

**A CRITICAL ANALYSIS OF WORKPLACE UNION
MAJORITARIANISM FOR THE PURPOSE OF COLLECTIVE
BARGAINING**

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DECLARATION

I, 8909853r, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

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ABSTRACT

This research report aimed to critically analyse workplace union Majoritarianism for collective bargaining and its effects in the workplace.

The Labour Relations Act promotes the concept of Majoritarianism, which has led to the exclusion of minority unions from the bargaining table. The changing nature of the workplace has led to more parties with specific interests, and in some instances, their exclusions have disturbed industrial peace.

This study examined legislation, case studies, and references to the Labour Law dispensations of other countries, including the United States of America, Japan, Germany, Sweden, and France. It demonstrated that majoritarianism and the effective exclusion of minority unions have severely undermined and rendered the collective bargaining process unsatisfactory.

The methodology used in this study is a literature review, so it was a desktop study. The literature review suggests that there are ways in which a majority trade union in the organisation can still lead at the bargaining table with the necessary input of minority unions, particularly those that represent specific interest groups.

This report is of significant importance as it provides a comprehensive understanding of majoritarianism within a democratic context, thereby contributing to the academic discourse on Labour Law and industrial relations.

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I. INTRODUCTION

The existence of trade unions emanates from the fact that economic organisations were based on small, owner-run enterprises that did not require structured labour arrangements.¹ Workers formed a structure because of industrialisation, thus creating an interest group that necessitated an organised voice for the protection of workers' rights.² As the group size increased, so did the variety of competing interests and the complexity of the employer-employee relationship.³ This ultimately led to the formation of trade unions, the primary purpose of which was to represent employees as a collective.⁴

Before the democratic dispensation, the foundation for trade union membership and activities in South Africa was entirely based on race. This racial organisation extends to the workplace, with White labourers assigned to higher positions.⁵ Before the Labour Relations Act 66 of 1995 (hereinafter referred to as the "LRA"), the majority of employees, notably Black labourers, were not fully protected.⁶

Legislation dealing with organised labour representation, such as the old Industrial Conciliation Act 28 of 1956 (later renamed the Labour Relations Act 28 of 1956), was poorly and inadequately drafted; even the concept of Organisational Rights was not defined. While some trade unions existed, many had no official recognition of their organisational rights or a bargaining platform.⁷

With the adoption of the Constitution of the Republic of South Africa in 1996 (hereinafter referred to as the Constitution), new labour laws were implemented which were in line with the standards set by the International Labour Organisation (hereinafter referred to as the ILO). The LRA sought to encourage advanced economic development, social justice, and labour peace, which led to the democratisation of the workplace.⁸

The above was in line with the political spirit of democracy, the multi-party system, and the inclusion of minorities, based on the right to freedom of association, to organise, and

¹ Shane Godfrey and Rochelle Le Roux 'Workplaces and bargaining units: they co-exist in practice, but can they co-exist in law?' (2023) 44 *ILJ* 2110.

² Temogo Geoffrey Esitang and Stefan van Eck 'Minority trade unions and the amendments to the LRA: reflections on thresholds, democracy and ILO Conventions' (2016) 37 *ILJ* 763.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Clive Thompson and Emma Fergus in 'Organizational right and collective bargaining' in Thompspon and Benjamin *South African Labour Law* 79 (2022) 1-5.

⁷ Godfrey & Le Roux op cit note 1.

⁸ Ibid.

to collective bargaining.⁹ Initially, bargaining was organised along occupational lines based on specific skills. However, with industrialisation and the fragmentation of such skills, the focus shifted to product levels and bargaining units, leading to the evolution of organising and bargaining. This historical context provides a comprehensive understanding of the development of collective bargaining in South Africa.¹⁰

The implementation of the LRA, a key piece of legislation governing labour relations in South Africa, resulted in a shift from imposing the duty to bargain to upholding a principle of voluntarism. This shift has left trade unions and employers free to determine with whom to bargain and the framework within which to bargain within the boundaries set by the LRA.¹¹ This enables the majority union to agree with the Employer regarding the threshold required to accept other parties at the bargaining table.

The size and form of the trade union seem to be major determining factors in the employer-union relationship under the LRA.¹² Notwithstanding that the LRA covers all classes of employees under its umbrella, majoritarianism has created a new category of employees. This group includes members of minority unions who are often left out, especially from the collective bargaining process. This exclusion underscores the urgent need for inclusive bargaining in South Africa.

Considering the above, this report posits the argument that South African labour laws favour and protect the rights of majority unions in the collective bargaining process to the exclusion of minority unions, proving that the current Labour Law landscape demonstrates strong support for the principle of majoritarianism.¹³

This report argues further that, because of majoritarianism, the collective bargaining process has been severely undermined, or even halted in some instances, by the exclusion of minority unions. In some cases, such exclusion has resulted in violent unprotected strikes, as experienced in the 2012 Marikana Lonmin strike, a significant event in South African labour

⁹ Esitang & Van Eck op cit note 2.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ian Macun 'Does size matter? The Labour Relations Act, majoritarianism and union structure' (1997) 1 *Law, Democracy and Development* 69.

¹³ Stefan Van Eck & Kamalesh Newaj 'The Constitutional Court on the rights of minority trade unions in a majoritarian collective bargaining system.' (2020) 10 *Constitutional Court Review*, 331-351.

history where the majority union's decisions led to a violent protest by the minority union.¹⁴ This will be elaborated upon later in the report.

