

UNIVERSITY OF CAPE TOWN

WORKERS' PARTICIPATION IN ZIMBABWE AND GERMANY: LESSONS FOR ZIMBABWE.

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9/14/2011

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

In fulfilment of the requirements for the degree MPhil

Faculty of Law

UNIVERSITY OF CAPE TOWN

15TH February 2011.

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Acknowledgements

I would like to thank the following people for their invaluable contribution to this paper:

Firstly, Professor Evance Kalula for so readily supervising my work. A patient man who will always go out of his way to help.

Dr Ashley Millar, who edited my paper and suggested some very good ideas to add to this paper, your invaluable contribution certainly made a difference. I am forever grateful.

Then to my partner, Lena kuehn, for being patient with me when I had to work on this paper and urging me to switch off Aljazeera and SkyNews to get some work done. Thank you for also helping me out with the final proof reading of this paper and making sure that everything went well. I wouldn't have done it without you. A jewel worth my kingdom.

Lastly, I would like to thank my grandparents and twin brother for the support. At one time Masters was a far distant dream and when all hope had been lost you urged me to soldier on. This paper also goes out to Zimbabwe; there is no condition that is permanent.

ABSTRACT

This paper examines the concept of workers' participation in Zimbabwe (developing country) and Germany (developed country). Its main focus is on the institutional and social context of legislative framework in promoting workers' participation in the two countries. It is concerned with the practical operation of collective bargaining and other forms of worker representation, the structure and functions of unions and employer associations, role of government agencies and the nature of political processes. Furthermore, it adds an international perspective to the concept of workers' participation through the lens of the International Labour Organisation (ILO). It also makes a comparative analysis of the functional equivalents between the different structures/institutions for workers' participation in Germany and Zimbabwe. By examining the German case, this provides insight into and lessons for Zimbabwe. While debate on workers' participation in Zimbabwe has mainly focused on the structure of present law, this paper argues that it is the application of law which reveals the true character of the institutions. It ends by suggesting a way forward on Zimbabwe's precipice with regard to workers' participation.

Abbreviations

AIPPA- Access to Information and Protection of Privacy Act (Zimbabwe)

B.G.B- German Civil Code

COTU- Central Organizations of Trade Unions (Kenya)

DAG- German White Collars Workers Union

DBB- German Federation of Career Public Servants

DGB- German Federation of Trade Unions (*Deutscher Gewerkschaftsbund*)

FKE- Federation of Kenya Employers

GNU- Government of National Unity

GPA- Global Political Agreement

ILO- International Labour Organization

JICC- Joint Industrial and Commercial Consultative Committee (Kenya)

LRA- Labour Relations Act of Zimbabwe 2002

MDC- Movement for Democratic Change

NEDLAC- The National Economic and Development Labour Council

NTCC- National Tripartite Consultative Committee (Kenya)

POSA- Public Order and Security Act (Zimbabwe)

TNF- Tripartite Negotiation Forum

TQM- Total Quality Management

ZANU PF- Zimbabwe African National Union Patriotic Front

ZCTU- Zimbabwe Congress of Trade Unions

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1 INTRODUCTION.

Workers' participation is a term fraught with different connotations and ideological overtones. It is a phrase that juxtaposes different meaning in different national contexts. Research on the topic has revealed a wide diversity of concepts, rules, institutions and practices in various countries hence there is no international agreement on the exact meaning to be given to the concept.¹ However, a common trend has been identified in the process, whereby workers and their representatives are becoming increasingly associated with decision making at the enterprise level. These studies have also shown that the concept has been applied in a fairly diverse way in various countries through legislative provisions and/or collective agreements.² For the purposes of this discussion, the term workers' participation is taken in its broad sense to include a variety of arrangements by which workers and their representatives have a say in the decision making process at the workplace.

A common fallacy on the topic of workers' participation has been the use of this term interchangeably with the notion of industrial democracy. Industrial democracy is the desired 'ultimate' goal in the workplace while workers' participation on the other hand refers to the means of reaching this desired goal. This paper outlines the concept of workers' participation in two different jurisdictions namely, Zimbabwe and Germany. A specific focus however is put on Zimbabwe as very little research has been done on workers' participation. At best, the literature has focused on the legislative framework in supporting workers' participation and not its application. This study, however, examines the legal and institutional frameworks that give effect to workers' participation in Zimbabwe. Germany on the other hand has proven to be a shining beacon or prototype of a successful industrial relations system that is free of government interference. It has been argued that the German system has achieved an institutional balance of power between capital and labour and this has promoted economic growth and adaptation to changing circumstances.³ By examining the German case, this should provide insight into and lessons for Zimbabwe in enhancing its structures that support workers' participation.

¹ Johannes Schregle 'Collective bargaining and workers' participation: the position of the ILO' (1992-1993) *14 CLLJ* at 431.

² Gianni Arrigo & Giuseppe Casale 'A comparative overview of terms and notions on employee participation' (2010) *ILO* at 16.

³ Michael Poole Russell Lansbury & Nick Wailes 'A comparative analysis of developments in industrial democracy' (2001) *40 IRJ* 3 at 505.

The Federal Republic of Germany is characterised by a dual structure of employee representation through the works council and trade unions. Its system of codetermination which occurs at the establishment level is highly institutionalised and based on a very detailed legal framework (Works Constitution Act), while collective bargaining agreements are negotiated between unions and employers' associations at industry level.

Workers' participation is quite a recent phenomenon in the international arena in comparison to collective bargaining. The International Labour Organisation (ILO) is at the forefront in promoting workers participation, through a number of legal instruments in the form of *Recommendations and Conventions* that it encourages member states to ratify. It also has been financing research on the topic and hopefully uniformity on the topic will be reached soon. An in depth analysis of these conventions and recommendations is needed in order to understand the position of the ILO on workers' participation. This paper gives a detailed account of ILO's position on workers' participation.

Research done in the past on workers' participation has helped shape the ideas in this paper. Scholars such as Clyde Summers, Johannes Schregle and Niki Jazdowska have influenced the writer to look into the topic on workers' participation. They have passed advice which has been headed by the writer and that is to stay clear from comparing similar institutions (in different countries) of workers' participation but rather to recognise and make explicit the special characteristics that frame our perspective (in this case Zimbabwe).⁴ This paper has also been influenced by the current shifts in the political climate, global economics, international trade policies and other developments within these particular jurisdictions (Zimbabwe and Germany) that have impacted on industrial democracy.

i. Zimbabwe: A Country in Transition.

Over the past decade, Zimbabwe has been characterised by a struggle that has cut across the economic, social and political fabric of the country. This struggle has seen the proverbial grass (workers) of the country taking a radical approach against the Mugabe Government to emancipate the ordinary person against what many would term a flagrant disregard for the basic

⁴ Clyde Summers 'An American perspective of the German model of workers' participation' (1987) 8 *CLLJ* at 333.

tenets enshrined in the constitution. The struggle has partially been waged through the Movement for Democratic Change (MDC) an outcome of the Zimbabwe Congress of Trade Unions (ZCTU) labour movement. A growing disenchantment with the Zimbabwe African National Unions Patriotic Front (ZANU PF) Government over their being *out of touch with reality* proved to be deciding factor in creating MDC. The frustration with the government was based on the economic turmoil that had besieged the country in the early 1990s. A populist ideology became the guiding principle for these radicals (MDC) to wage a 'political war' with the hope that this would ultimately lead to economic emancipation and democracy prevailing.

Since the turn of the century, Zimbabwe has seen the adoption of draconian laws that have ultimately quashed freedom of association and most of all industrial democracy. These punitive legislations- *Public Order and Security Act (POSA)*, *Access to Information and Protection of Privacy Act (AIPPA)* and, *Presidential Powers (Temporary Measures) Act*- have attacked the economic and political fabric of the country by giving the government absolute power to crackdown on any dissent especially from opposition parties and workers' movements. The institutional frameworks for promoting industrial democracy have now become remnants of the past and as a result, workers' participation has become lingo associated with the aspirations of the people in a democratic society.

It is important to note the historical developments of workers' participation in Zimbabwe that were largely shaped by its colonial past. The post-independent Government made its overtures towards the concept of 'workers' participation' soon after independence by encouraging the formation of trade unions and also through the adoption of a new Labour Relations Act (LRA) in 1985 whose sole mandate was to create industrial peace and social justice in the workplace. Currently, workers' participation in Zimbabwe occurs in three main forms. That is through workers committees, collective bargaining and works' council. A detailed analysis of these institutions will be given later on in this paper.

ii. Objectives.

This paper will assess the effectiveness of workers' participation in decision making through the institutional frameworks provided for in the different jurisdictions. It analyses the distinct structures through which labour representation takes place as well as the nature and accountability of these structures. This paper also investigates the limitations of this representation and the reasons for these limits. This paper explores the factors that could help explain the form/condition/nature of worker representation in the different jurisdictions and, in particular:

(a) Why it is weak in Zimbabwe?

(b) Why Germany has enjoyed industrial peace contributing to economic prosperity over the years?

After examining the weaknesses of workers' participation in Zimbabwe, the paper then provides a constructive framework within which the concept of workers participation can be strengthened. In particular, this paper proffers suggestions as to what can be done to strengthen workers' participation in Zimbabwe.

2 INDUSTRIAL DEMOCRACY.

*“In economic life as in political life, democracy is an indispensable ingredient of peace and co-operation in the longer term; for this reason industrial peace... implies a far reaching democratisation of the labour process.”*⁵

Industrial democracy is a phrase fraught with terminological confusions and ideological overtones.⁶ For the purposes of this paper, industrial democracy may be defined as the exercise of power by workers or their representatives over decisions within their places of service, coupled with the modification of the locus and distribution of authority within the workplace.⁷ It refers to the institutional and structural mechanisms that give workers or their representatives the opportunity to influence organisational decision making in their places of employment. Industrial democracy focuses on the two broad forms of workers’ participation in management and/or business decision making, namely direct and indirect participation. Within these two categories there are a range of sub-categories including collective bargaining through trade unions, codetermination, workers’ self management, works’ council, workers’ committee, shop floor programs, joint consultation, nationalisation, public ownership and shareholding by employees.⁸ Some forms of industrial democracy have been created through state initiatives and these involve social dialogue amongst key stakeholders.

Workers’ participation can be further classified according to the scope, range and levels of participation. The scope and range would in essence refer to the subjects covered and how far the representatives can go when negotiating on a particular issue at any level. The level on the other hand would entail the platforms offered for workers’ participation to occur in a specific country such as sectoral, establishment, regional or national level.

The term industrial democracy juxtaposes different meanings in different national contexts. Similarly, the concept of workers’ participation entails different institutional and structural frameworks in various countries with different economic and social structures. US and Britain use concepts such as industrial democracy or workplace democracy while Germany on

⁵ Kurt Moore *Worker participation in the new South Africa*. (unpublished LLM thesis, University of Cape Town, 2006) 17.

⁶ <http://www.eruditions.com.au/IR/IndustrialDemocracy.pdf>, accessed on 05 June 2011.

⁷ Poole et al op cit note 3 at 491.

⁸ Ibid.

the other hand, refers to terms such as codetermination (*Mitbestimmung*), partnership and economic democracy. Various literatures on Germany also distinguish between industrial democracy and economic democracy.⁹ As a result, you have codetermination (understood as industrial democracy) being focused on the industry and firm level while economic democracy focuses on workers' influence on the economic policy-making of the state (e.g. joint employer-union commissions, corporatism/tripartism, etc).¹⁰

Furthermore, the terms 'employee participation' and 'industrial democracy' cannot be used interchangeably. Research has been done and in the process a theoretical framework has been adopted in differentiating the two. Pateman (1970) regards participation as involving the 'adjustment' of an organization's traditional authority structure where the prerogative of management to make decisions is challenged to a certain extent.¹¹ She further breaks participation down into three main categories: full, partial and pseudo. A critical distinction is made in these categories between having the power to *determine* outcomes in the decision-making process and being able to *influence* the decision making process.¹² For full participation to occur, workers' representatives need to have equal power to *determine* outcomes in decision making. Partial participation includes the power of employees to influence decision making and this is characterised by the unequal power of resources between the different actors. Pseudo participation on the other hand involves techniques of persuasion rather than decision making and participation in this case is used to encourage its acceptance.¹³ Based on Pateman's theory, it is safe to assume that industrial democracy can be equated to full participation which becomes the intended objective. While partial participation on the other hand, can be equated to employee participation and in the process it may help bring about conditions supporting a move towards full participation (industrial democracy). Kenneth Walker (1976) has identified three main objectives of Industrial democracy and these are:

- Sharing of power between management and workers in the enterprise.

⁹ Carola Frege 'The discourse of industrial democracy: Germany and US revisited' (2005) 26 *Economic and Industrial Democracy* 1 at 153.

¹⁰ Ibid.

¹¹ Carol Pateman *Participation and Democratic Theory* (1970) 69.

¹² Sayce and Gold 'Revisiting industrial democracy and pension trusteeship: the case of Canada' (2011) 32 *Economic and Industrial Democracy* 3 at 481.

¹³ Ibid.

- Effective co-operation between all members of an organisation in the interests of efficiency and industrial peace; and
- Personal fulfilment of all members of the organisation, and this also raises the workforce morale and contributes to efficiency in workplace.¹⁴

Differing priorities are attached to these objectives by the parties to industrial relations. Unions have tended to view participation in terms of the first objective; management has focused on the second while human resource managers have focused on the third.¹⁵ These objectives at the same time reflect varying balances of power between parties and the changing political, economic and social circumstances.

Unionists, scholars and employers alike have been in support of the concept-industrial democracy. Kurt Moore (1996) argues that the issue is no longer about industrial democracy existing in the workplace but rather what form it should take and the extent to which it should be applied.¹⁶ Furthermore, he goes on to identify two schools of thought on the issue of industrial democracy in South Africa. The first one entails the right of control being vested in the ownership of property and in this case the only logical way of involving workers in decision making would be through giving them access to property rights by means of shareholding in company ownership. The other school of thought entails workers being entitled to a say in the management of the enterprise regardless of ownership, simply because they work there.¹⁷ As a result, the democratisation of the workplace encompasses a shift away from the individualistic and exploitative perception of property rights towards the notion of property as a social responsibility.

To conclude, industrial democracy is concerned with redressing disparities of power between employers and workers. It must be understood as a project of worker empowerment through its role of facilitating greater workers' participation and decision making within the

¹⁴ Raymond Markey & Greg Patmore 'The role of the state in the diffusion of industrial democracy: South Australia 1972-1979' (2009) *30 Economic and Industrial Democracy* 37 at 41.

¹⁵ *Ibid.*

¹⁶ Moore *op cit* note 5 at 18.

¹⁷ *Ibid* at 19.

workplace.¹⁸The following section deals with the concept of workers' participation and the theoretical approaches to it.

¹⁸ Darcy DuToit 'Industrial democracy in South Africa's transition' (1997) *1 Law, Democracy & Development 1* at 42.

