

**The Duty to Bargain and Collective Bargaining in South Africa, Lesotho
and Canada: Comparative Perspectives.**

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM (Labour Law) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Dedication

This dissertation is dedicated to my parents, Reverend Shadrack Moeketsi Ndumo and Mrs. Polo 'Malehlohonolo Ndumo.

You are both priceless.

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Abstract

This dissertation examines the development of the duty to bargain and its good faith component in the collective bargaining regime primarily in South Africa and from a comparative perspective in Lesotho and Canada. The dissertation focuses on the role played by legislation and the judiciary in the development of a 'duty to bargain' jurisprudence in the three jurisdictions and the enforceability of good faith bargaining.

In South Africa the Constitution 1996 has entrenched the right to engage in collective bargaining in terms of section 23(5), amongst other labour rights. The Labour Relations Act 66 of 1995 (LRA) does not include an express duty to bargain much less impose a duty to bargain in good faith. This omission has given rise to a debate on whether or not this omission is unconstitutional in light of section 23(5).

This dissertation therefore examines the various arguments made in favour of or against a statutorily imposed duty to bargain, which necessarily implies good faith bargaining, in the context of a voluntaristic system of collective bargaining.

Lesotho and Canada are utilized as examples of countries which have a statutorily imposed duty to bargain on employers with representative trade unions.

The dissertation attempts to avoid a purely legalistic approach in favour of an analysis that takes into account the socio-economic context within which collective bargaining takes place.

The proposition in the dissertation is that a voluntaristic system of collective bargaining is not incompatible with the imposition of a statutorily imposed duty to bargain, provided a clear distinction between process and product is maintained. In the South African context, despite criticisms of constitutionalising labour rights, I argue that the omission of a duty to bargain from the LRA is unconstitutional.

List of Abbreviations

CCMA	Commission for Conciliation Mediation and Arbitration
CLC	Canada Labour Code
DDPR	Directorate for Dispute Prevention and Resolution
ILC	International Labour Conference
ILO	International Labour Organisation
LRB's	Labour Relations Boards
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NEDLAC	National Economic Development and Labour Council
SADC	Southern African Development Community
UN	United Nations

Table of Cases

- BAWU v. Umgeni Iron Works 1990 11 ILJ 589 (IC)
- BCAWU v. Johnson Tiles 1985 6 ILJ 210
- Bleazard & others v. Argus Printing and Publishing Co. (Pty) Ltd 1983 4 ILJ 60 (IC)
- Dunlop Tyres v. NUMSA 1990 11 ILJ 149 (IC)
- ECCAWUSA & others v. Southern Sun Hotel Interests (Pty) Ltd 2000 21 ILJ 1090 (LC)
- ERGU v. NUM 1989 10 ILJ 675 (LAC)
- Macsteel (Pty) Ltd v. NUMSA 1990 11 ILJ 995 (LAC)
- MAWU v. Natal Die Casting (Pty) Ltd 1986 7 ILJ 520 (IC)
- Mynwerkersunie v. African Products 1987 8 ILJ 401 (IC)
- Natal Die Casting v. President, Industrial Court 1987 8 ILJ 245 (AD)
- National Police Services Union v. National Negotiating Forum 1999 20 ILJ 1081 (LC)
- NBAWU v. BB Cereals 1989 10 ILJ 870
- Nomaqumbe v. Multi Office (Pty) Ltd 1992 13 ILJ 152 (IC)
- NUM v. ERGU 1991 12 ILJ 1221 (A)
- Royal Oak Mines v. Labour Relations Board (Canada) 1996 1 S.C.R 369
- RTEAWU v. Tedalex 1990 11 ILJ 1272 (IC)
- UAMAWU v. Fodens 1983 4 ILJ 212 (IC)
- SANDU v. Minister of Defence & others 2003 (3) SA 239 (T)
- SANDU v. Minister of Defence & others 2003 24 ILJ 2101 (T)
- Stocks and Stocks v. BAWU 1990 11 ILJ 369 (IC)

Table of Statutes

Canada

Canada Labour Code 1985

Canadian Charter of Rights and Freedoms 1982

Criminal Law Amendment Act 1872

Industrial Disputes Investigation Act 1907

Labour Relations Act 1995

National Labour Relations Act 1935 (Wagner Act/U.S)

Wartime Labour Relations Regulations (Privy Council 1003)

Lesotho

Labour Code Order 1992

Labour Code (Amendment) Act 2000

Labour Code (Codes of Good Practice) Notice 2003

Master and Servant Act 1856 (Cape Colony)

Regulation of Wages and Conditions of Employment Act 1969

Trade Unions and Trade Disputes Proclamation 1942

Trade Union and Trade Disputes Law 1964

South Africa

Black Labour Relations Regulation Act 1953

Constitution of the Republic of South Africa 1996

Labour Relations Act 1956 (as amended)

Labour Relations Act 1995

Regional and International Instruments

Charter of Fundamental Social Rights 2003

North American Agreement on Labor Cooperation 1993

Southern African Development Community Treaty 1992

Constitution of the ILO 1919

Convention Concerning the Promotion of Collective Bargaining No.154 of 1981

Recommendation Concerning the Promotion of Collective Bargaining 1981

Right to Organize and Collective Bargaining Convention No.98 of 1949

Chapter One

Objectives, Methodology, Limitations and Justification for the Study

1. Objectives

1.1 Chapter One

The objective of this chapter is to outline the objectives, methodology, limitations and justifications of the 6 chapters of the dissertation. This outline will be done chapter by chapter. Each chapter has a conclusion section however the final chapter, that is to say, Chapter 6 shall contain a conclusion of the whole dissertation.

1.2 Chapter Two

The objective of chapter two is to provide a theoretical perspective on industrial relations and the normative context within which collective bargaining takes place. A suggestion is made that the dominant theory in any country or jurisdiction is the result of a conscious decision on how the actors of collective bargaining should interact and the role that the state plays to regulate this interaction. This chapter also seeks to illustrate the fact that the extent and nature of the state's intervention in collective bargaining is by no means a clear-cut one hence the controversial duty to bargain debate in South Africa.

1.3 Chapter Three

This chapter examines the historical development of collective bargaining and the duty to bargain and its good faith component in South Africa, Lesotho and Canada and the obvious role played by legislative enactments in this development. The chapter seeks to highlight in particular the role of the old Industrial Relations Court in South Africa in developing duty to bargain in good faith jurisprudence despite minimal legislative guidance.

1.4 Chapter Four

This chapter seeks to interrogate the efficacy of the international and regional labour law framework and whether this has any implications for the development of the duty to bargain and in good faith at the national level. The suggestion made is that this regime of international and regional labour law appears to serve as a general guide to the legislative framework, which seeks to establish certain basic norms while leaving the detailed provisions to national legislatures.

1.5 Chapter Five

This chapter seeks to provide a comparative analysis of the national labour law frameworks in the three jurisdictions pertaining to collective bargaining and the duty to bargain and its good faith aspect. Case law will also be included and discussed where available.

1.6 Chapter Six

This chapter concludes the discussion on collective bargaining and the general duty to bargain and its good faith element in South Africa, Canada and Lesotho. A brief analysis of the findings of the dissertation and recommendations will also be provided.

2. Methodology

The methodology utilised throughout the dissertation is basically library research. Heavy reliance has been placed on sources such as law journals, textbooks on labour law and primary sources such as legislation. Minimal use has been made of the Internet but where the actual materials were not readily available, such as in the case of Canada, reputable websites were referred to.

3. Limitations of the Study

The issue of a general duty to bargain and its good faith component has been fairly extensively researched in South Africa while in Lesotho it has not. The dissertation is therefore limited in terms of academic analysis of collective bargaining and the general duty to bargain particularly in Lesotho. In terms of Canada the limitations were the unavailability of a wider variety of written materials on collective bargaining and the duty to bargain. The primary sources, that is, the legislation governing collective bargaining in Canada were therefore indispensable and readily available on the Internet. The writer in addition consulted secondary sources, that is, textbooks on Canadian labour law with chapters on collective bargaining and articles written on collective bargaining.

4. Justification for the Study

The duty to bargain debate in South Africa forms a substantial basis of this study however the writer has adopted a comparative perspective to analyse the current collective bargaining framework. There are various reasons for having chosen Lesotho and Canada to compare to South Africa in this dissertation.

The writer chose Lesotho to form part of the study due to the fact that there is a paucity of written literature and research on collective bargaining, despite the existence of a legislative and policy framework. The writer humbly intends for this dissertation to make a small contribution towards the development of research in this area of the labour law. The Lesotho legal system and the norms informing the development of its jurisprudence have always been informed by the developments in South Africa mainly due to its geographical location. The development of the duty to bargain in good faith in the Lesotho labour law should therefore be compared and contrasted with the developments of the labour law in South Africa particularly after the advent of democracy.

Canada has been chosen as part of this study due to the fact that in developing its labour law in particular, South Africa had to 'borrow and bend'¹ largely from Canadian labour law and jurisprudence. This process occurred in the late eighties and early nineties during the heyday of the unfair labour practice jurisdiction of the Industrial Court.

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¹ This term is associated with Clive Thompson who has written extensively on collective bargaining in South Africa.

Chapter Two

2. Theoretical Framework of Industrial Relations and Collective Bargaining

In this chapter I will provide an overview of industrial relations theory as it relates to collective bargaining. The examination of these theories and perspectives enables us to identify the various processes and dynamics occurring within the environment in which collective bargaining takes place. I will also present a brief exposition of these theoretical perspectives in terms of the implications that they have for collective bargaining. In this regard, I will focus on the role of the state and the types of interventions that the state can make in terms of institutionalising collective bargaining.

2.1 The Industrial Relations Theoretical Framework

There is a diverse array of industrial relations theories. Grossett suggests that the major ones are Unitarism, Pluralism and Marxism or the Radical perspective.¹ Swanepoel adds to this list Corporatism which is divided into State Corporatism and Societal Corporatism.²

The Unitarist theory de-emphasises the role of unions in the workplace and contends that collective bargaining interferes with market forces.³ In addition, the Unitarist theory is considered to be largely irrelevant to contemporary discussion of industrial relations in a democratic setting and has been dismissed as 'incongruent with reality and useless for purposes of analysis.'⁴

The relevance of the Unitarist theory to this paper is therefore limited as 'with the rise of trade unionism...the unitary approach was gradually eroded.'⁵ One can safely deduce that Unitarism does not inform the industrial relations systems of the three countries under consideration in the dissertation.

¹ Grossett, M. 'Labour Relations in South Africa' 7

² Swanepoel, B.J. 'South African Employment Relations in Context' in 'Managing Employment Relations in South Africa' 1-10

³ Finnemore, M. 'Introduction to Labour Relations in South Africa' 13

⁴ *ibid*, 5

⁵ Bendix, S. 'Industrial Relations in South Africa' 21

In terms of the Pluralist theory, employers and employees have conflicting goals and values but acknowledge their interdependence.⁶ This therefore implies that conflict should be managed within mutually agreed procedures and structures.⁷ To this end, collective bargaining is a voluntary, usually decentralised process underpinned by the right to strike.⁸

Some of the most important elements underpinning the pluralist perspective are: freedom of association, the right to strike and lock out, and institutionalised power play and collective bargaining.⁹ In addition, Pluralist societies presuppose a wealth base that is perceived as sufficiently fairly distributed for the stakeholders to have an interest in maintaining rather than disrupting it.¹⁰

The pluralist theory is recognised as the best approach to accommodate the interests of the working class within a capitalistic economic system.¹¹ The pluralist theory also recognizes that the interactions between management and labour are defined by unequal bargaining power, with an 'equilibrium' that is never constant and determined by factors outside the parties' control.¹²

The pluralist theory is more widely accepted and reflected in current organisational and societal patterns than any other theory.¹³

The Marxist theory or the radical perspective on the other hand 'promotes an order in which productive capacity (including land, capital, and labour) and the fruits thereof are owned by and shared among the people.'¹⁴

⁶ Finnemore, M. op. cit. 6

⁷ *ibid*

⁸ *ibid*

⁹ *ibid*

¹⁰ *ibid*

¹¹ Bendix, op. cit. 22

¹² Rycroft, A. and Jordan, B. 'A Guide to South African Labour Law' 121

¹³ Grossett, M. op. cit. 7

¹⁴ *ibid*, 8

The traditional notion of collective bargaining therefore does not accord well with the basic tenets of Marxist theory because 'there is no division of labour [and] people work for the sake of working and not for what they stand to gain in return',¹⁵

In terms of this theory, 'collective bargaining is viewed as an employer strategy whereby the trade union is co-opted into the capitalist system.'¹⁶

It is trite that Marxism or Radicalism as a theory and in practice has been highly compromised by the fall of the Soviet Union and its allies in Eastern Europe. The efficacy of the Marxist theory in terms of analysing collective bargaining and its institutionalisation is therefore minimal.

In terms of State Corporatism on the other hand, trade unions are demobilised and co-opted into government structures.¹⁷ It is patent that where State Corporatism forms part of state policy in a particular state, collective bargaining and other trade union rights will not be recognised. Societal Corporatism recognises the autonomy of trade unions and their right to engage in industrial action.¹⁸ This theory attempts to accommodate the interests of all the actors of industrial relations and achieve 'social consensus' for the benefit of a sound and predictable economy.¹⁹

One can therefore conclude that societal corporatism can in effect promote collective bargaining while simultaneously avoiding measures of compulsion that would give rise to the perception that a particular group whether employer or trade union is being compromised. Achieving consensus among the various actors of collective bargaining on any issue of economic or labour policy is obviously the first prize however this is seldom the case in practice.

¹⁵ *ibid*

¹⁶ Swanepoel, *op. cit.* 1-10

¹⁷ *ibid*

¹⁸ Swanepoel, *op. cit.* 1-11

¹⁹ *ibid*

As will be illustrated in the subsequent chapters of the dissertation, the South African industrial relations system in particular and the legislative framework underpinning it are the product of a delicate consensus. Ten years after the adoption of the Labour Relations Act 66 of 1995 (LRA) some actors of the collective bargaining system are beginning to show signs of discontent with some provisions of the LRA as either favouring trade unions or employers to the detriment of the interests of the other. The issue of a statutory general duty to bargain and the debates surrounding it should therefore be examined in this context.

2.2 The Role of Law in Collective Bargaining

There are two principal ways in which the state can regulate collective bargaining that is via the legislature and the judiciary whose function it is to interpret and enforce the legislation.