The report examines the constitutional and legislative framework on this topic while interrogating the pitfalls and justification of majoritarianism. Due to the paucity of study in this area, this research paper makes a unique contribution to the field of Labour Law by offering possible remedies for majoritarianism and briefly examining the Labour Law landscape in other jurisdictions. These potential remedies provide a hopeful outlook for the future of collective bargaining in South Africa.

a) *Majoritarianism*

Majoritarianism, a system in which the majority of people have a certain degree of dominance in society and the authority to make decisions that influence society, is a key concept in this report. In the context of Labour Law, majoritarianism refers to the practice of allowing the majority union to make decisions that affect all workers, including those who are not members of the majority union.¹⁵ Simply put, majoritarianism excludes minorities in decision-making, making it clear why it is often referred to as the tyranny of the majority.¹⁶

While it is sensible that the majority's decision should prevail, the minority's input is critical and equally important to achieving an inclusive decision-making process. The reason is the urgent need for inclusivity in the context of workplace collective bargaining.¹⁷ Unfortunately, in many instances, a complete and total disregard for the minority and their core interests has led to violent protests both in society and in the workplace. This is a stark reminder of the negative impact of majoritarianism, which cannot be ignored.¹⁸

¹⁴ Saul Porsche Makamai; Lux Lesley Kwena Kubjan 'Collective bargaining misjudged: the Marikana massacre'. *Obiter*, 42(1).

¹⁵ A Przeworski and JM Maravail, 'Democracy and the rule of law' (2003) *Cambridge Studies in the Theory of Democracy* 5.

¹⁶ Thum Ping Tjin 'Principles of democracy: majority rule, minority rule' (2023) *Explainer* 1.

¹⁷ *Ibid.*

¹⁸ Deon Geldenhuys and Johann Rossouw 'The international protection of minority rights' (2001) *The FW de Klerk Foundation*.

b) *The meaning of democracy*

Many people have different ideas about democracy, but most agree that it reflects the wishes of the majority.¹⁹ Those who support majoritarianism argue that it assists in the democratisation of the workplace in accordance with the LRA's objectives.²⁰

Similar to democracy, this report argues that majoritarianism is predicated on multiple pillars, namely participation, consent, and voluntarism. The report argues that majoritarianism undermines these elements. This will be expanded upon below. The most crucial aspect of democracy is that everyone has an equal right to participate in decision-making.²¹ However, majoritarianism requires that participants are bound by the decision regardless of whether they agree with it or not. In this instance, the decision is legitimised by the fact that the majority of the participants agreed upon it.

Therefore, although majoritarianism allows for an equal right to participate, this right is severely undermined by the fact that the majority's decision prevails, rendering the minority's right to participate null and void. The second element is consent, which requires that decisions be made collectively and reached by consensus.²² Such consent should be informed, meaning that participants must understand what they are consenting to and the consequences of that consent.²³ As stated above, majoritarianism is structured so that the majority decision binds all participants, even those who did not participate when the decision was taken because they were excluded. Thus, consent is not an element of majoritarianism.

The final element is voluntarism. This means that all decisions made within a group are obligatory to the individual because the individual joined the group voluntarily. Regardless of whether the individual agrees with the decisions made, (s)he must abide by those decisions since they joined the group willingly.²⁴ Since majoritarianism requires members of the minority union to be bound by the decisions of the majority union(s), reconciling majoritarianism with voluntarism is challenging, as participants who are not members of a

¹⁹ Anonymous 'Principles of democracy' available at <https://www.principlesofdemocracy.org/majority>, accessed on 12 October 2023.

²⁰ Ian Macun op cit note 12.

²¹ S E A Mavee 'The relevance of civil society participation in democratic governance' (2022) 30 *Administratio Publica* 3 175.

²² Arend Lijphart 'Majority rule versus democracy in deeply divided societies' (2007) 4 *Politikon: South African Journal of Political Studies* 2 24

²³ Heidi Brooks, Trevor Ngwane and Carin Runciman 'Decolonising and re-theorising the meaning of democracy: a South African perspective' (2020) 68 *The Sociological Review* 1 8

²⁴ Heidi *et al* op cit note 23.

majority union are involuntarily bound by its decisions. This demonstrates that majoritarianism does not encompass voluntarism.

As argued above, majoritarianism fails to promote the three pillars on which democracy and participation are predicated: participation, consent, and voluntarism.²⁵ Hence, the notion that majoritarianism democratises the Labour Law landscape is entirely false.²⁶ Instead, it severely undermines, if not threatens, democracy in the workplace.²⁷ Hence, the researcher seeks to investigate what majoritarianism is and how it is linked to democracy.²⁸ In addition to the above, this report also looks at how the political science concept of democracy has legal consequences in Labour Law and how the LRA attempts to incorporate such elements to democratise the workplace.²⁹

II. THE SOUTH AFRICAN COLLECTIVE BARGAINING LANDSCAPE

a) *Historical background*

Collective bargaining was limited to specific racial groups during apartheid South Africa. This drastically changed with the implementation of the LRA, which offered strict regulations and made it mandatory to engage in collective bargaining. The strike by White mine workers in 1922 played a significant role in the development of the LRA.³⁰ The Industrial Conciliation Act of 1924 (hereinafter referred to as the “ICA”), a precursor to the LRA, only applied to White workers.³¹ The ICA only became applicable to black labourers in 1979 as a response to the 1973 labour unrest by black labourers who rejected the dispensation of the segregated Labour Law.³²