3 WORKERS' PARTICIPATION.

The concept of workers' participation is laden with different connotations in different countries. A common error among scholars is to interchangeably use this term with the concept of industrial democracy which is an over arching ultimate goal that is aspired for and its role is to facilitate greater workers' participation and decision making within the workplace.¹⁹ Workers' participation on the other hand, entails the different institutions and organisations, levels and mechanisms by which employees and their trade unions can influence the running and decision making processes of a company.²⁰ Workers' participation seeks to give expression to worker interests in the context of contradictory dynamics (market forces and political pressures beyond the control of the employers and employees) subject to the residual power of command of the employers.²¹ In addition to this, one should acknowledge the differences between national systems of industrial relations, be it in terms of the trade unions, the institutions of workplace representation, collective bargaining or employee board level representation.²² Furthermore, studies and research conducted on workers' participation have also shown that it is applied in diverse ways in various ILO member countries and this is either through legislative provisions and/ or collective agreements.²³ Germany is characterised by a dual system of worker representation through trade unions and works' council. While in Zimbabwe, workers' participation takes place through three avenues: namely workers' committees, collective bargaining and works' councils. These terms should not be equated to the German structures because they have no intrinsic meaning but derive their meaning from the Zimbabwean legal system which is totally different from the German labour system. The following paragraphs highlight theoretical foundations and the different institutional frameworks of workers' participation as a backdrop to the specific focus on the institutions that support workers' participation in Zimbabwe and Germany in the following sections.

Worker participation involves employee influence through a number of practices such as consultation of employees, codetermination in decision making by employee representatives

¹⁹ Arrigo & Cassale op cit note 2 at 148.

²⁰ Michael Stollt & Sascha Meinert Worker participation 2030 four scenarios (2010).

²¹ Darcy, DuToit op cit note 18 at 43.

²² Ibid.

²³ Arrigo & Cassale op cit note 2 at 11.

and even the superseding of management to some extent by full workers' control. This degree of influence is also affected by the level and type of decision making in which employees participate. The formal processes of worker participation can be divided into three approaches; these may coexist in one organisation and can be located at any point on the spectrum between consultation and workers' control.²⁴ These three approaches are:

- Financial participation: employees own all or part of an enterprise through share ownership.
- Direct participation: employees participate in decision making directly themselves and this takes place at shop or office level.
- Indirect participation: through representatives or trade unions involved in collective bargaining, works councils and joint consultation committees just to mention a few.²⁵

The concept of workers' participation involves workers in joint decision making with their employers or management. Fanham and Pimlott (1995) have identified three approaches on the notion of decision making within the workplace:

- The Managerial Approach
- The Traditional Approach and,
- The Advanced Approach²⁶

The managerial approach is based on the unitary perspective or theory of industrial relations which is predominantly management oriented.²⁷ It is a mere communication exercise by which management having made a decision simply informs employee representatives of that decision. This approach is highly bureaucratic and does not even necessitate the representation of

²⁴ Markey & Patmore op cit note 14 at 41.

²⁵ Ibid.

²⁶ Moore op cit note 5 at 31.

²⁷ Ibid.

employee interests through the trade union.²⁸ Management makes all the decisions and employees cannot challenge managerial prerogative.

The traditional approach is an employee-oriented approach. Management in this case seeks the views and ideas of employees through their representatives prior to decision making.²⁹ The ultimate decision falls short of a consensus decision. This process can be viewed as consultation and not negotiation because management sets the terms of reference and decision making ultimately rests with management.³⁰ As a result, management can also exclude certain topics from joint decision making. The main aim of this approach is to improve efficiency in order to maximise productivity in the workplace.³¹

Finally, the advanced approach does not distinguish between consultation and negotiation within the bargaining process because it covers any subject of concern (between employers and employees representatives) within the ambit of joint decision making.³² The main aim of this approach is to promote the principle of industrial democracy at the workplace and as such it threatens the unilateral right to manage. The ILO has endorsed this as a more favourable approach to workers' participation.

Workers' participation can be classified into two different categories and these are direct and indirect participation. I will go on to give a detailed account of the different forms of participation under these two categories.

A. Direct Participation

Workers may participate in decision making directly themselves on a face to face basis with their employers. Direct forms of participation tend to be small- scale and decentralised such as quality circles and self managed work teams.³³ Sometimes direct worker participation can occur through work enrichment. Teamwork in the workplace constitutes a form of group based direct participation. Direct participation may also be consultative or deliberative. Under consultative participation, workers are encouraged either as individuals or members of a group to make their

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid at 32.

³¹ Ibid.

³² Ibid at 33.

³³ Ibid at 67.

views known but it is up to the management to take action or not. Under face to face consultation, arrangements involving discussions between individual employees and immediate managers, such as regular performance reviews, regular trainings and developments reviews. Deliberative participation on the other hand, places some traditional management responsibility in the hands of employees' as is the case in team working or semi-autonomous work groups where some authority is delegated to the workers.³⁴ This form of management is also referred to as delegative participation because employees are given increased discretion and responsibility to organise and do their jobs without having to refer back to management.³⁵ Below, I will outline some forms of direct worker participation.

i Self Management Systems.

Self management can be defined as the management of undertakings by their workers. This constitutes worker control with employees managing the enterprise without traditional management.³⁶ ILO outlined the features of this system in a report and the key features are:

- Managerial rights are transferred to the worker but not the ownership. This would entail decision making by the employees to ensure the efficiency and effectiveness of the organisation.
- The entire workforce has the right to participate but these rights are lost if the worker leaves the undertaking.
- The rights conferred in this kind of system are usually exercised through workers' councils³⁷

The report cites the former Yugoslav system as the best known example of self management systems. The system in Yugoslav is based on '*social ownership*' and the main entities in this system are the 'workers assembly' and the 'worker's council.' Based on the Yugoslav system, it is evident that genuine self management in undertakings can only develop if relations at other

³⁴ Ozaki, Muneto 'Forms of worker participation' In Anne Trebilcock (ed) *Labour Relations and Human Relations Management: An overview* (2005) ch 21.

³⁵ Keith Sisson *Direct Participation and the Modernisation of Work Organisation* (2000).

³⁶ Moore op cit note 5 at 55.

³⁷ Ibid at 56.

levels of social organisation and in society as a whole are similarly self managing in nature.³⁸ Kurt Moore argues that self managing systems can only exist in a socialist society because it is based on social ownership and its implementation involves more than a simple restructuring of the organisation but rather it encompasses the restructuring of the whole social fabric.

In the case of Zimbabwe, this model would be quite detrimental to the economic fabric of the country. As we will see in the Zimbabwe case, the economic conditions of the time are not conducive for the growth of self management. Zimbabwe's economy has been on the downturn for over a decade and any form of self management would prove costly to any enterprise. Furthermore, as a result of the pariah state that Zimbabwe has assumed, there has been a rapid skills flight in search of greener pastures. Based on this, it would be difficult to establish and maintain a self management system owing to lack of skilled personnel, training and information. This situation has led to centralised direction by the state which has stifled economic growth and workplace participation.

It is my view that this system would not suffice in a developing country like Zimbabwe. This is so because such a system which has its root in socialism would definitely scare away foreign investors who are desperately needed to kick start the economic engine that has been dormant for over a decade.

ii Quality Circles and Total Quality Management.

Quality circles originate in Japan. They were established upon "Quality of Working Life" (QWL) or "Humanisation of Work" programmes that began in the early 1970s. They were inspired by a belief that Japan's ability to produce innovative and high quality products at low cost had something to do with the way personnel were managed in that country.³⁹ The aim of quality circles are: to enhance the quality and productivity within an enterprise and secondly, to foster a sense of participation in work related decisions among workers, leading to increased job satisfaction and better industrial relations.⁴⁰

³⁸ Ibid.

³⁹ Ozaki op cit note 34.

⁴⁰ Ibid.

Quality circles act as formal institutionalised mechanisms for productive and participative forms of problem solving interaction among employees.⁴¹ Each circle also acts as a surveillance mechanism which assists the organisation in adapting to its environment and in monitoring opportunities. In this instance it monitors opportunities within the environment the enterprise is operating in and identifies any opportunities the organisation can adopt to create a competitive advantage against rivals in the corporate industry.

Total quality management (TQMs) on the other hand were established as a response to the shortcomings of quality circles. Unlike quality circles, TQM targets all employees. It requires all employees to participate in the process of improving the business. This is so because every employee has the obligation to ensure quality and efficiency within their organisation. TQM encourages job enlargement and enrichment leading to semi autonomous work groups.⁴² Total quality management also promotes horizontal coordination in the firm through, for example, the use of adhoc, multi functional or interdepartmental project teams.⁴³

iii Joint Project Groups.

A joint project group is normally composed of managers, workplace union representatives and shop floor workers and also often assisted by outside experts.⁴⁴ Management team and the union concerned often establish joint project groups on issues such as new technology, work organisation, training and working environment. A notable example would be the Swedish model of joint project groups which offers direct participation of shop floor workers within a framework of collective labour relations.⁴⁵

iv Semi Autonomous Group work and Teamwork.

These two are forms of on-line direct participation of shop-floor workers in work related decisions, unlike joint project groups which are an example of off-line participation.⁴⁶ The

⁴¹ Olga Crocker Johnny Sik Leung Chiu & Cyril Charney *Quality circles: A Guide to Participation and Productivity* (1984) 278.

⁴² Ozaki op cit note 34.

⁴³ Ibid.

⁴⁴ Ibid

⁴⁵ Moore op cit note 5 at 39.

⁴⁶ Ozaki op cit note 34.

difference between semi autonomous group work and teamwork lies in the degree of participation (autonomy) which the members of the team or group enjoy in organising their work.⁴⁷ Teamwork structures are spreading in most organisations around the globe. Organisations have found it necessary to harness individual talent through teamwork and to also adapt an ever changing business environment by promoting autonomy within the organisations through teamwork. Team structures also differ from country to country. In some organisations, team leaders are usually appointed by management but in a few countries like Germany they are often elected by co-workers. An increasing interest has been shown by employers for team work because it tends to facilitate the upgrading of worker's skills and widens the range of workers tasks thus promoting greater flexibility in production processes.

B. Indirect Participation.

Indirect participation refers to the representation of workers in an undertaking through their representatives-trade unions or elected employee representatives. Trade unions engage in collective bargaining with employers to come up with collective agreements on matters of mutual interest. In most European countries, employee representation occurs at two levels. That is, through a works council at the plant and enterprise level and also through employee representatives' on supervisory boards.

i Collective bargaining.

Collective bargaining refers to "negotiations about working conditions and terms of employment between an employer, a group of employers or one or more employer's organisations on the one hand, and one or more representative worker organisations on the other hand, with a view to reaching an agreement."⁴⁸ Schregle argues that collective bargaining has a double role in workers' participation. The first one being an instrument of introducing workers' participation and the other encompasses the actual process of negotiating the collective agreement,

⁴⁷ Ibid.

⁴⁸ David Fanham & John Pimlott *Understanding Industrial Relations* (1995) 58.

particularly at the enterprise level.⁴⁹ Collective bargaining provides a formal channel through which differing interests of management and employees may be resolved on a collective basis. According to the ILO Convention No. 98, collective bargaining is seen as voluntary negotiation between employers' organisations and workers organisations with a view to regulating the terms and conditions of employment by collective agreements.⁵⁰ It is a term that symbolises industrial democracy because unions and employers participate on the basis of equality in the determination of wages and conditions of employment.

Elements/features of Collective Bargaining:

- Parties to collective bargaining attempt to reach an agreement on matters of mutual interest through direct negotiations, to resolve disputes and to determine the ground rules for the conduct of the employment relationships. These agreements may also address rules for future bargaining.
- Outcomes to collective bargaining are not always clear or predictable: negotiation is a process involving discerning views, compromises and accommodation will depend on a number of factors including external factors such as the state of the economy, the state of the labour market or the prior history of the relationships between parties. In addition to this, the success of negotiating tactics will depend upon the skills of individuals, the perceptions of party principals about the strengths of the other party and the employment of other, industrial action outside the negotiations.
- Collective bargaining systems rely upon the parties bargaining in good faith. This is usually guaranteed by collective legislation.
- Third party interventions occur only after the parties have reached a stalemate in negotiations. Conciliation and arbitration may either be determined by the parties in earlier agreements or be provided by established states institutions. The latter has been the case in South Africa where the CCMA (Commission for Conciliation, Mediation and Arbitration) is used as a referral body by collective parties to resolve nagging issues through mediation or arbitration.⁵¹

⁴⁹ Johannes Schregle 'Workers's participation in decisions within undertakings' (1976) *113 ILR* 1 at 3.

⁵⁰ Isaac Chaneta 'Collective bargaining' *PeCOP Journal of Social and Management Sciences* at 3.

⁵¹ *Ibid.*

An agreement reached as a result of collective bargaining is known as a collective agreement and is binding to all parties of the agreement. Collective bargaining legislation in respective jurisdictions imposes obligations on the parties to adhere to the terms of an agreement. Under Zimbabwean law on collective bargaining, collective agreements are required to be registered by the *Registrar of Code of Conduct* to provide the legal protection to the parties⁵² A detailed analysis on collective bargaining with regard to the specific jurisdictions will be outlined in their respective sections.

ii Works Councils.

Works councils are bodies comprised of workers with which management must consult prior to making decisions that affect the working lives of the employees.⁵³ Works councils are an institutionalised representation of interests of employees within an establishment. They act as counterparts of management on behalf of the workers. Works councils are sometimes referred to as workers committees in some other countries. Works councils are usually armed with the rights of participation, information, consultation and codetermination rights. Extensive consultation and information rights range from economic matters, codetermination rights on social concerns and human resource issues. They are empowered to conclude works agreements and are obligated to maintain labour peace. These will further be discussed on a country basis in following chapters.

iii Employee Representation on Supervisory boards and Shareholding.

In Germany and Scandinavian countries, workers have indirect participation above the enterprise level through the inclusion of workers' representatives on supervisory boards.⁵⁴ This system involves incorporating workers' representatives in the traditional company board structure and it has been argued that workers will have a stake in setting long term goals of the business. Holding positions on the board may provide access to additional information. However, this system has its downside. The workers on these boards are bound by the same rules as other members of the board. The most obvious being the duty of secrecy, this tends to limit their disclosure to their

⁵² Ibid at 6.

⁵³ Moore op cit note 5 at 67.

⁵⁴ Ozaki op cit note 34.

fellow workers. Also, these worker representatives on the boards may tend to be indecisive, by preferring to refer back to their peer groups. This slows down the decision making process. It is worth noting that the degree of influence on management decisions depends not only on the number of worker representatives on the board but also on the role and functions discharged by the board within the company's power structure.⁵⁵ The role of these boards differs from country to country and as such the influence of these boards on management decisions may vary.

Another expression of workers' participation lies in the ownership of shares in limited liability companies or corporations.⁵⁶ Shareholding in companies for workers is often encouraged through the use of share option and saving schemes. Workers often gain control of a company through the purchase of shares and this in turn gives workers the impetus to identify with the company financially and work harder for its success. This scheme is popular in North America and Europe.⁵⁷ In developing states it has been more reserved for top management and the benefits seldom trickle down to the ordinary employee at the grass root level.

As has been highlighted in the preceding subsections, workers' participation is a concept fraught with many approaches. These approaches are classified into different sections, mainly direct and indirect forms of workers' participation and they occur at different levels such as the plant /establishment level or regional and national level. The application thereof is characterised by a number of approaches in different jurisdictions which again will be highlighted in sections to follow on Zimbabwe and Germany.