Sidney and Beatrice Webb first defined collective bargaining in the 19th century in their classical work, *Industrial Democracy*, as a rational strategy for dealing with problems of unequal bargaining power between workers and employers.²⁰ Recently collective bargaining has been commonly defined as a voluntary method or system that regulates the bilateral control of workplace relations between employers and unions.²¹ Collective bargaining is integral to and a 'core' of the industrial relations systems of many democratic, free market economies.²² The problem that the Webbs were concerned with however, that is, unequal bargaining power still persists even in the 21st century therefore the efficacy of any collective bargaining regime should be assessed in this context.

²⁰ Kochan, T. 'Collective Bargaining and Industrial Relations' 5

²¹ Rycroft, A. and Jordan, B. op. cit. 114

²² Suwa, Y. 'The Actors of Collective Bargaining' in *The Actors of Collective Bargaining: A World Report* 23

There are two main actors in collective bargaining that is industry and trade unions.²³ The state through the mechanism of legislation determines the way in which the actors interact, the rules and procedures that they utilise to regulate their interaction and the institutions through which they interact. The role of the state in regulating collective bargaining has been the subject of controversy particularly within the regulation vis-à-vis deregulation debate. Academics and policy makers however do realise that 'abstention of the law is not always possible, nor is it always necessarily the best policy.'²⁴

The courts have also been given a role in various aspects of the individual and collective aspects of the employment relationship. Rycroft and Jordan describe the tensions in this approach succinctly: 'the tension between the non-interventionist spirit of the pluralist approach and the process of juridification is obvious.'²⁵

The extent to which the state will interfere in the labour-management relationship will depend generally on its adherence to the principle of voluntarism on one hand or mandatorism on the other.²⁶

In addition, the policy choices of the state in terms of whether to adhere to mandatorism or voluntarism will be influenced by some of the theoretical perspectives outlined above.

Historically, the term 'voluntarism' has its roots in the British industrial relations system whereby both labour and management resisted any government interference in industrial relations, 'including a compulsion to bargain.'²⁷

²³ Grandi, M. *ibid*

²⁴ Bendix, *op. cit.* 22

²⁵ Rycroft and Jordan, *op. cit.* 122

²⁶ Bendix, *op. cit.* 39

²⁷ Anstey, M. 'Global Shifts in Industrial Relations: Implications for South Africa' 19

Otto Kahn-Freund is widely credited as the proponent of the voluntarist model of industrial relations.²⁸ In this context, labour law operated within the framework of 'collective laissez-faire' in which the collective forces of labour and capital battled it out until the side with the superior social power brought the conflict to an end.²⁹ The courts intervened in labour disputes only in so far as they fell under the category of 'disputes of right.'³⁰

However, the British government has increasingly interfered in industrial relations to the extent that 'voluntarism in its original sense no longer pertains.'³¹ This can be attributed to the fact that 'voluntarism' was criticised as 'ill-defined and imprecise and could not account for a divergent range of British practice and prescription.'³²

Voluntarism in its theoretical sense insists on minimal or no interference in the interactions of labour and management.³³ In practice, '...absolute or pure voluntarism exists nowhere in the world. In so-called voluntary systems there are mandatory elements, the degree varying from country to country and, even in one country, from government to government or from year to year.'³⁴

Most industrial relations systems exhibit elements of both voluntarism and mandatorism, however, voluntarism is understood by some commentators to apply not so much to a 'duty to bargain' but to the *outcomes* of bargaining.³⁵ (emphasis added)

²⁸ Davis, D. 'Voluntarism and South African Labour law: Are the Queensbury Rules an Anachronism?' 45

²⁹ *ibid*, quoting Kahn-Freund's 'Labour and the Law'

³⁰ *ibid*, 46

³¹ *ibid*

³² Beardwell, I. 'Contemporary Industrial Relations: A Critical Analysis' 6

³³ Bendix, *op. cit.* 39

³⁴ *ibid*

³⁵ Anstey, *op. cit.* 19

The crux of voluntarism therefore is that legal intervention is tolerated only in so far as it is necessary to ensure the smooth operation of the process of collective bargaining so that its outcome can be determined by the relative economic strength of the parties.³⁶

The duty to bargain debate may therefore be seen as a concern with the general issue of the location and role of collective bargaining in a market economy.³⁷

The manner in which any government intervenes in the industrial relations system depends on its ideology, its political objectives, the socio-economic context and the strength of the trade unions.³⁸ The various organs of the state may be utilised to regulate the labour-management relationship particularly in terms of collective bargaining. The state may play a legislative role by enacting labour legislation and even providing for labour rights in the Constitution, which is the approach that has been adopted in South Africa. This 'constitutionalisation' of labour rights is not without its controversies.³⁹

The state may also play a role in industrial relations and collective bargaining via the judiciary, as it has been noted 'despite its theoretical independence from the government, [the judiciary] remains an instrument of the state.'⁴⁰

Questions do however arise in terms of the nature and exact role that should be played by the courts in collective bargaining particularly in terms of enforcing a duty to bargain. Quoting Thompson, Davis reiterates the principle that '[the] Court should act as a custodian of the process and absent itself from the *product* of negotiation, which should be a reflection of the dynamic balance of power between the parties.'⁴¹

³⁶ Rycroft, op. cit. 126

³⁷ Beardwell, op. cit. 3

³⁸ Bendix, op. cit. 40

³⁹ The 'constitutionalisation of labour rights' debate is discussed infra

⁴⁰ *ibid*, 45

⁴¹ Davis, op. cit. 63

In practice however, the lines of demarcation between the court's role in safeguarding the integrity of the process without imposing outcomes and actively intervening in the arena are difficult to draw. As will be illustrated in the subsequent chapters of the dissertation, in Canada the Labour Relations Boards (LRB's) have in cases of extreme bad faith bargaining crossed the delicate line and imposed outcomes or collective agreements on the parties.⁴²

It is clear that the tension between the role of the courts in a process that is theoretically 'free' and statutorily created bargaining structures is a perpetual one.

The advent of the LRA, the constitutional entrenchment of a 'right to engage in collective bargaining'⁴³ in the South African Constitution and the decisions of the South African High Court in the *SANDU* and other recent cases neatly illustrate this ever present tension.⁴⁴

2.3 Conclusion

One can make several observations a propos the theories governing industrial relations systems and by implication the nature of collective bargaining. Some of the theories have, in the context of a modern globalising world, lost prominence due to advances in democracy in the political sense. The increasingly important role of trade unions in liberation struggles in both South Africa and to a lesser degree Lesotho ensured the elevation of their role in industrial relations.

Trade unions, the state and industry are all important players in industrial relations and collective bargaining; hence the pluralist theory is most relevant in terms of explaining the role of each actor. However some systems exhibit a hybrid of theories and perspectives.

⁴² *Royal Oak Mines v. Labour Relations Board (Canada)*

⁴³ Section 23(5)

⁴⁴ Discussed in Chapter 5

This 'hybridisation' of theory and perspective has resulted in a disjuncture which is reflected in the controversy of whether collective bargaining should be compelled or not and what the exact limits of such compulsion would be. In terms of pluralism in its pure theoretical sense, collective bargaining is 'voluntaristic' therefore the notion of compulsion does not arise. This absolutism is however not reflected in the current global trend of the institutionalisation of collective bargaining and in the role that the judiciary plays in enforcing some of the prescriptions surrounding collective bargaining. No system can lay claim to being entirely voluntaristic. This in turn gives rise to tensions regarding the nature of the role played by the state in this sensitive arena. The term 'voluntarism' itself does not appear to negate some level of compulsion but the theoretical or definitional boundaries are not clear.

Would imposing a duty to bargain offend the voluntaristic perspective of collective bargaining in a largely pluralistic industrial relations system? Is a duty to bargain therefore capable of exact definition in a sense limiting the role of the courts in collective bargaining and do the statutory frameworks in the various countries under discussion provide guidance in this regard?

Clarification and certainty with regard to whether a duty to bargain is compatible with collective bargaining in the 21st century and its constantly evolving socio-economic context is absolutely crucial. Certainty in this regard would go towards clearly defining the boundaries of state intervention via its legislative function and the judiciary.

Chapter Three

3. The History of Collective Bargaining in South Africa, Lesotho and Canada with Reference to a Duty to Bargain

It is imperative to examine the historical development of collective bargaining and the duty to bargain. It is only through an appreciation of collective bargaining and its historical development through legislation and court jurisprudence that the utility of the current framework can be rigorously evaluated. The historical development approach also assists us to ascertain trends in terms of state intervention in collective bargaining and the social context in which such intervention becomes imperative. Examining the historical development of collective bargaining in the various jurisdictions also enables us to discern the labour policy choices adopted by the state to facilitate collective bargaining and how these policy choices are dictated to by various socio-economic contexts.

3.1 The Development of the Duty to Bargain in South Africa

Historically, South Africa had what has been termed a 'dualistic system of labour relations'¹ a system which was in line with the apartheid policy of separate development. Black employees were prevented from joining registered trade unions. As far as blacks were concerned their position was governed by the Black Labour Relations Regulation Act 48 of 1953 which, inter alia, provided for a 'restricted right to strike'²

In the late 1970's the government set up a Commission of Inquiry into Labour Legislation headed by Professor Wiehahn. This unprecedented move was precipitated by growing political tensions caused by the policies of the apartheid government and resulted in 'deracialised' labour laws.

¹ Grogan, J. 'Collective Labour Law' 3

² ibid

The Report of the Commission observed that collective bargaining with regard to white employees took place at the industry level, through industrial councils, while for black workers bargaining was primarily plant based.³

The Industrial Conciliation Act, later referred to as the Labour Relations Act 1956 went as far as prescribing the bargaining topics which the industrial council could negotiate on with the represented trade union(s)⁴ while still leaving the parties to decide on other topics to conclude agreements on.⁵ In a nutshell, the LRA 1956, '[was] an interventionist piece of legislation standing in sharp contrast to the collective laissez faire approach.'⁶

Unfortunately, the Wiehahn Commission did not examine the theories and ideologies underlying the economic and industrial relations system, as this did not form part of its terms of reference.⁷

One of the far-reaching recommendations made by the Wiehahn Commission was for the establishment of an Industrial Court which would be given powers to interdict 'unfair labour practices.'⁸ Rycroft notes that the 1986 Draft Bill to amend the LRA 1956 did not per se introduce the duty to bargain explicitly, instead the unreasonable failure or refusal to negotiate by either employer or trade union was included in the unfair labour practice definition.⁹

Some members of the Industrial Court eagerly embraced the unfair labour practice jurisdiction to the extent that some commentators labelled it 'vague but ultimately potent.'¹⁰

³ The Complete Wiehahn Report, par.3.10 p.24

⁴ Bloch, J. 'The Legislative Framework of Collective Bargaining in South Africa' 63

⁵ *ibid*

⁶ Davis, *op. cit.* 66

⁷ Wiehahn Report, *op. cit.* par.3.1 p.22

⁸ *ibid*, Recommendation 4.28.5.2 p.97

⁹ Rycroft, A. 'The Duty to Bargain in Good Faith' 202

¹⁰ Thompson, C. and Benjamin, P. 'South African Labour Law' vol.1 AA1-1

As a result of the unfair labour practice jurisdiction, 'bargaining relationships were imposed by judicial intervention.'¹¹ Even though the Industrial Court played an important role in establishing a 'general duty to bargain' in respect of representative trade unions, the Court avoided a deterministic role regarding bargaining levels.¹² The Court was particularly reluctant to compel bargaining at more than one level on the same issue.¹³

It is imperative to note that the notion of 'voluntarism' did not and arguably still does not fully account for the nature of South African labour law and its context.¹⁴

In this regard Davis notes that in a system that created statutory bargaining structures and provided rights for the respective parties, 'the voluntarist model has but limited application in South Africa.'¹⁵ The crux of a statutory system was that for collective bargaining to function effectively, the parties had to *participate* in the process.¹⁶ (emphasis added)

With this basic understanding in mind, but without further guidance from the Labour Relations Act 1956 as amended, the Industrial Court went about creating its duty to bargain jurisprudence. This process was however not without its hiccups and detractors within the Industrial Court and the academic community. As will be illustrated in the following chapters this tension persists even in the post-1995 LRA era.

¹¹ Grogan, *ibid* 5

¹² Horwitz, F. 'Collective Bargaining Rights in South Africa' 8

¹³ *ibid*

¹⁴ Davis, *op. cit.*, 49

¹⁵ *ibid*, 63

¹⁶ *ibid*

3.1.1 The Duty to Bargain Jurisprudence Developed by the Industrial Court¹⁷

The general duty to bargain gained prominence in the Industrial Court era 'because many employers were reluctant to recognise black trade unions as legitimate representatives of their workforces.'¹⁸

Initially some members of the Industrial Court did not favour the imposition of a duty to bargain while other members did.¹⁹ However, the Appellate Division in *NUM v. East Rand Gold & Uranium (Pty) Ltd* as the 'ultimate labour tribunal' took the view that a duty to bargain could in certain circumstances be imposed.²⁰ It would seem that even after the enactment of the LRA 1995 and the 1996 Constitution the courts still hold different opinions in terms of whether a duty to bargain should form part of South African collective bargaining regime.²¹

The duty to bargain in good faith had two main functions in the Industrial Court era, firstly it reinforced the obligation of an employer to recognise the bargaining agent and secondly it fostered rational, informed discussion therefore reducing the potential for unnecessary industrial conflict.²²

The first major bargaining case dealt with by the Industrial Court was *Bleazard & others v. Argus Printing and Publishing Co.Ltd & others*.²³ Briefly, the union, the South African Society of Journalists had for years been party to a non-statutory conciliation board with the employer's body. The union was unregistered.

¹⁷ I am indebted to John Grogan for his succinct analysis of the Industrial Court cases.

¹⁸ Grogan, op. cit. 24

¹⁹ *ibid*, 27

²⁰ 1991 12 ILJ 1221 (A)

²¹ As illustrated by the decisions of the High Court in the *SANDU* cases.

²² Rycroft, op. cit. 203

The main purpose of the conciliation board was to negotiate salaries and working conditions for union members. The employers unilaterally decided to withdraw from the Board and the union sought an order directing the employers to remain members of the Board and negotiate bona fide with the union on such matters for which the Board was established. In holding for the union, the Court ordered the employer to resume the bargaining relationship it already had with the union and negotiate in good faith.