In 1996, most of the prior laws were inevitably replaced with a single comprehensive piece of legislation, the LRA, which covered all employees, regardless of race.³³

The LRA continued to endorse a voluntarist approach to bargaining, thereby empowering parties to determine their arrangements, even in light of future amendments to the

²⁵ Arend Lijphart op cit note 22.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Wessel Visser, ‘The South African labour movement’s response to declarations of martial law’, (2003), *African Journal Online* 1913-1922

³¹ Andre van Niekerk, Nicola Smit, Marylyn Christianson, Marie McGregor & Stefan van Eck *Law@Work* 5 ed (2019) 12.

³² Andre *et al* op cit note 10.

³³ John Grogan ‘*Workplace Law*’ 13 ed (2020).

LRA.³⁴ Consequently, while certain aspects of workplace democratisation are implemented, they are predominantly afforded to the majority of unions.³⁵

South Africa created an international duty for itself that required to be reflected in local law when it re-joined the ILO in 1994 and ratified its central agreement. Nonetheless, the LRA favours majoritarianism, which raises concerns about the Constitutional rights of minorities.³⁶

b) Constitutional and legislative framework

Both the interim and final Constitution incorporate labour rights in its Bill of Rights. The two relevant ILO conventions in this regard are the Freedom of Association and Protection of the Right to Organise Convention 1949 (C098).³⁷ The second one is Article 2 of the CO98 on the freedom of association and protection of the right to organise, provides that:

‘Workers and employers, without distinction whatsoever, have the right to establish and subject only to the rules of the organisation concerned to join organisations of their choosing without previous authorisation.’

Section 23 of the Constitution deals with the provisions for labour relations. Section 23(5)³⁸ of the Constitution:

‘Every trade union, Employer’s organisation and Employer have the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.’

It should be noted that sections 23(2) and (3) of the Constitution.³⁹ It also guarantees freedom of association. As envisaged in s 23 of the Constitution, the LRA was promulgated, marking a new dawn in the labour space. The drafters intended to introduce a more cooperative dispensation, moving away from the adversarial one of the pasts.⁴⁰

It is, therefore, imperative to quote the LRA’s⁴¹ primary objects as contained in s(1)(c) and d:

³⁴ S Godfrey, J Theron and M Visser ‘The state of collective bargaining in South Africa: An empirical and conceptual study of collective bargaining’ (2007) *Development Policy Research Unit DPRU Working Paper 07/130*.

³⁵ Ibid.

³⁶ Iain Currie & Johan De Waal *‘The Bill of Rights Handbook’* 6 ed (2013) 487.

³⁷ International Labour Organisation Convention No. 98 concerning Freedom of Association and Protection of the Right to Organise (1949).

³⁸ No 108 of 1996.

³⁹ Ibid.

⁴⁰ Grogan op cite note 33.

⁴¹ 66 of 1995

‘to provide a framework within which employees and their trade unions, employers, and employers’ organisation can –

- i. collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - ii. formulate industrial policy, and
- (d) to promote –
- iii. orderly collective bargaining
 - iv. collective bargaining at the sectoral level
 - v. employee participation in decision-making in the workplace
 - vi. the effective resolution of labour disputes.’

This aligns with the LRA's purpose: to advance economic development, social justice, labour peace, and the democratisation of the workplace.

It is interesting that while the LRA does not create an obligation to bargain between the parties, it commits employers and employees to workplace democracy, entailing active participation and joint decision-making.⁴²

While at face value, the LRA promotes pluralism by including unions with sufficient representation, these unions are not allowed at the bargaining table; the principle of majoritarianism justifies this exclusion.⁴³ This demonstrates another negative consequence for minority unions. Considerable inducements are offered to majority unions and minority unions willing to join forces with others to achieve joint majority status.⁴⁴

On the one hand, the rights afforded to minority unions with sufficient representation only include access to the Employer’s workplace and an entitlement to deduct trade union subscriptions.⁴⁵ Meanwhile, majority unions enjoy additional organisational rights, which include election of trade union representatives, leave for trade union activities, disclosure of

⁴² Grogan op cite note 33.

⁴³ Chamber of Mines of South Africa and Others v AMCU and Others [2014] ZALCJHB 13.

⁴⁴ B Conradie, G Giles, S Godfrey, C Cooper, T Cohen, A Steenkamp & D Du Toit ‘*Labour Relations Law: A Comprehensive Guide*’ (2000) 283.

⁴⁵ Section 25 of the LRA.

information, and, most notably, a seat at the bargaining table. It has been argued that the above is structured to prevent the proliferation of trade unions in the workplace.

Section 21 (8) states:

If the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner –

- (a) must seek
- (i) to minimise the proliferation of trade union representation in a single workplace and, whether possible, to encourage a system of a representative trade union in a workplace.⁴⁶

This matter is particularly contentious, especially given that the stated objective appears to be the reduction of the financial and administrative burden placed on the Employer.⁴⁷ The adherence to majoritarian principles by legislators is unfortunate and contributes minimally to the advancement of workplace democratisation and the establishment of labour peace.