⁵⁵ Schregle op cit note 49 at 10.

⁵⁶ Ozaki op cit note 34.

⁵⁷ *ibid*

4 ILO AND WORKERS' PARTICIPATION

Workers' participation as used by the ILO usually refers to the enterprise level. Workers' participation in the ILO language is restricted to the wording "workers' participation in decisions within undertakings."⁵⁸ This wording links workers' participation to decision making and excludes them (workers' participation schemes' involvement) in the results of the enterprise such as the various forms of profit sharing.⁵⁹ As a result, workers' participation is understood by the ILO as workers' participation in decision making at the enterprise level. This participation also includes collective bargaining. Workers' participation varies from country to country and according to the ILO, no one size fits all. Instead, a number of conventions and recommendations have been promulgated by the ILO and some member states have ratified most of them.⁶⁰

Worker participation is an important tool in promoting industrial democracy in the workplace. In one of its studies, ILO lists five models of workers' participation and these are:

- *Information and consultation*
- *Collective bargaining*
- *Co-decision making works council or similar body*
- *Representatives of personnel management body*
- *Workers' self management.*⁶¹

Soon after the end of World War Two, ILO actively promoted the furtherance of collective bargaining. The *Declaration of Philadelphia* (1944) concerning the aims and purposes of the ILO, effectively recognised the right of collective bargaining and at the same time promoted this right among its member states. In ILO's view, collective bargaining has always been considered

⁵⁸ Arrigo & Casale op cit note 2 at 10.

⁵⁹ Ibid.

⁶⁰ These conventions and Recommendations are Recommendation No.94, Recommendation No. 129, and Recommendation No.130, Convention No. 135. The list is not exhaustive. All these instruments provide a framework where worker representatives are involved in one way or another with certain types of decision making.⁶⁰ The instrument of collective bargaining supplements all these other conventions in promoting worker participation.

⁶¹ Ozaki op cit note 34.

as an integral part of the international protection of trade union rights.⁶² The ILO adopted *Convention No.98* and article 4 of this convention states that , “measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers’ organisations and workers organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”⁶³ Furthermore, *Recommendation 91* was adopted two years later and this recommendation established the principles regarding collective bargaining machinery and the effects, interpretation, and application of collective agreements.⁶⁴ The ILO in this recommendation suggested that the machinery to support collective bargaining was supposed to be supported by means of agreement or national laws or regulations as may be appropriate.

However, *Convention No. 98* excludes public servants engaged in the administration of the state. This has somehow become an impediment in promoting industrial relations because members of the public sector seem not to enjoy the same collective bargaining rights enjoyed by their counterparts in the private sector. As a result of these disparities, the ILO adopted *convention No. 151* which makes reference to measures being taken to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organisations.⁶⁵ *Convention No.154* supplemented by *Recommendation No. 163* creates an obligation for member states/governments to actively promote collective bargaining through concrete measures. *Convention No.154* reiterates *Convention no.98* and adds more detail especially through the new definition of collective bargaining according to which the subject matter of bargaining was no longer limited to working conditions and terms of employment but rather it extended to the relations between the employers and workers, and also between the organisations of both sides.⁶⁶ *Conventions No. 154* provides details of how collective bargaining should be promoted. Other recommendations such as recommendations (94,129 and 130) which deal with consultation,

⁶² Schregle op cit notel at 432.

⁶³ Right to Organize and Collective Bargaining Convention, *adopted* July 1, 1949, art. 4 [hereinafter *Convention No.98*].

⁶⁴ Collective Agreements Recommendation *adopted* June 29, 1951 [hereinafter *Recommendation No. 91*].

⁶⁵ Labour Relations (Public Service) Convention, *adopted* June 27, 1978, art.7 [hereinafter *Convention No. 151*].

⁶⁶ Schregle op cit note 1 at 435.

communications and grievance procedures' have been adopted to promote workers' participation and industrial relations. I will elaborate on these recommendations in the following paragraphs.

Recommendation No.94 (1952) primarily deals with the issue of cooperation at the level of the undertaking. Its main purpose is to encourage stakeholders (employers and workers) at the enterprise level to take necessary steps to promote consultation on matters of mutual interest.⁶⁷ This recommendation makes a clear distinction between the role of collective bargaining and that of consultation. It explicitly states that the matters to be dealt with should not fall within the ambit of issues to be determined through collective bargaining. The recommendation clearly states that the process of consultation and cooperation should be facilitated by the encouragement of voluntary agreements between the parties or by the process of promoting laws or regulations which would normally be used to establish bodies for consultation and cooperation. It goes without saying that the same laws and regulations should also determine the scope, function, structure and methods of operation of the above mentioned bodies in line with the social context and national conditions of that particular country.⁶⁸

The ILO went that extra mile to promote industrial democracy in the workplace by issuing *Recommendation No. 129 (1969)*. ILO views communication as important for the promotion of sound labour relations. The recommendation is based on the premise that it is in "the common interest of employers and employees to... recognise the importance of a climate of mutual understanding and confidence within undertakings that is favourable both to the efficiency of the undertaking and to the aspirations of the workers."⁶⁹ The climate of mutual understanding mentioned above should be supported by the rapid dissemination and exchange of information, as complete and as objective as possible relating to the various aspects of working life in the enterprise.⁷⁰ In this instance the ILO stresses the importance of workers being consulted in the workplace before any structures of communication are established. In a way this recommendation is targeted at employers or authorities responsible for establishing policies regarding labour-management communication at the enterprise Level. *Paragraph 2* of the recommendation suggests that management should take appropriate steps in consultation with

⁶⁷ Arrigo & Casale op cit note 2 at 11.

⁶⁸ Ibid.

⁶⁹ Sonia Bendix *Industrial Relations in South Africa* (2007) 37.

⁷⁰ Arrigo & Casale op cit note 2 at 12.

worker's representatives to adopt an effective communication policy that ensures information sharing and consultation between the parties before major decisions of mutual interest are taken.

Recommendation No. 129 explicitly states that the method of communication between the employers and workers should in no way undermine the principle of freedom of association. The communication policies should not cause prejudice to worker representatives or their organisations and undermine the functions of worker's representative bodies. Furthermore, the communication policy within the enterprise should be drafted in such a way that the best possible method of communicating and exchanging information is selected. These may vary from, meetings for the purpose of exchanging views to media such as personnel policy manuals, publications-in-house journals, magazines and newsletters just to mention a few⁷¹

The issue of disclosure of information has always been a thorn in the flesh in labour management relations. More often than not, management is not always willing to disclose information to workers claiming sensitivity of the operational information. Regardless of this, management should be obligated to disclose information relevant to matters of mutual interest in relation to the operation and future prospects of the enterprise, and to the present and future situation of the workers themselves.⁷² The nature of the information disclosed to the workers or their representatives should be in such a way that it does not cause damage to either party.

Recommendation No. 130 of 1967 addresses the issue of examination of grievances. This recommendation specifically deals with labour disputes in the workplace mainly arising from employment conditions or labour relations. The ILO encourages member states to have employers operating within their jurisdictions to implement these provisions for grievance procedures. At present, the ILO can do very little to have member states conforming to these conventions and recommendations. However, it should encourage more research on the topic to try and come up with an international consensus on the concept.

While the ILO influences many of its member countries through its thinking about and experiences in labour issues, some of the states that have ratified these conventions and recommendations have fallen short in implementing them in letter and in spirit of their intended purpose. A monitoring mechanism is necessary to limit this kind of intransigence. Also, the fact that no consensus has been reached on the subject, workers' participation, the ILO should

⁷¹ Ibid.

⁷² Ibid.

continue with its objective of facilitating the exchange of information and opinions through conferences and publications in the hope of reaching a mutually agreeable position on workers' participation.

5 WORKER PARTICIPATION IN ZIMBABWE.

A. Historical background.

Zimbabwe's experiences during the colonial era largely shaped its approach towards workers' participation post independence.⁷³ Similar to South Africa, labour legislation enacted by the settler regime denied majority natives (African workers) any significant participation in the workplace.⁷⁴ The general belief was that these African workers were politicians in disguise and to have given them a voice would ultimately be detrimental in the long run. As a result, the first legislation to include any workers' participation rights- *Industrial Conciliation Act* (1934) - excluded Africans from its definition of a 'worker.'⁷⁵ The Act was modelled on the *South African Industrial Conciliation Act of 1924* which was largely facilitative and non interventionist.⁷⁶ The facilitative part included provisions for collective bargaining by formally recognising collective bargaining, recognition of trade unions, limited right to strike including civil liability for union officials for acts done during lawful strikes.⁷⁷ There were also provisions that undermined real and effective collective bargaining such as severe restrictions on the right to strike, extensive powers of the state to intervene in trade unions and the exclusion of unregistered trade unions from collective bargaining.⁷⁸

African workers continued to be governed by a draconian piece of legislation called the *Master and Servant Act* (1901) which did not provide for any form of workers' participation.⁷⁹ The provisions of this Act made African labour property of the master.⁸⁰ Furthermore, a new industrial conciliation act came into force in 1960 and it claimed to extend its coverage to African workers.⁸¹ The act was characterised by stringent requirements for the registration of African trade unions and as a result no meaningful participation existed for the African workers

⁷³ Lovemore Madhuku 'Worker participation in a developing country: the case of Zimbabwe' (1996) 17 *CLLJ* at 603.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Munyaradzi Gwisai *Labour and Employment in Zimbabwe: Relations of Work under Neo-colonial Capitalism* (2006) 312.

⁷⁷ *Ibid* at 313.

⁷⁸ *Ibid.*

⁷⁹ The Master and Servant Act of 1901

⁸⁰ Luke Malaba 'Supply control and organisation of African labour in Rhodesia' (1980) 7 *ROAPE* 18 at 8.

⁸¹ Madhuku *op cit* note 71 at 604.

until independence in 1980.⁸² Even after the act (*Industrial Conciliation Act*) had been amended to incorporate African workers into the definition of an 'employee and allow for the existence and legal operation of African trade unions, these trade unions still remained as blunt knives and were merely reduced to consultative bodies without the power to participate in decision making'⁸³ Workers' participation in Zimbabwe was ushered into the legal system after 1980 by the new Government.

B. Obstacles to Workers' Participation in Zimbabwe.

A number of problems confronted the introduction of workers' participation in Zimbabwe after independence. The first and most obvious problem was the polarisation of races between an exclusively black group of workers and a predominantly white group of managers.⁸⁴ Their relationship at the time of independence was one of conflict and suspicion. Secondly, most companies lacked either the experience or the desire to introduce workers' participation.⁸⁵ If these conditions existed it would have facilitated the introduction and development of workers' participation and the democratisation of decision making in the work place. Thirdly, there was no legal framework within which worker participation was to take place until the enactment of the *Labour Relations Act* (LRA) at the end of 1985.⁸⁶ The absence of a legal framework meant that the nature, content and implementation of workers' participation, was left at the discretion of individual companies.

The existence of multinational corporations meant that local management would not be able to influence corporate policy and the nation state could lack control over important sectors of the economy. The form of ownership and control of capital effectively relegated worker's committees to mere channels of communication.⁸⁷ With this background, the new government sought to promote worker participation in the workplace by adopting a new LRA in 1985 and providing structures that would promote the process and this act has been amended a number of times and the most recent being in 2002.

⁸² Ibid.

⁸³ Maphosa J 'Industrial democracy in Zimbabwe' (1991) 18 *Zambezia* 1at 15.

⁸⁴ Ibid at 16.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid at 17.

Over the years, Zimbabwe has stuck its guns on an outdated constitution and in the process retained the authoritarian traditions of the past. This is evident by the retaining of provisions (*Presidential Powers Act*) within the constitution which have negatively impacted on workers' participation. Instead of the constitution being interpreted as a living instrument and given a generous and purposive construction, it has been viewed as a tool for furthering individual agendas and these have in the process metered out damage to the economic and social fabric of the country. Coupled with other punitive laws such as the POSA and AIPPA, the rights to freedom of association and organizing collectively have been attacked. Freedom of association and assembly is an important right in promoting workers' participation but over the past decade this has been reduced to a fictitious infatuation by civic organizations, political parties and trade unions alike. The right to freedom of assembly and association in Zimbabwe is guaranteed under article 21 of the constitution which provides:

21 Protection of freedom of assembly and association

Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.

Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -In the interests of defence, public safety, public order, public morality or public health; For the purposes of protecting the rights or freedoms of other persons; for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations; or

That imposes restrictions on public officers except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.(4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street,

lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles

The Supreme Court of Zimbabwe in *re Munhumeso & Ors*⁸⁸ emphasises that the importance attached to exercising the right to freedom of expression and assembly must never be underestimated. These lie at the foundation of a democratic society and are two of the basic conditions for its progress and for the development of every man.⁸⁹ However, under Section 20 (2) (a) and Section 21(3) (a) of the constitution, laws can be enacted which abrogate the freedom of expression and assembly in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic state. This has been misconstrued by the powers that be and in the process used as a back-drop to introducing POSA and AIPPA. Through these draconian laws, trade unions cannot effectively function because these laws provide a cumulative effect to ban strikes in virtually all sectors of employment in Zimbabwe. They also deny trade unions the right to use their most potent tool (striking) in pursuit of their main objectives for forming labour associations. Over the past ten years, gatherings in Zimbabwe by civic organisations, trade unions and political parties have been continuously banned under the auspices of the above named laws and the masses have lost faith in the effectiveness of trade unions in representing them on issues affecting them in their workplaces. Other incidences of arrest and frequent detention of trade union leaders have been recorded in Zimbabwe⁹⁰

Under the same provision (*Protection of Freedom of Association and Assembly*), the constitution seemingly guarantees the right to form and belong to political parties. The same provision through the use of the plural, *parties*, endorses the aspect of a multi party system. In practice however, Zimbabwe has one of the most hostile environments for a multi party system in Africa.⁹¹ ZANU PF has actively stifled a multi party system through its punitive legislations and also by unleashing a wave of violence against its opposition.

Another obstacle to workers' participation has been the framework within which it operates under the rights of ownership and control which are firmly established legally and institutionally. In Zimbabwe those who own control and those who control shape the events and

⁸⁸ *re Munhumeso & Ors* 1994 (1) ZRL 49 (S).

⁸⁹ Gwisai op cit note 74 at 329.

⁹⁰ Bonaventure Rutinwa 'Freedom of association and assembly union, NGOs and political freedom in Sub Saharan Africa' (2001) at 71.

⁹¹ *Ibid* at 77.

to a larger extent shape the outcomes.⁹² As a result of this strength, management have been able to determine any agendas' within their companies and have also been able to remove or gloss over issues that the company does not want on the agenda. At best, input from the workers' committees will only be accepted to the extent that they make sound business sense. Over the years however, management have also been reduced to mere chattels in their business by the government. At the height of the economic crisis, companies were forced to stay in business despite citing operational constraints. The government was of the view that these companies were making up excuses at the behest of western countries to effect a regime change. More recently, management in these companies have been threatened with expulsion from the country if they did not come up with an acceptable blue print for complying with the indigenisation law. While the law may sound noble in terms of enhancing workers' participation through shareholding, the probability of this law being applied in letter and spirit are very slim. Some analysts have questioned the authenticity of this project as they believe it will only benefit those at the helm of Govt mainly ZANU PF.