The Court was however aware of the shortcomings of ordering a party to 'negotiate in good faith' particularly in terms of enforcing such an order.²⁴

Miles notes that the Industrial Court's concern with the enforceability of an order to bargain in good faith was due to two reasons:

- (a) There was no practical way in which the Court could ensure that either party would behave/bargain in good faith especially because there were no rules pertaining to good faith bargaining,
- (b) The LRA 1956 as amended did not make provision for the enforceability of Industrial Court orders.²⁵

Following *Bleazard's* case, the Industrial Court went on to decide another bargaining dispute in *UAMAWU v. Fodens*.²⁶ The union alleged a total of 37 unfair labour practices including the refusal by the company to bargain with a representative registered trade union. The Industrial Court built on the *Bleazard* jurisprudence and made the following statement: "One might infer...that where the majority of the employees should elect to be represented by a registered trade union the employer could fairly be expected to deal with that union in connection with matters concerning the relationship with its employees."²⁷

²³ 1983 4 ILJ 60 (IC)

²⁴ at 77

²⁵ Miles, M. 'The Duty to Bargain in Good Faith in South Africa' 2

²⁶ 1983 4 ILJ 212 (IC)

²⁷ at 226

The Court ordered the company to commence negotiations in good faith with the union in regard to recognition. In addition the Court emphasised that it was not every recognition dispute that warranted an order to bargain. Miles calls this the 'case-specific' approach²⁸ in that an order to bargain is only granted where the unique circumstances of the case warrant such an order being granted or not.

Both *Bleazard* and *Fodens* had an immediate impact not only on the parties to the cases but on other employers and unions. Thompson notes that the decisions had a ripple social effect.²⁹ Many employers hostile to unions altered their propensity to refuse recognition as a matter of course and changed direction in deference to the law, also the number of recognition disputes altered dramatically and unions began recruiting with renewed vigour.³⁰

As stated before, the Industrial Court decisions contradicted each other and there seemed to be no judicial consensus on the duty to bargain. In *BCAWU v. Johnson Tiles*³¹ the Court totally disregarded the *Bleazard* and *Fodens* decisions and held that it could not order the respondent company to bargain with the applicant union.

A subsequent case in which the Industrial Court affirmed the duty to bargain is *Macsteel (Pty) Ltd v. NUMSA*.³² The presiding member in this case made the observation that the LRA created machinery which made collective bargaining not only possible but compulsory. The court went on to state 'Its [the LRA] operation is such that, if parties negotiate genuinely and in good faith, and their demands and offers are reasonable, settlement will be reached before

²⁸ Miles, op. cit. 3

²⁹ Thompson, op. cit. 197

³⁰ *ibid*

³¹ 1985 6 ILJ 210

³² 1990 11 ILJ 995 (LAC)

disruption takes place...with the help of the machinery provided for by the Act.’³³

It is imperative to note that the Industrial Court was not per se imposing bargaining outcomes on the parties. This crucial point was emphasised in *BAWU v. Umgeni Iron Works*³⁴ ‘an employer is obliged to negotiate to an end (sic) a dispute of interest but there is no obligation on the employer to come to an agreement with the other party to the dispute.’

The court therefore made a clear-cut distinction between the duty to bargain (which did not prescribe outcomes but had to be conducted in good faith) and the duty to conclude a bargain (which would have gone against the voluntaristic grain of the LRA and ‘free’ collective bargaining).

After the Appellate Division rendered its decision affirming a duty to bargain in appropriate circumstances³⁵, it seemed to be settled that ‘a duty rests upon employers...to negotiate with trade unions which are *representative* of their employees.’³⁶ (emphasis added)

One can therefore make a few observations with regard to the approach of the courts prior to the 1995 dispensation:

- (1) The duty to bargain rose in prominence because employers were refusing to recognise black trade unions for collective bargaining purposes.
- (2) The duty to bargain therefore became a tool of expediency and fairness under the Industrial Court’s ‘unfair labour practice’ jurisdiction.
- (3) The duty to bargain, in terms of content, did not impose outcomes on the bargaining agents but brought them to the table to initiate the bargaining process.

³³ at 1006A-E

³⁴ 1990 11 ILJ 589 (IC)

³⁵ *Natal Die Casting v. President, Industrial Court* 1987 8 ILJ 245 (AD)

³⁶ Grogan, op. cit. 27

- (4) The duty to bargain as it was applied and developed was not applicable in all circumstances of a refusal to bargain. The Appellate Division made it clear that a trade union that sought recognition for collective bargaining purposes had to be *representative* of the employees in the particular bargaining unit.

The legacy of the Industrial Court is somewhat controversial as reflected in this statement, ‘...while its [the Industrial Court] over-endowment could be seen as a virtue in the politically blighted eighties, it became a liability in the democratising nineties.’³⁷

One would disagree with this statement particularly as the Act itself did not define the notion of unfair labour practices; this task was left to the Industrial Court whose interpretation of the phrase curbed a lot of abuse of black unions in particular. At the time this type of judicial interference in collective bargaining was necessary and well within the jurisdiction of the court.

Thompson concedes that the South African industrial relations context demanded the Industrial Court to ‘institutionalise the escalating conflict [which] left it with little choice but to be robust and interventionist.’³⁸

3.1.2 The Content of the Duty to Bargain

This section of the paper seeks to establish the levels and thresholds imposed by the Industrial Court on the bargaining relationship once it had concluded that a duty to bargain was appropriate in the circumstances. Usually, once a union had established a majority presence at the plant it would present management with a demand for recognition.³⁹ A bargaining relationship with an ‘in-built’ duty to bargain over terms and conditions of employment would then ensue with the conclusion of a recognition agreement.

³⁷ Thompson and Benjamin, *ibid* AA 1-1

³⁸ *ibid*

³⁹ Thompson, C. ‘Borrowing and Bending: The Development of South Africa’s Unfair Labour Practice Jurisprudence’ 192

Failure to recognise the union for bargaining purposes precipitated a 'refusal to bargain' dispute which fell under the Industrial Court's 'unfair labour practice' jurisdiction. Although the Industrial Court was loathe to impose in particular, bargaining levels, topics and units, in the absence of an agreement it provided guidelines in this regard.

This section therefore examines the subject under four areas: bargaining units, bargaining topics, bargaining levels and bargaining conduct.

3.1.2.1 Bargaining Units

In order for a union to access bargaining rights, its level of representativity in the unit had to be determined. The common approach was that in order for a union to be recognised for collective bargaining purposes, it had to represent at least 50% of the work force.⁴⁰ This approach therefore confirmed the basic principle of majoritarianism. The Industrial Court did not always adhere to the principle of majoritarianism in recognition disputes; in certain cases the required threshold was 'sufficient' majority in the bargaining unit.⁴¹ In addition, the Industrial Court approved the 'all-comers' approach whereby the employer was obliged to bargain with any union, group of employees, and even individual employees.⁴²

One can therefore conclude that there was no single approach to the issue of recognition for collective bargaining purposes. Employees, as of right, had the right to bargain with the employer irrespective of whether they had a majority of the employees in the bargaining unit. It seems that even minority unions could compel an employer to recognise and bargain with them.

⁴⁰ *Nomaqumbe v. Multi Office (Pty) Ltd* 1992 13 ILJ 152 (IC)

⁴¹ *Mynwerkersunie v. African Products* 1987 8 ILJ 401 (IC) and *Stocks & Stocks v. BAWU* 1990 11 ILJ 369 (IC)

⁴² *NBAWU v. BB Cereals* 1989 10 ILJ 870 and *RTEAWU v. Tedalex* 1990 11 ILJ 1272 (IC)

One can also draw the conclusion that the absence of a recognition agreement did not prevent a union from seeking to bargain with an employer on any number of topics.⁴³

The duty to bargain flowed whether the recognition was informal or formal.⁴⁴

3.1.2.2 Bargaining Topics

In this regard, the Industrial Court was stricter in delineating the issues that unions and employers could bargain on 'employers were not obliged to bargain over any matters which unions [cared] to place on the table.'⁴⁵

Whether there was a duty to bargain over a particular issue 'depended in the final analysis on whether the court perceived it to be a matter concerning which the union [could] legitimately claim to represent its members. The general rule is that the obligation to bargain covers all matters affecting the relationship between the employer and its workers.'⁴⁶

It was however not always clear where a definite line could be drawn between matters where there was a clear duty to bargain and matters which legitimately fell under the managerial prerogative of the employer.

The Court attempted to draw this line by distinguishing between 'mandatory and optional bargaining topics.'⁴⁷ However this was in exceptional circumstances where the court was called upon to pronounce itself on an issue which fell under its unfair labour practice jurisdiction.

Generally, and most importantly, *the Industrial Court confined its role to bringing the parties to the table and ensuring that they adhered to the tenets of good faith bargaining.*⁴⁸ (emphasis added)

⁴³ *Sticks & Sticks*, op. cit. 369

⁴⁴ Grogan, *ibid* 30

⁴⁵ *ibid*, 31

⁴⁶ *ibid*

⁴⁷ *ibid*, 32

⁴⁸ *ibid*, 33

This notion of 'bringing the parties to the table' is important in terms of defining the content of the duty to bargain and its inherent limits in a voluntaristic industrial relations system. As noted by Davis, 'in so far as the *substance* of the agreement is concerned...collective bargaining should be free of intervention whether of a governmental or judicial nature.'⁴⁹ (emphasis added)

One of the purposes of this paper is to demonstrate that imposing a general duty to bargain accords with institutionalised voluntarism and that its omission in the LRA 1995 is unconstitutional in light of the right to engage in collective bargaining. As the Industrial Court rightly pointed out, the courts can never hope to impose bargaining outcomes on the parties. The outcome is in the final analysis to be decided by industrial power play.

3.1.2.3 Bargaining Levels

In the case of bargaining levels there was a tension between sectoral and plant-based bargaining. Some decisions of the Industrial Court preferred plant-based bargaining and emphasised that sectoral bargaining was a voluntary process wherein the union(s) had to exercise power in order to compel the employer to bargain at that level.⁵⁰

However, in *MAWU v. Hart*⁵¹ the Industrial Court made the following statement regarding the plant versus sectoral level bargaining, '[the Court] does not find the two systems to be incompatible and that having regard to current trends in industry, bargaining at plant level ought to be encouraged as much as possible.'

One can therefore conclude that the Industrial Court saw the potential 'synergy' between the two levels of bargaining while it avoided making prescriptions in that regard.

⁴⁹ Davis, op. cit. 62

⁵⁰ *Dunlop Tyres v. NUMSA* 1990 11 ILJ 149 (IC)

⁵¹ unreported

3.1.2.4 Bargaining Conduct

Not only did the Industrial Court compel parties to meet at the bargaining table, it also insisted that the process of bargaining itself be conducted genuinely with the intention to compromise and reach settlement.⁵²

It would compromise and defeat the whole process of collective bargaining if parties could go through the motions without any intention whatsoever to honour undertakings therefore the duty to bargain of necessity involved good faith.⁵³

Industrial Court cases abound where the basic principle of good faith bargaining was held to be the very backbone of collective bargaining.⁵⁴

In *MAWU v. Natal Die Casting (Pty) Ltd*⁵⁵ the court listed a range of unacceptable bargaining tactics thus: making unreasonable proposals; the refusal to make concessions; dilatory tactics; the imposition of onerous or unreasonable conditions; the by-passing of representatives; the unreasonable refusal to disclose sufficient information to enable the other party to appreciate and discuss the issues involved. Conduct that the court frowned upon also included parties using abusive, derogatory and insulting language at the bargaining table.⁵⁶

⁵² Grogan, op. cit. 38

⁵³ ibid

⁵⁴ *ERGU Co. Ltd v. NUM* 1989 10 ILJ 675 (LAC)

⁵⁵ 1986 7 ILJ 520 (IC)

⁵⁶ Grogan, op. cit. 46

3.2 The Development of the Duty to Bargain in Canada

There are 11 provinces in Canada, all with their own statutes dealing with labour law and other legal matters. I will however not deal with each province's labour law due to space constraints; instead I will trace the development of collective bargaining in Canada by examining federal or national law. In any case, the provinces have all adopted labour legislation which reflects certain basic norms as far as collective bargaining is concerned. The Canadian federal government began to address the plight of trade unions in the 1870's by enacting the Trade Unions Act, 1872 which decriminalised unions and enabled them to register.⁵⁷ The Criminal Law Amendment Act, 1872 went a step further and legalized all strikes, except those which coerced the employer or prevented him carrying on his business.⁵⁸ The momentum of this period of legal reform was however interrupted by the 'long depression' of the mid-1870's to mid-1890's which practically nullified the gains that had been made by the unions.⁵⁹

These developments 'made it clear that the repeal of criminal prohibitions against unionism did not automatically place labour organisations on an equal footing with employers.'⁶⁰

In terms of the development of collective bargaining in particular, the federal government enacted the Industrial Disputes Investigation Act, 1907 which 'theoretically provided for the legitimacy of collective bargaining and the propriety of even-handed government intervention to assist the development of a permanent, bilateral relationship.'⁶¹ In practice the opposite was true, employers refused to bargain with unions on matters such as terms and conditions of employment.⁶²

⁵⁷ Carter, D.D. et al 'Labour Law in Canada' 49

⁵⁸ *ibid*

⁵⁹ *ibid*, 50

⁶⁰ *ibid*

⁶¹ *ibid*, 51

⁶² *ibid*

Collective bargaining was 'a private matter' between employers and employees.⁶³ This attitude towards collective bargaining began to shift however after the First World War when 'the vast majority of workers demanded union recognition, collective bargaining and improved terms and conditions of employment.'⁶⁴

These efforts came to nought because the government was unwilling to actively intervene in employer-employee affairs.⁶⁵ Instead government inaction resulted in a 'gross disparity of bargaining power between employers and employed.'⁶⁶ In this type of environment, employers ignored conciliation efforts and made it impossible for workers to bargain collectively, 'when unions were formed, employers simply refused to deal with them.'⁶⁷

During the Second World War the government responded to the increased demand for legislative recognition of trade unions and collective bargaining by 'issuing exhortatory regulations declaring the freedom of association and extolling the benefits of collective bargaining.'⁶⁸ Needless to say the employers were unmoved by these efforts.