The suitability of the majoritarian system in South Africa is questionable, especially given the loss of confidence in majority unions by unskilled and semi-skilled workers.⁴⁸ This is demonstrated by the Rock Drillers Operator's strike that led to the Marikana Massacre in Lonmin, which will be discussed later in this report.

III. PITFALLS OF MAJORITARIANISM

a) Rights of majority union to establish a threshold.

In terms of section 18 of the LRA, the Employer and a duly registered trade union that represents the majority of employees engaged by that Employer in a specific workplace or the entities involved in a bargaining council may enter into a collective agreement. This agreement may establish a threshold of representativeness necessary for one or more of the organisational rights specified in sections 12, 13, and 15.⁴⁹

Moreover, a collective agreement formulated in accordance with subsection (1) will only be deemed binding if the thresholds of representativeness outlined in the agreement are

⁴⁶ Section 21(8)(a)(i) of the LRA.

⁴⁷ Section 21(8)(a)(ii) of the LRA.

⁴⁸ D Abrahams, K Calitz, M Chicktay, T Cohen, O Dupper, E Fergus, S Mahomed, K Pollay & T Qotoyi *Labour Law in Context* 2 ed (2018) 197.

⁴⁹ Section 18 of the LRA.

uniformly applied to all registered trade unions pursuing the organisational rights referred to in that subsection.⁵⁰

It is an unfortunate truth that unions can exploit this right by establishing a higher threshold that minority unions may find insurmountable, thereby obstructing the entry of other, smaller unions. In instances where such rights are conferred to the minority union, it does not entitle it to have a seat at the collective bargaining table. According to Vettori, collective bargaining is the most essential instrument for serving the interests of members.⁵¹

Section 18 of the LRA⁵² serves as a significant mechanism predominantly utilised to marginalise minority unions and uphold the principle of majoritarianism. Implementing s 18 has challenges, particularly for unions seeking organisational rights, as illustrated in the case below. The matter of obtaining organisational rights was a contentious issue in the *National Union of Metalworkers of South Africa (NUMSA) v Bader Bop (Pty) Ltd & another* [2003] 2 [CC].

On 16 August 1999, the National Union of Metalworkers of South Africa (NUMSA) formally requested that the Employer grant it organisational rights as delineated in s12, 13, and 14⁵³ of the LRA.⁵⁴ At that time, twenty-six percent (26%) of the defendant's employees were affiliated with the union.

In its response, as outlined in the Bader Bop case, the Employer agreed to confer certain rights upon NUMSA in accordance with s 12⁵⁵ and 13⁵⁶ of the LRA, which pertain to unions that demonstrate sufficient representativity. However, the Employer declined to grant NUMSA

⁵⁰ Ibid.

⁵¹ MS Vettori, 'Alternative means to regulate the employment relationship in the changing world of work' (*published Doctorate Thesis, University of Pretoria, 2005*) 88-105.

⁵² 66 of 1995.

⁵³ Section 14 of the LRA (1) in this section, representative trade union' means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace

⁵⁴ 66 of 1995.

⁵⁵ Ibid.

⁵⁶ Section 13 of the LRA deals with the deduction of trade union subscriptions or levies, (1) any employee who is a member of a representative trade union may authorize the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages. (2) An employer who receives an authorization in terms of subsection (1) must begin making the authorized deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made. (3) An employee may revoke an authorization given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employees work in the public service, three months' written notice.

the rights specified in s 14,⁵⁷ which are reserved for unions achieving majority representativity.⁵⁸

Following the CCMA's unsuccessful conciliation, a dispute was formally recognised between the involved parties.⁵⁹ NUMSA notified *Bader Bop* of its intention to initiate a strike.⁶⁰ The defendant asserted that a minority union lacked the authority to strike over organisational rights and applied to the court for an interdict.⁶¹ The matter was ultimately presented to the Constitutional Court, which ruled in favour of the minority union.⁶² The Court concluded that since organisational rights pertain to issues of mutual interest, unions are entitled to strike to secure these rights when collective bargaining proves ineffective.⁶³

The Constitutional Court has established two distinct approaches concerning union representation (1) In cases where a union is classified as representative, it is obligated to employ s 21 alongside sections 64⁶⁴(1)(c) and 65⁶⁵(2). Under these circumstances, the union may choose to either refer the matter to arbitration or engage in a strike. (2) Conversely, in situations where a union is not considered representative, it must pursue rights negotiations in accordance with s 20 of the LRA.⁶⁶ If these negotiations prove unsuccessful, the union has the option to strike, but it is not permitted to proceed to arbitration.

This judgment has attracted some criticism, as proponents argue that s 20 of the LRA⁶⁷ should be applicable solely to representative unions. They assert that failing to do so renders the provisions concerning representation ineffective.⁶⁸ Conversely, others contend that by granting minority unions the right to strike without the option of recourse to arbitration, there is a potential infringement on democratic principles.⁶⁹

It has been argued that the promotion of majoritarianism, by treating minority unions less favourably, serves as a distraction to the effectiveness of our collective bargaining framework.⁷⁰ Ronald Dworkin delineates two concepts of democracy. The first is statistical

⁵⁷ Ibid.

⁵⁸ NUMSA v Bader Bop (Pty) Ltd [2003] 2 [CC].

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ 66 of 1995.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ *Bader Bop* supra note 58.

⁶⁹ Ibid.

