeng[1343] make commitments to the industry 'zero harm' standard.[1344] Similarly, the Sasol code of conduct commits to the provision of safe and healthy working conditions at workplaces. The zero harm principle is often expressed by committing to having all employees and all contractors

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[1337] AngloGold Ashanti Code of Ethics 11.

[1338] Harmony Code of conduct 6.

[1339] Harmony Code of conduct 6.

[1340] See the DMR 'Mining tripartite stakeholders recommit to zero harm' Available at <https://www.dmr.gov.za/news-room/post/1742/mining-tripartite-stakeholders-recommit-to-zero-harm> (accessed 22-02-2020); Sasol Code of Conduct (2015) 11; BHP Billiton Code of Business Conduct (2016) 10; Lonmin Code of Conduct (2017) 9; AngloAmerican Code of Conduct (2016) 7.

[1341] Anglo American 'Code of Conduct' Available at <https://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/approach-and-policies/sustainability/our-code-of-conduct-english.pdf> (accessed 22-01-2020).

[1342] Glencore Xstrata 'Code of conduct' Available at <http://www.tenderlink.com/tenderers/2744.482/resources/Code%20of%20conduct.pdf> (accessed 22-01-2020).

[1343] Royal Bafokeng Platinum Ltd 'Code of conduct' Available at <https://www.bafokengplatinum.co.za/pdf/our-business/policies-charters/code-of-ethics.pdf> (accessed 22-01-2020).

[1344] See Anglo American Code of conduct.

returning home, safely after the course of the working day.[1345] The inclusion of the principle in codes of conduct demonstrates the linkage between the vision of the Mine Health and Safety Council (MHSC) and the approach of mine companies to health and safety issues.[1346] The principle of zero harm to the environment must also be understood with the constitutional right of everyone to an environment that is not harmful to health or wellbeing.[1347] The Sibanye-Stillwater code of conduct relating to health and safety begins with reference to the importance of health, safety and well-being of all employees.[1348] Lastly, according to the code of conduct, every employee must go home, safely every day.[1349]

Another dimension that features widely in codes of conduct is the linkage between the mining right holder (to the obligations of suppliers, contractors), and other stakeholders (on health and safety). The Exxaro code of conduct, for example, directs suppliers and contractors towards ensuring adequate compliance with safety, health and hygiene legislation.[1350] Likewise, the Glencore Xstrata Code of conduct aims among other things to operate safe workplaces and applies to employees, temporary employees, contractors, consultants, agents, advisors among others.[1351] In a similar fashion, the AngloAmerican Code of Conduct is committed to ensuring that "…employees and contractors must be able to return home, fit, at the end of every shift and during the course of their working lives" – a rephrasing of the zero harm commitment.[1352] This commitment, which is the motto of the MHSC is finding its way into codes of conduct,

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[1345] See Anglo American Code of conduct.

[1346] MHSA, s 41 establishes the MHSC which is a tripartite body, tasked with advising the Minister on health and safety at mines.

[1347] Constitution of the Republic of South Africa, 1996 s 24(a).

[1348] Sibanye-Stillwater Available at <https://www.sibanyestillwater.com/sustainability/safety-health/> (accessed 21-01-2020).

[1349] Sibanye-Stillwater Available at <https://www.sibanyestillwater.com/sustainability/safety-health/> (accessed 21-01-2020).

[1350] Exxaro code of conduct.

[1351] Xstrata Code of Conduct 2.

[1352] AngloAmerican Code of Conduct 8.

showing to some extent the success of MHSC in promoting a culture of health and safety at mines.

The prohibition of working or operating machinery under the influence of alcohol and drugs remains a key feature in most codes of conduct.[1353] The AngloAmerican Code,[1354] BHP Billiton,[1355] Sasol,[1356] all prohibit operating any machinery or coming to work under the influence of drugs or alcohol as it creates risks to other workers. The significance of this inclusion must be understood from the high alcohol and drug abuse prevalent in South Africa and at mines in general.[1357] A study on substance abuse by the MHSC across seven mines showed that about 50% of workers used alcohol and in the gold sector, about 32% of workers demonstrated a risky drinking behaviour.[1358] The ILO management of alcohol and drug-related issues at the workplace emphasises the need for cooperation between social partners in combating drug and alcohol abuse at the workplace.[1359] In addition to alcohol and substance abuse, codes of conduct have provisions dealing with HIV/AIDS, TB among other common mining-related illnesses.

More prevalent at mines is the issue of HIV/AIDS and TB. Having identified HIV/AIDS, TB and other diseases affecting health and safety at mines, mining companies are increasingly adopting policies aimed at mitigating the impact of these diseases through the provision of free HIV/AIDS testing facilities, the provision of antiretroviral drugs and

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[1353] AngloGold Ashanti Code of Ethics 11.

[1354] AngloAmerican Code of conduct 11.

[1355] BHP Billiton Code of conduct 11.

[1356] Sasol Code of conduct 14.

[1357] R Evans 'Substance abuse in mines better control with broader understanding' (2018) Mining Safety Available at <https://www.miningsafety.co.za/newscontent/5053/substance-abuse-in-mines-better-control-with-broader-understanding> (accessed 24-01-2020).

[1358] F Ajani 'SIM 020103 Alcohol and cannabis use among South African mine workers' Safety in Mines Research Advisory Committee (SIMRAC) Final Report Available at <https://mhsc.org.za/sites/default/files/public/research_documents/SIM%20020103%20Final%20report.pdf> (accessed 24-01-2020).

[1359] ILO Management of alcohol- and drug-related issues in the workplace (1996) ILO Code of Practice 9.

free counselling facilities to their workers.[1360] The Lonmin code lists HIV/AIDS, TB and community health as critical areas of focus.[1361] Under the heading of 'Our People', the Lonmin Code of conduct, for instance, commits to supporting workers, who have HIV/AIDS with medication 'for the rest of their life'.[1362] On the other hand, the Exxaro code of conduct encourages all suppliers to implement an HIV/AIDS policy that is directed at raising awareness on matters relating to the spread of HIV/Aids and TB, and towards eliminating stigma attached to HIV/AIDS. There is thus a linkage between commitments to health and safety and binding requirements. However, there is often no information on how the company follows up with the suppliers and contractors to ensure compliance. In addition, there is no clarity under codes of conduct on whether access to critical drugs, such as those for HIV/AIDS is also extended to non-standard workers.

A clear trend across codes of conduct is the making of general commitments without invoking specific binding legal provisions. In addition, some codes of conduct are silent on specific information in line with the obligations of the employer or the owner of the mine. This includes information on the provision of safety clothing; the use of earplugs; the training of personnel; the provision of first aid assistance; and the protection in both surface and underground workings. The following section addresses some of the gaps found in codes of conduct, which are rendering them less effective in protecting and advancing the rights discussed above.

4 Limitations of the current codes of conduct

This section seeks to shed some light on the rights discussed above. It provides an overview of the weaknesses of codes of conduct. First, there is a general lack of clear implementation mechanisms of codes of conduct. For example, how does a subcontracted worker enforce and exercise the right to collective bargaining? Most codes of conduct stipulate that they apply to all employees, including temporary employees and to contractors. Yet there are no clear guidelines that promote the

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[1360] Lonmin Code of Conduct (2017) 17.

[1361] Lonmin Code of Conduct (2017) 17.

[1362] Lonmin Code of Conduct (2017) 17.

exercise of these rights. Taking the health provisions in codes of conduct, for example, it is not clear whether a subcontracted worker who becomes HIV/AIDS positive can claim free antiretroviral drugs or whether such a right is limited to full-time, permanent employees.[1363] There is thus a clear disjuncture between the scope of application of the code of conduct and the actual beneficiaries of the rights.

4.1 Ambiguous enforcement procedures

One of the weaknesses of codes of conduct is their lack of clear guidelines on how the workers can enforce the rights and commitments enumerated. Apart from provisions that seek to protect whistle-blowers, the codes discussed above have no meaningful mechanisms for employees to report or to enforce violations of their rights. Secondly, there is often no dedicated body responsible for receiving complaints. Some codes have incorporated anonymous reporting procedures for violation of the code.[1364] However, even when anonymous reporting procedures are entrenched, it remains unclear on how workers can enforce rights. This lack of comprehensive procedures affects the effectiveness of codes of conduct in accessing and enforcing the labour standards. It is therefore not surprising that one of the criticism levelled against codes of conduct relates to the unclear position on how the rights enumerated can be exercised and enforced by workers.[1365] The AngloAshanti Gold code of conduct provides that the executive and senior management have the authority to make decisions regarding violations and misconduct. Such decisions can involve dismissal, termination, demotion among other listed possible actions.[1366] While understanding the hybrid nature of codes of conduct in how they contain provisions dealing with disciplinary actions, the provisions are nonetheless one-sided and problematic. This provision creates the impression that only workers and employees can violate the code. A better position is found in the Sasol code of conduct that recognises that individuals whose rights have been violated must have access to appropriate

[1363] See chapter six, part 3.4.

[1364] See AngloAshanti Gold and Gold Fields above.

[1365] See chapter six, part 4.

[1366] AngloAshanti Code of Conduct 23.

grievances and mechanisms and steps must be taken to correct such violations.[1367] Despite the seemingly better position under the Sasol code, there is no laid-out procedure in the code on how workers can exercise their rights.

Accessing rights at the workplace are easier for permanent employees of the mining company, who in most cases are represented by trade unions and have the full protection of the legal framework. This is different for non-standard workers who often do not enjoy the full protection of the law and who are usually not organised. It, therefore, means that mining companies and corporations must provide clear rights and procedures to enable such workers to access these rights. This includes not forcing workers to join sham trade unions.[1368] Apart from the vague and ambiguous process, the drafting process of a code of conduct is critical towards its final acceptance and legitimacy.