A comprehensive collective bargaining regime was adopted by the Federal government in the 1940's and heavily borrowed from the United State's National Labour Relations Act, 1935 (or the Wagner Act).⁶⁹

In this regard, the government enacted Wartime Labour Relations Regulations in 1944 (P.C. 1003 or Privy Council 1003), 'a set of regulations made under the War Measures Act.'⁷⁰

⁶³ ibid

⁶⁴ ibid

⁶⁵ ibid

⁶⁶ ibid, 52

⁶⁷ ibid, 52

⁶⁸ ibid, 53

⁶⁹ ibid, 53

⁷⁰ ibid, 53

These regulations established a regime of collective bargaining which included bargaining unit determination and certification, unfair labour practices (which imposed on employers a duty to bargain in good faith with representative unions) and a prohibition on strikes during the currency of a collective agreement.⁷¹

3.3 The Development of the Duty to Bargain in Lesotho

Lesotho gained its independence, after being a British protectorate, in 1966. Despite having gained independence close to more than three decades ago, Fashoyin notes that Lesotho's industrial relations system remained underdeveloped until recently.⁷² As a result, Lesotho's labour market institutions were for a very long time not properly developed mostly as a result of political instability, lack of democratic governance and the 'overbearing influence of the apartheid system in South Africa.'⁷³

The collective bargaining regime and other associated factors in the industrial relations system should therefore be evaluated in this context. In the case of Lesotho it is also important to bear in mind the 'small size of the industrial base and wage employment which may inhibit the forthrightness of public policy or its enforcement.'⁷⁴

During the colonial period the Master and Servant Act 1856 of the Cape Colony governed industrial relations as Lesotho was administered from the Cape.⁷⁵

⁷¹ *ibid*, 53

⁷² Fashoyin, T. 'Industrial Relations in Southern Africa' 1

⁷³ *ibid*

⁷⁴ *ibid*, 6

⁷⁵ Lethobane, L.A. 'Freedom of Association, Trade Union Rights and Application of ILO Conventions'

The 1856 statute did not recognise the right of workers to form or to join trade unions.⁷⁶ It is therefore safe to conclude that the 1856 statute could not have recognised the right to bargain collectively much less a duty to bargain. The 1856 statute was followed by the Trade Unions and Trade Disputes Proclamation, 1942, which provided for the formation and registration of trade unions.⁷⁷

Due to Lesotho's negligible industrial development and small working population, the first trade unions were only registered in 1952.⁷⁸ The Trade Union and Trade Disputes Law, 11 of 1964, then repealed the 1942 statute. This statute did not provide for a duty to bargain much less establish statutory support for collective bargaining, in addition there was no mention of freedom of association.⁷⁹

Rugege notes however that by virtue of Lesotho being a party to the Convention on Freedom of Association 87, the right to freedom of association was therefore binding on the authorities.⁸⁰

One can deduce that in terms of collective bargaining, the conclusion of collective agreements was strictly voluntary with no element of mandatorism to ensure participation in the process by both employers and unions. After independence, other labour related pieces of legislation were enacted, that is, The Regulation of Wages and Conditions of Employment Act 1969 which had minimal impact in terms of institutionalising collective bargaining.

Molefi notes that during the late eighties in particular, one of the major causes of strikes in Lesotho's private sector was union recognition and negotiations.⁸¹

⁷⁶ *ibid*

⁷⁷ *ibid*

⁷⁸ *ibid*

⁷⁹ Rugege, S. 'Workers' Collective Rights under the Lesotho Labour Code' 932

⁸⁰ *ibid*

⁸¹ Molefi, J. 'Labour Law and Industrial Relations in Lesotho: Recent Developments and Prospects' 31

It is not difficult to see why union recognition and collective bargaining would cause industrial upheaval; there was hardly any provision in the legislation for processes and procedures that safeguarded the integrity of collective bargaining.

In 1992, Lesotho overhauled its entire labour law framework and under the technical assistance of the ILO adopted the Labour Code Order, 1992. The Code's collective bargaining provisions were at best rudimentary and did not legislate for a duty to bargain. There were actually no provisions in the Code that *directly* promoted collective bargaining.⁸² The lack of collective bargaining machinery in Lesotho was exacerbated by 'mutual mistrust that [was] not conducive to collective bargaining.'⁸³

Rugege notes that the Code did not even provide for recognition procedures or for the conclusion of recognition agreements for the purposes of collective bargaining.⁸⁴ The definition of a 'trade dispute' under the Code did not include the refusal to recognise a union for collective bargaining. Notwithstanding this state of affairs, the union could still declare a trade dispute and have the matter resolved under the auspices Labour Court which had the wider discretion to entertain 'any other matters relating to industrial relations other than trade disputes.'⁸⁵

It is doubtful whether this approach advanced the institution of collective bargaining in Lesotho as it did not give the parties the opportunity to thrash out the details of a freely concluded recognition or collective agreement. Instead the parties relied on interventions by the Labour Department and the Labour Court hence the adversarialism so evident in the system.

⁸² Rugege, *op. cit.* 933

⁸³ *ibid.*, 935

⁸⁴ *ibid.*, 936

⁸⁵ Section 24(c)

In terms of developing jurisprudence or rules in relation to the content of a duty to bargain the Labour Court was constrained by lack of legislative guidance. The Labour Code and the legislation that preceded it hardly provided for a right to bargain collectively or entrenched collective bargaining. Although the Code provided for 'unfair labour practices' it was hardly on the scale of the South African Industrial Court's unfair labour practice jurisdiction. The Lesotho Labour Court therefore did not have room to approach collective bargaining creatively and develop its jurisprudence primarily because the Code strictly defined the notion of an 'unfair labour practice' and this did not include the refusal to bargain. The Labour Court could however be assisted to a certain extent by the provision in the Labour Code which allowed it to refer to and apply relevant ILO Conventions and Recommendations where there was ambiguity and difficulty in terms of interpreting its provisions.⁸⁶

Collective bargaining in Lesotho has historically been characterised by bad faith bargaining including 'stalling, refusing trade union recognition and refusal to bargain' even where this was objectively due to the union concerned.⁸⁷

Both the Trade Unions and Trade Disputes Law 1964 and the Labour Code 1992 merely provided that employers may *confer* with trade union officers whose members are employed by such employers. Conferring or discussing is not the same as bargaining and imposes no obligation whatsoever on employers to conclude agreements or even participate in collective bargaining. As a result of this provision, 'employers [took] advantage of this outdated [provision] by refusing to recognise their employees union, let alone negotiating meaningfully with such a union.'⁸⁸

⁸⁶ Section 4

⁸⁷ Molefi, *op. cit.* 33

⁸⁸ *ibid*, 33

3.4 Conclusion

In South Africa, the approach of the lawmakers prior to the LRA dispensation was to provide 'statutory support for collective bargaining without compelling participation in the system.'⁸⁹ This form of 'abstentionism' was augmented by the unfair labour practice jurisdiction of the Industrial Court which held that there was a duty to bargain in good faith in appropriate circumstances.

It would appear that the position, in terms of the stated voluntaristic approach of the LRA has not changed much from that of the Labour Relations Act 1956. The only difference in the present context is that the Constitution of South Africa, 'constitutionalises' certain labour rights such the right to engage in collective bargaining⁹⁰ while previously this was not the case.

One can make the general observation that practice, especially in terms of judicial practice, did not always conform to the ideological base underpinning industrial relations in South Africa prior to the democratic dispensation. The Industrial Court assumed an activist role filling in the gaps in the legislation and utilising its unfair labour practice jurisdiction to the fullest extent possible. This activist role should also be examined in the context of the socio-economic and political situation in South Africa at the time, particularly the plight of black unions which had to struggle for recognition and could not always assume that this would extend to collective bargaining and the conclusion of agreements.

Be that as it may, the stated nature of the industrial relations system at the time was that it was institutionalised voluntarism. Indeed the LRA is decidedly voluntaristic but this voluntarism clearly has its limits.

⁸⁹ Cameron, E. et al 'The New Labour Relations Act' 7

The state and its various organs and through the various legislation including the Constitution has carved out a meaningful role for itself. As a result of the 'interference' of the state in industrial relations, tensions have and do continue to arise particularly in terms of the role of the judiciary in collective bargaining.

The questions that arise in this regard are: what was the intention of including the right to engage in collective bargaining in the Bill of Rights of the Constitution? Is the omission of a general duty to bargain from the LRA unconstitutional? What would the content of a duty to bargain be (and its limits) in the context of a voluntaristic system of industrial relations? Would the duty necessarily compel parties to conclude a bargain as opposed to meeting each other at the negotiating table? What role does the Labour Court envisage for itself in this regard particularly in terms of interpreting the rights contained in the Constitution in the context of the LRA?

In a largely voluntaristic system to what extent should mandatory elements be allowed to dictate the manner in which collective bargaining is conducted?

A pluralistic system of industrial relations, as discussed above, acknowledges that the labour-management relationship is essentially defined by conflict, although this does not always imply lack of common ground. For instance it is the aspiration of both parties that the business thrives because on a basic level it provides profits and jobs. The question that must inform this paper, especially in the recent context of globalisation and the prominence of market forces is how to accommodate the interests of both parties. As it is, the trade union numerical base is under serious threat as a result of casualisation and other atypical forms of employment.

⁹⁰ Section 23(5)

On the other hand employers have to compete for market share on a global basis with countries that not only offer superior infrastructure but also deregulated labour markets. As a result collective bargaining issues must be discussed with this context in mind.

With regard to collective bargaining in Lesotho, the legislation was abstentionist in terms of both the process and product of collective bargaining. The only form of collective interaction that the legislation allowed to take place between employers and trade unions were discussions or conferring on whatever matter that affected employees. Unfortunately, the unfair labour practice jurisdiction of the Labour Court was strictly defined by the Labour Code and did not include bad faith bargaining such as refusing to recognise a representative trade union and so on. The legislation was so abstentionist in terms of establishing a collective bargaining regime that as much as it recognised the legal validity of collective agreements it did little to facilitate their conclusion.

In Canada a comprehensive collective bargaining regime including the duty to bargain good faith has characterised industrial relations since the early 1940's.

The legislature actively intervened in collective bargaining primarily to stem employer abuses such as refusal to recognise representative trade unions for collective bargaining purposes and other instances of bad faith bargaining. This level of intervention by the state and its machinery in collective bargaining was necessitated by the prevailing climate in industrial relations at the time. Without some measure of compulsion to engage in collective bargaining most employers simply refused to deal with trade unions.

Chapter Four

4. The International and Regional Framework for Collective Bargaining

This chapter examines the instruments of the regional organisations of which South Africa, Lesotho and Canada are members. South Africa and Lesotho are both members of the South African Development Community (the SADC) while Canada is a member state of the North America Free Trade Area (the NAFTA) and its labour accord the North American Agreement on Labour Cooperation (NAALC).

This comparative analysis will also be done in the context of the respective countries' obligations under the international instruments they have ratified. All the countries are member states of the International Labour Organisation (ILO) however this does not presuppose uniformity in terms of their ratification of its various instruments.

4.1 ILO Instruments and Collective Bargaining

International labour standards (ILS) are primarily expressions of international tripartite agreement on matters relating to labour and other connected issues in social policy, human and civil rights.¹

The International Labour Organisation (ILO) is a specialised United Nations agency (UN) responsible for the formulation of international labour standards. In addition, the ILO monitors the implementation of the ILS once a country has ratified a convention dealing with any labour matter. In order to ensure proper implementation and other connected matters, the ILO is often requested by various governments to render technical assistance.

All the three countries under discussion are Member states of the ILO; therefore it is important to examine the ILO framework of Conventions and Recommendations in relation to collective bargaining.

The Constitution of the ILO requires that international labour standards be set with "due regard to those countries in which climatic conditions, the imperfect development of industrial organisation or other special circumstance make the industrial conditions substantially different."²

Be that as it may, ILO standards have permeated and substantially altered the labour laws of national states in a manner that reflects the essence of these standards.

There is a fundamental difference between ILO Conventions and Recommendations, the former are treaties and therefore binding on the ratifying member state while the latter are non-binding guidelines.³

Not all instruments emanating from the ILO have the same status, some are considered to be '*Fundamental ILO Conventions*' (there are eight in all) others are termed '*Priority Conventions*' (there are four) while the remaining instruments have been categorized into 12 categories of '*Conventions and Recommendations*'⁴

The Right to Organize and Collective Bargaining Convention, 1949 (No. 98) falls under the category of 'fundamental conventions.' Convention 98 came into force in August 1951. According to the ILO Governing Body, 'fundamental conventions' are crucial to the rights of people at work irrespective of the levels of development of individual member states.⁵

Most importantly, 'These rights are a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work.'⁶

¹ ILO 'International Labour Standards' www.ilo.org/public/standards accessed 11/11/04

² Preamble of the ILO Constitution 1919

³ *ibid*

⁴ *ibid*

⁵ *ibid*

⁶ *ibid*

In 1980, the International Labour Conference (ILC) appointed a Conference Committee on Collective Bargaining which ultimately led to the adoption of Convention (No.154) Concerning the Promotion of Collective Bargaining 1981. Convention 154 falls in neither the 'fundamental conventions' nor the 'priority conventions' categories but one should hasten to add that this should not be interpreted as detracting from its importance.

What do Convention 98 and Convention 154 provide in terms of collective bargaining and a duty to bargain in good faith?

4.1.1 The Right to Organize and Collective Bargaining Convention 1949

South Africa ratified Convention 98 on the 19 of February 1996 while Lesotho ratified the Convention on the 31st of October 1966.⁷ Surprisingly Canada has not ratified Convention 98.

I will discuss only those aspects of Convention 98 which have specific relevance to collective bargaining and a duty to bargain. The voluntary nature of collective bargaining is emphasised in Convention 98.⁸ To that end, states must ensure the adoption of measures which encourage and promote collective bargaining machinery with a view to regulating terms and conditions of employment by unions and employers.⁹

Convention 98 does however allow the ratifying member states to do so with modifications if they so wish, without prescribing the scope of such modifications.¹⁰

Nowhere in Convention 98 is a general duty to bargain mentioned or provided for, at all times the instrument emphasises the 'voluntary' nature of collective bargaining. All that is required in terms of state interference is the institution of machinery that will 'encourage' and 'promote' collective bargaining.