⁷⁰ Ibid.

democracy, which entails quantifying opinions to provide a statistical representation of public desires.⁷¹ The second is integrated democracy, which emphasises the significance of the individual.⁷² Consequently, the rights of individuals within a collective context should not be entirely disregarded.⁷³

The ILO has affirmed that a majoritarian system is consistent with the principle of freedom of association if minority unions are permitted to exist, organise, and represent their members in individual grievances and challenge majority unions.⁷⁴ Consequently, the court's ruling is at odds with ILO standards.⁷⁵ The court ought to have acknowledged that by granting minority unions the right to strike without any possibility of recourse to arbitration, it has failed to fulfil its obligations under ILO guidelines.⁷⁶

In *Bader Bop*⁷⁷ the decision was subsequently confirmed in the case of *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; it was held that the South African Correctional Services Workers Union (SACOSWU) had no statutory entitlement for organisational rights. It had to engage in collective bargaining and, if that failed, could go on strike. However, SACOSWU⁷⁸ was bound by a collective agreement which regulated issues in dispute and was, therefore, prevented from engaging in a strike.

In *Transnet Soc Ltd v National Transport Movement and Others* [2014] 1 BLLR 98 (LC), the collective agreement did not bind the union since its application did not extend to other unions. The court held that since the collective agreement binds neither the union nor its members, they were allowed to strike to acquire organisational rights. The constitutionality of extending collective agreements was challenged in the case of *Chamber of Mines of South Africa and Others v AMCU and Others* [2014] ZALCJHB 13. It was held that, while the sections may be a violation of the right to strike, they were a reasonable and justifiable limitation. Its purpose was to achieve functional, orderly and stable collective bargaining.

⁷¹ Celestine Edozie Anyaorah "Analysis of Ronald Dworkin's concept of liberal democracy (2024) 10 An African Journal of Arts and Humanities 4.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ AMCU case supra note 43.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ *Bader Bop* case supra note 56.

⁷⁸ *Police and Prisons Civil Rights Union v Ledwaba No and Others* [2013] 11 BLLR 1137 (LC).

Evidence suggests that many workers, especially in mining companies, experience a dysfunctional, disorderly, and unstable collective bargaining environment. Section 23(1)(d) of the LRA provides for an agreement, concluded between the Employer and majority union, to be extended and bind non-parties mentioned therein. The immediate problem is that this prohibits any such party from striking in any matter regulated in the agreement.

In *Chamber of Mines v AMCU*,⁷⁹ The constitutionality of the above provision was challenged. The Court held that it was not irrational and served a legitimate legislative purpose of orderly bargaining. It is consoling that the extension of the agreement must be rational. Le Roux argues that there will be instances where such an extension is mala fide, capricious, or arbitrary.⁸⁰ The difficulty arises when such agreements are extended during the retrenchment process, as Le Roux correctly concludes that majoritarianism is a blunt instrument in service of broad workplace order.⁸¹

In the above case, AMCU argued that the gold producers in individual mines were separate workplaces. The Labour Appeal Court held that AMCU's argument undermined collective bargaining and the policy of majoritarianism, which the lawmakers had carefully selected when the LRA was first constructed.⁸²

In 2014, the LRA was amended with the hope of bringing peace and resuscitating the collective bargaining regime that was destroyed during the 2012 Marikana Massacre. In terms of s 21,⁸³ the CCMA Commissioner is empowered to grant basic organisational rights to a minority union.

While this amendment is a welcomed relief for minority unions, it is argued that it still does not provide an inclusive collective bargaining regime in the workplace. Minority unions are still excluded from having a seat at the collective bargaining table and, in some instances, are not even able to represent their members on disciplinary matters. It was held in *Bader Bop*⁸⁴ that freedom of association will be impaired or negatively affected when employees are not allowed to have their trade union represent them in disciplinary and grievance matters but are instead required to be represented by a rival union that they have not chosen to join. It is

⁷⁹ *AMCU* case supra note 43.

⁸⁰ Rochelle Le Roux 'The tentacles of majoritarianism: how far Can They Reach into Retrenchment' (2020) 41 *Obiter*.

⁸¹ Le Roux op cit note 80.

⁸² *Ibid*.

⁸³ 66 of 1995.

⁸⁴ *NUMSA v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 [CC].

encouraging that many workplace policies allow colleagues to represent an employee in disciplinary or grievance processes. Section 18 was again invoked in the case of *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* (CCT152/17) [2018] ZACC 24.

The judgment deals with the right of minority unions to acquire organisational rights from an Employer, where the majority union has a pre-existing collective agreement with the Employer setting a threshold of representativeness for admission to a Departmental Bargaining Council, which the minority union does not meet.⁸⁵ The Department of Correctional Services concluded a collective agreement with the Police and Prisons Civil Rights Union (POPCRU), which is the majority union in the Departmental Bargaining Council.⁸⁶

The Department went on to conclude another collective agreement with the SACOSWU. They granted SACOSWU certain organisational rights even though SACOSWU did not meet the threshold fixed in s 18(1) collective agreement with POPCRU.⁸⁷

POPCRU disputed this and argued that their collective agreement with the Employer on the threshold was binding on SACOSWU.⁸⁸ The matter ultimately came before the Constitutional Court after the LAC concluded that the Department and SACOSWU were entitled to conclude the collective agreement.⁸⁹