State intervention in the form of legislated minimum wages or maximum salaries has also proved to be an obstacle for effective workers' participation. In the case of salaries for civil servants, the govt through the ministry of finance sets parameters for the maximum amount to be paid to civil servants. Workers have not been able to use power play to compel their employer (government) to submit to their demands because their applications to strike have been turned down by the Ministry of Home Affairs under the auspices of POSA.

The structure of Zimbabwean companies has also proven to be an impediment for workers' participation. Most Zimbabwean companies are characterised by tall bureaucratic hierarchies with the board and its chairman at the top. These boards do not have employee representatives like their counterparts in Germany. The boards unilaterally decide on matters that affect workers and even with workers' committees existing in companies, management has been able to influence the composition of these committees thus limiting their influence on decisions favouring employees.

A myriad of obstacles exist that have constantly been undermining workers' participation in Zimbabwe. The ones mentioned above are just a few that have stood out over the

⁹² Maphosa op cit note 81 at 17.

years. These need to be addressed before any meaningful change can occur with regard to workers' participation in Zimbabwe. Suggestions for redressing these obstacles are proffered in the section, "*way forward*" towards the end of the paper.

C. Workers' Committee.

A workers committee is one of the central pillars of workers' participation in Zimbabwe. They are usually initiated by employees in response to failures and non-accountability of central union leadership.⁹³ Post 1990, workers' committees have increasingly provided an alternative platform for workers' to organise and fight back in the face of weak and corrupt union leadership or to mobilise rank and file pressure to transform their unions. Sometimes they may also be encouraged or initiated by employers as a tactic to undermine the unions and divide workers.⁹⁴ In the case of Zimbabwe, these workers' committees are being established to promote the interests of the government. The government has seen it necessary to create alliances with the workforce to fight against the so called 'imperial interests' that they claim these companies and some trade unions represent. Also, in the case *Cold Storage workers' committee v Cold Storage Co Ltd 2002*, the judge held that the committee could not initiate actions in its own name because it was not a legal persona and had no locus standi. This was an attack to the rule of law and also a direct attack to the powers vested in this body (workers committees) to initiate actions in its own name. This was also contrary to the often stated dictum by courts that labour disputes were not supposed to be disposed off through mere technicalities.⁹⁵

Section 23(1) of the LRA of Zimbabwe clearly states that the composition and the procedure of election of members of the workers committee are to be determined by the employees at the workplace. This should be in line with certain conditions and these are:

- *"All members of the workers committee have to belong to a union that has a membership of 50 per centum plus of employees at the workplace.*
- *Managerial employees cannot be part of the committee but instead they have to form their own committee.*

⁹³ Gwisai op cit note 74 at 338.

⁹⁴ Ibid.

⁹⁵ Ibid at 342.

- *There can only be at most two workers' committee per employer, that is: one for the managerial members and the other for the non managerial employees. The minimum number of members is 3 and the maximum is 15".⁹⁶*

The primary functions and powers of a workers' committee are to:

- *Represent the employees in any matter affecting their rights and interest such as wage increments*
- *Elect members into a works' council and negotiate collective agreements with the employer subject to the provisions of ss24 and ss 25.*
- *Can recommend collective job action to the affected employees.⁹⁷*

The employer in a works' council is obliged under section 25A(5) of the LRA to consult with the committee and also allow them to make representations and alternative proposals before implementing issues such as dismissal based on operational requirements, restructuring, mergers, training or education schemes and job grading just to mention a few.⁹⁸

i. Similarities and differences between Workers' Committees in Zimbabwe and Works' Councils in Germany.

Some similarities exist between Zimbabwean workers' committees and German works councils. Both are workers' bodies that are formed at the enterprise level and possess some collective bargaining power at this level.⁹⁹ They all consult with managers on matters of mutual interest. In both jurisdictions, the employer is supposed to fund the representative bodies as they go about their representative tasks. Fundamental differences also exist between Zimbabwean workers' committees and German works' councils. The German works' council cannot recommend collective job action such as strikes while the Zimbabwean workers' committee uses its ability to recommend collective job action as its primary weapon.¹⁰⁰ Furthermore, the German works council is independent from industry-wide trade unions on matters within its sphere of competence but in sharp contrast, the Zimbabwean workers' committee functions like a trade

⁹⁶ Ibid at 340.

⁹⁷ Ibid.

⁹⁸ Ibid. at 340.

⁹⁹ Madhuku op cit note 71 at 607.

¹⁰⁰ Ibid.

union branch.¹⁰¹ Also, members of a workers' committee in Zimbabwe are required by law to be members of a trade union while German works' council members are not supposed to be members of a trade union.

B. Work's Council.

According to the LRA of 2002, a works council refers to a group composed of an equal number of representatives from the employer's side and equal number of representatives drawn from the workers' committee.¹⁰² The law stipulates that the formation of a workers committee must be accompanied by the creation of a work's council.¹⁰³ The works' council role is more consultative than anything else. It seeks to:

- *“Focus the joint interest of the place of employment on the best possible human resources and capital equipment so that maximum productivity is maintained;*
- *Foster, enlarge and maintain good relations between employers and employees;*
- *Promote health and safety; and*
- *Promote and maintain the effective participation of workers in works council establishment”.*¹⁰⁴

A works council in Zimbabwe has a special role in cases involving dismissal based on operational requirements (retrenchments). The moment an employer contemplates dismissing employees on operational requirements, they are required by law to give notice to the works' council.¹⁰⁵ The council has a statutory duty to approve or disapprove the retrenchment of the employees.¹⁰⁶ Failure to reach an agreement within a month, the council is then required by law to refer the matter to a committee set up by the government to deal with retrenchment issues.¹⁰⁷ An important responsibility is thus placed on the workers committee in an economy that is witnessing a lot of job losses because of the pariah state the nation has assumed.

¹⁰¹ Ibid.

¹⁰² The Labour Relations Amendment Act of Zimbabwe 2002.

¹⁰³ Gwisai op cit note 74 at 341.

¹⁰⁴ Ibid.

¹⁰⁵ Madhuku op cit note 71 at 610.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

The problem with this is that the employer has to carry the burden all by themselves because the government has resisted any retrenchment exercises by companies as this negatively affects its image on the international arena. The government has accused companies intending to retrench workers as being economic saboteurs. Based on the aforesaid, it would suffice to say that a statutory framework does exist to ensure that workers have a voice in matters relating to any economic dismissals but this is at the expense of employers' economic needs.

C. Collective bargaining in Zimbabwe.

Collective bargaining law in Zimbabwe has been influenced by regional and international developments.¹⁰⁸ It was first recognised under the Industrial Conciliation Act of 1934 and modeled along the lines of the Industrial Conciliation Act, 1924 of South Africa. At an international level, developments in the USA were influential.¹⁰⁹ These developments were characterised by class struggles in the early 1930s which ushered in the promulgation of new radical legislation in particular the *Wagner Act* which in essence set the foundation of modern bourgeois collective bargaining internationally.¹¹⁰ It provided key rights such as the right to organise, bargain collectively, and engage in peaceful strikes and picketing.¹¹¹

According to Clyde Summers, the "negotiation of the agreement is the basic act of participation in relation to collective bargaining."¹¹² Workers' participation in Zimbabwe and the rest of the world is regulated through collective bargaining. The LRA of Zimbabwe seeks to regulate the negotiation, scope and enforcement of collective agreements.¹¹³ In other words, the principle aim of this legislation is to prevent and settle disputes between employers and employees. Similar to South Africa, the pluralist perspective of separation of power has manifested itself in the form of a tripartite arrangement.¹¹⁴ This involves committees that

¹⁰⁸ Gwisai op cit note 74 at 312.

¹⁰⁹ Ibid.

¹¹⁰ Ibid at 313.

¹¹¹ Ibid.

¹¹² Madhuku op cit note 71 at 608.

¹¹³ The Labour Relations Act of 2002.

¹¹⁴ Kurt Moore Supra (note 4) at 33.

represent all key stakeholders. In Zimbabwe a tripartite negotiating forum was established in the early 1990s and this body comprises of representatives from government, business and labour.

Collective bargaining in Zimbabwe is divided into two types of agreements. That is (1) an enterprise level/workplace level collective agreement negotiated with the worker's committee and (2) industrial level agreement negotiated with appropriate unions.¹¹⁵ The industry level agreement usually prevails if it contains more favourable terms but otherwise the two agreements complement one another. Workplace level bargaining is usually between an individual employer and a worker's committee and is done under the auspices of a work's council where the parties have equal representation.¹¹⁶ Industry level bargaining on the other hand involves bargaining between a trade union and an employer or employers' organisation. It is usually done through the auspices of an employment council.¹¹⁷ The LRA provides for the establishment of an employment council under PART VIII. An employment council is a bilateral body comprising of equal representation of employers and trade unions and its constitution must meet the minimum requirements stipulated in S 58 for it to be registered.¹¹⁸ The employment council also has the duty of assisting its members in the conclusion of collective bargaining agreements and taking such steps it may consider necessary to ensure that any collective agreement pertaining to an undertaking or industry in question are being observed.¹¹⁹ According to law, all statutory collective bargaining agreements must be registered with the Ministry of Labour and gazetted.¹²⁰ It is clear in this instance that the government can interfere with collective agreements. The Minister may refuse to register the agreement if he/she feels it is not in the best interests of the country and the government. This is subjective considering the pariah status that Zimbabwe has assumed. If the Minister is tempted to favour one party over the other he/she could actually weaken the collective bargaining process instead of safeguarding it. It is worth noting that this is a far cry compared to the German system where collective bargaining is free of government interference through the principle of *Tarifautonomie* (autonomy). As a result of this, collective

¹¹⁵ Lovemore Madhuku Supra (note 69) at 608.

¹¹⁶ Munyaradzi Gwisai Supra (note 72) at 314.

¹¹⁷ Ibid.

¹¹⁸ Labour Relations Act of 2002, S58.

¹¹⁹ Gwisai op cit note 74 at 314.

¹²⁰ Ibid.

bargaining in Germany has proved to be effective in fulfilling its mandate hence the low levels of industrial action and economic prosperity that is rivalled by very few countries in the world.

i Legal framework.

The LRA of Zimbabwe defines the scope and extent of collective bargaining. The main purpose of the act is to provide a framework in which employers and employees can bargain collectively for the improvement of working conditions.¹²¹ Section 74 (2) specifically states that trade unions and employers' organisations may negotiate collective bargaining agreements as to any conditions of employment which are of mutual interest to the parties." However, the act stipulates a floor for minimum conditions below which no terms of an employment contract may go.¹²² These include rates of remuneration, benefits for employees, overtime, vacation periods, conditions of employment for apprentices and occupational safety.¹²³ This to a certain extent compromises the power of collective bargaining. Collective bargaining may further be classified as statutory or non statutory agreements in Zimbabwe.

ii Statutory Collective Bargaining Agreements.

Statutory collective bargaining agreements are those that are made in terms of the act. These are specifically provided for under Section 2 of the LRA. A 'collective bargaining agreement' is defined as an agreement negotiated in accordance with the act which regulates the terms and conditions of employment.¹²⁴ These agreements may be industrial or works' council based. Industrial agreements are made in terms of PART X of the LRA between the registered trade unions, employers or employers' organizations.¹²⁵

The second type (works' council based) is a collective agreement made at the workplace level between an employer and a workers' committee under part VI of the Act.¹²⁶ This agreement requires 50% or more of the employees that work at the enterprise and belong to a registered trade union for the particular industry.¹²⁷ As stated earlier in the paper, a works

¹²¹ LRA.

¹²² Madhuku op cit note 71 at 609.

¹²³ Ibid.

¹²⁴ LRA s2.

¹²⁵ Gwisai op cit note 74 at 317.

¹²⁶ Ibid.

¹²⁷ Ibid.

council agreement is subordinate to the employment council and is valid only to the extent that it provides more favourable conditions of employment.¹²⁸

iii Non Statutory Collective Bargaining Agreements.

Non statutory collective bargaining agreements refer to those agreements between employers and trade unions made outside the parameters of PART X. Non statutory collective bargaining agreements also cover union agreements. Union agreements refer to collective bargaining agreements that have been negotiated by an appropriate trade union and an employer or employers' organisation. These collective agreements can only be binding under common law provided they meet the conditions necessary for the various modes of incorporation under common law¹²⁹. The only obstacle to a non statutory agreement is that it is only limited to the parties who have negotiated it unlike the statutory one which binds all parties regardless of consent.¹³⁰

iv Duty to Bargain.

The LRA provides a number of instruments to ensure that the actual bargaining process itself is transparent and effective. Zimbabwe has a judicially enforceable duty to bargain. There is an express duty to bargain in good faith, duty to financial disclosure and right to collective job action. Under Zimbabwean law, it is an unfair labour practice for an employer to fail to negotiate in good faith with a workers' committee or appropriate union. In the case, *Olivine Industries (PVT) Ltd v Olivine Workers' committee 2000 (2) ZLR 200 (S)*, it was held that the employer could not refuse to negotiate. The ambit of this duty is entrenched in s 75 of the LRA which stipulates that the parties have a duty to negotiate in "absolute good faith."¹³¹ The parties are required to:

- "Disclose all information relevant to the negotiation.
- Make no false or fraudulent misrepresentations with regard to matters that are relevant.

¹²⁸ Ibid.

¹²⁹ Ibid at 318.

¹³⁰ Ibid.

¹³¹ LRA s75.

- Earnestly and endeavour to arrive at a successful conclusion in negotiation and not in any way bring about a situation that undermines the basis of negotiating in good faith."¹³²

Section 76 provides for a party that declares incapacity on financial grounds to make a full disclosure of its financial position through the submission of all relevant accounting papers. If a dispute about full disclosure arises it shall be referred for determination to a labour officer unless the parties agree to refer it for voluntary arbitration.¹³³ This duty does not compel any party to reach an agreement or to give in to the demands of the other party.

The act also has a number of provisions to ensure compliance with the duty to bargain. These range from:

- *"An aggrieved party filing an unfair labour practice complaint with a labour officer S75 (2)*
- *Where there is failure to disclose relevant financial information, a party may institute action for determination before the labour officer, with a further right to appeal in the labour court- s76(2)*
- *If any employer fails to comply with a direction from a labour officer, criminal proceedings may be instituted against them under s76 (3)*
- *An application for determination of the dispute may also be made to the employment council."*¹³⁴

v *Obstacles to Collective bargaining in Zimbabwe.*

It is worth noting that the current constitution in Zimbabwe does not provide for collective bargaining in comparison to the South African Constitution. This is certainly something that the constitution currently being drafted needs to look into.

Government has also tended to interfere in matters of mutual interest between employers and employees. The Zimbabwean Government has passed restrictive legislation on collective bargaining and also, the Labour Minister has power to veto any collective agreements which he/she may deem counterproductive to government policy. This is in violation of ILO

¹³² Gwisai op cit note 74 at 321.

¹³³ Ibid.

¹³⁴ Ibid. at 323.