⁷ ILO Ratifications List www.ilo.org/ilolex accessed 11/11/04

⁸ Article 4

⁹ *ibid*

¹⁰ Articles 9 and 10

The issue is therefore whether the extent of state intervention envisaged by the 'encouragement and promotion' of collective bargaining machinery allows the imposition of a duty to bargain. How would a state ensure that indeed an employer or association of employers and a trade union or association of trade unions participate in the bargaining process? How would a state ensure the participation of both actors of collective bargaining if the machinery that it has created does not include a duty to bargain? Would this 'omission' not make nonsense of the measures to 'encourage and promote' collective bargaining which every ratifying state must take? Simamba notes that this very notion of 'voluntariness has been challenged in recent years [particularly] in the form of restrictions such as wage controls.'¹¹ Regardless of the form they take, the rationale for restrictions on collective bargaining is the health of the economy and the public interest.¹²

The question then becomes, should further inroads be made into the notion of 'voluntary' collective bargaining by imposing a duty to bargain? Is the duty to bargain necessary and justifiable, since the notion of 'voluntary' collective bargaining like all other legal notions cannot be absolute? My view is that a duty to bargain does not adversely alter the character of collective bargaining, crucially; the parties are still free to conclude their agreement the above-mentioned restrictions notwithstanding. The general duty to bargain in good faith ensures actual participation in the process and should not be readily dismissed.

¹¹ Simamba, B.H. 'The ILO and the Right to Collective Bargaining: An African Perspective' 518

¹² *ibid*, 519

4.1.2 The Collective Bargaining Convention 1981

It is imperative to note that Convention 154 was adopted 'in the context of an acute and prolonged economic recession, [it] is therefore instructive to enquire into possible changes of attitudes towards the promotion of collective bargaining and the principle of voluntariness.'¹³

Convention 154 carries through the thread of 'free' collective bargaining established by Convention 98. The measures taken by the state to promote and encourage collective bargaining 'should not be so conceived or applied as to hamper the *freedom* of collective bargaining.'¹⁴ (emphasis added) In fact, such measures shall be the subject of prior consultation and where possible agreement between the social partners.¹⁵

The measures adopted should in the final analysis achieve four things:

- (a) Collective bargaining should be made possible for all employers and groups of workers involved in economic activity.
- (b) Collective bargaining should be progressively extended to cover all matters stipulated in the Convention
- (c) Where there is an absence of appropriate rules and procedures for collective bargaining, this should not hamper the process, and
- (d) Dispute settlement procedures and bodies (voluntary) should contribute to the promotion of collective bargaining.¹⁶

Unlike Convention 98 whose approach was to state the basic principles without providing sufficient detail, Convention 154 to some extent stipulates the topics that might be the subject of negotiation between unions and employers or employers' organisations.

¹³ *ibid*

¹⁴ Article 8

¹⁵ Article 7

¹⁶ Article 5

For instance, collective bargaining is defined as a process of negotiating terms and conditions of employment and relations between employer and workers and their organisations.¹⁷

However, the extension of the term 'collective bargaining' to other matters is also valid under the Convention where this accords with national law and practice.¹⁸

The Committee on Freedom of Association has reiterated 'the importance which it attaches to the principle that both employers and trade unions *should* bargain in good faith making every effort to come to an agreement.'¹⁹ However, the Committee has also stated that collective bargaining must, if it is to be effective, assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining.²⁰ In fact the Committee has gone so far as to suggest that refusal to bargain at a particular level by an employer does not constitute infringement of the freedom of association.²¹

4.1.3 Recommendation 163²²

The Collective Bargaining Recommendation is meant to supplement the Collective Bargaining Convention, 1981. The Recommendation enjoins states to adopt measures that ensure that representative employers' and workers' organisations are recognised for the purposes of collective bargaining.²³ Furthermore, it appears that once the procedures for granting recognition have been complied with, namely establishing representativeness, the right to bargain collectively follows.²⁴

¹⁷ Article 2

¹⁸ Article 3

¹⁹ International Labour Conference No. 5(1) 1980: Promotion of Collective Bargaining

²⁰ *ibid*

²¹ *ibid*

²² Recommendation Concerning the Promotion of Collective Bargaining 1981

²³ Article 3(a)

²⁴ Article 3(b)

With respect to bargaining levels the Recommendation envisages bargaining to take place at the establishment, the undertaking, the branch of the activity, the industry, or the regional or national levels.²⁵ Where bargaining takes place at several levels in a particular country, there should be coordination among these levels.²⁶

The Recommendation also encourages measures that ensure that parties involved in collective bargaining have access to the information required for meaningful negotiations, including information on the economic and social situation of the negotiating unit and the undertaking as a whole.²⁷

One might therefore reasonably conclude that representative organisations, whether trade unions or employers' organisations, are entitled to bargain collectively which in turn implies a measure of compulsion to give effect to the right. In addition the Recommendation does not proscribe multi-level bargaining instead it emphasises the importance of bargaining coordination presumably to avoid the duplication of efforts.

However, the main drawback of Recommendation 163 is that its status as an instrument that creates binding obligations is unlike that of Conventions. ILO member states are not obliged to implement Recommendations nor follow their prescriptions to the letter. Recommendations merely provide guidelines for the member states to follow in implementing ratified ILO Conventions.

4.1.4 Conclusion

A few conclusions will suffice at this juncture. In terms of both Conventions, 'free' collective bargaining is affirmed as a principle that must permeate all collective bargaining.

²⁵ Article 4(1)

²⁶ Article 4(2)

²⁷ Article 7

Secondly, the measures adopted to promote and encourage collective bargaining should not be imposed on employers, workers and their respective organisations without consultations but not necessarily with their agreement. Thirdly, the Conventions emphasise that whatever measures are adopted to encourage collective bargaining these should respect the notion of 'freedom of collective bargaining.' Fourthly, some measure of state intervention is anticipated and even encouraged provided the above-mentioned principles are respected.

Convention 154 to some extent 'interferes' by stipulating certain minimum topics which must of necessity form the basis of any credible exercise of collective bargaining that is terms and conditions of employment and dispute resolution procedures.

Would a duty to bargain in good faith fall under the category of measures that might be deemed contrary to the notion of 'freedom of collective bargaining' safeguarded in Convention 154? Provided there is judicial and legislative clarity as to the content and limits of a duty to bargain in good faith it would appear that it does not run counter to 'free' collective bargaining. Perhaps the Committee on Freedom of Association could have contributed to the duty to bargain jurisprudence by distinguishing between process and product.

Compulsion with regards to the former would not constitute an infringement of 'free' collective bargaining and would safeguard the integrity of the process. It is difficult to see how the right to engage in collective bargaining would be given effect without some measure of compulsion in terms of ensuring *bona fide* participation in the process. In terms of product, compulsion with regard to the substance of an agreement, if reached, would obviously be contrary to 'free' collective bargaining.

The instruments enjoin states to ensure that collective bargaining is 'possible' without imposing an obligation on governments to make bargaining compulsory. The question that arises is how collective bargaining can take place without the duty to bargain in good faith. The theoretical difficulty however is how the duty to bargain can be reconciled with the notion of 'free' collective bargaining notwithstanding the interventionist inroads that have been made into this notion by labour policies and statutes.

Another difficulty that arises is the issue of utilising legislation as a means of resolving labour disputes. Suppose an employer refuses to bargain with a trade union and the governing statute imposes a duty to bargain? The end result is that the judiciary would have to interfere and impose a 'solution' in the form of an order to bargain and so on.

The ILO supervisory bodies generally disapprove of legislation as a means of resolving labour disputes.²⁸ The Committee on Freedom of Association has pointed out that an unduly or excessively legalistic attitude on the part of either a government or workers is irreconcilable with the development of harmonious industrial relations.²⁹

The danger of a legislated duty to bargain in good faith is that it obviously introduces a legalistic aspect to the labour law framework, whether this is 'undue or excessive' is open to conjecture. Empirical research would be useful in this regard as this would avoid making assumptions about the duty to bargain without the evidence to back them up. In my opinion it is clearly unfair for an employer to outright refuse to bargain with a representative trade union on terms and conditions of employment, without the aggrieved union having recourse to an appropriate and effective legal remedy.

²⁸ Simamba, *op. cit.* 526

²⁹ *ibid*

So much for the international labour law instruments and the standards laid down for the promotion of collective bargaining.

4.2 Regional Labour Law and Collective Bargaining

Regional labour law is important to the discussion although it is to be noted that regional instruments have to conform to ILO Conventions as much as national law does. This part of the dissertation interrogates the provisions of the regional instruments governing labour matters in Southern Africa and North America.

4.2.1 The Southern African Development Community (SADC)

As stated previously, both South Africa and Lesotho are SADC member states and have as a result of such membership incurred obligations contained in the SADC instruments. At present the SADC is comprised of 14 member states which have adopted several instruments geared towards the ultimate aim of regional integration, what form this integration is supposed to take remains to be seen.³⁰

The SADC states have adopted the SADC Treaty, a Charter on Fundamental Social Rights, and several Declarations.

4.2.1.1 The SADC Treaty

The SADC Treaty was adopted in 1992 but came into force in 2001.³¹ The Treaty has minimal relevance to the issue of collective bargaining save to state that one of its main purposes is to foster the harmonisation of the labour laws of the member states.³²

³⁰ Kalula, E. et al 'Law and Labour Market Regulation in East Asia and Southern Africa' 20

³¹ Legal instruments www.sadc.int accessed 11/11/04

³² Article 5(2)(a)

One would venture to state that the harmonisation of labour laws in the region would also need to be achieved in line with the objectives of the Treaty. How this would shape the law in terms of collective bargaining and a general duty to bargain remains to be seen.

4.2.1.2 The Charter of Fundamental Social Rights

The Charter was adopted by the SADC states in 2003 with the express purpose of making provision for labour relations and associated matters in the region, and to give effect to the principle of the harmonization of labour laws throughout the region.³³

The Charter gives effect to the 'basic human rights' embodied, inter alia, in international instruments such as those of the ILO and its Constitution, including the Philadelphia Declaration.³⁴

With regard to freedom of association, the right to organize and collective bargaining the Charter takes its cue from the relevant Conventions of the ILO.³⁵

Organisational rights are also safeguarded in the Charter for 'representative unions'³⁶ although there are no guidelines as to how such representativity would be determined. Presumably representativity thresholds would be the subject of nationally determined guidelines. The notion of representativeness however does suggest that the SADC member states do subscribe to the notion of 'majoritarianism', it is not every union that can have access to organisational rights or the right to bargain collectively.

³³ Article 2(1)

³⁴ Article 3

³⁵ Article 4

³⁶ Article 4(f)

The range of organisational rights mentioned in the Charter includes: access to employer premises for union purposes in accordance with agreed procedures; stop order facilities for union dues; election of union representatives; leave for union activities and disclosure of information.³⁷

The Charter states that 'employers associations and trade unions *shall have the right* to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.'³⁸

The nomenclature that the Charter utilizes to give expression to the participation of employers and unions in collective bargaining seems, from a literal interpretation, to be contrary to the voluntaristic nature of collective bargaining promoted in the ILO Conventions.

The provision does however state that this 'right' shall be exercised in accordance with national law and practice. In other words where a duty to bargain does not accord with a jurisdiction's laws or practice, the stated laws would not be contrary to the Charter provisions.

The Charter also enshrines procedures that should follow unsuccessful negotiation, by giving expression to the right to resort to industrial action³⁹ and 'traditional collective bargaining.'⁴⁰ The Charter however does not define the meaning of 'traditional collective bargaining' save to state that the employer's right to have recourse to lockout procedures is also protected therein.⁴¹

In addition the Charter states that the exercise of industrial action shall be consistent with the provisions of ILO instruments and other international laws.⁴²

³⁷ Article 4(f)(i-vi)

³⁸ Article 4(c)

³⁹ Article 4(e)(i)

⁴⁰ *ibid*

⁴¹ Article 4(e)(ii)

⁴² *ibid*

The observation that one can make at this juncture is that the relevant ILO Conventions discussed above appear to give precedence to 'voluntarism' while Recommendation 163 and the SADC Charter utilise more prescriptive language. This approach creates problems of interpretation especially the use of terms such as 'traditional collective bargaining.'

4.2.2 The NAFTA Labour Law Regime and Collective Bargaining

The North American Free Trade Agreement (NAFTA) is a regional free trade zone and its members are Canada, the United States and Mexico.⁴³ The preamble of the NAFTA Treaty states that, inter alia, its objectives are to 'Protect, enhance and enforce basic workers' rights'⁴⁴

NAFTA also adopted an agreement on labour in 1993 known as the North American Agreement on Labor Cooperation (NAALC), which has various implications for the institution of collective bargaining in the respective member countries.

4.2.2.1 The North American Agreement on Labor Cooperation (NAALC)

The preamble of the NAALC places emphasis on the importance of labour-management dialogue and cooperation and the parties resolve to enhance and promote it.⁴⁵

Some of the stated principles of the NAALC that have specific relevance to collective bargaining include freedom of association and protection of the right to organize.⁴⁶ In addition, the right to bargain collectively and the right to strike are also regarded as foremost in the NAALC regime.⁴⁷

⁴³ www.nafta.org accessed 12/11/04

⁴⁴ *ibid*

⁴⁵ Preamble, NAALC www.naalc.org accessed 12/11/04

⁴⁶ Annex I 'Principles of the NAALC' www.naalc.org accessed 12/11/04

⁴⁷ *ibid*

Principle 2 which regulates the right to bargain collectively emphasises the voluntary nature of collective bargaining on matters including terms and conditions of employment. This is similar to the approach adopted by ILO Convention 154 on Collective Bargaining in terms of delineating appropriate bargaining subjects.⁴⁸ The labour principles however have the status of 'guiding principles' and do not have the force of law.⁴⁹ To that end, the principles do not establish common minimum standards for the member states; instead they have to be interpreted in the context of each state's laws, regulations, procedures and practices.⁵⁰

To illustrate the limited influence of the NAALC on national labour law, Arthurs notes that because of Canadian constitutional constraints the NAALC is only applicable to Canada when a prescribed number of provinces sign on.⁵¹ In addition the NAALC is only applicable to industries 90% of whose employees work in those provinces that have acceded to the instrument.⁵²

The NAALC is viewed with scepticism primarily because it was adopted at the last minute to deflect criticism by key constituencies. The three signatory governments agreed at the level of general principle to respect certain basic labour rights, but at an operational level, only to observe their own domestic legal regimes.⁵³

⁴⁸ *supra*

⁴⁹ Annex 1 Labour Principles www.naalc.org accessed 12/11/04

⁵⁰ *ibid*

⁵¹ Arthurs, H. 'Constitutionalism and Labour Law' 7

⁵² *ibid*

⁵³ Arthurs, H. 'The Collective Labour Law of a Global Economy' 145

In addition, complaints by aggrieved unions, companies and individuals involving collective labour law matters begin and end with a minor investigative agency in each member state rather than to trigger formal ministerial consultation which is the ultimate step prescribed for most other violations.⁵⁴

Arthurs concludes by stating that the NAFTA procedures 'are ultimately aimed at governments rather than unions or employers; they can be invoked only after failure of national law or administration; they have no relational dimension; they do not provide dispute resolving machinery or sanctions; and they are cumbersome and politicised.'⁵⁵

⁵⁴ Article 21

⁵⁵ Arthurs, op. cit. 146

Chapter Five

5. National Labour Law and Collective Bargaining: South Africa, Lesotho, and Canada

This Chapter will examine the current laws regulating collective bargaining in South Africa, Lesotho and Canada. The interpretation given to the statutory provisions governing collective bargaining by the respective countries' Labour Courts including academic opinion will also form part of the discussion. According to Grossett, 'collective bargaining is fundamental to inculcating a culture and spirit of participation, cooperation and compromise, thus generating sustained economic growth.'¹ The discussion that will follow examines the legislative frameworks of South Africa, Lesotho and Canada bearing in mind the ultimate objective of collective bargaining.