4.2 Drafting of codes of conduct

In most cases, codes of conduct are drafted, implemented and enforced by management or company executives.[1369] The 'SEC', the 'ethics officer', or the 'legal governance and ethics department' within a company are in most cases responsible for drafting a code of conduct.[1370] Such codes are only operational after approval by the board of directors.[1371] Of all the codes analysed, only the Harmony code of conduct indicated that an outside party was consulted in the drafting of the code of conduct.[1372] With the majority of the codes of conduct, there is no clarity on the identity of the drafters of the code.

The Harmony code of conduct was first prepared by iThemba Governance and Statutory Solutions (Pty) Ltd.[1373] Subsequent reviews of the code were done by the

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[1367] Sasol Code of Ethics 3.

[1368] See note 283 above.

[1369] See chapter six, part 4.2.

[1370] See for example the Harmony Code of Ethics (2016) 1.

[1371] See for example the Implats Code of Ethics (2015) 12.

[1372] See for example the Harmony Code of Ethics (2016) 1.

[1373] The company provides company secretarial, corporate governance and related services and it

legal, governance and ethics departments and the management ethics committee.[1374] Knowledge of the drafters of any regulatory instrument is crucial for the acceptance and legitimacy of the instrument. What remains unclear is whether the input from workers were considered during the drafting of the code. Other codes are equally not as clear on the actual drafters. For example, the Implats Code of Conduct provides that it has been 'approved by the Company's Board of Directors and senior management'.[1375] The Lonmin code of conduct is silent on the actual drafters of the code but requires all directors, employees, contractors, consultants, agents to commit to the values and principles under the code.[1376] There is a lack of information on the actual drafters of the code of conduct and on whether any consultations with key stakeholders were taken into account. Lastly, there is no useful information on how such codes of conduct must be implemented.

4.3 Implementation of codes of conduct

Most codes of conduct are worded in general terms and impose no clear binding standards on the company itself. The general trend in the assessed codes of conduct is to commit to international instruments and non-binding principles, which impose no direct obligations on the company. Such instruments include the UNGC, the UDHR and the ILO Conventions.[1377] It is common cause that the ILO conventions bind state parties and not companies or corporations.[1378] On the other hand, few codes of conduct refer to binding, domestic legal instruments. The Harmony and the Exxaro Resources codes make a commitment to the Bill of Rights in the South African Constitution, to the MHSA and the MPRDA. Most of the codes of conduct analysed seem to prefer committing to international instruments, without reference to domestic,

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drafted the Harmony Code of Conduct in 2011. Company information is available at <https://www.ithembaonline.co.za> (accessed 28-06-2018).

[1374] Harmony Code of Conduct (2016) 1.

[1375] Implats Code of Conduct (2015) 2.

[1376] Lonmin Code of Ethics 5.

[1377] See chapter six, part 2.

[1378] See B Hepple 'A race to the top? International investment guidelines and corporate codes of conduct' (1999) 20 *Comparative Labour Law & Policy Journal* 347, 353.

binding instruments. While the commitment to international instruments on labour standards is significant in that it brings the issue of meaningful regulation of labour standards at the workplace, it does not translate into tangible, enforceable rights for the workers. Thus, without referencing the key domestic instruments that expound on these rights and translate into enforceable rights, codes of conduct become ineffective.[1379] Others have however argued that the mere fact that codes incorporate the ILO conventions is proof that the ILO core conventions are reaching the targeted workforce.[1380] Whatever merit this position might hold, invoking the ILO conventions does not in itself translate into enforceable rights at company level for the benefit of vulnerable workers. This position with codes of conduct explains why authors such as Bercusson and Estlund have argued that despite many attempts at finding new regulatory approaches, the efficacy of the emerging regulatory patterns and their legitimacy is still largely in dispute.[1381]

For CSR mechanisms to be effective and meaningful, they must go beyond the established legal mechanisms and improve the living standards of the employees and workers.[1382] Thus, where the selected codes do no more than referring to existing legal standards, they cannot be seen as meaningful attempts at CSR. In addition, when assessing the effectiveness of a given regulatory system, key components including implementation, compliance and enforcement must be assessed.[1383] At its core, the effectiveness of any given regulatory instrument denotes its ability to produce anticipated outcomes.[1384] If the desired result of the codes is to complement and

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[1379] Most codes of conduct do not invoke domestic, binding legislation. On the contrary, they make extensive reference to ILO conventions etc. The idea is not to say the ILO instruments are not relevant, but that the same inclusion must be done with domestic normative instruments which have an immediate application on the workers.

[1380] H Arthurs 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' (2002) 478.

[1381] B Bercusson & C Estlund (eds) *Regulating labour in the wake of globalization: New challenges, new institutions* (2008) 2.

[1382] K Davis 'Can business afford to ignore social responsibilities' (1960) 2 *California Management Review* 70.

[1383] G Teubner 'Regulatory law: Chronicle of a death foretold' (1992) *Social & Legal Studies* 451.

[1384] I Jenkins *Social order and the limits of the law: A theoretical essay* (1980) 88.

improve upon the rights and standards of workers on the mines, then whether the codes are achieving this is doubtful.[1385]

The regulation of labour standards has been largely premised on the formal workforce as opposed to the informal workforce. This calls for a shift in the regulatory perception from limited scope in the application of commitments to a wide, more inclusive approach. Codes of conduct have already contributed to the protection of rights by highlighting the precarious working conditions in other sectors, including the garment and apparel sectors. As noted earlier, the current generation of codes of conduct does not advance the rights of workers in any meaningful way, apart from piecemeal references. There is a need to adopt a new approach that is inclusive of all stakeholders in the making of codes of conduct. Furthermore, codes of conduct must provide in clear terms the rights and commitments enshrined for non-standard workers who have limited protection under the legal framework.

5 Conclusion

This chapter has looked at the content of selected codes of conduct on provisions that regulate the selected labour standards. The main aim was to assess the extent to which the rights contained within such codes of conduct can assist a sizeable number of workers who are excluded from the labour law framework mainly through the new arrangements of work. In most cases, these codes contain commitments to freedom of association, collective bargaining and, health and safety. They also state their commitments to the ILO core conventions and the UN Global Compact principles which are recognised internationally. However, on closer analysis, there are no clear mechanisms for the workers to access the stated rights and commitments, thereby rendering these codes merely window dressing. There is a dearth of information across many codes of conduct on the participation of workers in the drafting process of such instruments. In addition, the rights are stated in vague terms with no detail on what constitutes the right. Furthermore, there is no separation between the drafters of the

[1385] For instance, Arthurs argues that for self-regulation mechanisms to produce meaningful results, such initiatives must replicate some of the values underlying state regulation. See H Arthurs 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' (2002) 478.

codes and those who enforce the rights. The benefits offered by these codes are unclear or generic at best. The rest of the codes place compliance with the code under the realm of management. Yet, there are no guidelines or procedures that a worker can follow if his/her rights are violated by management.

If codes of conduct are to be viewed and accepted as alternative regulatory mechanisms, both employers and the workers must have an input in the nature and content of rights. As Arthurs notes, for codes to be effective, they must be viewed as genuinely capable of offering an alternative means to statutory regulation.[1386] As they currently stand, unilaterally adopted codes of conduct by mining companies do not offer anything new beyond what is contained in the legal system. In this regard, codes of conduct lack clear transparency from their making to their enforcement. The following chapter addresses the weaknesses of codes of conduct and how such weaknesses can be mitigated to improve the conditions of the workers.

[1386] H Arthurs 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' in J Conaghan, R Michael Fischl & K Klare (eds) *Labour law in an era of globalization: Transformative practices and possibilities* (2002) 477.

Chapter 7: Making codes of conduct complementary regulatory tools

1 Introduction

This thesis has so far demonstrated that the State, through the 'command and control' regulatory approach, is failing to offer adequate protection to a significant number of workers in the mining sector. Notwithstanding the potential that codes of conduct can offer in complementing State regulation, currently, codes of conduct are not meaningfully aiding or complementing state regulation. Current debates on whether self-regulation mechanisms can offer any role in regulating labour standards have been largely prompted by the deficiencies of state regulation.[1387] Literature suggests that there is potential in the use of self-regulation instruments, particularly codes of conduct, to improve and empower workers who are not adequately protected by the prevailing state legal framework. The challenge, however, remains how to mould such instruments into useful regulatory tools, without upsetting the voluntarist level in their approach.[1388] The need to create complementary regulatory instruments that are designed specifically to meet the demands of individual companies, while at the same time protecting the rights of workers, must underpin the revision of these codes. This chapter focuses on mechanisms that can strengthen codes of conduct in regulating labour standards in the mining sector.

As indicated in chapter three, this thesis does not propose the abandonment of state regulation as a regulatory approach to labour standards.[1389] It proposes revisiting self-regulation techniques as complementary tools to public regulation. In this regard, it has been argued that "innovative approaches to regulation do not require the State to abandon traditional methods of labour regulation…. [L]egally binding standards must

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[1387] S Lee & D McCann 'The Impact of Labour Regulations: Measuring the Effectiveness of Legal Norms in a Developing Country' *in* S Lee & D McCann (eds) *Regulating for decent work: New directions in labour market regulation* (2011) 294.

[1388] The argument is that voluntarism empowers workers and employers to structure their affairs to suit their prevailing needs with some degree of freedom.

[1389] See chapter three, part 3.1; A Sobczak 'Codes of conduct in subcontracting networks: A labour law perspective' (2003) 44 *Journal of Business Ethics* 225.

remain the touchstone of any regulatory system."[1390] As demonstrated globally, state regulation of labour standards remains largely reactionary to the effects of globalisation and is continuously failing to protect workers in non-standard employment adequately.[1391] This failure continues, despite the existence of a comprehensive set of labour laws. Traditionally, collective bargaining has been central in shaping the relations between employers and workers.[1392] Yet, as demonstrated earlier, the effectiveness of collective bargaining has been premised on the high rate of the standard employment relationship – which is in a constant decline.[1393]

The effectiveness of codes of conduct as regulatory instruments in environmental, social and economic aspects of a business are influenced by various actors, including customers, governments, employees, shareholders and NGOs.[1394] These groups and institutions have an effect on how companies conduct business and the level of its commitment to the rights and principles applicable to their workers.[1395] The ultimate goal of strong codes of conduct is to empower workers not only to organise but also to increase their participation in the affairs of the company that affect them both in the long term and short term.[1396] Through amplifying how the increased privatisation of

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[1390] C Fenwick, J Howe, S Marshall & I Landau 'Labour and Labour-related Laws in Micro and Small Enterprises: Innovative Regulatory Approaches' (2007) International Labour Organization: Legal Studies Research Paper 322, 15.