Convention No. 98 which stipulates that government should promote collective negotiation by providing a legal framework that does not impinge on the process, voluntary character of the bargaining process and the autonomy of the bargaining parties.¹³⁵ It is through statutory laws like the *POSA* and the *Presidential Powers Act* that workers' participation is being stifled in Zimbabwe. The Minister of Home Affairs can invoke *POSA* to block any gatherings which may be deemed as potentially harmful to peace and stability in the country. Presidential decree can also be used to declare martial law in Zimbabwe.

Government interference in collective agreements seriously undermines workers' rights and based on this, a complete overhaul of the Labour legislation to promote acceptable international labour standards is needed.

¹³⁵ Ibid.

6 SOCIAL DIALOGUE.

According to ILO, social dialogue is designed to include all types of negotiation, consultation or simply the exchange of information between, or among representatives of governments, employers and workers on issues of common interest relating to the economic and social policy.¹³⁶ A social contract (an outcome of social dialogue) is an agreement by the country's stakeholders (government, business, labour and civic society) to subordinate their individual and sectoral interests for the achievement of common national goals and objectives within an agreed framework.¹³⁷ This entails a shared vision, mutually agreed objectives and shared principles supporting win-win negotiations. The concept of social dialogue may vary from country to country and the enabling conditions for social dialogue include:

- Collective independent workers' and employers' organizations equipped with the technical capacity and access to vital information to participate in social dialogue.
- Political will and commitment to engage in social dialogue on the part of all parties
- Respect for fundamental rights of freedom of association and assembly; and appropriate institutional support.¹³⁸

Under the social contract model, stakeholders come together to agree on mutually beneficial national objectives, programs and action plans for achieving those objectives as well as the ambit and mechanisms for engagement. The social partners must commit to discharging their specific obligations as agreed to in the social contract within the agreed time frames¹³⁹. For social dialogue to work, the government has to be actively engaged in promoting dialogue. The state has the responsibility for creating a stable political and civil climate that enables employers' and workers' organisations to operate freely, without fear of reprisal.¹⁴⁰ This in present day Zimbabwe has been a fictitious dream because of the constant harassment of trade unions and civic organisations by government led by ZANU PF. Even when the dialogue is bipartite (between management and labour), the Government still has to provide essential support for the

¹³⁶ Arrigo & Cassale op cit note 2 at 184.

¹³⁷ Gono, G *Consensus Building, Social Contracts and the Role of Visionary Leadership and Strategic Management in Socio Economic Turnarounds*(unpublished thesis, Atlantic International University,2007) 27.

¹³⁸ Arrigo & Cassale Supra (note 2) at 166.

¹³⁹ Gono op cit note 135 at 27.

¹⁴⁰ Ibid.

parties' actions by providing legal and institutional frameworks that enable the effectiveness of the parties.¹⁴¹

It is also worth considering that social dialogue takes many different forms. It can either be bipartite (trade unions and employers organisations) or tripartite (government, business and labour). It can take place at the national, regional or enterprise level. It can be inter-professional, sectoral or a combination of all of these.¹⁴² The following section looks at the advent of social dialogue in Zimbabwe and how it has shaped labour dynamics since independence.

A. Genesis of Social Dialogue in Zimbabwe.

Zimbabwe is a fully fledged member of the ILO and has ratified a number of its conventions. It has subsequently incorporated the principles enshrined in these conventions to its national laws (Constitution and Labour Laws).¹⁴³ In essence, Zimbabwe ratified ILO Convention No. 144 (Tripartite Consultation) soon after independence. Despite having ratified to this convention, very little progress has been made towards social dialogue in Zimbabwe. Many would think that the first step towards social dialogue in Zimbabwe started with the *Kariba declaration* but this is not the case. Serious economic challenges were bedeviling the country from the early 90s and this led to the government in conjunction with labour and business, coming up with a forum to discuss national issues that were affecting the country. Three social partners, the Employers Confederation of Zimbabwe (EMCOZ), Zimbabwe Congress of Trade Unions (ZCTU) and Government met in September 1998 to discuss the way forward and this meeting marked the birth of the Tripartite Negotiating Forum (TNF). A tripartite technical team was constituted to establish the TNF and its terms of reference were to come up with a document- *the founding principles of the TNF*- of the founding principles of the negotiating chamber. This document spelt out the terms of reference, the composition of the team, legal position and the guiding values and methods of work of the body.¹⁴⁴

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Magure Booker *The state, labour and the politics of social dialogue in Zimbabwe 1996 -2007: issues resolved or matters arising?* (2010) at 12.

¹⁴⁴ Ibid at 13.

This body was chaired by the Minister of Public Service Labour and Social Welfare, while other ministries such as the ministries of trade finance and tourism among others comprised the government team. Labour was represented by the ZCTU President and business was represented by the President of the Employers Federation of Zimbabwe, its executive director and captains of various industries.¹⁴⁵ Very little was achieved by this body. In actual fact, there was always animosity between government and labour. The turning point of the love hate relationship between the two was the formation of the MDC by organised labour. The politics of the stomach could not be separated from the politics of the state and hence the idea of mobilising for state power.¹⁴⁶ It is significant to note that the MDC was formed in 1999 and has its roots in the labour movement and the National Constitutional Assembly (NCA), civic groups and nongovernmental organisations that were lobbying the government for constitutional reforms.¹⁴⁷ The MDC was formed as a result of government's failure to provide stewardship over national resources and its aim since then has been to directly challenge ZANU PF politically and effect change in the country. However, some quarters of the country (mainly beneficiaries of the land reform) have viewed the economic policies of the MDC as 'market friendly' and thus skewed towards neo-liberalism which is what the current government has blamed for the countries' woes.

The government again organised meetings in 2000 with its social partners and this led to the adoption of the "*declaration of intent towards a social contract*."¹⁴⁸ This declaration of intent was about the different roles to be fulfilled by the social partners. ZCTU later abandoned this project and accused the Government (ZANU PF) of politicising institutions of governance, allowing its members to wear party regalia and selling its membership cards at the workplace which was in contravention of the basic tenets of the declaration of intent. The government and labour accused organised business of wanton self help and holding Zimbabwean citizens at economic ransom by increasing prices of basic commodities recklessly and not fulfilling the agreed position of the TNF. The business fraternity was also accused of increasing the gap between the rich and the poor.

¹⁴⁵ Ibid.

¹⁴⁶ Brian Raftopoulos *The Labour Movement and the Emergence of Opposition Politics in Zimbabwe Labour, Capital and Society* (2000) at 273.

¹⁴⁷ Magure op cit note 141 at 15.

¹⁴⁸ Ibid.

Through the stewardship of the Reserve Bank of Zimbabwe, the social partners came to a realisation that economic hardships that were bedeviling the country were of a political nature and accordingly they organised a political retreat in Kadoma and the discussions and recommendations made at this retreat have become what is known today as the *Kadoma declaration: towards a shared national and economic vision*.¹⁴⁹ The *kadoma declaration* was anchored on the need to address issues of a political nature such as good governance, restoration of the rule of law, and de-politicisation of public institutions and the restoration of relations with key development partners.¹⁵⁰

According to Gideon Gono, a two step approach was used and it encompassed the following phases:

- *Focusing on getting social partners to agree and voluntarily commit to a social contract which among other things, set specific and timed variables for each social partner.*
- *It also focused on the accelerated disinflation and sustainable stabilization of the economy.*¹⁵¹

At the launch of the declaration, the tripartite partners:

- *made a commitment to work together*
- *emphasised on the need to engage in more dialogue in the country*
- *called on the partners to strengthen the TNF and support its reform process*
- *agreed on the need for more involvement of the TNF in the development of socio-economic policies*
- *Need to use the kadoma declaration to support other national economic development frameworks and the national political dialogue process under the global political agreement.*
- *Urgency of setting up implementation and monitoring mechanisms for the declaration, and*

¹⁴⁹ Ibid at 18.

¹⁵⁰ *The Kadoma Declaration: Towards a Shared national and economic vision* , unpublished paper, Ministry of Public service, Labour and Social welfare., Harare, Zimbabwe, August 2007

¹⁵¹ Gono op cit note 135 at 30.

- *The need for more ILO technical support on strengthening social dialogue, for example to support the TNF reform process, establishment of the TNF secretariat and labour law reform process.*¹⁵²

However, the social dialogue in Zimbabwe has been held back by obstacles such as:

- *Lack of common vision*
- *Mistrust among negotiating partners*
- *An unwieldy negotiating format*
- *Constant breaking off of negotiations, and*
- *Lack of will power to implement agreed positions.*¹⁵³

In Africa, South Africa has been a beacon of hope for other African states with regard to social dialogue. Under the auspices of the National Economic Development and Labour Council (NEDLAC), the social dialogue process has helped to ease the transition from apartheid to democracy by promising that everyone's socio-economic and political interests would be taken into account.¹⁵⁴ Through NEDLAC, government (represented by the department of labour and also the department of trade and industry), organised business (Business Unity South Africa,) and organised labour (represented by three main Federations of labour- COSATU, FEDUSA, and NACTU) have come together at national level to discuss and try to reach consensus on social and economic policy issues. The aim of NEDLAC has been to make economic decisions more inclusive, to promote the goals of economic growth and social equity. This to a certain extent has led to some form of consensus in reconciling the interests of all stakeholders. To date, NEDLAC plays a fundamental role in policy making. NEDLAC is empowered to discuss and reach consensus on all pieces of socio-economic legislation before they are tabled in parliament and this gives labour a very powerful voice to influence policy on a wide range of issues for the benefit of their members.¹⁵⁵

¹⁵²

http://www.ilo.org/public/english/region/afpro/harare/download/minutes_for_launch_of_kadoma_declarati_on.pdf accessed on 28 August 2011.

¹⁵³ Ibid.

¹⁵⁴ Tayo Fashoyin 'Tripartite cooperation, social dialogue and national development' (2004) 143 *ILLR* 3 at 364.

¹⁵⁵ Cherry Janet 'Workers' and policy-making.' In Sakele Buhlungu (ed) *Trade unions and democracy: cosatu workers' political attitudes in South Africa* (2004) 146.

Kenya is also another shining example in Africa that adopted a tripartite cooperation framework. In 1962, Kenya introduced an industrial relations charter which encompassed tripartite institutions such as the National Tripartite Consultative Committee (NTCC), Labour Advisory Board and the National Minimum Wages Board.¹⁵⁶ The tripartite cooperation scheme was rekindled in the 90s after the country had begun to go through economic turmoil. The workers were represented by the Central Organisation of Trade Unions (COTU); the employers on the other hand were represented by the Federation of Kenya Employers (FKE). While on the government side, the Ministry of Labour was the key player and it was assisted by other government agencies with an important mandate in economic and social development.¹⁵⁷

Social dialogue in Kenya has been successful because the social partners have been able to work together through the Joint Industrial and Commercial Consultative Committee (JICC) in addressing economic and social issues affecting development within the nation. The JICC is made up of a 50-50% of all the key stakeholders (labour included) and this body can propose solutions and in some instances issue a directive to the relevant government agency to implement them within a definite time frame.¹⁵⁸ “As a result, the JICC has helped formulate the socially responsible policy while at the same time enhancing Kenya’s evolving democracy.”¹⁵⁹

B. Lessons for Zimbabwe.

Zimbabwe still has a long way to go in achieving a shared vision through social dialogue. The *Kariba declaration* has established a framework on which a unity of purpose can be achieved by the relevant stakeholders in addressing the key challenges bedeviling the country.

Based on the two case studies (Kenya and South Africa), the ‘*Kariba declaration*’ may deliver on its key goals if all parties (government, business and labour) agree to compromise on each other’s key concerns. The partners to the declaration need to build trust amongst each other and in the process work together to meet the desired goals. Zimbabwe still has a long way to go in achieving this desired state because of a lack of political will. The political leadership has failed to work together despite having a Government of National Unity (GNU). The different

¹⁵⁶ Gono op cit note 135 at 46.

¹⁵⁷ Ibid at 46.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid at 47.

portfolios within the government are now being used for personal political party agendas and not for the greater good of the country. This has proved to be a stumbling block in resuscitating an economy on its bended knees.

It also follows that there is need for the government to provide sound and coherent macroeconomic and social policies to stimulate and maintain stability within all sectors. The social contract can only achieve the desired results if the government provides the necessary leadership in this department. The set out goals must be measured against specific time deliverables to ensure that they achieve their desired goals. This will also provide ready intervention need be to ensure success.

7 WORKERS' PARTICIPATION IN GERMANY.

Germany is the archetypal case for successful workers' participation. While it is important to acknowledge that institutions must necessarily be tailored to their unique national contexts, an examination of the German case provides insight into and lessons for the Zimbabwe. Workers' participation in Germany is characterised by a dual structure of employee representation and this occurs through works councils and trade unions. Trade unions are responsible for negotiating collective agreements while works councils, on the other hand, are mainly responsible for codetermination through works agreements. A detailed outline of the institutional framework is necessary to understand the role that they play in promoting workers' participation.

A. Collective bargaining.

Indirect workers' participation in Germany occurs at the industry level through collective bargaining between unions and employers. The collective bargaining system in the Federal Republic of Germany is highly centralised. To fully understand the context of collective bargaining in Germany, one has to look at its historical development in the Federal Republic.

i History of collective bargaining in Germany.

Collective bargaining in Germany dates back to as early as 1873 through the organisation of employers and labour (*Sozialpartner*) outside planned legislation.¹⁶⁰ During this period unions and employers in the printing business agreed to have union members being employed by specific members of an employers association only on the conditions stipulated by the two organised groups (*Tarifvertrag*). Union members would be given preferential treatment for employment. German employers predominantly bargained on a multi unit basis on a national or regional level while labour on the other hand bargained through craft unions by combining people of similar skills and occupational background.¹⁶¹ "During that period, three unions competed in each field of occupation: the *free (socialist) union*, the *Christian union*, and the

¹⁶⁰ Kronstein Heinrich 'Collective bargaining in Germany: before 1933 and after 1945' (1952) *1 American Journal of Comparative law* 3 at 199.

¹⁶¹ *Ibid.*

Hirsch Dunker (liberal) union.” As a result, it was necessary for employer associations to bargain with each craft union operating in any field in which one of the member firms was interested. Bargaining was favoured between associations because it was widely believed that public interest could best be protected by collective action on both sides and this would also curb the danger of individual exploitation.¹⁶²

The provisions of collective agreements during this time can be divided into two parts. In the first part the organisations (union and employers association) made commitments to each other, to maintain peace within the field that was covered by the agreement and to call on mediators (*Obligatorischer Teil*) appointed under the agreement to resolve grievances.¹⁶³ The second part of the collective agreement contained the rules regulating the agreement. Some of these sought to assure the minimum contents of each individual employment contract between a member of a participating union and a member of a participating association of employers; while others regulated the methods of entering into and ending individual employment contracts (*Normativer Teil*).¹⁶⁴ Considering that no law existed to regulate these collective agreements, the draftsmen had to rely on the general contract rules of the Civil Code (B.G.B) drafted entirely for different purposes.