5.1 Labour Law and Collective Bargaining in South Africa

The provisions governing collective bargaining are contained in the Labour Relations Act, 1995 (LRA). The LRA's stated purpose is to give effect to and regulate the labour rights entrenched in the Constitution of South Africa.² With regard to collective bargaining, the Constitution provides that 'every trade union, employer's organisation and employer has the right to engage in collective bargaining.'³ The Constitution furthermore safeguards the freedom of association of employers and employees and their ability to form and join their respective organisations.⁴ A limitation of this and other rights in the Bill of Rights must comply with the requirements stipulated in the Constitution.⁵ Furthermore the LRA purports to give effect to the obligations incurred by South Africa as a result of its membership of the ILO.⁶

¹ Grossett, M. 'Labour Relations in South Africa' 363

² Section 1(a)

³ Section 23(5)

⁴ Section 23(2) and (3)

⁵ Section 36(1)

⁶ Section 1(b)

In terms of collective bargaining the approach of the LRA is to provide a 'framework within which orderly collective bargaining between unions, employers and their organisations can take place.'⁷

The LRA is to be interpreted in manner that gives effect to its primary objects and 'in compliance with the Constitution and South Africa's public international law obligations.'⁸

5.1.1 The Duty to Bargain

Prior to the enactment of the LRA, a Legal Task Team was appointed in 1994 to draft the Labour Relations Bill.⁹ One of the issues which were problematic for the task team was whether or not to include a legal duty to bargain collectively taking into account that this duty had assisted unions to gain a foothold in the turbulent 1980's.¹⁰

Not surprisingly, the trade union movement was in favour of a legally enforceable duty to bargain particularly at industry level while employers were not in favour of such a duty, as this would introduce additional rigidities into the system.¹¹

Ultimately, the LRA does not contain a provision imposing a general duty to bargain on either employers or trade unions. Jordaan notes that 'it is quite evident that the [LRA] vigorously pursues a policy of abstentionism in relation to the bargaining process and its outcome.'¹² Indeed, the LRA removes the bargaining process and its outcome from judicial interference and instead subjects the whole exercise to limited arbitral supervision.¹³

⁷ Section 1(c) and (d)

⁸ Section 3

⁹ Le Roux, P.A.K. 'Organisational Rights: The Labour Relations Act 1995' 21

¹⁰ *ibid*

¹¹ *ibid*

¹² Jordaan, B. 'Collective Bargaining under the new Labour Relations Act' 1

¹³ *ibid*, 3

The drafters of the LRA carefully narrowed down the 'unfair labour practice' definition to avoid giving the Labour Court free rein in the collective bargaining process, as was the case in the Industrial Court era.

As discussed in the previous Chapter, the Industrial Court could order an employer to bargain with a representative union at enterprise level. The old duty to bargain was however not absolute, hence the term 'general duty to bargain.'

There are two schools of thought in South Africa with regards to the general duty to bargain.

The compulsionist school of thought which is gradually gaining prominence, asserts that the absence of a general duty to bargain in the LRA is unconstitutional in light of s.23 (5) which confers the 'right to engage in collective bargaining.' On the other hand, the voluntarist school of thought, to which the majority of academic and judicial opinion subscribes, asserts that a duty to bargain is contrary to the notion of 'voluntary' collective bargaining which underpins the LRA. According to this body of opinion, s.23 (5) should not be interpreted as 'constitutionalising' labour rights such as the 'right' to engage in collective bargaining.

However Du Toit recognises that section 23(5) establishes collective bargaining as a fundamental right *potentially enforceable* as between unions and employers.¹⁴ It is also argued that the LRA in any event protects existing bargaining relationships¹⁵ and regulates or prevents bad faith bargaining.¹⁶

¹⁴ Du Toit, D. 'The Duty to Bargain Revisited' 5

¹⁵ Schedule 7 item 13(2)

¹⁶ Jordaan, op. cit. 5, citing Section 16 (disclosure of information) S.64(4) (regulates unilateral action by employer) and S.5 (protection against victimisation)

The LRA's collective bargaining provisions therefore 'constitute enough of an incentive for [employers] to agree to establish formal bargaining relationships.'¹⁷

In addition, Le Roux suggests that the LRA is so strongly supportive of collective bargaining that 'the combined effects of its provisions are to provide a legal framework which in effect may compel bargaining by all but the most recalcitrant of employers.'¹⁸

The question still remains however how collective bargaining can take place in the South African industrial relations environment in the absence of a general duty to bargain, notwithstanding the LRA statutory support. Mischke notes that 'it is at first glance surprising to find that the LRA contains no general duty to bargain.'¹⁹

The ultimate consequence of this omission is that 'in principle, an employer may refuse to engage or bargain collectively with a trade union-irrespective of the numerical strength of that union or the extent to which the union represents employees in the employer's organisation.'²⁰ As shall be illustrated below, the refusal to bargain is not merely theoretical or academic.

Refusal to bargain disputes are gradually becoming a prominent part of the collective bargaining landscape in South Africa hence concerns with the omission of a general duty to bargain in the LRA.²¹

¹⁷ *ibid*, 6

¹⁸ Jordaan, B. *op. cit.*

¹⁹ Mischke, C. 'Organisational Rights and Collective Bargaining in Terms of the LRA' 51

²⁰ *ibid*

²¹ CCMA Statistics on Refusal to Bargain disputes (sourced directly from the CCMA)

The omission of a general duty to bargain needs to be examined in the context of two factors, namely the stated purpose of the LRA to promote and protect collective bargaining²² and the constitutional entrenchment of the right to engage in collective bargaining.²³ Any useful analysis of collective bargaining provisions in South Africa has to interrogate the implications of section 23(5) which entrenches the 'right to engage in collective bargaining.'

However, legislation may limit any right in the Bill of Rights to the extent that the limitation complies with section 36(1). Section 36(1) states that any limitation of a fundamental right is valid only if it meets certain stringent criteria; the limitation must be reasonable and justifiable in an open and democratic society, it should be proportional to its goal and it should be as least intrusive as possible.

The question of a constitutional right to bargain is important because the South African Constitution applies not only vertically but horizontally as well.²⁴ Du Toit therefore ponders the implications of the 'constitutional right to bargain collectively' thus: Does this mean that employers are bound by unions' constitutional right to bargain in the sense of being obliged to bargain when called upon to do so by a representative trade union? Does the Constitution [therefore] revive a duty to bargain essentially similar to that which the Industrial Court had imposed?²⁵

Those who contend that a duty to bargain is incompatible with the voluntarism underpinning the LRA opine that the constitutional right to bargain collectively is ultimately irrelevant.

²² Section 1

²³ Section 23 (5)

²⁴ Section 8(2)

²⁵ Du Toit, *op. cit.* 6

Emphasising the voluntarism underlying collective bargaining in terms of the LRA, Mischke does however acknowledge that voluntarism has its limits.²⁶ To balance the voluntaristic scheme of the LRA, the legislature provides for the resolution of 'refusal to bargain' disputes and organisational rights.²⁷

A refusal to bargain can take various forms; other than refusal to recognise a union for collective bargaining purposes, the employer may withdraw recognition or resign from a bargaining council.

In addition, disputes about appropriate bargaining levels, bargaining units and bargaining topics all fall under the umbrella of 'refusal to bargain' disputes.²⁸

In a refusal to bargain dispute, a trade union alleging refusal to bargain has to refer the dispute to the CCMA.²⁹ In this type of dispute, the CCMA may render what is known as an 'advisory' arbitration award.³⁰

Unlike other arbitration awards that are final and binding the 'advisory' arbitration award is not. The effect of this award is that the employer can choose to ignore it without falling foul of the LRA; the advisory award ultimately has moral authority.

At this stage the trade union has one choice that is to embark on industrial action in terms of the provisions of the LRA. Embarking on a strike does not imply that collective bargaining is a *fait accompli*; the strike might not lead to the bargaining table.

In addition, industrial action is not always the solution to sound industrial relations. Strikes cripple trade unions, which always face the threat of retrenchments and the reduction of their numerical base moreover they have to contend with the 'no work no pay' rule.

²⁶ Mischke, op. cit., 51

²⁷ Sections 64 and 11-22 respectively

²⁸ Section 64(2)

²⁹ Section 64

³⁰ Section 64

Employers on the other hand suffer in terms of loss of productivity, and the additional costs of hiring 'scab' or replacement labour. Strikes also adversely affect the economy and the wider societal interests. Should we rely on industrial action to ultimately compel bargaining or should the approach rather be one that seeks to avoid the pitfalls of industrial action and its effects on industrial relations and the economy?

The other feature of the LRA said to mitigate the absence of a general duty to bargain are organisational rights. A detailed analysis of organisational rights goes beyond the scope of this paper however I will discuss those aspects which have implications for collective bargaining and the duty to bargain.

Organisational rights enable a trade union to 'secure a foot in the door of the employer's organisation.'³¹

The LRA confers the following range of organisational rights: trade union access to the workplace³², the deduction of trade union subscriptions or levies³³, the election of trade union representatives within a workplace,³⁴ leave for trade union activities³⁵ and the disclosure of information.³⁶

The election of union representatives and the disclosure of information are only granted to majority unions while the rest of the organisational rights can also be accessed by unions that are 'sufficiently representative.'³⁷ What is 'sufficiently representative' is not defined in the LRA. However if there is a dispute with regard to the representativeness of a trade union the dispute must be resolved through arbitration.³⁸

³¹ Mischke, *op. cit.*, 52

³² Section 12

³³ Section 13

³⁴ Section 14

³⁵ Section 15

³⁶ Section 16

³⁷ Sections 14 and 16

³⁸ Section 21(8)

In effect, the representativity criteria are determined by the CCMA Commissioners in accordance with guidelines such as avoiding the proliferation of unions and reducing the financial and administrative burden on employers in relation to more than one union.³⁹

The LRA is therefore governed by the majoritarianism principle and seeks to prevent the proliferation of unions at workplaces to the detriment of orderly collective bargaining. Grogan is of the view that these representativity thresholds are too high and might prevent unions, particularly minority unions, from accessing organisational rights.⁴⁰ In addition, 'the size or dispersed nature of the workplace may lead to the union or unions finding it difficult to acquire the necessary level of representativeness.'

This could prevent the union from acquiring the organisational rights it would normally use to negotiate collective bargaining rights with the employer.⁴¹ Additionally, having to recruit members from *all* employees within the workplace could make it difficult for unions to meet the representativeness criteria.⁴²

In order for a trade union to exercise organisational rights, it must inform the employer of its intention to do so in writing.⁴³ The notice must clearly state which of the organisational rights the union wishes to exercise, in respect of which workplace and the manner in which it wishes to exercise the rights.⁴⁴

³⁹ Section 21(8)(a)

⁴⁰ Grogan, J. 'Workplace Law' 224

⁴¹ Le Roux, *op. cit.* 23

⁴² *ibid.*, 24

⁴³ Section 21(1)

⁴⁴ Section 21(2)

In order for the union to ultimately exercise these rights it must meet with the employer and conclude a collective agreement to that effect.⁴⁵ If no agreement is concluded the dispute may be referred to the CCMA for conciliation, failing which arbitration.⁴⁶

The organisational rights agreement is just that, an agreement to regulate the exercise of organisational rights by a representative trade union. This type of agreement should not be confused with an agreement recognising a trade union for collective bargaining purposes. Once the trade union has passed the hurdle of acquiring organisational rights it still faces the challenge of recognition and the establishment of a bargaining relationship. It must also be borne in mind that organisational rights may be terminated by the employer in terms of the collective agreement regulating them or by giving reasonable notice.⁴⁷

Organisational rights are presumed to ensure that a diligent trade union can build and maintain a 'power-base of sufficient strength [to] enable it to compel the employer to bargain.'⁴⁸ Ultimately bargaining with the employer on wages, terms and conditions of employment depends on the employer and its willingness to negotiate. This is the logical conclusion of the absence of a general duty to bargain.

That is not to conclude that organisational rights are not important. In fact the provision of organisational rights in the LRA has to be applauded because representative unions no longer have to embark on industrial action to access them. Organisational rights are therefore a 'pivotal part in the LRA's scheme of promoting and protecting collective bargaining.'⁴⁹ However their limitation in terms of promoting collective bargaining should be recognised.

⁴⁵ Section 21(3)

⁴⁶ Section 21(4)

⁴⁷ Section 23

⁴⁸ Mischke, *op. cit.* 52

⁴⁹ *ibid.*, 60

As things stand, even established trade unions still face the threat of a 'refusal to bargain' and the possibility of industrial action in order to compel bargaining.

In essence organisational rights are an instrument to enable a union to get a foot in the door. Organisational rights '[enhance] the *possibility* of the development of collective bargaining.'⁵⁰ (emphasis added) Getting a foot in the door is not the same as engaging in collective bargaining, is this 'foot in the door approach' justified particularly in terms of the Constitution?

Le Roux suggests that the LRA is so strongly supportive of collective bargaining that 'the combined effect of its provisions is to provide a legal framework which in effect may compel bargaining by all but the most recalcitrant of employers.'⁵¹

Statistics from the Commission for Conciliation Mediation and Arbitration (CCMA), a statutory labour dispute resolution agency, suggest that in fact organisational rights by themselves do not guarantee that collective bargaining will take place. A rash of 'refusal to bargain' cases have been referred to the CCMA despite representative or established trade unions having accessed organisational rights. As of November 2004, the number of 'refusal to bargain' disputes that have been referred to the CCMA are approximately 5450.⁵² In some cases an advisory award was rendered while in other cases a certificate of non-resolution was issued. In other disputes of this nature the parties did not even show up at the proceedings while in others the matter was settled.⁵³

⁵⁰ Le Roux, *op. cit.*, 22

⁵¹ *ibid*

⁵² CCMA 'Refusal to Bargain' disputes (Statistics for period 1996-2004)

⁵³ *ibid*

The question that arises is therefore whether the present structure of the LRA in terms of collective bargaining is sufficient to make 'refusal to bargain' disputes the exception rather than the rule?