[1391] A Harrison, J Scorse, S Collins & KA Elliott 'Globalization's impact on compliance with labor standards [with comments and discussion]' (2003) *Brookings Trade Forum*, (2003) 45, 45; L Compa & T Hinchliffe-Darricarrere 'Enforcing international labor rights through corporate codes of conduct' (1995) 33 *Columbia Journal of Transnational Law* 687.

[1392] HW Arthurs 'Labour law without the State' (1996) 46 *The University of Toronto Law Journal* 1.

[1393] See Chapter two, part 4.1 above.

[1394] OECD 'Making codes of corporate conduct work: Management control systems and corporate responsibility' (2001) OECD Working Papers on International Investment, 2001/03, Available at <https://doi.org/10.1787/525708844763> (accessed 09-09-2018) 3; R Jenkins 'Corporate codes of conduct: self-regulation in a global economy' (2001) United Nations Research Institute for Development 8; L Huyse & S Parmentier 'Decoding codes: the dialogue between consumers and suppliers through codes of conduct in the European community' (1990) 13 *Journal of Consumer Policy* 253.

[1395] OECD 'Making codes of corporate conduct work: Management control systems and corporate responsibility' (2001) OECD Working Papers on International Investment, 2001/03, Available at <https://doi.org/10.1787/525708844763> (accessed 09-09-2018) 3.

[1396] OE Herrnstadt 'Voluntary corporate codes of conduct: What's missing? (2001) *The Labor Lawyer* 349, 369;

labour standards has not correlated with the increased protection of workers, the rest of the chapter looks at mechanisms to make codes of conduct into meaningful regulatory tools.

2 Increased privatisation of labour standards

As globalisation, technological advances and easy access to information continue to increase globally, key questions remain regarding the role of CSR in strengthening regulatory regimes, particularly the regulation of labour standards.[1397] State regulation of labour standards is continuously being weakened by globalisation, the easy movement of capital across borders, technological advancement as well as neo-liberal policies more generally.[1398] This is not a closed list. Jenkins argues that the increase in codes of conduct is both a manifestation and a response to the process of globalisation.[1399] In this respect, workplace institutions and labour relations have significantly changed.[1400] Government institutions designed to deal with challenges emanating from labour relations are constantly being rendered inadequate.[1401] For example, the new arrangements of work and arrangements on how labour is hired and offered are increasingly being designed to limit the reach of state regulation.[1402]

[1397] R Mares 'Global corporate social responsibility, human rights and the law: An interactive regulatory perspective on the voluntary-mandatory dichotomy' (2010) *Transnational Legal Theory* 221; D Wells 'Too weak for the job: Corporate codes of conduct, non-governmental organizations and the regulation of international labour standards' (2007) 7 *Global Social Policy* 51.

[1398] H Arthurs 'Private ordering and workers' rights in the global economy: corporate codes of conduct as a regime of labour market regulation' (2002); see also KW Stone 'Flexibilization, globalization, and privatization: Three challenges to labour rights in our time' (2006) 44 *OSGOODE Hall Law Journal* 77; J Fudge, S McCrystal & K Sankaran (eds) *Challenging the legal boundaries of work regulation* (2012); D Vogel 'The private regulation of global corporate conduct: Achievements and limitations' (2010) 49 *Business & Society* 68, 72.

[1399] R Jenkins, R Pearson & G Seyfang (eds) *Corporate responsibility & labour rights: Codes of conduct in the global economy* (2002) 1.

[1400] B Bercusson & C Estlund *Regulating labour in the wake of globalisation: New challenges, new institutions* (2008 1.

[1401] E Webster 'Labour after globalization: Old and new sources of power' (2015) Institute of Social and Economic Research, Working Paper No 2015/1, 2.

[1402] G Davidov & B Langille (eds) *Boundaries and frontiers of labour law: Goals and means in the regulation of work* (2006) 189; E Webster & S Buhlungu *Review of African Political Economy* (2004) 234.

Companies and corporations have internalised functions that were previously only in the realm of the State, including the regulation of labour standards and occupational health and safety.[1403] Of importance, however, is the way the new actors are executing their roles in regulation labour rights. By adopting codes of conduct, companies have taken on the role of the legislature (through drafting), the role of the executive (through implementation) and the role of the judiciary (through adjudication). This compounded role is what has raised questions on whether codes of conduct can be effective regulatory tools. Lastly, as they currently exist, the increased use of codes of conduct have not translated into meaningful protection of workers' rights. Through adopting several recommendations targeted at the weaknesses, codes of conduct can become useful regulatory tools, particularly in protecting non-standard workers.

3 Making codes of conduct meaningful regulatory tools

To be viewed as useful self-regulatory tools, codes of conduct must be capable of offering similar or better outcomes than state regulation.[1404] In particular, they must address the gaps in state regulation. This entails, partly the ability of self-regulation to meet social demands and to reach areas that state regulation is failing to reach.[1405] Self-regulation instruments are only capable of shaping and bringing tangible regulation benefits when they are not designed as window-dressing or as a tick-box exercise.[1406] There are key concepts that must underpin a successful code of conduct. These include adopting inclusive participation of key stakeholders in drafting codes of

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[1403] E Webster 'Labour after globalisation: Old and new sources of power' (2015) Institute of Social and Economic Research, Working Paper No 2015/1, 2; T Schulten, T Brandt & C Hermann 'Liberalisation and privatisation of public services and strategic options for European trade unions' (2008) 14 *Transfer: European Review of Labour and Research* 295, 300; M Horst & K Priegnitz 'Soft law – second best solution or a privatisation of social rights? Some pointers for a future discussion' (2007) 13 *Transfer: European Review of Labour and Research* 671; B Bercusson & C Estlund (2008) 2.

[1404] H Arthurs 'Corporate Codes of Conduct' 477.

[1405] H Arthurs 'Corporate Codes of Conduct' 477; for opposing views on the effectiveness of codes of conduct and other self-regulation mechanisms, see T Royle 'The ILO's shift to promotional principles and the 'privatization' of labour standards: An analysis of labour standards, voluntary self-regulation and social clauses' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 249.

[1406] JL Short 'Self-regulatory in the regulatory void: "Blue moon" or "bad moon"? (2013) 649 *The American Academy of Political & Social Science* 22, 24.

conduct, detailed enumeration of rights and a clear formulation of enforcement mechanisms in cases of breach. Inclusive participation of all stakeholders, including workers in the making of a code of conduct increases the legitimacy and the ultimate acceptance of the code of conduct by all workers.

Thus, the process of making a code of conduct, including selecting the drafting team among other stages must be transparent and inclusive of the affected stakeholders.[1407] Certain procedures must be adhered to, from the process of making the codes to their implementation. Firstly, for codes of conduct to offer a meaningful regulatory role in the workplace, the process of making such codes of conduct must be democratic.[1408] This involves the participation of all affected stakeholders in the drafting and making of codes of conduct. Second, such codes of conduct must not only provide a detailed description of the labour standards, but they must list clearly the beneficiaries of such rights. In addition, codes of conduct must provide clear obligations of the employer in fulfilling such rights. Third, there must be clear procedures for reporting violations of rights contained within the code. Fourth, the code must be written in a language that is understandable by the workers. Finally, codes of conduct must establish an independent monitoring body. The drafting of a code of conduct is a key stage in protecting the rights of workers.

3.1 The drafting of codes of conduct

The effectiveness of CSR mechanisms in regulating labour standards depends in part on the involvement of key stakeholders[1409] including consultation with all who may be affected by any adopted code of conduct.[1410] Du Toit argues that "regulation must be (co)drafted by those who will be subject to it".[1411] The author argues further that the development of new representative structures on which non-standard and precarious

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[1407] A Sobczak 'Corporate social responsibility: From labour law to consumer law' (2004) *Transfer: European Review of Labour and Research* 401, 408-409.

[1408] A Sobczak (2004) *Transfer: European Review of Labour and Research* 401, 408.

[1409] M Anner 'Corporate social responsibility and freedom of association rights: the precarious quest for legitimacy and control in global supply chains' (2012) 40 *Politics & Society* 609.

[1410] M Anner (2012) 40 *Politics & Society* 609.

[1411] D du Toit 'Should precarious work be the focus of labour law? (2018) 39 *ILJ* 2089, 2100.

workers can participate should be incorporated into codes of conduct.[1412] In the mining context, such stakeholders include workers, contractors, suppliers, shareholders and management. Undoubtedly, some stakeholders may occupy various roles – a position which must be considered when consulting stakeholders.[1413] With the current labour dynamics and the increase in subcontracting of core mining activities, a subcontracted company, for example, can be an employer at the mine, depending on the nature of its work.[1414] The result is a multiplicity of employers at the same workplace – a position that undermines accessing participation rights. Several aspects can be addressed to make codes of conduct more effective in addressing labour standards at the workplace. As discussed in chapter six, there is a dearth of information on the participation of workers in the drafting of codes of conduct. The drafting of a code of conduct must endeavour to obtain inputs from all workers at the mines therefore, notwithstanding the identity of their legal employer.[1415]

3.1.1 Worker participation rights

The participation of workers, employees, contractors and suppliers at the workplace in drafting a code of conduct has the potential to bring legitimacy to the final code of conduct.[1416] In the South African context, worker participation has been central in advocating for political freedom and worker rights at the workplace.[1417] The participation of workers on issues that affect them at the workplace is further recognised by the ILO, which acknowledges that the nineteenth century was

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[1412] D du Toit (2018) 39 *ILJ* 2094.