The Constitutional Court found that neither s 18 nor 23 precluded the conclusion of a collective agreement between an Employer and a minority union, whereas s 18 threshold agreement between the same Employer and the majority union existed.⁹⁰ The Court confirmed that minority unions can access such rights in one of three ways. Firstly, they may acquire the rights if they meet the threshold. Alternatively, they may bargain and agree with the Employer, permitting them to exercise such rights. Further and alternatively, they may refer the matter for Arbitration in terms of s 21(8)(c) of the LRA, provided it meets the stipulated conditions in that Section. In such an instance, the Arbitrator may grant such organisational rights.⁹¹

⁸⁵ *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* (CCT152/17) [2018] ZACC 24; [2018] 11 BLLR 1035 (CC); 2018 (11) BCLR 1411 (CC); (2018) 39 ILJ 2646 (CC); 2019 (1) SA 73 (CC) (23 August 2018).

⁸⁶ *POPCRU* case supra note 78.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

The court held that the LRA should not be interpreted in a manner that denies minority unions their constitutional right to collective bargaining while recognising that an Employer may not necessarily be obliged to grant that minority union the rights it seeks.⁹² The report argues that it is still not enough to fully extend the minority union's right to participate in the normal bargaining process with the Employer. It only provides a minority union with limited basic organisational rights.⁹³

The court concluded by emphasising that the principle of majoritarianism, as embraced in our Labour Law, is compatible with the principle of freedom of association, which finds expression in the right to form and join a union of one's choice. Forcing workers who belong to one union to be represented by a rival union at disciplinary hearings would seriously undermine their right to freedom of association.⁹⁴

Democratisation, which focuses on size while neglecting other specific interests, is unsustainable.⁹⁵ The majoritarian principle is justified by the formation of fewer, larger unions increases efficiency and puts them in a better position to engage in social and policy debates.⁹⁶

A small group of rock drillers in Lonmin and Impala has demonstrated that membership size does not always correlate with negotiating power but rather with mutual interests.⁹⁷ According to Chaison, as cited in Macun's article, small unions are not inherently inefficient, especially when negotiating a small number of collective agreements or when representing specialised groups of workers.⁹⁸

Le Roux notes a serious challenge for minority unions.⁹⁹ A minority union must represent all employees within the workplace, regardless of their rank, status, or working hours, making it more difficult to establish the degree of representativeness required.¹⁰⁰ It may then need to recruit members from groups of workers it has previously not represented or who are more difficult to recruit.¹⁰¹

⁹² Ibid.

⁹³ *POPCRU* case supra note 78.

⁹⁴ Ibid.

⁹⁵ Ian Macun op cit note 12.

⁹⁶ Ian Macun op cit note 12.

⁹⁷ R.G.B. Pickering and K. Moxham, 'The Development and Implementation of the Lonmin Mechanized Breast Mining' (2007) *The Journal of the Southern African Institute of Mining and Metallurgy* 107 6.

⁹⁸ Ian Macun op cit note 12.

⁹⁹ Le Roux op cit note 80.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

An employer's willingness to engage in organisational rights discussions with a minority union depends on that Employer's ability to do so.¹⁰² Racial division of labour continues to influence organisational boundaries and intra-organisational structure in South Africa.¹⁰³ Political divisions within the union movement are still a factor.¹⁰⁴ While democracy is based on futurity, collective bargaining seeks to address previous and current shortcomings for a better future. Democracies exist at specific points in space and time under specific material circumstances.¹⁰⁵

The concept of majoritarianism falls short in addressing historical facts and the wider aspirations of establishing an all-encompassing economic and social transformation. Derrida argues that it is not only the necessity for constant renegotiation but also the possibility of radical change.¹⁰⁶ Nevertheless, welcoming differing viewpoints and fresh perspectives can be risky. For this reason, inclusivity is paramount.

Participation by all stakeholders is important for the legitimacy of decisions. Given limited organisational rights, such participation must be real and not just perfunctory.¹⁰⁷ Where there is no common or unifying factor amongst workers and where people are not given space to contribute to decision-making, compliance with such decisions is achieved by making threats of sanctions or using force.¹⁰⁸ Hence, workers do not adhere to collective agreements entered into by other unions or even defy the existence of those standing agreements.¹⁰⁹

Majoritarianism proponents argue that majority rule is a useful democratic decision-making tool and that alternate methods would violate popular sovereignty.¹¹⁰ They fail to acknowledge that in a country like South Africa, where its diverse society extends to the workplace, minority interests are critical. The winner-takes-all type of workplace democracy

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Rosine Kelz 'Thinking about future/democracy: towards a political theory of futurity' (2018) 14 *Sustainability Science*.

¹⁰⁶ Kelz op cit note 104.

¹⁰⁷ FT Abioye 'Constitution-making, legitimacy, and rule of law: a comparative analysis' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 1 65

¹⁰⁸ Ibid.