Another form of collective understanding developed at the plant level between labour and management just before the First World War. During World War One, management began to share its responsibility for the order and discipline in the plant (maintaining working hours, lunch time, health and safety institutions, fines, control of piece-wages just to mention a few) and factory worker councils were now elected by the workers in the plant (*Betriebsvereinbarung*).¹⁶⁵ By becoming an employee within that particular plant/establishment, the worker was subjecting himself to the rules stipulated by the management and factory council. If it so happened that the worker breached any of the rules within the establishment, this would in essence mean that they were breaching the employment contract.¹⁶⁶ At a later stage, the factory councils undertook to supervise the implementation of collective agreements between the unions and the employers.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

A third form of collective operation also emerged between organised labour and organised employers in different trades and it was called *Arbeitsgemeinschaften* (communities of interests). These operations represented joint interests of labour and management especially in regard to their relationship to government.¹⁶⁷

Up until the end of World War One, German law had continued to develop outside statutory law. After the breakdown of the monarchy during the German Revolution in 1918, a coalition of reform Socialists, Catholics, and Social liberals began to influence the new German Government (Weimar Republic). On November 15th, 1918 a group of top level employers' associations and trade unions (referred to as the followers of the idea of social settlement by organisational co-operation) concluded "central agreements" which were aimed at the fundamental renewal of collective agreements.¹⁶⁸ The captains of industry and the heads of labour made a commitment to bargain collectively, to develop joint boards of conciliation and arbitration, and to develop the institutions of factory councils and industry councils.¹⁶⁹ The duty to bargain collectively emerged here as an obligation of both the employer and labour. A new form of social organisation had emerged whereby there was a distribution of social power between groups based on co-operative and democratic principles.¹⁷⁰ The central agreement referred to above contained various provisions for the recognition of collective agreements and these provisions were also included in the Collective Agreement Ordinance (*Tarifvertragsverordnung*) of December 1918.¹⁷¹ This statute guaranteed the principle of collective bargaining autonomy.

All these gains in the employment relationship started disappearing slowly with the introduction of the legislation, *Ordinance on Arbitration*, which gave the state power to use compulsory arbitration. When the Nazi Government came into power in 1933, they completely abolished free trade unions and collective bargaining.¹⁷² Instead, they passed a law (*Regulation*

¹⁶⁷ Ibid. at 201.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid at 202.

¹⁷⁰ Ibid.

¹⁷¹ Thorsten Schulten, 'Collective agreement act celebrates its 50th anniversary' available at <http://www.eurofound.europa.eu/eiro/1999/05/feature/de9905200f.htm> accessed on 7 August 2011.

¹⁷² Ibid.

of *National Labour*) that replaced freely negotiated collective agreements with a trustee of labour (*Arbeiter*) who by decree, ruled the employer-employee relations.¹⁷³

After the Second World War, the new military Government authorised the new foundations of trade unions and employers associations. Before that, they maintained the wage freeze that had been implemented by the Nazi regime and only lifted it in 1948. The military regime in Germany, together with the new labour administration prepared the creation of a new collective agreement Act and it was adopted in 1949.¹⁷⁴ The Basic Law (constitution) of 1949 contained a guarantee of general freedom of association (*Koalitionsfreiheit*). East Germany had its own labour law experiences during this period but after the unification in 1990, the entire West Germany labour law system was extended to East Germany.

A general social contract was negotiated in 1950 between labour unions and an organization of employers' in a small town called Hattenheim.¹⁷⁵ They pledged to bargain collectively, to keep the government out of labour affairs, and to settle their differences through the service of conciliators and arbitrators appointed by them. Factory councils were also established in each plant to regulate factory conditions and to also serve as representatives of labour in collective wage settlements.¹⁷⁶ In comparison to the 1919 system of unions, the 1950 system of unions was characterised by a single union called the *Deutscher Gewerkschaftsbund* (D.G.B) and it was subdivided into industry groups.

The first legal provisions of collective bargaining in Germany came into force during the First World War. There was a significant increase in the number of collective agreements during the first decade of the 20th century and a number of employers were initially against these agreements because they considered them as posing a threat to the right of employers to manage. This strong opposition came from employers in the core industries such as mining, iron and chemical industry. Employers had to accept trade unions as a bargaining party because of the war circumstances that Germany was faced with. These circumstances demanded a close cooperation between the capital and labour to guarantee war production. The "Act on Patriotic Services" (*Gesetz über den vaterländischen Hilfsdienst*) came into effect in December 1916 and it contained provisions for the subordination of the whole economy to the needs of the Germany

¹⁷³ Kronstein op cit note 158 at 204.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

war effort¹⁷⁷. The act provided some legal rights for trade unions to determine working conditions in the workplace

Today, collective bargaining and collective agreements are provided for in the German Constitution (Article 9 section 3) and the Collective Agreements Act of 1949 (amended in 1969).

ii Collective Bargaining in present day Germany.

The concept of collective bargaining in Germany is characterised by the principle of collective bargaining autonomy (*Tarifautonomie*) and this describes the rights of coalitions of employers and employees to regulate the terms and conditions of employment at their own volition, independently from any influence exercised by the state.¹⁷⁸ The coalition of employers and employees are vested with the powers to conclude the labour market constitution autonomously. Bargaining in the German labour market is enshrined in the Basic law (constitution) and its purpose is:

- *“creating social and industrial peace by reconciling the conflicting interests of employers and employees (the “peace function”);*
- *Creating an order for the labour market (order function)*
- *And protecting employees against the unilateral regulation of work by employers (protective function).”¹⁷⁹*

Collective bargaining is centralised and collective agreements are usually reached at the industry or regional level. These collective agreements are legally binding for all members. Once an agreement has been reached between a union and an industry association over basic conditions of employment such as wages etc, the terms agreed upon are extended by law to other employees and firms in that industry.¹⁸⁰ No distinction is made between unionised and non unionised workers under collective bargaining agreements. In other words, as a result of the principle of equal treatment, employers usually apply the contract to all workers within a company. The Federal Minister of labour and Social Order can also declare a collective contract which covers

¹⁷⁷ Ibid at 167.

¹⁷⁸ Zagelmeyer, Stefan ‘Collective bargaining coverage in western Germany’ available at <http://www.eurofound.europa.eu/eiro/1997/12/feature/de9712140f.htm> accessed on 17 August 2011.

¹⁷⁹ Ibid.

¹⁸⁰ Silke Woehlert *Impact of the new South African and German Constitution on Labour Law: A comparative analysis* (Unpublished LLM thesis University of Cape Town, 1999) at 54.

about 50% and above, to be generally binding on all employees within that region and industry. This is referred to as *Allgemeinverbindlichkeitserklärung* (extension of collective agreements). This can only be done at the request of one of the social partners within the bargaining process.

The bargaining style for industrial level collective bargaining is adversarial and the topics for negotiation are distributive issues.¹⁸¹ Trade unions may conclude collective agreements with employers associations (*Verbandstarifverträge*) or with individual employers (*Firmentarifverträge*). The collective agreement signed between the trade unions and an employers association is sometimes referred to as an area of collective agreement (*Flächentarifvertrag*).¹⁸² These areas of collective agreement may cover a particular region of an industry or the entire territory of the Republic of Germany for a certain industry or branch.¹⁸³ The territory of Germany is divided into different regions for the purpose of collective bargaining and the trade union has the sole right to decide on the boundary of such regions.¹⁸⁴

Two particular outcomes exist when collective bargaining occurs at the industry or branch level. These are:

- Conditions within that collective agreement can not take into account particular circumstances in individual companies. As a result, the standards within the agreement must be vague and ambiguous.
- Secondly, since the agreements cover a large number of enterprises and employees, public attention and pressure are significant and thus the parties to a collective agreement must act in an economical and responsible manner.¹⁸⁵ The minimum standards laid down in collective agreements should not exceed the scope of small companies within the respective industry.

Collective bargaining is regulated through the *Collective Agreements Act* of 1949. This statute determines who is competent to conclude collective agreements.¹⁸⁶ It governs the form and

¹⁸¹ Maria- Stella Vettori *Alternative means to regulate the employment relationship in the changing world of work* (unpublished PhD thesis, University of Pretoria, 2005).

¹⁸² Manfred Weiss *Labour law and industrial relations in Germany 4 ed* (2008)546-548.

¹⁸³ Ibid.

¹⁸⁴ Ibid. at 546-548.

¹⁸⁵ Ibid. at 428-431

¹⁸⁶ Woehlert op cit note 178 at 54.

content of the agreement, regulates its effect on the individual employment contract and determines to whom the agreement is binding.¹⁸⁷

Collective agreements usually cover all areas of the private and public sector.¹⁸⁸ Before the economic crisis in the 1970s, collective bargaining only concentrated mainly on remuneration and other economic benefits. Since the 1980s, their scope has been increased to other issues such as the reduction and flexibility of working time, job security and vocational training just to mention a few¹⁸⁹ As a result, the scope now covers working and economic conditions.

iii Trade Unions in Germany.

A number of trade unions exist in the Federal Republic of Germany but the Germany system of trade unions is not completely a unitary one. The trade union system is mainly concentrated in individual member unions of the German Federation of Trade Unions- *Deutscher Gewerkschaftsbund* (hereinafter, DGB), *German White Collar Workers' Union* (DAG) and the *German Federation of Career Public Servants* (DBB). My Focus here will be on the largest union in the Federal Republic of Germany- DGB. The *Metal Workers' Union* is the largest of these trade unions and has just over four million members of the DGB.¹⁹⁰ This union includes workers in the iron and steel plants, automobile factories, electrical equipment factories and many others. The multi industrial character of this and other unions creates special problems on internal cohesion and contract coverage.¹⁹¹

Public, Services Transport and Traffic Union is another union within the *German Industrial Relations System*. It is comprised of federal, state and local civil servants, truck drivers and also workers from the gas, water and electric power plants. The *Mine Workers' Union* on the other hand includes both coal and hard-rock miners and it is the only union that assumes complete organisational coverage of the workers assigned to it. The last of the four unions that make up a large percentage in the DGB is the *Railway Union* which is comprised of administrative, operating and maintenance employees of the railroads.

¹⁸⁷ Ibid.

¹⁸⁸ Weiss op cit note 180 at 434-435

¹⁸⁹ Ibid.

¹⁹⁰ Clark Kerr 'Collective bargaining in postwar Germany' (1952) 5 *ILRR* 3 at 327.

¹⁹¹ Ibid. at 328.

The *Construction Workers' Union* is made up of construction workers and employees of building suppliers. This union is famous for its pattern setting influence of its contracts and the radicalism of some of its leaders.¹⁹² Others workers unions include, the *Chemical and Ceramic Workers' Union*, the *Textile and Clothing Workers Union*, *Printing and Papers Workers Union*, *Post and Telegraph Workers Union*, the *Wood Working Union*, the food, *Beverages and Restaurant Workers' Union*, *Agricultural Workers' Union*, the *Commerce Banking and Insurance Workers' Union*, *Education and Science Union* and the *Arts and Professions Union*.¹⁹³

Unions in Germany are organised from top to down with subdivisions at district and local level unlike employers associations.¹⁹⁴ For the greater part, unions are industry based in accordance with the principle of industrial organisation. Administrative apparatus and benefits provided by the unions (strike pays) are financed from membership dues normally levied at a rate of 1% of gross pay.¹⁹⁵

iv Legal framework and Trade Union Existence in Germany.

Trade unions in Germany are constituted freely and each worker has the option of joining one. There are no compulsory memberships, closed shops, or elections to determine whether a union is entitled to operate within an establishment and this is consistent with their liberal treatment of industrial relations.¹⁹⁶ In other countries, certain conditions have to be met for a trade union to enter into an establishment. In our own backyard (South Africa), closed shop agreements exist and trade unions can only elect representatives if they have sufficient representation or a majority of union members within that particular establishment. Trade unions are regulated by Article 9 (3) of the Basic Law (constitution). This law guarantees coalitions the right to improve conditions of labour and the economy and renders illegal any measures which hinder this basic right.¹⁹⁷ The constitution also decrees that industrial action is an integral part of trade union liberty. While legislative restraint exists with regard to industrial action and relations, the

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ <http://www.eurofound.europa.eu/emire/GERMANY/TRADEUNION-DE.htm> accessed on 11 May 2011.

¹⁹⁵ Ibid.

¹⁹⁶ Buschmann Rudolf *Workers' participation and collective bargaining in Germany* (1994) 15 *CLLJ* 26 at 26.

¹⁹⁷ GRUNDGESETZ (Constitution) art.9.S3. (F.R.G)

German legal system has managed to regulate these areas to a considerable extent.¹⁹⁸ These regulations have been propagated by the *Supreme Labour Court* and the *Constitutional Court* through decisions that have been handed down over the years. These decisions have created basic principles that form the core of the German system among them, the principle of *Tarifautonomie* (collective bargaining autonomy).

The *Federal Labour Court* has placed restrictions on the unions ability to strike (and the employers' right to use a lockout) despite expressing its view that collective bargaining without the right to strike is nothing more than "collective begging."¹⁹⁹ These restrictions include:

- Industrial action can only be commenced after the expiration of a collective agreement and instigated only for the purpose of effecting a new legal agreement.
- Supported by a union, and
- Only to be used as a last resort during the process of collective bargaining.²⁰⁰

The labour court has also held it illegal the use of political strikes, solidarity strikes and strikes that aim to achieve results otherwise possible through the legal process.

B. Duty to Bargain under German Law.

The German Constitution does not include the express right of collective bargaining. However, according to the German Constitutional Court, the autonomy to bargain collectively is part of the constitutional guarantee of freedom of association.²⁰¹ Article 9 (3) has been interpreted to not only guarantee the individual freedom of association but also protection for trade unions by the Constitutional Court. This specific section of the constitutional law has been interpreted to include the protection of trade union activities such as the safeguarding and improvement of working and economic conditions entrenched in the constitution. Since the autonomy of collective bargaining has been entrenched in the constitution through the provisions of freedom of association, it follows to say that the foundation of a system of collective agreements is also

¹⁹⁸ Buschmann op cit note 194 at 26.

¹⁹⁹ Ibid.

²⁰⁰ Ibid

²⁰¹ Woehlert, op cit note 178 at 51.

provided for.²⁰² If this was not the case then trade unions would not have been able to fulfil their function and arrange a detailed working life through collective agreements.

Under the German labour system, the duty to bargain is one of the duties of the organization resulting from collective agreements and not a duty of one party alone. The parties to collective agreements have over the years relied on social pressure to keep individual firms or employers' in line with the operation of collective bargaining. The legal line of defence on the duty to bargain has been indirect legal compulsion by threat of being subjected later on to collective bargaining by government decree.²⁰³ The German law provides for the duty to collective bargaining to be enforced through the means of administrative compulsion or by criminal penalties. In this instance the government can enforce legal duties whenever a person does not comply with the demands of the law.

C. Works Council in Germany ('Betriebsrat').

The German works council is a statutory representative body of employees within an establishment. It is an organ of the works constitution (*Betriebsverfassungsgesetz*) and denotes an institutionalised form of representation of the interests of employees within an establishment. Unlike most countries, works councils in Germany are mandatory but not automatic in all establishments exceeding a threshold size of five permanent employees.²⁰⁴ This institution enjoys codetermination rights on so-called social matters unlike similar institutions in other European countries. These include the commencement and termination of working hours, regulation of overtime and reduced working hours, leave arrangements just to mention a few.²⁰⁵

A number of rights are conferred to this 'vehicle' by the works constitution. These range from the rights of participation to information and consultation as well as codetermination.²⁰⁶ The information rights are fairly extensive and as a result, the employer has to provide the works council with both timely and comprehensive information to enable it to

²⁰² Ibid at 53.