[1413] MA Hermanus 'Occupational health and safety in mining – status, new developments, and concerns' (2007) 107 *The Journal of the Southern Institute of Mining and Metallurgy* 532.

[1414] See for example *Association of Mineworkers and Construction Union ("AMCU") and Others v Buffalo Coal Dundee and Another* (2016) 37 *ILJ* 2035 (LAC); B Kenny & A Bezuidenhout (1999) *The Journal of the South African Institute of Mining and Metallurgy* 185.

[1415] D du Toit (2018) *ILJ* 2099.

[1416] SP Sethi 'Self-Regulation Through Voluntary Codes of Conduct' *in* S Prakash Sethi (ed) *The crucial role that corporates codes of conduct play in global business* (2011) 6.

[1417] G Adler & E Webster 'challenging transition theory: The labor movement, radical reform, and transition to democracy in South Africa' (1995) *Politics and Society* 75; K von Holdt 'Social movement unionism: The case of South Africa' (2002) *Work, Employment and Society* 283.

characterised by the increasing shift of social issues to the workplace.[1418] A large amount of the activities of the ILO have been devoted towards enabling workers to exercise key rights, such as freedom of association and giving effect to collective bargaining.[1419] The right of workers to freedom of association for example, enables workers to organise and collectively improve the conditions of work.[1420] As previously noted, one of the weaknesses of the current codes of conduct is that despite making references to the ILO's core labour standards, codes tend to dictate to workers aspects of regulation.[1421] Indeed, some scholars have argued that codes of conduct often make workers the objects of regulation as opposed to treating such workers as partners who are bearers of rights.[1422]

Broadly, worker participation refers to the involvement of workers in the control and decision making activities of the business or operations of the employer.[1423] Worker participation is further aimed at transforming relationships at the workplace, from militancy in nature to joint problem solving on various contentious issues.[1424] There is a close linkage between worker participation, empowerment and human development.[1425] Over the years, worker participation has been at the core of the ILO

[1418] G Rodgers, E Lee, L Swepston & J van Daele *The international labour organisation and the quest for social justice, 1919 – 2009* The International Labour Office 4.

[1419] H Johnstone & C Land-Kazlauskas 'Organising on-demand: Representation, voice and collective bargaining in the gig economy' (2019) ILO Conditions of Work and Employment Series 94, 31.

[1420] See chapter four, part 3.1.

[1421] J Gearhart 'Workplace codes: Transforming rights into practice' (2006) 9 *Perspectives on Work* 8; SC Gilman 'Ethics codes and codes of conduct as tools for promoting ethical and professional public service: Comparative successes and lessons' (2005) PREM: World Bank Available at <https://www.oecd.org/mena/governance/35521418.pdf> (accessed 30-11-2019) 23.

[1422] R Jenkins, R Pearson & G Seyfang *Corporate responsibility and labour rights* (2002) 4.

[1423] L Madhuku 'Worker participation in a developing country: The case of Zimbabwe' (1996) *Comparative Labour Law Journal* 603, 603.

[1424] ME Manamela 'Regulating workplace forums in South Africa' (2002) *SA Merc LJ* 728, 728; CM Smith 'The right of revolution: Black trade unions, workplace forums, and the struggle for democracy in South Africa' (2000) *Georgia Journal International & Comparative Law* 595.

[1425] D Matlou 'Understanding workplace social justice within the constitutional framework' (2016) *SA Merc LJ* 544, 557.

agenda.[1426] Through the use of the ILO Conventions and Recommendations, the principles of worker participation have permeated into most domestic labour regulatory instruments across the globe.[1427] Indeed, one of the achievements of the ILO that subsequently shaped labour legislation across member states has been the increase in worker participation on issues that affect workers' rights.[1428]

It therefore, comes as no surprise that the formulation and implementation of codes of conduct must include the participation of non-standard workers in developing strategies to remedy problems they experience at work. Already, some codes of conduct purport to cover all employees, including non-permanent employees and those in supply chains.[1429] The right of workers to participate in matters that affect them is closely linked to other fundamental rights, including the right to freedom of expression,[1430] equality,[1431] the right to fair labour practices,[1432] the right to dignity,[1433] the right to a safe working environment,[1434] and the right to effective collective bargaining and to join a trade union.[1435]

This thesis argues that mining companies have an opportunity to ensure that the views of all workers on issues that affect them at the workplace are adequately represented in various committees. The extension of participation rights to all workers, at the

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[1426] D du Toit 'Collective bargaining and worker participation' (2000) 21 *ILJ* 1544, 1575.

[1427] SC Gilman 'Ethics codes and codes of conduct as tools for promoting ethical and professional public service: Comparative successes and lessons' (2005) PREM: World Bank Available at <https://www.oecd.org/mena/governance/35521418.pdf> (accessed 30-11-2019) 11.

[1428] E Cordova 'Workers' participation in decisions within enterprises: Recent trends and problems' (1982) 121 *International Labour Review* 125; see also L Madhuku (1996) *Comparative Labour Law Journal* 603.

[1429] See chapter six, part 3.1.

[1430] Constitution, s 16.

[1431] Constitution, s 9.

[1432] Constitution, s 23.

[1433] Constitution, s 10.

[1434] Constitution, s 24.

[1435] Constitution, s 23 (5); See generally JJ McCall 'Employee voice in corporate governance: A defense of strong participation rights' (2001) 11 *Business Ethics Quarterly* 195.

workplace, remains an area in which codes of conduct can make a meaningful contribution in regulation. This participation would entail that all the views of the workers are well represented. The views and perspectives of workers, who previously had no right to be represented, must be considered. This does not mean that all workers have clearly defined, common interests and goals. Undoubtedly, non-standard workers may be focused on acquiring job security or more 'standard' working arrangements while employees may be more interested in improving their conditions and other terms of work. Yet, it is these diverse interests that must be expressed and captured in effective codes of conduct. For practical reasons, not all workers at the mine or even employees can draft the code of conduct. However, the drafters of the code must take cognisance of the respective interests of all those affected, through the mechanism of inclusive participation. Not only is the incorporation of various voices important, the selection of who drafts, reviews or amends a code of conduct must also be transparent and democratic.

At the workplace, collective bargaining has traditionally been the most inclusive form of participation accorded to employees.[1436] Collective bargaining represents an important, mechanism of participation in industry life for many employees.[1437] Yet despite its importance, traditional collective bargaining tends to exclude certain categories of workers, particularly non-standard workers who cannot easily organise.[1438] In addition, collective bargaining is failing as an effective dispute resolution mechanism at the workplace.[1439] This is despite the guarantees made in the Constitution that every worker has the right to join a trade union and to participate in the activities of a trade union which must include representation through the trade union's entitlement to bargain collectively.[1440] The LRA which gives effect to these

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[1436] D du Toit (2000) 21 *ILJ* 1544, 1575.

[1437] A Blackett & C Sheppard 'Collective bargaining and equality: Making connections' (2003) 142 *International Labour Review* 419, 421; C Thompson & P Benjamin *South African labour law* (1997) vol 1 A1-68; H Cheadle 'Collective bargaining and the LRA' (2005) *Law, Democracy & Development* 147.

[1438] A Blackett & C Sheppard (2003) 142 *International Labour Review* 419.

421; C Thompson & P Benjamin *South African labour law* (1997) vol 1 A1-68.

[1439] IG Farlam, PD Hemraj, BR Batoka 'Marikana Commission of Inquiry Report' (2015) 45; D du Toit and R Ronnie 'The necessary evolution of strike law' (2012) *Acta Juridica* 195, 197.

[1440] Constitution of the Republic of South Africa, s 23; H Cheadle 'Collective bargaining and the LRA'

rights limits the beneficiaries to 'employees' and 'employers'.[1441] Despite the 2014 LRA amendments, significant sections of the workforce are still excluded from exercising these core labour rights.[1442] Creating mechanisms to enable workers who are not employees in the traditional sense to associate freely thus remains crucial. The above has elaborated on the need to create an enabling environment for workers to participate in issues that affect them.

In addition to responding to the difficulties for non-standard workers of participating in the development of codes of conduct and engaging in collective bargaining, meaningful regulation (through codes of conduct) must at least attempt to address some of the underlying causes of the Marikana massacre. Lessons from the Marikana massacre suggest that the participation of workers at the plant level must be taken into account.[1443] In the platinum sector,[1444] some collective agreements are concluded between the recognised trade union or unions and the respective mining companies.[1445] Similarly, in the gold and coal sectors that are part of the Minerals Council South Africa (formerly the Chamber of Mines),[1446] collective bargaining occurs between the Minerals Council and the recognised trade unions.[1447] Gold, coal and platinum companies or mining houses that are not part of the Minerals Council South Africa are in most cases covered by firm level collective agreements.[1448] Yet most of the collective agreements concluded in this sense do not cover non-standard mine

(2005) *Law, Democracy & Development* 147, 147.

[1441] LRA, s 1(c)(i) and 1(d)(iii).

[1442] D du Toit & R Ronnie 'The necessary evolution of strike law' (2012) *Acta Juridica* 195.

[1443] See chapter two, part 3.

[1444] In 2017, the platinum sector employed about 172,171 people, see <https://www.mineralscouncil.org.za/downloads/send/18-current/634-facts-and-figures-2017> (accessed 30-11-2019).

[1445] See IG Farlam, PD Hemraj, BR Batoka 'Marikana Commission of Inquiry Report' (2015) 45.

[1446] Minerals Council South Africa is an employers' organisation in the mining industry. It changed its name from the Chamber of Mines to Minerals Council South Africa on the 23rd of May 2018. Information available at <https://www.mineralscouncil.org.za> (accessed 11-11-2018).

[1447] S Godfrey, J Theron & M Visser (2007) Labour and Enterprise Policy Research Group 10.