¹⁰⁹ Nicholas R. Miller 'Majority Rule and Minority Interests' (1996) 38 *NOMAS: American Society for Political and Legal Philosophy* 78

¹¹⁰ Robin M. Fields 'In Search of Democracy: Reconciling Majority Rule, Minority Rights and Group Rights in South Africa and the United States' (1996) 16 *Boston College Third World Law Journal* 1 78

will not be sustainable for workplace peace. Balancing the majority and minority interests and implementing the model of consensus democracy in the workplace remains difficult.¹¹¹

In as much as the majority will prevail, the prevention of the majority abusing its power must be put in check.¹¹² Suppose the LRA's objective is to democratise the workplace to mirror our political system. In that case, pluralism, which allows diversity on the vigorously competing grounds present in parliament, should be the idea.¹¹³ Workers grant a tremendous licence to the majority union, hoping that they will act democratically and that imperative decisions will be reached democratically. However, such a process is devoid of checks and balances, alienating members from it.¹¹⁴

As Sir Arthur Lewis suggested, democracy's primary rule should be that citizens, in this case, workers, can participate in decision-making, either directly or indirectly.¹¹⁵ Good governance encourages democratic inclusion, representativeness, transparency, participation, and accountability to avoid abuse of power.¹¹⁶ Thus, inclusive and pluralist democracy represents an aggregation of diverse interests.¹¹⁷

Tommasoli also argues that democracy goes beyond the rule of law, protection of human rights, good governance and the effective management of resources. It primarily concerns the use of power and management of conflict.¹¹⁸ Another pitfall of the threshold concerns what is considered a workplace or bargaining unit. It appears that the LRA supports the coexistence of bargaining units and only discusses workplace representation in the event of a dispute.¹¹⁹ An indication of majority is based on the workplace and not on the bargaining unit, which makes it difficult for a minority union representing specialised skills and specific interests to have a say at the bargaining table.

Theron concluded that the agreement appeared to be a hybrid of earlier agreements that provided predetermined bargaining units and organisational rights to protect already

¹¹¹ Ibid.

¹¹² Thum Ping Tjin op cit note 16.

¹¹³ Daryl Glaser 'Assessing the Performance of South Africa's Constitution' (2016) ch 4.

¹¹⁴ Guy Grossman, Dorothy Kronick, Matthew Levendusky, and Marc Meredith 'The majoritarian threat to liberal democracy' (2022) 9 *Journal of Experimental Political Science* 43.

¹¹⁵ Arend Lijphart op cit note 22.

¹¹⁶ S E A Mavee op cit note 21.

¹¹⁷ Theunis Roux *Democracy* (n.d) ch 10.

¹¹⁸ J Govender, PS Reddy and P Pillay 'Dimensions of participation and implementation in South African local government' (2011) 19 *Administratio Publica* 3 189.

¹¹⁹ Godfrey & Le Roux op cit note 1.

recognised trade unions.¹²⁰ The problem is that the definition of the workplace remains contentious. The first question is whether a bargaining unit can be considered a workplace for organisational rights or if the workplace must be defined using its ordinary meaning.¹²¹ The Constitutional Court in the *AMCU*¹²² case held that the statutory meaning of a workplace differs from its common connotation. When endorsing the concept of majoritarianism, the Court highlighted that s 23(1)(d) gives a specific meaning to the workplace.

In *NUMSA*,¹²³ the court concluded that the statutory definition left no scope to argue that a workplace does not envisage a place and that a distinction must be made between the place and those who occupy it. It concluded that a bargaining unit comprises a group of employees as part of a workplace, which is, in turn, based at a workplace. The court's reasoning on the above is based on the concept of majoritarianism, which will be discussed fully below.

The first factor concerns legislative values. Godfrey and Le Roux agree with the court that orderly collective bargaining is a sound value in the workplace. However, they believe that workplace democracy is equally important.¹²⁴ They disagree with the court's view that multiple unions in the workplace will lead to shambolic free-for-all and an inevitable unmanageable union rivalry.¹²⁵

This report agrees that many unions in the workplace are not necessarily a source of conflict. A multiplicity of voices should be a foundation for proper workplace democracy. Failure to do so will amount to a one-union system, like a one-party state, which may not reflect a true democratic model. When considering statutory language, the court held in *NUMSA* that the legislature did not intend for a bargaining unit to have a statutory claim to organisational rights. This is in support of the court's view that workforce representativeness is the preferred factor to be considered.¹²⁶

They then turned to the court's rationale on the principle of majoritarianism to justify its judgment. Godfrey and Le Roux reinstate the notion that majoritarianism implies that the will of the majority prevails over that of the minority.¹²⁷ They refer to *AMCU's* judgment,

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² *AMCU* case supra note 43.

¹²³ Godfrey & Le Roux op cit note 1.

¹²⁴ Godfrey & Le Roux op cit note 1.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

which concluded that majoritarianism is constitutional.¹²⁸ However, it can be argued that constitutionality does not render majoritarianism a democratic principle. Instead, the majority can indeed suppress minorities, thereby rendering democracy in the workplace repugnant.

Le Roux further argues that organisational rights are based on the principles of majoritarianism and cannot be used to deny minority unions the right to organise or deny individuals their freedom of association.¹²⁹ Any attempt to deny said rights amounts to oppressive conduct.¹³⁰ Godfrey and Le Roux argue that the NUMSA case demonstrates that minority trade unions' failure to meet the threshold set in s 18 of the LRA is not an absolute obstacle to acquiring organisational rights since minority unions still have s 21(8)(c) at their disposal to refer any matter for Arbitration.¹³¹

It has been argued that using workforce representativeness may make it difficult for minority unions to achieve organisational rights even though they are well represented in the bargaining unit.¹³² Esitang and Van Eck argue that the threshold agreement resembles a close-shop agreement, creating a monopoly by excluding rival minority unions.¹³³ They can do this by setting unrealistic targets that exclude other unions from the bargaining table.