²⁰³ Kronstein op cit note 158 at 187.

²⁰⁴ Addison J, Schnabel C& Wagner J Works councils in Germany: their effects on establishment performances (2001).

²⁰⁵ Ibid.

²⁰⁶ Arrigo & Casale op cit note 2 at 88.

discharge its general duties.²⁰⁷ Information rights increase with the establishment size to reflect the different consultation requirements.²⁰⁸ In an establishment with more than 20 employees with voting rights, the council must be given information in 'full and in good time' on reductions in operations and the introduction of new working methods.²⁰⁹ While in establishments with more than 100 permanent employees, an economic or finance committee has to be established by the works council and it has to be informed about the current and future economic situation of the firm.²¹⁰ This standing body has to be supplied with all the relevant information. Consultation rights on the other hand cover such matters as planned structural alterations to the plant and prospective changes in equipment and working methods that affect job requirements, all decisions relating to manpower planning and individual dismissals.²¹¹ Failure to consult on individual dismissals renders the dismissal notice a nullity.²¹² Codetermination will be examined more extensively later in this section as it forms the backbone of works councils.

In principle and according to law, works councils are institutions separate from trade unions. They represent all employees within an organization whether they are members of a trade union or not. Despite all this, trade unions have been successful in influencing the composition of works councils. According to Weiss, the majority of the members in a works council are also trade union members. The works council is empowered to conclude work agreements for the establishment and is authorised to institute legal actions under the '*Beschluss*' procedure if its rights are disregarded.²¹³

It should be borne in mind that a works council is an institution that represents workers in the private sector. This institution also has an equivalent in the public sector called a staff council and this will be examined below.

²⁰⁷ Addison et al op cit note 202 at 664.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

i. *Staff Council.*

According to the Works Constitution Act of 1976, a staff council must be formed in every public sector establishment with at least five employees (this encompasses white collar and manual workers).²¹⁴ The staff council draws its powers from the Federal Staff Representation Act (*Bundespersonalvertretungsgesetz*) and the staff representation laws.²¹⁵

The composition of the staff council is determined by the outcome of the staff council elections. According to statutory regulations, each employee group with a presence in the establishment must have at least one representative on the staff council. The exact number of such representatives depends on the total number of the members of the group. The size of the staff council is calculated according to the total number of employees in the public sector establishment in question. The term of office is four years.

The internal structures of the staff council are laid down by law. The staff council has to elect an executive board representative of every group present in the council. The staff council also has to elect a chairperson and a vice chairperson. The chairperson's mandate is to represent the council in the context of the decisions it takes and these are arrived at only through an absolute majority vote of the members present.²¹⁶ Similar to the works council, the cost of the staff council's activities are borne by the public sector establishment, this includes travel expenditure, accommodation facilities and office staff where applicable. Staff council members in public sector establishments with more than 300 employees are granted full-time release from work to carry out staff council duties.

The staff council's duty is essentially to exercise its participation rights. The staff council is required together with the public sector establishment head, to maintain amicable co-operation in good faith when exercising its participation rights.²¹⁷ These rights are tailored along the lines of those enjoyed by the works council in the private sector under the works constitution act of 1976. The rights include information and consultation rights mainly in personnel matters and codetermination rights in the context of social matters. All the decisions within this ambit are reached through formal resolutions. In instances where a matter concerns one employee group

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Arrigo & Casale *Supra* op cit note 2 at 91.

²¹⁷ Ibid.

represented, that group alone can be involved in reaching a decision. The Staff council can also exercise its codetermination right by concluding an agreement with the head of the public sector establishment. In the event of a deadlock on reaching an agreement, the matter can be referred to the establishment level arbitration committee similar to the one that is provided for works councils in the private sector.

It should be noted that participation rights can only be exercised in a public sector establishment that possesses the authority to regulate the matters in question.²¹⁸ If no agreement can be reached then the authority passes to the next-higher administrative level concerned.

D. Codetermination ('Mitbestimmung').

Codetermination refers to two distinct levels and forms of employee participation. The first level entails codetermination at the establishment level by the works council while the second level involves codetermination above the establishment level, at the company level through the supervisory board of a company. The ultimate objective of codetermination is to give workers a significant voice in the industry. Below is an outline of the broad objectives of codetermination.

i Objectives of Codetermination.

A number of objectives exist for codetermination but the most fundamental are:

- *“Equality of capital and labour: codetermination is seen as an instrument for rebalancing the unequal powers between labour and capital.*
- *Democratisation of the economy- Conflicts in the economic realm should not be solved by power but by discourse.*
- *Social development- codetermination is an instrument for improving working people’s living and working conditions.*
- *Co-operation between labour and capital: codetermination allows for a flexible non-bureaucratic, efficient and peaceful organisation of production. This is highly*

²¹⁸ Ibid.

*beneficial during times of economic pressure. As a result, Germany has been credited as having one of the lowest industrial action (strike) rates in the world.*²¹⁹

Next, we will examine the codetermination rights conferred to the works' council by the Works Constitution Act.

ii Codetermination rights of the Works' Council.

The most far reaching form of participation for the works council is the codetermination right. It covers participation in arrangements on health and safety at work and the formal adoption of reconciliation of interests and a 'social plan' in the event of substantial alterations in the establishment, such as a plant closure (Works Constitution Act, paragraphs 87 ff. and 111ff.).²²⁰ Codetermination rights also extend to guidelines for staff selection and appraisal, in service training and measures affecting individual workers such as grading, transfer and dismissal (paragraphs 94 f., 96 ff., 99 and 102). In principle the right of codetermination is exercised through a works agreement or semi formal works agreement in the case of matters relating to individual staff.²²¹ As a rule of thumb, codetermination rights of the works council are confined to formal regulatory conditions of employment regarding company fringe benefits and performance related rates of pay, to participating in the "how" after the employer has made a decision on the "whether".²²² The restriction of the council's rights of codetermination is a result of statutes and collective agreements taking priority over the exercise of these rights.

Areas of obligatory codetermination include matters related to "works rules; working hours in the organization including breaks and overtime, methods of payment used for remuneration, arrangement of general principles on annual holidays and the preparation of the holiday roster, introduction and use of technical devices for monitoring employees' conduct and performance; accident prevention and health protection; the form; structure and administration of fringe benefits; the fixing of performance related pays; and the principles underlying the company suggestions scheme for employees' suggestion for improvements."²²³ By law, the employer cannot take any action on these matters without the agreement of the works council.

²¹⁹ Heiner Michel 'Co-determination in Germany: the recent debate' (2007) at 5.

²²⁰ Weiss op cit note 180 at 594.

²²¹ Arrigo & Casale op cit note 2 at 90.

²²² Weiss M op cit note 180 at 598.

²²³ Arrigo & Cassale Supra op cit note 2 at 90.

The works council can even require the company to accept rules on these matters by referring to the establishment-level arbitration committee. The decision of this arbitration committee can take the place of voluntary agreement between the employer and the works council in collective matters.²²⁴

In the event of a disagreement between the employer and the works council, a laid out settlement procedure has to be followed. Both parties can set up a conciliation committee (*Einigungsstelle*), equally representing each side.²²⁵ An independent chairperson should be selected and accepted by both parties to head the conciliation committee. If this committee cannot resolve the dispute in question, the courts are then left to adjudicate the matter.

As a result of the ever changing production landscape where technology is increasingly influencing the economic prosperity of establishments, the codetermination rights of the works council have steadily increased in importance. This is so because the terms in collective agreements which assign the practical implications of regulations on working hours are constantly changing as a result of negotiations between the works council and the employers to promote the viability of establishments.

It is also important to note that the realisation of works councils is not the full democratisation of the work place or some other objective but rather the protection of employees. Hence the strongest rights of the works council are the rights that cover social matters. Rights concerning human resources and economic matters are the weakest ones.

iii *Codetermination in the Supervisory Board ('Aufsichtsrat')*.

German company law provides for a two-tier board system. The first is the supervisory board (*Vorstand* in a joint stock corporation or *Geschäftsleitung* in a limited liability company) to which the top executive is accountable and the other is the management board, which comprises of the executives.²²⁶ Unlike Germany, most countries only have a single tier system characterised by a management board where employees are not represented. This is usually the case with Anglo Saxon countries who at present are also considering introducing a two tier system of

²²⁴ Ibid.

²²⁵ Heiner op cit note 217 at 10.

²²⁶ Poole et al op cit note 3 at 505.

boards following the model proposed by European communities.²²⁷ The idea is to create a supervisory board distinct from the management board and to provide for the inclusion of workers' representatives in the former.²²⁸ This system would also augur well in the case of Zimbabwe so as to enhance employee representation at the helm of organizations. At present the system in Zimbabwe is characterised by the existence of workers' committees and councils whose rights are limited to consultation.

The participation of employees and their trade unions in the organs of companies (particularly in the supervisory boards) is regulated by four Acts listed below:

- *“Employee codetermination Act of May 4, 1976*
- *Section 76 ff. of the Works Constitution Act of October 11, 1952*
- *The Act on Employee Codetermination in the Supervisory Boards and Managing Boards of the Coal Iron and Steel-producing Industries of May 21, 1951 (Coal, Iron and Steel Codetermination Amendment Act) and*
- *The Act supplementing the Act on Employee Codetermination in the Supervisory Boards and Boards of Directors of the Coal, Iron and Steel Industry of August 7, 1956 (Coal, Iron and Steel Codetermination Amendment Act).”²²⁹*

The 1976 *Codetermination Act* makes it mandatory but not automatic for all business organizations with more than 2000 employees to form a supervisory board composed of 50% shareholders and 50% employee representatives.²³⁰ Employees' representatives are elected either by direct election by the workforce or by the works council. The shareholders' representatives on the other hand are elected by the appropriate shareholders meeting or a company general meeting.²³¹ The chairman of the supervisory board is elected through a majority vote by the qualified members. However, if no majority vote is attained then the representatives elect the chairman from their own ranks. The importance of this is that, in the event of a tie vote the chairman is entitled to two votes in the second ballot. The reasoning behind the second vote is to guarantee the enterprises' ability to function and not to assure shareholders' superiority which

²²⁷ Johannes Schregle 'Workers' participation in the federal republic of Germany in an international perspective' (1987) *126 ILLR* 3 at 324.

²²⁸ *Ibid.*

²²⁹ Gunter Halbach, Norbert Poland, Rolf Schwedes & Otfried Wlotzke *Labour Law in Germany: An Overview*. (1994) 443.

²³⁰ *Ibid.*

²³¹ Arrigo & Cassale *op cit* note 2 at 89.

would seem to be the most obvious reason. To add to this, the Codetermination Act boasts of an endearing compromise character and employees are supposed to participate equally in the direction of the enterprise. Hence the supervisory board is deemed a homogenous body making decisions for the enterprise and not a pluralistic group of competing interests.²³²

It is worth noting that the *Codetermination Act* of 1976 assures employee representation within the corporate structure. It does this not by introducing new bodies into the corporate structure but rather by simply fitting workers' participation into the traditional corporate framework. Employees are afforded the opportunity to participate in the selection and current monitoring of corporate management as well as the shaping of principles of corporate policy through their representatives.

The tasks of the supervisory board are to appoint and supervise the activities of the management board and to make policy. In addition to these, the supervisory board has extended rights to information. The management board is mandated to provide information on business operations and other basic aspects of corporate planning. The law also allows both boards (management and supervisory) to establish rules whereby certain decisions require the consent of the supervisory board. The supervisory board may appeal to the shareholders if the management board refuses.²³³

Just like any system, codetermination has its own strengths and weaknesses. Because of its success story in Germany, the debate of harmonising codetermination in Europe has been going on for a while. This debate has also raised possible weaknesses of the system. The next subheadings will highlight the strengths and weaknesses of codetermination

iv Strengths of Codetermination.

Codetermination has introduced democratic principles in the workplace where an individualistic sphere of civil law existed.²³⁴ The prescribed and institutionalised framework of interaction via codetermination is consensus. Section 2 (1) of the *Works Constitution Act* states that "the employer and the works' council shall work together in a spirit of mutual trust." As a foreign observer it is interesting to note that it is conceivable for law to prescribe such a thing as 'mutual

²³² Moore op cit note 5 at 71.

²³³ Ibid. at 66.

²³⁴ Ibid.

trust' which would seem to be an attitude outside the realm of enforceable law. This is one aspect that stands out about the German system on industrial democracy. It would be interesting to compare the provision of "mutual trust" in the German system with the provision of "bargaining in good faith" in Zimbabwe and other countries.

The system of codetermination in Germany has seen a reduction in the occurrence of industrial action because of the active participation of employees' in decision making through the supervisory boards and the works council. The workers representatives on the boards enjoy the same rights as their counterparts representing management and as a result they can influence strategic decisions that affect their welfare and the operation of the establishment.²³⁵ The system of codetermination in Germany advocates for a worker-centered approach built on consensus and autonomy in the workplace. These characteristics are favourable in today's business environment where change is constantly taking place and flexibility is needed in the workplace. The flexibility in question is one that promotes worker autonomy whereby employees can be innovative in their approach without always having to seek the green light from management which often slows down progress in the workplace.

A number of reasons exist to justify the participation of employees' and trade union representatives in such important managerial plans and decisions. By participating in the supervisory board, this guarantees the "supplementing of economic legitimation of corporate management by a social one"; it guarantees optimum consideration of the interests of the employees as well as the interests of the general public when implementing corporate policies."²³⁶ Participation of employees' and trade union representatives also promotes equality of capital and labour. In the same vein, it ensures the democratisation of large industrial concerns as structures of social relevance as well as the monitoring of managerial power.²³⁷ It is worth noting that where a supervisory board makes plans and decisions, it will take into account the interests of both the shareholders and the employees. Management's responsibility towards the employees becomes institutionalised by the latter's say in the appointment and removal of managers.²³⁸ This setup paves the way for a *social corporate policy* to be adopted consciously taking into account the social facts and figures together with the willingness to promote social interests within the

²³⁵ Michel op cit note 217 at 11.

²³⁶ Halbach op cit note 227 at 444.

²³⁷ Ibid.

²³⁸ Ibid

limits of economic capacities.²³⁹ Collective agreements or works councils' rights of participation cannot achieve such effects in an establishment.

Depending on the extent of employees' influence in the supervisory board as defined by law, employee participation in management also requires more or less the same intensive cooperation between the shareholders' representatives and the management on the one hand and representatives of the employees on the other.²⁴⁰ This would in turn mean that shareholders' representatives and the management cannot unilaterally implement their plans without justifying them to the employees' representatives. As a result, employees are presented with an opportunity to bring in their knowledge and opinion to assist in decision making. This also has a trickle down effect on the relationship of the 'stakeholders' at the board level. Management and shareholders will look at employee representatives as partners. Employee representatives on the other hand will get a better understanding of the company's economic requirements and also share the responsibility for decisions that might substantially affect the employees themselves.²⁴¹ It is a known fact that such participation in decision making enhances organizational commitment from a human resources perspective. Employees will be able to identify with the establishment as their own area of responsibility and not to consider it as someone else's institution.

v *Weaknesses of Codetermination.*

The German works' council system has worked well for the country however, this system has mainly been concentrated in larger firms and has a low frequency among small to medium enterprises.²⁴² This has proved to be a stumbling block in promoting industrial democracy in a system that has been touted as one of the best in contemporary capitalist societies.