[1448] S Godfrey, J Theron & M Visser (2007) 10.

workers. Codes of conduct can, therefore, offer unique opportunities for non-standard workers to participate in the affairs of the company.

After enabling workers to participate in the making of a code of conduct, the application of the code is of importance.

3.1.2 Application of codes of conduct

In bridging the regulatory gap, codes of conduct must be widely inclusive – catering for workers who, because of their status fail to access core labour rights contained within domestic legislation. Chapter six demonstrated the gaps in the application of codes of conduct, with no uniformity being found across such codes of conduct. Secondly, codes must address the needs of non-standard workers. In this respect, the Lonmin code of conduct is instructive as it applies to workers brought to the mine through various means, including subcontracting. Since most standard employees are represented by trade unions or covered by the extension of collective agreements, codes of conduct must be drafted with non-standard workers in mind.[1449] This will ensure that the employment status of an individual is not used as a basis of exclusion in accessing certain rights. In fact, when one traces the origin of codes of conduct in the South African mining sector, the aim was to offer protection to workers who were not adequately protected by the race-based legislation of apartheid.[1450]

Another theme under the application of codes of conduct is their reach, geographically – further motivating why global mining companies have codes of conduct that apply across all employees, contractors, and suppliers on a global scale. In many cases, there is an express acknowledgement in such codes of conduct to the different standards of human rights commitments in different jurisdictions. These codes, therefore, commit to applying higher, international standards in countries where local

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[1449] See LRA, ss 23 and 32 governs the extension of collective agreements to employees who are not members of the trade unions or trade unions party to the agreements. Three pre-requisites must be met namely that such employees must be identified in the agreement, the agreement must expressly bind such employees and the trade union(s) concluding the agreements must enjoy the majority status of the employees at the workplace. Another method through which collective agreements are extended to non-members is through the agreements concluded through bargaining council under section 32.

[1450] See chapter two, part 6.2.

laws and regulations are weaker. A key characteristic of the global codes is that they are not drafted for a specific country or sector.[1451] They cover the company's operations across countries and sectors. For example, the AngloAmerican code of conduct applies to both the platinum and coal sectors and is not limited to one jurisdiction. The challenge with codes of conduct that are not designed for specific jurisdictions or specific mining operations is that they tend to be generic, with no precision in addressing the specific needs in such jurisdictions or mining sectors. In addition, while it is possible for the global corporations to receive input in the drafting of the code from trade unions in jurisdictions of their operations, the challenge with the global codes of conduct is the difficulty in incorporating the voices of non-standard workers. Lastly, global codes by design are largely generic instruments, designed and dictated to various workplaces across the globe by the corporation.

A key question remains as to who within the company should be tasked with drafting the code of conduct. The following section argues that the SECs is the most viable option, in drafting a code of conduct.

3.1.3 Social and ethics committees and workplace forums

As noted in chapter six, there is generally no information in most codes of conduct on who is responsible for drafting a code of conduct. A few codes with this information make use of an external consulting firm, senior management within the company, the legal department or the SECs.[1452] Despite the lack of information on the actual drafters of the code, a common procedure is that after the code is drafted, the company's Chief Executive Officer or the President of the company or corporation signs the code and reaffirms the company's commitment to the values, rights and commitment expressed therein.[1453] Yet, most codes do not mention the identity of the drafters.

[1451] See for example the AngloAmerican 'Code of Conduct' (2016) Available at <http://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/approach-and-policies/sustainability/our-code-of-conduct-english.pdf> (accessed 02-05-2018).

[1452] See chapter six, part 4.2.

[1453] See for example the Sasol Code of Conduct; Xstrata Code of Conduct and the Glencore Code of Conduct.

Within the current labour framework and companies' law in South Africa, workplace forums can also be a meaningful platform in drafting the codes of conduct. Workplace forums are established under Chapter V of the LRA and such forums must seek to promote the interests of all employees in the workplace, enhance efficiency in the workplace and represent an attempt to have democratic workplaces.[1454] A representative trade union may apply to the Commission to establish a workplace forum where a company employs over 100 employees in a workplace. The process of establishing a workplace forum is initiated by the trade union. The LRA covers both procedural and substantive aspects of the workplace forums.[1455] With origins in the White Paper on Reconstruction and Development, workplace forums were incorporated within the LRA mainly to deal with non-distributive issues on aspects that did not fall under the traditional parameters of the collective bargaining.[1456]

To date, workplace forums have failed to realise the aspirations as envisioned under the LRA. To demonstrate their failure to discharge their envisioned role, the following is seminal:

> Workplace forums as they are currently envisaged in the LRA are a dead duck. In the light of the decline in firm and plant-level bargaining a decision needs to be made about the appropriate vehicle through which engagement can take place at this level, particularly with a view to supplementing centralised bargaining.[1457]

In addition to the above, trade unions have historically seen workplace forums as possible threats however and so very few have been established. Given the shortfalls of the forums, and the disjuncture between their format and the composition of the workplaces, their role as a platform to draft codes of conduct is thus questioned.

[1454] LRA, s 79.

[1455] LRA, s 80.

[1456] MM Botha 'In search of alternatives or enhancements to collective bargaining in South Africa: Are workplace forums a viable option? (2015) 18 *PER* 1812.

[1457] S Godfrey, J Theron & M Visser 'The state of collective bargaining in South Africa: An empirical and conceptual study of collective bargaining' (2007) DPRU Working Paper 07/130, Labour and Enterprise Policy Research Group; F Steadman 'Workplace forums in South Africa: A critical analysis' (2004) 25 *Indus. LJ* 1170.

This thesis therefore argues that if the SECs are representative of the key stakeholders of the company, they are best placed to draft the company code, after consultation with workers and the management. In addition, the company board can delegate some of its functions to any committee, which may include tasking the SEC with the drafting of a code of conduct.[1458] The insistence of the legislature on certain companies to have the SECs is an acknowledgement that such committees can be key drivers of CSR, good company practices and good governance.[1459] This section seeks to outline some of the weaknesses of the SECs, with the aim that after addressing such limitations, they are the most ideal committees to be tasked with the responsible of drafting codes of conduct.

In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company*[1460] the court made reference to the King Report on Corporate Governance and included social responsibility as a key characteristic of good governance.[1461] The court cited the King Report as follows:

> "A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits such as improved productivity and corporate reputation by taking those factors into consideration."[1462]

The role and importance of the SECs must be understood from this perspective. The SEC as discussed in chapter five can play a critical transformative role in the operations of the company, particularly in relation to employment matters.[1463]

[1458] See chapter five, part five.

[1459] HJ Kloppers 'Driving corporate social responsibility (CSR) through the Companies Act: An overview of the role of social and ethics committee' (2013) *PER/PELJ* 165.

[1460] (2006) 5 SA 333 (W).

[1461] King Report on Corporate Governance (2002).

[1462] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* (2006) para 16.9.

[1463] See chapter five, part 5.

However, in their current format and composition, the SECs are not perfect. It has been argued that the position of the SECs limits their effectiveness as they are not at the centre of the company's decision – making.[1464] Secondly, the composition of the SECs may not be representative enough of the key stakeholders of the company, particularly workers, which may limit their independence, crucial to their monitoring and oversight role.[1465] A constant theme in the academic literature on the SECs is the absence of the representation of 'labour' on the SECs.[1466]

The legal framework requires a minimum of three directors or prescribed officers of which one of the directors must not be involved in the day-to-day operations of the company.[1467] At least one of the directors is significantly independent to the extent that he/she must not be involved in the daily management of the company. In theory therefore, one of the directors of the SEC can be appointed from employee representatives, thereby bringing direct representation and participation by workers. Whether this inclusion is adequate to ensure meaningful participation by the workers is unclear. In performing their duties, the SEC is empowered to request information from any employee of the company.[1468] However, the provision does not empower the SEC to request information from workers who are not employees – a position that compromises a key voice of workers who, through the arrangement of their work do not qualify as employees. In addition to the above, while the SECs are obliged to report periodically to shareholders on the company's activities, the shareholders may either adopt or ignore the reports and recommendations.[1469] The SECs must, therefore, be inclusive, in line with the new approach in company law to increase the participation of workers on matters that affect them. It must, therefore, be a mandatory requirement to

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[1464] J Howard 'Half-hearted regulation' (2015) 17.

[1465] Companies Regulation 43 (4). The social and ethics committee must comprise of not less than three directors or prescribed officers of the company. Of that composition, at least one must be a director not involved in the day to day management of the company's business.

[1466] MM Botha 'Evaluating the social and ethics committee: Is labour the missing link' (2016) 79 *THRHR* 583.

[1467] Companies Regulations 2011, regulation 43(4).

[1468] Companies Act, s 72(8)(b).

[1469] MM Botha (2016) 79 *THRHR* 593.

have a worker representative on the committee. This is further justified by the mandate of the SECs, which include a huge component of issues affecting labour matters. Addressing these limitations is key towards situating the committees to be more inclusive on employments and social matters, including in making the committee responsible for drafting codes of conduct.[1470]

The following section considers the importance of describing the rights that are provided for in codes of conduct more fully to make them effective in promoting worker participation and in realising the rights of all workers to an environment that is not harmful to health.

3.2 Rights under codes of conduct

A code of conduct must provide in detail the rights and obligations of the parties involved. While codes are often drafted in vague terms, legislation tends to outline rights and the beneficiaries of such rights more clearly.[1471] Codes of conduct should emulate the approach in legislation to clarify rights, the beneficiaries of such rights, the procedural aspects to access such rights; the consequences for the employer for non-compliance and the remedies available in cases of violation of such rights. That is not to say that such codes should repeat the substantive failings of legislation, however. As demonstrated in chapter six, codes of conduct largely invoke ILO Conventions and UN instruments which are not binding on companies directly.[1472] There is, therefore, a need for inclusion of binding domestic legal instruments.

The current codes of conduct in the mining sector are marred by conflicting approaches. One of the conflicting aspects relates to the content of rights. The rights included are often worded vaguely, imprecisely and with no clear content on what constitutes the right.