5.1.2 Representativity Thresholds

The LRA adopts strict majoritarian requirements in terms of trade union access to rights within the collective bargaining framework particularly the full range of such rights. Whereas unions that are 'sufficiently representative' may have access to their members at the workplace those deemed to be representing the 'majority' of employees at the workplace may exercise the full range of organisational rights.⁵⁴ These representativity thresholds also apply to the establishment of bargaining and statutory councils.⁵⁵

*One weakness of the LRA is that it does not establish representativity thresholds criteria in quantitative indicator terms. As a result what is 'sufficiently representative' is not readily ascertainable; in fact the LRA leaves such determination to the Commissioners of the CCMA.

The LRA allows majority unions and employers to set the representativity thresholds even higher if a collective agreement to that effect is concluded.⁵⁶

5.1.3 Bargaining Levels

The LRA strives to promote bargaining at the sectoral level but without proscribing enterprise level bargaining.⁵⁷ To this end the LRA provides for bargaining councils⁵⁸ and statutory councils.⁵⁹

⁵⁴ Sections 11-22

⁵⁵ *infra*

⁵⁶ Section 18(1)

⁵⁷ Section 1(d)(ii)

⁵⁸ Sections 27-38 (including public sector bargaining councils)

⁵⁹ Sections 39-63

Bargaining councils are empowered to conclude collective agreements⁶⁰ while statutory councils basically perform dispute resolution functions and may conclude collective agreements in that regard.⁶¹

Du Toit notes that in practice 'many of the country's major employers have [in fact] entered into recognition agreements regulating bargaining obligations [at enterprise level]'⁶² Webster is of the opinion that sectoral bargaining generally lacks coordination and is afflicted by adversarialism and sectionalism.⁶³ Centralised bargaining, although not a complete failure, has not taken off as anticipated. In practice, collective bargaining is still a concern of the enterprise due to the negative attitude of employers to centralised bargaining.⁶⁴ Since calls for a general duty to bargain specifically relate to enterprise level bargaining perhaps the failure of centralised bargaining makes this more pertinent.⁶⁵

5.1.4 Bargaining Topics

As much as the LRA does not provide for a general duty to bargain, there are however certain compulsory topics which although not direct but work out so in effect⁶⁶: organisational rights as discussed above, picketing conduct, the establishment of workplace forums, retrenchments, and the discipline of union officials. However in terms of the most crucial topics, such as wages and terms and conditions of employment the LRA maintains its voluntaristic stance.⁶⁷

⁶⁰ Section 28(1)(a)

⁶¹ Section 43(1)(a)

⁶² Du Toit, op. cit. 4

⁶³ Webster, E. and Macun, I. 'Bargaining Levels' 7

⁶⁴ *ibid*, 8

⁶⁵ Du Toit, op. cit. 6

⁶⁶ *ibid*, 5

⁶⁷ Section 1(c) (i)

5.1.5 The Constitution and the Duty to Bargain

As stated before, the impact of section 23(5) on the collective bargaining provisions of the LRA has been the subject of a vigorous debate in South African academia. The 'constitutionalisation' of labour rights is a controversial issue 'while it is often assumed to be a positive development, it also has far reaching and sometimes negative implications for the development of labour law.'⁶⁸ Some of the dangers said to arise from the constitutionalisation of labour rights include:⁶⁹

- (1) The fact that judicial decision-making is undemocratic.
- (2) Non-specialised courts are ill-equipped to deal with labour disputes which involve not only legal questions, but also questions of social and economic policy and the weighing up of individual versus collective interests.
- (3) Judicial decision-making is inherently unpredictable and uncertain.
- (4) The decisions of the courts in constitutional matters often involve pronouncements on matters of socio-economic policy, which are best left for politicians and parliament to determine.

Although some of these concerns may be valid, the jurisprudence established by the old Industrial Court in refusal to bargain disputes illustrates the fact that courts are mindful of their proper role in industrial relations. The Industrial Court intervened in collective bargaining cases only to the extent of safeguarding the integrity of the process and never imposed agreements on the parties.

⁶⁸ Jordaan, B. 'The New Constitution and Labour Law' 2

⁶⁹ *ibid*, 3

5.1.6 Recent Case Law on the Duty to Bargain

The new Labour Court has proceeded tentatively in terms of its involvement in collective bargaining disputes. The role of the court has been substantially whittled down by the CCMA's arbitral supervision role, that is, the advisory arbitration award and the dispute of right/dispute of interest categorisation.

The Labour Court has embraced the voluntaristic stance of the new LRA and its strictly defined unfair labour practice regime.

In *National Police Services Union v. National Negotiating Forum*⁷⁰ the Court noted that:

“The LRA adopts an unashamedly voluntarist approach-it does not prescribe to the parties who they should bargain with, what they should bargain about or whether they should bargain at all. In this regime, the Courts have no right to intervene and influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process.”

In *ECCAWUSA & others v. Southern Sun Hotel Interests (Pty) Ltd*⁷¹ the trade union argued, inter alia, that recognition included an implied duty to bargain in good faith. The Labour Court rejected the union's argument by holding that ‘there is no legal duty, implied by the Act, or any other law, to the effect that there is a duty to bargain in good faith.’⁷² Where a trade union has concluded a recognition agreement with the employer, collective bargaining is not guaranteed; the agreement has to specifically include this aspect.

One can deduce that the Labour Court was determined not to exceed its jurisdiction and enter the collective bargaining fray.

Surprisingly, the High Court has entered the collective bargaining fray in the *SANDU* cases.

⁷⁰ 1999 20 ILJ 1081 (LC)

⁷¹ 2000 21 ILJ 1090 (LC)

⁷² at 1098

The judgements of Van der Westhuizen, J. and Smit, J. in the *SANDU* cases have once again raised the topicality of the duty to bargain issue in South African labour law. Hence the omission of the general duty to bargain is being revisited by certain academics and a labour court judge.⁷³

In *SANDU v. Minister of Defence*,⁷⁴ the proper interpretation of section 23(5) was examined by two High Court judges. Van der Westhuizen, J. insisted that the 'right to engage in collective bargaining' is in fact not a 'right' but a 'freedom'. The implication of holding that the 'right to engage in collective bargaining' is in fact a 'freedom' is that section 23(5) merely imposes an obligation on an employer not to interfere with an employee's exercise of this 'right'. Schooling criticises this approach of the court thus 'it seems that the court merely examined and accepted the prevailing academic opinion on whether this section of the Constitution imposes a duty to bargain, without seeking to interpret this right itself.'⁷⁵

In the same case but before Smit, J. the right versus freedom argument was examined. Smit, J. held that the 'right to engage in collective bargaining' is in fact a right and not a freedom as had been suggested previously. The implication of this interpretation is that a 'right' in the proper sense of the word imposes a correlative duty on the employer to bargain.

Since the *SANDU* cases involved the Minister of Defence and a military trade union, some academics insist that the duty to bargain is therefore only valid for those in the military and not private employers and employees.⁷⁶

⁷³ Their viewpoints will be canvassed infra.

⁷⁴ 2003 (3) SA 239 (T) ; 2003 24 ILJ 2101 (T)

⁷⁵ Schooling, H. 'Is There a Duty to Bargain After All?' 10

⁷⁶ Thompson, C. 'Collective Bargaining' 23

5.2 Labour Law and Collective Bargaining in Canada

Unlike the South African approach of constitutionally entrenching labour rights such as the right to engage in collective bargaining, Canada has no specific constitutional protection for collective bargaining as a whole.⁷⁷

The 1982 Canadian Charter of Rights and Freedoms only goes so far as to guarantee the right to freedom of association.⁷⁸ Freedom of association as Archibald notes 'does not automatically require collective bargaining rights.'⁷⁹

Collective bargaining rights flow from the labour relations legislation promulgated by the 11 provinces.⁸⁰ Canadian labour law adheres to the principle of 'free collective bargaining' which has somehow been tempered by the legislative obligation on the parties to bargain in good faith and make 'reasonable efforts' to reach an agreement.⁸¹

Although Canadian labour law experts emphasise that collective bargaining is primarily free and based on contract principles, a striking feature of the regime is the institution of labour relations boards. Every province has a Labour Relations Board or LRB (established under the Labour Relations Act 1995) which has the power to 'impose arbitration, order the employer to adopt or resile from a particular line of negotiation, or make other directions to try to effect an agreement.'⁸² Similarly, at federal level collective bargaining is regulated by the Canada Labour Code (CLC).

⁷⁷ *ibid*, 94

⁷⁸ Section 2(d)

⁷⁹ Archibald, T. 'Canada' in 'Actors of Collective Bargaining' 95

⁸⁰ Carter, D. et al 'Labour Law in Canada' 250

⁸¹ Archibald, T. *op. cit.* 100

⁸² *ibid*

The preamble of the CLC recognises that Canadian labour law and policy is designed for the promotion and encouragement of free collective bargaining which fosters effective industrial relations. However, the CLC provides for a duty to bargain.⁸³

How do the Canadian authorities reconcile the notion of 'free collective bargaining' with the notion of a statutorily imposed duty to bargain? As shall be illustrated below, the two apparently contradictory notions are ultimately not irreconcilable.

④ The CLC provides a specific method by which trade unions can acquire bargaining rights. Unlike the South African collective bargaining system of organisational rights and voluntary recognition procedures, the Canadian legislation proscribes gaining recognition by embarking on strike action.⁸⁴

All that a representative trade union has to do is to apply to a labour relations board for certification and provided it meets all the stipulated requirements shall be granted a certificate.⁸⁵ The certificate gives the union exclusive representation of the employees in the bargaining unit and most importantly imposes upon the employer a corresponding obligation to bargain exclusively with the union.⁸⁶ In order to ensure orderly collective bargaining the legislation imposes deadlines on the application for certification and termination thereof.⁸⁷

Where despite the granting of the certificate the employer is intransigent and refuses to bargain, the legislation provides for first-contract interest arbitration.⁸⁸

⁸³ Section 50

⁸⁴ Carter, D. op. cit. 262

⁸⁵ These procedures are outlined in ss.24-36 of the CLC

⁸⁶ Section 50

⁸⁷ Section 24(2)(b-d)

⁸⁸ Section 80(1)

This first-contract arbitration is, unlike the CCMA advisory arbitration award, binding and effectively settles the terms and conditions of the first collective agreement between the parties.⁸⁹

A union may also gain recognition and therefore collective bargaining rights through voluntary recognition by the employer; however most unions and employers prefer the certification route.⁹⁰

The actual bargaining process commences once the union serves the employer with a notice to bargain.⁹¹ The notice to bargain may be in relation to a first contract agreement or a renewal or revision of an existing collective agreement.⁹²

Once the notice has been served, the parties are under an express duty to bargain in good faith and to make every reasonable effort to negotiate a collective agreement.⁹³ Carter notes that 'labour boards in administering the duty to bargain in good faith have placed far greater emphasis on the manner in which negotiations have been conducted than upon the content of negotiations.'⁹⁴

Therefore it is evident that the labour relations boards have been and continue to be circumspect in terms of distinguishing between the collective bargaining processes and procedures on one hand, and the product of bargaining on the other hand. This distinction appears to be crucial to safeguarding both the integrity of 'free collective bargaining' and the duty to bargain in good faith.

⁸⁹ Section 80(2)

⁹⁰ Carter, *op. cit.* 262

⁹¹ Section 48

⁹² Sections 48 and 49 respectively

⁹³ Section 50 (a) (i-ii)

⁹⁴ Carter, *op. cit.* 300

To this end the labour relations boards have determined the following factors as constituting good faith bargaining:⁹⁵

- (1) The duty to meet
- (2) The duty to refrain from circumventing the bargaining agent
- (3) The duty to engage in full and informed discussions
- (4) The duty to supply information
- (5) The duty to refrain from untimely use of economic sanctions
- (6) The duty to complete negotiations.

This 'process-versus-product' approach is similar to that adopted by the South African Industrial Court in the heyday of the general duty to bargain in good faith. The various labour relations boards also have the jurisdiction to determine associated matters such as appropriate bargaining units.⁹⁶ Where good faith bargaining has been infringed the labour boards have invoked a wide range of remedies such as: a declaration and order to negotiate in good faith, in cases of illegal demands an order to remove the illegal demand from the bargaining table, and ordering the execution of a collective agreement where the illegal demand is the only outstanding issue.⁹⁷

In addition, the Labour Relations Boards (LRB's) have ordered an employer to agree to a union's proposal on union security to rectify breach of good faith bargaining, ordering reinstatement of striking employees, awarding damages to employees for loss of the opportunity to negotiate a collective agreement and awarding damages to an employer where a union has failed to negotiate in good faith.⁹⁸

⁹⁵ *ibid*, pp. 300-303

⁹⁶ Section 27 of the federal legislation

⁹⁷ These remedies have been ordered by the LRB's in various collective bargaining disputes.

⁹⁸ *ibid*

It is clear from the above that the labour boards have 'a broad remedial mandate'⁹⁹ however the Canadian courts have stressed the fact that the boards cannot impose a collective agreement on the parties.¹⁰⁰

Collective bargaining in the Canadian private sector is therefore enterprise based and primarily based on contract principles, although in certain sectors (notably construction) industry-wide collective agreements are the norm.¹⁰¹

The nature of collective bargaining in Canada might therefore be characterised as 'a mix of private agreement and legislative protection.'¹⁰²

The obvious problem with this approach is that the lines of demarcation between what constitutes valid intervention in the interests of safeguarding the integrity of the bargaining process and actually dictating the product are somewhat blurred. Admittedly, drawing a manageable line of demarcation between process and product becomes even more problematic in the context of a legislated duty to bargain in good faith which demands a set of remedies if it is to be enforceable. However the extent of third party intervention in collective bargaining is in the final analysis determined by the deliberate policy choices adopted by the executive and the legislature.