The current global trends pose a myriad of problems for the present model of codetermination. It is the writer's view that employee representatives on the supervisory board are forced to wear two hats in fulfilling their mandate to their constituents and the board. This often proves to be difficult because, just like their counterparts within the board, they are sworn

²³⁹ Ibid

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Russell Lansbury 'Workplace democracy and the global financial crisis' (2009)55 JIR 5 at 602.

to an oath of secrecy and upholding the values of the establishment.²⁴³ This often tends to clash with their role of remaining loyal to the workers.

Also, codetermination in German transnational corporations poses a particular problem. Some German companies tend to have subsidiaries in other European states and a number of these do not have the same setup in terms of a two tier board system (supervisory and management boards).²⁴⁴ Codetermination in these states is more restricted to the extent that the interests of the employees inside Germany are generally better represented than the interest of the employees elsewhere because only German employees are represented on supervisory boards. This creates a problem of partiality or unequal representation favouring employees inside Germany at the expense of employees outside.²⁴⁵

While the system of codetermination may be desirable in other European states and also in our own developing countries, differences in historical and cultural roots of the different systems of employee participation may prove to be a stumbling block because uniformity in institutional capacity does not necessarily imply functional uniformity.²⁴⁶ Globalisation is also proving to be an anathema for codetermination. Rapidly changing markets demand increased flexibility from establishments, trade unions and from works' councils.²⁴⁷ Works councils and trade unions are sometimes forced to accept less favourable arrangements to avoid establishments downsizing due to operational requirements or resorting to outsourcing. Works councils are even forced to take on management tasks and to present more favourable alternatives to preserve efficiency and effectiveness in the workplace and as a result, codetermination is in danger of degenerating into co-management.

²⁴³ Heiner op cit note 217 at 12.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

vi *The Relationship between Works Councils and Trade Unions Today.*

Although under the *Works Constitution Act*, the works councils are separate from and independent of trade unions, their links in practice are substantial. Works councils have sometimes been referred to as an extended arm of the union movement.²⁴⁸

The overlap between collective bargaining and the works constitution on similar matters makes it necessary to clearly articulate the differences between the two institutional frameworks. A number of provisions within operating legislations (*Works Constitutions Act* and the *Collective Agreements Act*) attempt to make this differentiation.²⁴⁹ The idea is to prevent works councils from competing with trade unions.

In both statutes, provision is made on the scope of works agreements concluded under the works council. Section 77(3) of the works constitution act, stipulates that works agreements shall not deal with remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreement.²⁵⁰ However, this condition shall not apply where a collective agreement authorises the making of a supplementary works agreement. The *Works Constitution Act under Section 87 (1)* gives the express right to codetermination on social issues when they are covered by legislation or collective agreement.²⁵¹ An existing collective agreement can be extended to include employees and employers not directly bound by the agreement through a process called *Allgemeinverbindlichkeitserklaerung* (Order imposing extension, issued by the Minister of Labour).²⁵²

Both laws make it clear that collective agreements will supersede works agreements on most matters and also that works agreements shall not be contracted on matters that are reserved for collective agreements. At best works agreements can improve resolutions in the employee's favour and this is referred to as the favourability principle.²⁵³ The favourability principle has been a contentious issue in the German industrial society for over two decades. It has been viewed as a direct attack on the autonomy of collective bargaining which is enshrined in the

²⁴⁸ Schregle op cit note 225 at 325.

²⁴⁹ Buschmann op cit note 194 at 34.

²⁵⁰ Ibid.

²⁵¹ BetrVG 87 (1)

²⁵² Buschmann op cit note 194 at 35.

²⁵³ Moore op cit note 5 at 72.

constitution because it is seen as somehow giving works councils the right to overrule collective agreements with lower conditions than those reached by the union.

Trade unions are responsible for sectoral collective bargaining and in the process set minimum standards for a whole sector or at least a region, while works' councils are responsible for the day to day arrangements in the company.²⁵⁴ In other words the role of the works council is to monitor the conditions within an establishment and ensure that the agreed on conditions are met. These conditions would have normally been agreed upon through collective bargaining. An example would be trade unions agreeing on a position with employers with regard to working time. The works' council representatives would then be on the ground to monitor that the employer is sticking to the agreed upon position and not making employees work overtime.²⁵⁵ The works' council would in this case use their right of codetermination, whereby the employer cannot unilaterally change and implement basic terms and conditions of employment without the consent of the works' council.

Also, collective agreements provide a framework to be filled in by works councils and individual employers.²⁵⁶ Collective agreements have proven to be flexible by providing 'opening clauses' giving significant lee-way for works' councils and individual employers to regulate the implementation of the agreed on positions in collective agreements through work agreements.²⁵⁷ This notion takes into consideration the differences among individual enterprises and the rigidity of the rules pertaining to some collective agreements. It also seeks to promote the development of structural patterns within a sector as a whole as well as the necessary flexibility at workplace level.²⁵⁸

Weiss also raises the issue of restructuring at the corporate level. A number of establishments have had to deal with organisational restructuring due to economic vicissitudes and in some instances would have to lay off workers due to operational reasons. This in essence would mean that management has to liaise with worker representatives on the way forward. On the part of employees, the success of these difficult restructuring processes would hinge on the

²⁵⁴ Ibid.

²⁵⁵ Manfred Weiss 'Trade unions and institutionalised workers' participation: the German experience' (2005) 9 *Law Democracy and Development* 2. at 164.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid

basis of close co-operation between trade unions and works councils.²⁵⁹ This would in turn result in a shared acceptability (among the whole workforce) of the concessions made in order to safeguard the future of existing jobs.

A trend common in most establishments is that trade unions are significantly represented in companies where works' councils are established. Trade unions supply the necessary information to employees on the advantages of having a works' council and this usually results in the election of such a body. A study carried out in German establishments in 2004 shows that trade unions are absent in small and medium enterprises and works' councils do not exist in some of these companies.²⁶⁰

Works' councils have also been seen to add an innovative input into the trade union system. This is so because works councils are faced with an ever changing work dynamic and this calls for extraordinary interventions even if the relevant trade unions have not agreed on a common approach.

In conclusion, the German system of industrial relations is characterised by a dual structure of employee representation through the works council at the establishment level and unions at the industrial level. This system of workers' participation has been successful in contributing to economic growth in the country and also maintaining industrial peace as evidenced by a low rate of industrial action. The process of codetermination has seen employers having more influence in decision making in the workplace and many countries have followed suit in tailoring this process in line with their economic and social context to make it work in their own jurisdictions.

²⁵⁹ Ibid.

²⁶⁰ Ibid at 165.

8 WAY FORWARD FOR ZIMBABWE.

In light of our assessment of the theoretical underpinnings of workers' participation as well as the practical manifestation of workers' participation in Germany, the question arises, what is the way forward for Zimbabwe?

The winds of change are certainly blowing in Zimbabwe, if the developments in the past 3 years are anything to go by. The presidential and parliamentary elections in 2008 proved to be a watershed period. These elections saw ZANU PF lose its majority in Parliament and Robert Mugabe losing his stronghold at the helm of the country to Morgan Tsvangirai. This ultimately led to the formation of the Government of National Unity (GNU). Already a lot of positives have come out of this marriage of convenience. Most economic sectors have witnessed collective engagement. The *Kariba declaration* has been initiated through the revival of the tripartite negotiating forum. Civic organisations and churches have also been included in this social dialogue and this has set a precedent in the history of social dialogue in Zimbabwe. However, these moves by the Unity Government are a far cry from addressing the problems that have bedevilled the country over the past decade. In this section I will outline a few suggestions on how to improve workers' participation in Zimbabwe.

The most fundamental move is for all the parties in the inclusive government to fulfil what has been agreed upon in the Global Political Agreement (GPA). Political will is the most important tool in providing guidance in any socio-economic situation. A number of agreements are outstanding in the GPA, the most obvious being the adoption of a new constitution which effectively eradicates the old constitution that has been used by politicians to achieve their personal agendas. As has been the case since 2008, the parties to the GPA have been using different portfolios to further the interests of individual political parties and not for the greater good of the country. The government needs to stick to its mandate of governing the people and providing sound socio-economic policies that create an enabling environment for all its citizens to actively participate in the development of the country without fear or favour. A new constitution would guarantee the rights of every citizen to associate and speak freely without fear of intimidation. Freedom of association and assembly has been attacked in Zimbabwe through draconian laws such as POSA and AIPPA. Once these laws have been repealed, trade unions and civic organisations will find it easy to go about their core mandate of representing its members in

the bargaining arena at both industrial and national level. It is also worth noting that Zimbabwe should take a cue from its counterparts across Limpopo-South Africa, and entrench the right to collectively bargain in the constitution. The current constitution does not provide any provisions for collective bargaining and this has somewhat proved to be a thorn in the flesh especially considering the powers that employers and the govt continue to enjoy over their employees. Entrenching this provision in the constitution would definitely be a bonus for workers because then they will have the option to use their most potent tool (striking) in the event of a deadlock.

The government also needs to revamp labour legislation in line with international best practices that have been set through the labour body- ILO. At present, the LRA in use has constantly been amended and it has failed to keep up with the ever changing circumstances in the global village. Most notably, it undermines the power of employers when it comes to dismissal based on operational requirements because they have to seek consensus from workers' representatives. While this is a positive for employees, it has defeated the whole purpose of bargaining autonomy and exercising power play to settle disputes.

In her doctoral thesis on worker representation in Zimbabwe, Niki Jazdowska, highlights an obvious and yet important caveat for the government in power which is to protect the meaningful and functional existence of the institutions that defend and uphold the most basic human rights.²⁶¹ That is, the government has to respect the independence of the judiciary, protect trade union structures and desist from using state apparatus against its citizens when they protest peacefully. The government led by ZANU PF has been on a crusade of sponsoring state terror and violence through the military. This has negatively impacted on the right to freedom of association and assembly which is entrenched in the constitution. As a result, government has to respect these institutions and provide a safe environment for all its citizens regardless of political affiliation.

For workplace democracy to flourish an environment that is compatible with its core values, provides infrastructure for optimal operation and offers political support and protection for its fundamental needs and goals has to exist.²⁶² This environment can only be achieved through the ability of labour to exercise significant power at the levels of the firm, the industry

²⁶¹ Niki Jazdowski *Will They Ever Learn? Worker Representation in Zimbabwe's Manufacturing Industry 1980-1998* (Unpublished PhD thesis, University of Coventry, 2001) 102.

²⁶² Edward Greenberg 'Workplace democracy in the core countries: problems and prospects (1999) at 2.

and the state. The writer agrees with Greenberg on the view that power balance has been relatively uneven as a result of neoliberal values and this has resulted on an assault of workplace practices that promote workers' participation by the state. As mentioned above, a framework should be put in place that promotes the autonomy of these worker representative bodies. This framework would involve a legal avenue that seeks to limit government interference in collective agreements and the formation of workers committees. The role of government would then need to be limited to providing a legislative framework for promoting workers' participation.

The parties to the *Kariba declaration* would also need to take it upon themselves to uphold the agreed upon positions and most of all address key concerns of social partners through practical compromise. Social contracts on their own cannot produce the desired results; they need dedication from the stakeholders' to implement sound policies that directly impact on the desired expectations and targets. These targets must be achievable and generate modest victories upon which substantive successes can be built.²⁶³

At the plant level, management should consider including workers in decision making as this is likely to have a ripple effect on the efficiency and effectiveness of the organisation. From a human resources perspective, organisations that promote employee autonomy and engagement have tended to record a high productivity ratio compared to those that are more bureaucratic. This is so because the former enjoys the fruits of innovation while the latter stifles innovation within the workforce.

To conclude, Zimbabwe is in need of a political leadership that is sensitive to the need of the people and willing to work with other parties to find common long lasting solutions to address the current problems that have bedevilled the country. It may seem impossible but history will define Zimbabwe's future through political dialogue and the ability to compromise by all parties in the conundrum that the country finds itself in.

²⁶³ Gono op cit note 135 at 27.

9 CONCLUSION.

Based on the evidence presented in this paper, the desire of workers to take part in decision making that affects their work life is universal. Zimbabwe is no exception. Zimbabwe is faced with a seemingly insurmountable task to harmonise its statutory regulations on labour in line with international standards. On paper it seems like a champion of employee rights but for the past ten years, the government has blatantly disregarded the core tenets of workers' participation through draconian legislations such as POSA and AIPPA which directly challenge an important arsenal in the collective bargaining process- the right to strike. Enshrining collective bargaining in the constitution could reduce the shortcomings of the process considering that labour is already weakened by its inability to use its only weapon (right to strike) because of POSA. A new constitution will provide a framework for a new LRA to be adopted and this will ultimately help Zimbabwe create a new labour relations system that promotes industrial democracy.

Zimbabwe is a country in transition. As a result, it remains to be seen if all social partners in Zimbabwe will commit to the "*kariba declaration*" to provide a guiding compass on promoting workers' participation and reviving the economy. This social dialogue cuts across political divisions and goes to the extent of providing a framework for negotiation at national level. Political will should prevail in building trust amongst stakeholders and in the process; the parties to the dialogue will learn to compromise for the greater good of moving the country forward. Having drawn on success stories in Africa (South Africa and Kenya), Zimbabwe should be cognisant of the fact that the process of adapting to more progressive forms of workers' participation, needs to be a gradual one. Anything short of this is likely to derail the whole process.

This research makes it necessary to ask the question, what can a developing country learn from a developed country? An in-depth analysis of workers' participation in Zimbabwe and Germany provided us with the platform to identify special characteristics which frame our perspective (Zimbabwean system) and also the weaknesses in the system in achieving particular social goals.²⁶⁴ Zimbabwe can in the process learn, not by transplanting but by cultivating or

²⁶⁴ Summers op cit note 4 at 333.

creating institutions or legal rules that will remedy the weaknesses made visible by this analysis.²⁶⁵

Previous studies on workers' participation in Zimbabwe have, at best, been limited to the legal framework of the concept but not the application. This paper therefore substantially contributes to the existing literature and our understanding of the impact of industrial relations in Zimbabwe by focusing on the actual practice of workers' participation.

The fact that different connotations have been extended to the subject of workers' participation in different countries means that no agreed upon position exists on this topic. This paper challenges scholars and practitioners alike to further develop the notion with a view to achieving international consensus on the actual meaning of the term, "workers' participation".²⁶⁶ The International Labour Organisation should also provide guidance on the subject by drawing on member experiences on the topic to come up with a holistic approach to this issue. Until consensus is reached on workers' participation, it will remain as one of the most controversial subject in comparative industrial relations.

²⁶⁵ Ibid.

²⁶⁶ Arrigo & Cassale op cit note 2 at 10.

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