[1470] See chapter five, part 5 above.

[1471] E Córdova ‘From full-time wage employment to atypical employment: A major shift in the evolution of labour’ (1986) 125 *International Labour Review* 641. The traditional employment relationship was characterized by the worker, working full time for one employer at a designated working for an indefinite period is continuously shifting.

[1472] Chapter six, part 2; A Sobczak ‘Are codes of conduct in global supply chains really voluntary? From soft law regulation of labour relations to consumer law’ (2006) 16 *Business Ethics Quarterly* 167.

3.2.1 Freedom of association and collective bargaining

Codes of conduct can improve the status of workers through assisting disempowered workers to associate freely and therefore to organise at the workplace. The precariousness of many workers in the mining sector can be mitigated if such workers are given the means to organise. Acknowledging the disenfranchisement of non-standard workers and their job insecurity among other challenges they face is key to enabling such workers to organise. The holders of mineral rights or the employer have the capacity to hold the subcontractor to account if such a subcontractor is practising unfair labour practices. Undoubtedly, this is often easier to achieve theoretically than it is in practice and careful consideration of the consequences must be taken into account. For example, through terminating the contract between the subcontractor and the holder of the mineral right or owner of the mine, rights can be enforced. However, it may result in a far more dire situation for the workers if they lose their jobs. Mechanisms must therefore be put in place to ensure that in the event of drastic actions, such as termination of contract, the workers do not lose their jobs but are taken over by a new subcontractor. In particular, codes of conduct must ensure that the owner of the mine or the mineral right holder together with the subcontractor are not undermining the rights of workers through limiting trade unions access to workplaces, victimising union representatives, interfering in union activities, or refusing to recognise representative trade unions for bargaining and other purposes.[1473] Non-standard workers are often reluctant to exercise their rights fully, fearing victimisation or the non-renewal of contracts.[1474] This precarious status, therefore, calls upon all interested parties, including trade unions to ensure that the abuse of non-standard workers is curbed. This will ensure that such workers enjoy key rights, including job security. Through targeting non-standard workers to organise, the decline of trade union density may simultaneously be curbed.[1475]

[1473] Ethical Trading Initiative 'ETI briefing: Freedom of association' Available at <https://www.ethicaltrade.org/sites/default/files/shared_resources/foa_briefing1.pdf> (accessed 27-02-2020).

[1474] WM Mokofe (2018) Unpublished PhD Thesis 174.

[1475] B Gudrun & JE Isaac 'How effective are the ILO's Labour Standards under Globalisation? (2002) Australian Institute of Economic Research, Working Papers No. 178 (WIFO) 6. The authors argue that structural changes in industries towards a services industry, driven by technological developments has

3.2.2 The right to a safe working environment

The Constitution guarantees everyone the right to an environment that is not harmful to health.[1476] As discussed in chapter five, the right is further expanded under the MHSA, which, among other things sets out the rights and obligations of various individuals at the mine in relation to health and safety.[1477] The gaps in accessing this right for some workers at mines who are not adequately protected by existing laws create the need for codes of conduct to incorporate meaningful health and safety principles. Such rights must fill the gaps in the MHSA and the workers must be represented. In addition, such workers must be allowed to participate in the health and safety representatives' committees to begin with.

Relevant ILO Conventions offer further insights. The Safety and Health in Mines Convention[1478] provide for the right of a worker to remove themselves from a work situation when there is a reasonable justification that such a workplace or situation presents an imminent danger to health or life.[1479] Member states must incorporate this right within national laws and must give workers the right "to remove themselves from any location at the mine when circumstances arise which appear, with reasonable justification, to pose a serious danger to their safety or health…".[1480] The Convention gives rights to workers broadly and is not limited to the category of employees. Yet, the MHSA does not follow the wording of these conventions.[1481] In terms of the MHSA, the right to leave a workplace is worded with the employee in mind.[1482] Furthermore,

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impacted on trade union density and further reinforced the decline of unionism.

[1476] Constitution of the Republic of South Africa, s 24(1)(a).

[1477] MHSA, see Chapter 2 which outline the duties and obligations of various parties at the mine.

[1478] ILO Safety and Health in Mines Convention 176 of 1995, Article 13(1)(e).

[1479] Safety and Mines Convention 176 of 1995 (Convention concerning Safety and Health in Mines), Article 13.

[1480] Article 13(1)(e) of Convention 176.

[1481] MHSA, s 23.

[1482] MHSA, s 23 (1)(a).

the procedures that must be followed after leaving such a working place refer only to the employer and the health and safety representatives in mind.[1483]

What is required are elaborate provisions on health and safety for all workers. Codes of conduct can include the rights of workers at the mine to leave a dangerous workplace. Instead of making commitments to vaguely stated rights, codes of conduct must go beyond the deficiencies in legislation and bridge such gaps with more elaborate and inclusive occupational health provisions. Being grounded in legislation provides more effective options for enforcement, but it does not respond to the deficiencies of legislation. This means codes of conduct need to address these deficiencies more specifically. The above explanation does not take away the general duties of the employer to ensure that all persons at the mine are protected from hazards.[1484]

HIV/AIDS and other occupational diseases are common at mines. Codes of conduct must therefore also address issues relating to access to medical treatment; must indicate the person responsible for such treatment; must not discriminate between non-standard employees' and workers' access to medicine; and must incorporate non-standard workers within health and safety committees. The incorporation of non-standard workers within health and safety committees must be proportionate to their numbers at the workplace.

In designing health and safety provisions, reference must be made to the Guidance Note for the Implementation of HIV Self-Testing in the South African Mining Industry.[1485] The Guidance Note provides information on how an employer must implement HIV self-testing at the workplace. It targets employees who are usually not reached through the conventional community-based HIV testing. The targets which are aligned with the UNAIDS targets aim to ensure that 90% of people living with HIV know their status and that 90% of those who know their status and who are infected by HIV

[1483] MHSA, s 23 (2).

[1484] See the case of *Joubert v Buscor Proprietary Limited* 2017 JDR 0106 (GJ) where the court pointed out that the employer has duties extends beyond the employer's employees.

[1485] DMR 'Guidance Note for the Implementation of HIV Self-Testing in the South African Mining Industry' GN 30 in *GG* 42956 of 17 January 2020/ DMR 16/3/2/3-B1.

receive sustained antiretroviral therapy.[1486] In addition, 90% of those receiving treatment must suppress the viral infection.[1487]

Similarly, the Guidance Note on Strengthening the HCT (HIV Counselling and Testing) Uptake in the South African Mining Industry[1488] aims to assist the South African mining industry to achieve set targets on HIV awareness. Key aspects of the HIV Counselling and Testing Guideline include directing mining companies to address the allocation of funds for HIV programmes, directing mining companies to engage with all stakeholders and ensuring that companies provide on-site testing facilities among other policy considerations.[1489] If all these commitments are expressed within a code of conduct, it becomes an important regulatory tool in addressing contemporary health and safety challenges at mines.[1490] Importantly, the guidelines are not exhaustive and mining companies must make reference to other mandatory guidelines issued by the Chief Inspector of mines when drafting health and safety provisions.[1491] Lastly, these commitments by mining companies to key labour rights and to the health and safety of all workers can only be rendered effective if there are clear independent monitoring and enforcement mechanisms in place.

[1486] DMR 'Guidance Note for the Implementation of HIV Self-Testing in the South African Mining Industry' GN 30 in *GG* 42956 of 17 January 2020/ DMR 16/3/2/3-B1, part 3.

[1487] DMR 'Guidance Note for the Implementation of HIV Self-Testing in the South African Mining Industry' GN 30 in *GG* 42956 of 17 January 2020/ DMR 16/3/2/3-B1, part 3.

[1488] DMR 'Guidance Note on Strengthening the HCT (HIV Counselling and Testing) Uptake in South African Mining Industry' GN 31 in *GG* 42956 of 17 January 2020/DMR 16/3/2/3-B2.

[1489] DMR 'Guidance Note on Strengthening the HCT (HIV Counselling and Testing) Uptake in South African Mining Industry' GN 31 in *GG* 42956 of 17 January 2020/DMR 16/3/2/3-B2, part 7.

[1490] A study of selected codes of conduct in different countries including South Africa demonstrated that such codes benefitted both permanent and non-permanent workers – see S Barrientos & S Smith 'Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems' (2007) 28 *Third World Quarterly* 713, 722.

[1491] DMR 'Guidance Note on Strengthening the HCT (HIV Counselling and Testing) Uptake in South African Mining Industry' GN 31 in *GG* 42956 of 17 January 2020/DMR 16/3/2/3-B2, part 2.2.

4 Enforcement and monitoring mechanisms

Chapter six identifies the lack of clear monitoring and accountability mechanisms in codes of conduct as a key weakness that must be addressed.[1492] This lack of clear monitoring and accountability mechanisms to enforce rights has led some to dismiss or challenge the efficacy of codes in regulating labour standards.[1493] The mere creation of a company code of conduct is not adequate.[1494] The company must put in place effective mechanisms to monitor and police the rights enshrined in such a code. It is accepted that creating accountability mechanisms may present internal challenges for the company given the need to separate the drafters and the enforcers of the code of conduct. Prakash argues that the company must not only put enforcement and monitoring mechanisms in place but must further ensure that the company itself is completely independent of the monitoring and enforcement system established by the code.[1495] In addition, the company must ensure that it does not interfere with that system or mechanisms.[1496] Similar views are expressed that without clear implementation and monitoring processes in place, codes of conduct may remain only symbolic instruments with no real contribution towards improving labour standards.[1497] The poor monitoring and enforcement of codes of conduct directly speaks to one of the related weaknesses of codes of conduct – the lack of company accountability.[1498]

If codes of conduct are to be useful instruments in regulating labour standards, it follows that clear accountability measures must be set out.[1499] Chapter six considered

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[1492] See chapter six, part 4.