It might therefore be argued that the Canadian system is more intrusive than the South African system, and as will be illustrated below the Lesotho one. In practice however the tribunals and courts only intervene in the process in the most extreme cases of bad faith bargaining such as in the important case of *Royal Oak Mines Inc v. Canada (Labour Relations Board)*¹⁰³

⁹⁹ Carter, op. cit. 306

¹⁰⁰ ibid

¹⁰¹ Archibald, op. cit. 97

¹⁰² ibid, 103

¹⁰³ 1996 1 S.C.R 369

In this case which involved threats and acts of violence and a long acrimonious strike, the Canada Labour Relations Board found the employer in breach of the duty to bargain and ordered it, as a remedy, to table a previous offer to the union that it had later withdrawn. A collective agreement was as a result concluded and the union called off the strike. The employer appealed to the Canadian Supreme Court on the basis that the Labour Relations Board lacked the remedial authority to order the employer to make a particular offer. The Supreme Court upheld the Board's remedy reasoning that while free collective bargaining is the norm, it is not absolute. Archibald notes that the *Royal Oak* case 'reminds us of the potentially long shadow cast by boards and courts over the bargaining process.'¹⁰⁴

Despite the Wagnerist model of labour law and collective bargaining adopted by the Canadian provinces and the federal government, collective bargaining is said to be currently in decline in Canada with employers having more voice in the labour market.¹⁰⁵ This trend is mostly attributed to the inability of labour law to account for new modes of work or atypical forms of employment and a declining union numerical base which has led to 'increasing bargaining tensions with existing firms.'¹⁰⁶

The lesson offered by the Canadian experience with regard to collective bargaining is that in spite of deliberate state intervention in collective bargaining, legislation permeated by unmistakable elements of mandatorism does not always guarantee meaningful or effective collective bargaining. This is exacerbated by the growing trend of atypical forms of employment which have and continue to erode trade union densities.

¹⁰⁴ Archibald, T. op. cit. 100

¹⁰⁵ *ibid*, 93

¹⁰⁶ *ibid*, 94

5.3 Labour Law and Collective Bargaining in Lesotho

The Labour Code Order 1992 (the Code) was amended in 1997 and 2000; however for purposes of this paper only the 2000 amendments are pertinent. The Labour Code (Amendment) Act 2000 introduced for the first time in Lesotho's collective bargaining regime, the concept of a duty to bargain in good faith.¹⁰⁷

The breach of the duty to bargain in good faith is characterised as an unfair labour practice.¹⁰⁸

The weaknesses of section 198A of the Code have been augmented by the promulgation of a Code of Good Practice on Collective Bargaining by the Minister of Labour and Employment in 2003. The Code of Good Practice has various implications for collective bargaining in Lesotho.

The explanatory notes of the Codes of Good Practice define a code of good practice as 'soft law' the implication being that its provisions do not impose any obligation on any person. However, although an employer may depart from the provisions of the Codes it still has to justify such departure which in effect creates some sort of obligation.¹⁰⁹ The kinds of reasons that may justify a departure include the size of the employer and the nature and location of the employer's business or premises.¹¹⁰

5.3.1 The Content of the Duty to Bargain in Good Faith

The Code of Good Practice stipulates elements of what constitutes good faith bargaining as follows:

- (a) The duty to bargain itself;
- (b) The duty to disclose information, and
- (c) The duty of fair representation.

¹⁰⁷ Section 198A

¹⁰⁸ Section 198A(4)

¹⁰⁹ Labour Code (Codes of Good Practice) Notice 2003 at 11

¹¹⁰ Section 22(4)

The duty to bargain itself is applicable only where the employer and the trade union have concluded a recognition agreement for purposes of collective bargaining. This type of duty to bargain is compulsory post-recognition whereas in terms of the South African duty to bargain debate those in favour of compulsion would support a duty that would arise irrespective of recognition provided the trade union is a representative one.

The Code emphasises that there is no duty to recognise a trade union, however there is an obligation to bargain with a representative one.¹¹¹

Furthermore whether the parties conclude a recognition agreement or not does not appear to affect the obligation to bargain with a representative trade union. The recognition agreement however serves to, inter alia, to formalize the relationship, stipulate mutually-agreed procedures, designate bargaining units, and stipulate bargaining topics and so on.¹¹²

The upshot of these provisions is that there seems to be a duty to bargain but only with respect to representative trade unions. In addition this type of duty to bargain is only with respect to matters of mutual interest.¹¹³

As far as minority unions are concerned, the employer is not obliged to recognise them for collective bargaining purposes. However where it does the duty to bargain will arise upon the conclusion of a recognition agreement.

¹¹¹ Section 24(2)

¹¹² Section 24(2)(a-e)

¹¹³ Section 30(1)

5.3.2 Bargaining Topics

The parties may bargain on any matter that legitimately forms the subject matter of a collective agreement, that is, matters of mutual interest.¹¹⁴

Matters of mutual interest include: recognition, organizational rights, terms and conditions of employment; technological change and restructuring in terms of their employment-related consequences; employment policies and practices; termination of employment; grievance and dispute procedures and 'any matter that has historically been an issue that the employer has bargained with unions in the past.'¹¹⁵

Unfortunately there is no case law on the interpretation of either the Code as amended or the provisions of the Code of Good Practice: Collective Bargaining. Admittedly the introduction of these concepts into the Lesotho labour law framework is relatively recent however this does not explain why the Labour Court has not yet heard a matter or dispute dealing with bad faith bargaining or refusal of recognition where it is objectively due. Should this state of affairs be interpreted to mean that there are no instances of bad faith bargaining in Lesotho industrial relations? Are representative trade unions immediately granted recognition by employers to facilitate collective bargaining?

In an industrial relations system that is acknowledged to be adversarial it is more likely that such disputes do arise but that trade unions do not pursue them all the way to the Directorate for Dispute Prevention Resolution (DDPR) or Labour Court. Anecdotal evidence suggests that trade unions in Lesotho do not approach negotiations and collective bargaining as a core union activity.

¹¹⁴ Section 26(1)

¹¹⁵ Section 26(5) (a)

Furthermore trade unions are more likely to represent their members on individual matters such as unfair dismissals before the Labour Court rather than to initiate collective bargaining. This could explain why the Labour Court or the DDPR have not dealt with such disputes, particularly in the case of the latter.

5.4 Conclusion

In the South African context the notion of 'voluntarism' appears to be rather ill-defined. Rather the nature of 'voluntarism' that prevails in South Africa is to my mind 'regulated voluntarism' because 'voluntarism' as it was originally conceived in Britain has never formed part of the South African industrial relations scenario.

As much as Canada has a statutory duty to bargain enforced by the Labour Relations Boards and the Supreme Court, judicial intervention in the bargaining process has made some commentators uncomfortable.

In the same vein academics and some members of the judiciary in South Africa are opposed to a statutorily imposed duty to bargain precisely because of the perceived undesirability of judicial intervention in the collective bargaining process and its outcomes.

Chapter Six

6. Conclusions and Recommendations

6.1 Collective Bargaining and the Duty to Bargain in South Africa

There are two schools of thought in South Africa with regard to a statutorily imposed duty to bargain in good faith. The voluntarists firmly oppose such a duty while on the other hand there are those who favour compulsion to bargain. The basis for opposing or affirming a duty to bargain is underpinned by both ideological and practical considerations. For instance, the voluntarists oppose a statutorily imposed duty to bargain primarily because it is contrary to principles of freedom of contract (and they contend freedom of association) in a free market economy where the proper role of the state is not to actively intervene in the labour-management relationship by compelling processes such as collective bargaining. From a practical point of view the voluntarists always contend that a duty to bargain in good faith lacks the ability to be enforceable.

Those in favour of compulsion on the other hand contend that abstentionism by the state and its machinery from industrial relations and collective bargaining in particular fails to take into account the social realities of the labour-management relationship and the perpetual lack of 'equilibrium' characterising it. Therefore the 'compulsionists' argue that the state has to intervene to bring some measure of equilibrium to the labour-management interaction by for instance compelling collective bargaining. The 'compulsionists' do not necessarily expect the state to conclude collective agreements for the parties instead the approach is that the state must and should ensure actual participation in the process. Failure to reach agreement would therefore ultimately necessitate resort to industrial action which is also regulated by the LRA.

The debate is not only confined to academia, the judiciary itself is divided (not necessarily evenly) on whether or not the legislature should impose the duty to bargain in good faith thereby inviting the courts to enter the collective bargaining fray. As illustrated in the previous chapters, the South African labour courts and tribunals, beginning with the old Industrial Court with its unfair labour practice jurisdiction have always had difficulty with wholly embracing the duty to bargain in good faith. In the Industrial Court era, the judgements of this tribunal in refusal to bargain disputes illustrated a division in terms of whether the unfair labour practice jurisdiction accommodated the duty to bargain in good faith. The Appellate Division eventually settled the issue by holding that indeed the notion of a 'general' duty to bargain in good faith formed part of the unfair labour practice jurisdiction of the Industrial Court. Even with the judgement of the Appellate Division, the issue of the duty to bargain would remain a contentious one.

With the advent of a new democratic order in 1994 and the adoption of a new Constitution the South African authorities set about reforming and consolidating all legislation including labour legislation. The new Constitution of the Republic of South Africa 1996 adopted the unique approach of entrenching labour rights in the Bill of Rights including the right to engage in collective bargaining in section 23(5). On the other hand, the new Labour Relations Act 66 of 1995 adopted a 'voluntaristic' approach and omitted the duty to bargain in good faith. The LRA, despite its voluntaristic approach, does not eschew collective bargaining and includes as one of its purposes the promotion of orderly collective bargaining through various mechanisms. Not surprisingly, during the negotiations preceding the adoption of the LRA and indeed the Constitution, the unions were in favour of a statutorily entrenched duty to bargain while the employers were not. Currently the LRA promotes collective bargaining through organisational rights for 'sufficiently representative unions' and majority unions. In addition

there is the notion of an advisory arbitration award in refusal to bargain disputes and ultimately recognition strikes which are regulated by the LRA. Whether these mechanisms are sufficient in light of section 23(5) of the Constitution remains a matter for debate. The voluntarists however contend that the effect of section 23(5) is limited in terms of collective bargaining and that the 'constitutionalisation' of labour rights should be avoided, in any event, so the argument goes, there is no such thing as an absolute right.

The matter, to my mind, would have been a far simpler one had there not been a constitutionally entrenched right to engage in collective bargaining. Surely this provision has to have implications for the institution of collective bargaining in South Africa. Arthur Chaskalson, the Chief Justice of South Africa stated during the inauguration of the new building of the Constitutional Court of South Africa that:

"The Bill of Rights has had a profound impact on our legal order. It is all embracing, protecting everyone and is binding on both public and private actors. It is relevant to [inter alia] the interpretation of statutes." The Chief Justice went on to emphasise the fact that the rights entrenched in the Bill of Rights are not absolute in accordance with the limitations provision.¹ The limitations provision contains criteria which must be utilised to analyse the limitation of a right entrenched in the Constitution in subsequent national legislation. These criteria or factors include:

- (1) The nature of the right being limited.
- (2) The importance of the purpose of the limitation.
- (3) The nature and extent of the limitation.
- (4) The relation between the limitation and its purpose.
- (5) Less restrictive means to achieve the purpose.

¹ Section 36(1) of the Constitution of South Africa

Chaskalson, C.J. also reiterates the principle of separation of powers and cautions that the proper role of the courts should always be to refrain from compromising the policy choices of the executive. However Chaskalson, C.J. states that 'whilst policy is ordinarily a matter for the executive or the legislature, cases do arise where state policy is challenged as being inconsistent with the Constitution.'²

Indeed the crux of the duty to bargain debate is whether the omission of the duty from the LRA by the legislature and by implication the executive is consistent with section 23(5) of the Constitution. The Constitutional Court is empowered to declare any legislation that it finds to be contrary to the state's constitutional obligations to be invalid to the extent of its inconsistency.³

It remains to be seen whether the Constitutional Court will declare the omission of the general duty to bargain from the LRA to be unconstitutional in light of section 23(5) thereof. The issue of a duty to bargain has recently been revisited in terms of academic debate with the judgements handed down in the *SANDU* judgements. More than a decade later it seems that the issue of the general duty to bargain remains an open one in South Africa.

6.2 Collective Bargaining and the Duty to Bargain in Lesotho

Despite constitutional 'abstentionism' from collective bargaining and a history of poorly articulated collective bargaining provisions in the labour legislation, Lesotho has recently acquired a duty to bargain good faith. The Code of Good Practice: Collective Bargaining 2003 contains extensive provisions on what constitutes good faith bargaining. Traditionally Codes of Good Practice were considered to be soft law and not binding.

² Chaskalson, A. 'The Vision of the South African Constitution' 22

³ Section 172(1) of the Constitution

However the Lesotho Code clearly stipulates that its provisions shall be applied to any labour dispute by an arbitrator/conciliator and that any departure from its provisions has to be justified.

6.3 Collective Bargaining and the Duty to Bargain in Canada

The duty to bargain in good faith has long been part of Canadian labour law. Like Lesotho, the Canadian Charter of Rights and Constitution do not contain provisions entrenching the right to bargain collectively. The Canada Labour Relations Act 1995 which is a federal instrument however provides for a duty to bargain in good faith. The labour statutes of the 11 Canadian provinces also provide for a duty to bargain in good faith. The statutory duty to bargain in good faith is strictly regulated with procedures on how such a duty accrues and how it is terminated.

6.4 Recommendations

This dissertation focused; inter alia, on collective bargaining in South Africa in particular the historical development of the duty to bargain prior to 1995 and its omission from the new LRA and its subsequent 'revival' in the *SANDU* cases. Lesotho and Canada were utilised for purposes of a comparative perspective.

One would recommend that the South African authorities perhaps via the National Economic Development and Labour Council (NEDLAC) revisit the decision to omit the duty to bargain from the LRA. The jurisprudence of the old Industrial Court with regard to the duty to bargain needs to be re-examined bearing in mind the fact that the duty was applied generally and only when the circumstances of the case required such application. The Industrial Court, despite criticisms with regard to the manner in which it applied unfair labour practice jurisdiction, was circumspect with regard to compelling bargaining relationships. There is no reason why the Labour Court would not proceed with the same caution.

The number of refusal to bargain disputes being referred before the CCMA needs to be examined in light of the provisions of the LRA guaranteeing organizational rights and the constitutional right to engage in collective bargaining. If the collective bargaining regime set up by the LRA is inadequate in the face of what occurs in practice, the position needs to be re-examined with reference to examples from other jurisdictions such as Canada and Lesotho.

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