[1493] N Newell 'Citizenship, accountability and community: the limits of the CSR agenda' (2005) 81 *International Affairs* 541, 556; R Pearson & G Seyfang (2001) 68.

[1494] R Jenkins, R Pearson & G Seyfang (2002) *Global Social Policy* 73.

[1495] SP Sethi (ed) *Globalization and self-regulation: The crucial role that corporate codes of conduct play in global business* (2001) 7.

[1496] SP Sethi (2001) 7.

[1497] J Merk 'The private regulation of labour standards: The case of the apparel and footwear industries' (2007) *Transnational Private Governance and Its Limits* 141, 150.

[1498] R Pearson & G Seyfang (2001) *Global Social Policy* 68; T Bartley 'Corporate accountability and the privatization of labor standards: The struggles over codes of conduct in the apparel industry' (2005) *Research in Political Sociology* 211.

[1499] R Pearson & G Seyfang (2001) 69. Authors discuss several monitoring and accountability that can

the vagueness of most codes of conduct where transparency and monitoring mechanisms are concerned. In many cases, codes of conduct make the senior management responsible for monitoring compliance with the code. However, such a position creates a conflict of interest in cases where the management is involved in violating the code. Whereas circumstances for companies may differ, a company can entrench both internal and external monitoring mechanisms in the code of conduct. This may include the use of the SECs. Lastly, the mine can use third party monitoring bodies, such as auditing firms, to monitor the implementation and any violations of the code.[1500] External monitoring mechanisms on whether the company is complying with its code are beginning to emerge with a rapidly growing industry on auditing, consulting companies or by NGOs.[1501] The use of free, reporting hotlines in conjunction with auditing firms can further promote accountability in the implementation of codes of conduct.

Above, it was explained how the SECs, could potentially play a role in the drafting of codes of conduct if certain shortcomings are addressed.[1502] An alternative approach may adopt the mechanisms entrenched in the MHSA when drafting a code of practice.[1503] The MHSA makes provision for the use of two codes of practice on health and safety matters in the mining sector. First, the employer (or owner) may voluntarily prepare a code of practice on any matter affecting the health and safety of employees and other persons at the mine.[1504] Second, the employer must prepare a code of practice on any matter affecting the health and safety of employees or other persons at the mine when requested to do so by the Chief Inspector of Mines.[1505] The MHSA,

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be entrenched in codes of conduct.

[1500] See L Yanz & B Jeffcott 'Bringing codes down to earth' (2001) 8 *International Union Rights* 8 where auditing firms were used to monitor implementation of codes. The paper also discusses the limitations of such firms

[1501] A Kolk & R Van Tulder (2002) 266.

[1502] See chapter seven, part 3.1.

[1503] MHSA, s 9.

[1504] MHSA, s 9(1).

[1505] MHSA, s 9(2).

therefore, creates a mechanism to enable employers to be proactive on health and safety issues at the mine. While it is limited to issues affecting health and safety to employees and other persons at the mines, it can nonetheless be used as a model for drafting codes of conduct in the sector, with the Chief Inspector playing an oversight role.

Notably, issues relating to participation rights, including freedom of association and collective bargaining do not fall under the scope of the Chief Inspector of Mines. An interpretation of participation rights in the mining context to include issues that may affect the health and safety of workers at mines may require extending the powers of the Chief Inspector. This is so since the exercise of these rights is directly linked to health and safety at mines. The second option is to involve the labour inspectors or an official from the Department of Labour in a monitoring capacity to determine whether the mining company code of conduct is furthering enabling rights of the workers. Undoubtedly, issues relating to the capacity of labour inspectors to discharge their functions would have to be addressed.[1506]

The MHSA lays a foundation for the oversight role of the Chief Inspector of Mines in private initiatives of the employer.[1507] The Chief Inspector of Mines must review a code of practice of a mine if requested to do so by either a registered trade union with members at the mine, a health and safety committee or a health and safety representative at the mine.[1508] In seeking to entrench some independence, this thesis argues that the same mechanism could be used to review a code of conduct drafted by the social and ethics committee. Such codes of conduct must, however, be drafted with more inclusiveness, particularly the inclusiveness of non-standard workers at the mine in mind. The Chief Inspector of mines can order an employer to remedy a code of conduct that fails to protect adequately the health and safety of all workers. Notably, the inclusion of the Chief Inspector of mines may take away some level of voluntariness on the part of the mineral right holder or the employer in the making of a code of

[1506] See chapter five, note 1249.

[1507] MHSA, s 9(6).

[1508] MHSA, s 9(6).

conduct. However, such a position will be consistent with the increasingly incorporation of CSR instruments within the reach of legislation.

5 Conclusion

The use of codes of conduct to regulate labour standards has increased tremendously across various industries and sectors, with the mining industry being no exception.[1509] In line with the decent work agenda of the ILO as well as private initiatives, there has been an increase in the internalisation of labour standards by corporations and companies across the globe. It is clear that such initiatives can no longer be ignored, despite their internal weaknesses. As Mares argues:

> "there is no mutual exclusivity between hard law and corporate voluntarism once one replaces the black and white notion of voluntarism with the layered idea of discretion with which hard law can interact in a variety of ways, from leaving discretion untouched, to guiding it, to completely replacing it."[1510]

This means that private initiatives can play a critical role in bridging the shortcomings of state regulation, particularly of labour standards. For codes of conduct to provide meaningful regulatory assistance in the mining sector, the processes of drafting such codes must be inclusive of all workers. Secondly, rights and the bearers of such rights must be set out in a detailed manner. Merely listing rights without providing clear mechanisms indicating how all workers on the mines (regardless of their employment status) can access these rights renders codes of conduct ineffective and little more than window dressing. The rights covered must go beyond the enabling rights and the health and safety discussed in this thesis.[1511] Third, codes must provide an accessible and effective approach to monitoring and to the enforcement of rights. In addition, a

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[1509] A Blackett 'Global governance, legal pluralism and the decentered state: A labor law critique of codes of corporate conduct' (2001) 8 *Indiana Journal of Global Legal Studies* 401, 402.

[1510] R Mares 'Global corporate social responsibility, human rights and law: An interactive regulatory perspective on the voluntary-mandatory dichotomy' (2010) 2 *Transnational Legal Theory* 221, 284.

[1511] There is room for further theoretical engagement with procedural rights in the context of collective labour law. The findings and argument in the thesis provide an opportunity for further theoretical engagement although regrettably the scope of the current project would not allow that theoretical engagement to be done any justice. Such further work could also address industrial democracy, self-determination, and workplace citizenship.

code of conduct must provide clear steps on how workers can access and enforce their rights without victimisation or fear of losing their jobs. This chapter has explored the possibilities of codes of conduct in the regulation of labour standards. However, it does not call for the abandonment of state-sanctioned regulation. On the contrary, self-regulation mechanisms have been found to work in environments where state regulation is strong. In other words, they should be seen as complementary to – rather than as substitutes for – domestic laws.

Chapter 8: Conclusions and Recommendations

1 Introduction

This thesis set out to examine the effectiveness of codes of conduct in regulating labour standards in the mining sector. This research was premised on the inadequate state regulation of labour standards, given the prominence of non-standard work – which in essence increases the casualisation, externalisation and informalisation of work at mines. Partly due to these employment trends and their effect on the labour framework, labour relations at the mines have become dysfunctional, creating the need to promote enabling rights of all workers on South African mines. The Marikana massacre presents in clearer pattern this chasm and the failure of the labour framework to offer adequate protection to workers and to resolve industrial disputes.[1512] This thesis further argued that the exclusion of non-standard workers from meaningful participation in forums such as the health and safety committees that make full-time employment a pre-requisite for joining, is highly problematic.[1513] In addition, it undermines the rights of workers inter alia to a healthy and safe working environment.

2 Finding and Recommendations

Chapter two focused on the background of the study and gave context to the research question. The South African mining legacies, poverty, unemployment, high levels of inequality, and the effects of globalisation on labour standards are increasing the plight of mineworkers across sectors.[1514] In addition, new work arrangements such as subcontracting are undermining the effectiveness of labour standards and are effectively reversing the gains made by the ILO and domestic legislation in earlier decades. The net effect of these work arrangements is the creation of a workforce that is akin to a commodity. In most cases where less-skilled workers are used through

[1512] See chapter two, part 3.

[1513] See chapter five, part 3.5.

[1514] See Chapter two, part 2.

subcontracting, it results in fewer unionised workers, who earn less than their permanent counterparts who are directly employed by the mining house concerned, despite performing similar work.[1515] Subcontracting also creates mineworkers who cannot easily access core labour rights granted under the current legal framework. In other words, subcontracting renders the traditional institutions of labour regulation ineffective, thereby motivating for new mechanisms to complement the existing state regulation.[1516]

The above challenges in the regulation of labour standards are occurring when various stakeholders are increasing attempts to regulate labour standards. This thesis demonstrated how, in South Africa, CSR principles are increasingly being incorporated within national legislation, removing the voluntary aspect associated with CSR.[1517] Despite this move to legislate CSR aspects, individual company or corporation codes of conduct remain outside the purview of direct state regulation. Yet, their development and influence is not entirely disconnected from state regulation.

Chapter three evaluated perspectives on regulation and concluded that the state does not command a regulatory monopoly on labour standards.[1518] Key to this evaluation was to find out how codes of conduct relate to state regulation. The findings, at least within the literature, indicate that to the extent that the term ‘self-regulation’ is used to indicate the absence of state regulation, it is largely a misnomer.[1519] Any meaningful regulatory matrix involves, with varying degrees the direct or indirect influence of the state.[1520] For example, a corporation or company may adhere to self-regulation standards to prevent the government from imposing further regulation. A more nuanced way of understanding regulation must attempt to unpack the level of either direct or indirect government involvement. In demystifying the categories of regulation,

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[1515] See chapter two, part 4.1.

[1516] See chapter two, part 4.4.

[1517] See chapter two, part 6.

[1518] See chapter three, part 4.

[1519] See chapter three, part 3.2.

[1520] See chapter three, part 7.

chapter three offered a way to understand regulation through placing regulation along a spectrum, which effectively refutes the narrative that only the state has the monopoly to regulate labour standards. Regulation must, therefore, be viewed as a hybrid of self-regulation mechanisms and state regulation. The chapter dismissed the pure dichotomy between the command-and-control regulatory model and self-regulation models. Chapter three argues that the regulation of labour standards requires a new approach since both international conventions and domestic legislation were crafted with a narrow conception of the bearers of rights – those who fall under the statutory definition of employee.[1521]

Chapter four emphasised the success of the ILO in influencing member states, including South Africa, to ratify core ILO Conventions. Despite the ILO's progress in driving social justice across nations, its impact on domestic legislation particularly in developing countries protected a small group of workers, in standard employment relationships.[1522] It nevertheless managed to influence the protection of employees across the globe. Assisted by new actors and tools, including national governments, civil society organisations, multinational corporations, the UN Global Compact, among others, the ILO is championing the protection of workers in non-standard employment relationships.[1523] The inclusion of various actors in regulating labour standards has given rise to the phenomenon of the privatisation of labour standards. The underlying assumption is that all workers should be adequately protected. Yet this is barely the case as CSR driven regulatory campaigns are failing to remedy or to bridge weak legislation due to several reasons, including lacking binding and clear monitoring mechanisms.

Chapter five assessed the gaps within the South African labour framework, further demonstrating the narrow conceptions of the bearers of full protection under the labour framework.[1524] It provided some insights on how South Africa faces a triple threat of

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[1521] See chapter three, part 6.

[1522] See chapter four, part 3.4.

[1523] See chapter four, part 4.

[1524] See chapter five, part 2.

inequality, unemployment and poverty. Together with the new patterns of work, these factors undermine key participation and enabling rights, including freedom of association and the right to collective bargaining.[1525] In addition to these enabling rights, they also undermine the right of the workers involved in accessing a safe working environment.[1526] With a shrinking base of standard employment, which is disproportionately protected by legislation, newer forms of regulation must be devised and strengthened.

Chapter six accordingly analysed the content of selected codes of conduct in selected sectors of the mining industry, concerning key rights namely - the right to freedom of association, the right to collective bargaining, and the right to an environment that is not harmful to health and wellbeing.[1527] The findings indicate that codes of conduct reflect several commitments to respecting these fundamental rights. These rights were commonly provided for with reference to various international instruments including the UDHR, UN Global Compact Principles, ILO Conventions and other non-binding international instruments.[1528] It was discovered that health and safety provisions go beyond the workplace, and encompassed other aspects including HIV/AIDS pandemic, tuberculosis, and other mine-related illnesses.[1529] While codes of conduct expressed commitments to health and safety, such obligations are stated vaguely, with no reference to the Constitution or the MHSA.[1530] In addition, there are no clear procedures on how workers can access these stated rights – rendering the commitments merely window dressing.

Chapter six brought some insights on how the codes of conduct lack clear mechanisms for workers to access the stated rights and commitments, thereby rendering codes of

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[1525] See chapter five, part 4.1.

[1526] See chapter five, part 3.5.

[1527] See chapter six, part 0.

[1528] See chapter six, part 3.1.

[1529] See chapter six, part 3.4.

[1530] See chapter six, part 4.

conduct ineffective.[1531] This chapter further identified gaps within codes of conduct, namely the lack of clear separation between the drafting, enforcement and the remedies available in cases of violations.[1532] Secondly, there is a lack of consistency across codes of conduct with some codes of conduct restricting their application to direct employees and others applying to all workers, including workers in supply chains or those brought to the mine through subcontracting. Thirdly, chapter six noted the lack of participation of workers in the drafting of codes of conduct, the vagueness of the stated rights, the lack of procedures in accessing the rights and the absence of clear monitoring and implementation of the stated rights.[1533] The chapter concluded by stating that these limitations reduced codes of conduct to window dressing.

Chapter seven focussed on how to translate the commitments found within codes of conduct into tangible rights, capable of protecting workers not covered under labour law. This chapter offered some mechanisms to make codes of conduct meaningful regulatory instruments.[1534] First, it recommended the process of drafting codes of conduct to be inclusive, particularly the inclusiveness of subcontracted, temporary workers whose participation under the LRA and the MHSA is limited.[1535] Inclusiveness remains a critical area, and most codes of conduct do not illustrate the extent to which workers, in general, are involved in the drafting process of the codes. Undoubtedly, this is a drawback when one considers the nature of the current legal framework which in a way encourages the participation of workers in the affairs of the company.

A feature of the post-1994 labour framework is the need to give voice to workers at the workplace. Most codes of conduct are drafted with little or no input from the employees, workers, contractors and suppliers to whom such codes are designed to apply.[1536] In this respect, they are top-down managerial instruments. The inclusion of workers in

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[1531] See chapter six, part 4.3.

[1532] See chapter six, part 4.1.

[1533] See chapter six, parts 4.2.

[1534] See chapter seven, part 3.

[1535] See chapter seven, part 3.1.1.

[1536] See chapter seven, part 3.1.

the drafting of codes of conduct can assist in fostering democratic principles at the workplace. Moreover, it gives more legitimacy to the use of such instruments as regulatory instruments. Chapter seven further discussed how the rights of the workers, particularly the right to freedom of association, the right to collective bargaining and the right to an environment that is not harmful to health must be elaborated with accuracy and greater specificity.[1537] Not only should such rights be listed and explained in full, but the procedural process of exercising such rights must be well illustrated.

3 Reconfiguring the regulation of labour standards

This thesis has argued that while codes of conduct are potential regulatory instruments, once their current limitations are eliminated, it does not call for the abandonment of state regulation. To the contrary, self-regulation mechanisms have been found to work in environments where public regulation is strong. It has been argued that the state possesses one powerful resource that is unique from other entities – the power to impose sanctions or to coerce compliance.[1538] This premise while being generally true, fails to take into account the amount of power and influence that most global corporations and companies possess. This power of corporations and companies can either influence the nature of laws passed by national governments and the ability of such corporations to impose sanctions on contractors who violate the rights of workers. It is from this observation that one cannot categorise state regulation on the one hand and self-regulation by corporations on the other. This thesis argued that the two forms of regulation operate along a spectrum thereby making regulation an interplay between self-regulation and the state's command-and-control.

With the above understanding of how regulation works in practice, this thesis proposed a reconfiguration of labour regulation that takes into account self-regulation mechanisms as complementary to state regulation.[1539] Closely linked to this reconfiguration must be an express understanding of the changing nature of labour

[1537] See chapter seven, part 3.2.

[1538] GJ Stigler (1971) *The Bell Journal of Economics and Management Science* 4.

[1539] A Kolk, R van Tulder & C Welters (1999) 8 *Transnational Corporations* 143; R Locke, T Kochan, M Romis & F Qin 'Beyond corporate codes of conduct: Work organization and labour standards at Nike's suppliers' (2007) 146 *International Labour Review* 21.

relationships, placing non-standard workers as a distinct group of workers that needs more protection.[1540] Meaningful regulation and its design must focus on improving the participation and health and safety rights of non-standard workers, including subcontracted mine workers.[1541] Such new regulatory techniques must complement rather than replace, state regulation. As Ruggie notes, there remains no substitute for national regulation when it comes to effective regulation.[1542] Thus, despite the pressure exerted on national governments by globalisation, the state remains key in framing and monitoring regulatory approaches.[1543] The state has a significant role to play, by setting the frameworks for labour regulation.

This thesis has challenged the current perspectives on the regulation of labour standards. The central theme of this thesis is one that was coined by J Theron through the adage 'new wine in old wineskins'. The emergence of new forms of work relationships undermines the traditional premise on which labour relations is based. This thesis proposed a hybrid model on the regulation of labour standards that places employers as agents of globalisation and not as passive consumers of regulation.

This study was a qualitative research study, and it gave insights into the nature of codes of conduct, including on their democratic legitimacy. Despite the relevance and significance of the findings in this thesis, there is room for a quantitative study to assess further the practical issues and the efficacy of such instruments on the ground. There is also scope for a thorough theoretical engagement with procedural rights in the context of collective labour law.

[1540] On the changing nature of employment relationships see J Theron 'Employment is not what it used to be' (2003) *ILJ* 1247.

[1541] H Arthurs 'Labour Law After Labour' *in* G Davidov & B Langille (eds) (2011) 15.

[1542] JG Ruggie (2002) 5 *Journal of Corporate Citizenship* 31.

[1543] C Scott 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' *in* J Jordana & D Levi-Faur (eds) *The politics of regulation: Institutions and regulatory reforms for the age of governance* (2004).

4 Conclusion

Codes of conduct are laudable instruments that have attempted to bridge the gaps in state regulation. They have incorporated labour rights purporting to cover workers who, under the current legal framework are not protected by legislation. Yet despite this ambitious move, in their current form, codes of conduct in the mining industry of South Africa (at least in the sectors reviewed) are ostensibly incapable of offering meaningful regulatory relief to the disenfranchised workers. On the one hand, codes of conduct seek to go beyond the prescriptions of legislation. Yet, an analysis of codes of conduct reveals that from the drafting, implementation, enforcement and monitoring, the process is flawed, leaving such instruments illegitimate and inadequate regulatory tools. In particular, codes of conduct lack the participation of key stakeholders to make them credible and democratic regulatory instruments. As Arthurs notes, for codes to be effective, they must be viewed as genuinely capable of offering an alternative means to statutory regulation.[1544] This means they must provide a meaningful and complementary role to the regulation of labour standards. As they currently stand, most of the codes of conduct adopted by the mining companies analysed in South Africa's gold, platinum and coal mining sectors do not offer anything new beyond what is contained in the legal system. In this regard, codes of conduct are largely window dressing instruments, offering no meaningful rights to non-standard workers.

[1544] HW Arthurs 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation' (2002) 477.

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