Brassey sums this up, arguing that the LRA's insistence on workplace majoritarianism enables a union to connive with employers and exclude other unions.¹³⁴ By doing so, as Du Toit states, minority unions stand no chance of getting a foothold in the workplace. As stated previously, while amendments brought a slight relief, the LRA fails to clearly define the interpretation of significant interest and *what* constitutes a substantial number of employees.¹³⁵ While minority unions can still strike over organisational rights, their limited size and lack of access to the workplace may pose a difficulty in that regard since the Employer may not feel the desired impact to concede to their demands.

Esitang and Van Eck correctly argue that the threshold does not determine the labour rights in the Constitution.¹³⁶ If that is the case, then Section 18 agreements cannot be constitutionally valid, as the Court declared in the *NUMSA* case. Clear guidelines on what

¹²⁸ Ibid.

¹²⁹ Le Roux op cit note 80.

¹³⁰ Ibid.

¹³¹ Godfrey & Le Roux op cit note 1.

¹³² Ibid.

¹³³ Esitang & Van Eck op cit note 2.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

constitutes significant interests, or a substantial number of employees do not equate to compliance with the requirements set by the ILO regarding objective and precise criteria that avoid bias against minority unions.

The ILO Convention No. 87 Articles 2 and 11 states that a provision in a closed agreement that refuses the admission of another union on the basis that a union already exists is unacceptable. This is because it denies workers the right to join an organisation of their choice, contrary to the principles of freedom of association, as guaranteed in the Constitution.¹³⁷ Gaining organisational rights bears significant importance for minority unions as it provides an opportunity to earn a seat at the collective bargaining table. It is a means to an end.¹³⁸ Setting the threshold too high is contrary to the principle of workplace democracy and service of labour conflict.¹³⁹

There seems to be no guaranteed formula for ensuring maximum worker representativity, leading disgruntled union members to leave and join other unions.

b) Union security arrangements

‘Agency-shop agreements’ are described as trade union security arrangements used to address the problem that the so-called free riders present to trade unions at a workplace. This agreement requires employees who are not members of the majority union to pay an agency fee to a trade union.

Section 26¹⁴⁰ of the LRA states the following:

(1) ‘A representative trade union and an employer or employer’s organisation may conclude a collective agreement known as a closed-shop agreement, requiring all employees covered by the contract to be members of the trade union.’

Section 26 of the LRA appears to be the most vulnerable to constitutional attack because it violates an employee’s right to join a trade union. Section 23(2)(a) of the Constitution guarantees a person’s fundamental right to freedom of association.¹⁴¹ Our courts have yet to decide on this provision's constitutionality to determine whether these constitutional rights' limitations can be justifiable.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ 66 of 1995

¹⁴¹ B Conradie *et al.* op cit 44.

The case of *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2006] BCLR 355 (CC) makes an interesting pronouncement on this issue of closed-shop agreements. The Court held that several constitutional provisions acknowledge the value of diversity and pluralism in our society, which gives a particular texture to the broad-phrased right to freedom of association. Section 26 of the LRA is contrary to such values and merely serves to enhance the principle of majoritarianism at the expense of minorities. This defeats the LRA's purpose and objective of democratising the workplace.

The concept of a closed-shop agreement is based on despotic majoritarianism, wherein powerholders draw on majoritarian victories to claim legitimacy while constraining the expression and participation of others by curtailing their union space.¹⁴² The enclosing of democratic space and great efforts to delegitimise any opposition found their way through majoritarian rhetoric in the form of close-shop agreements.¹⁴³

While there is no right to bargaining, the ability to engage in collective negotiations implies that workers are entitled to participate effectively in determining the terms and conditions of their employment. Du Toit supports this, arguing that collective bargaining assists workers in maintaining certain standards regarding the distribution of work rewards, which ensures industrial peace.¹⁴⁴

Excluding minority unions using closed-shop and agency-shop agreements is tantamount to contravention of their rights to engage in such collective bargaining. The trade union's responsibility is not limited to workplace sectional interests but extends to broader collaboration, which assists in creating wealth.¹⁴⁵ Unions contribute to a society's overall sustainable development, directly impacting participation in a democratic process.¹⁴⁶

Therefore, excluding unions from the workplace extends to societal exclusion. Due to close-shop agreements, excluded unions are denied participation in ensuring social justice.¹⁴⁷ This supports that freedom of association in the workplace, or lack thereof, affects participation

¹⁴² Benjamin Abrams 'The rise of despotic majoritarianism' (2022) 9 *Democratic Theory* 1 74.

¹⁴³ Ibid.

¹⁴⁴ Du Toit 'What is the Future of Collective Bargaining (and Labour Law) in South Africa' 2007 28 *ILJ* 1405.

¹⁴⁵ Monray Marsellus Botha 'Responsible Unionism during collective bargaining and industrial action: Are we ready yet?' *De Jure* (2015) 48 2.

¹⁴⁶ Floyd 'Fair work laws: Good faith bargaining, union right to entry and the legal notion of responsible unionism' 2009 *ABLR* 265.

¹⁴⁷ Van Niekerk *et al* op cit note 31.

in civil and political society.¹⁴⁸ This exclusion results in violence, particularly in the mining industry, ultimately affecting functional collective bargaining.¹⁴⁹

According to Oliver, the right to freedom of association includes the right to join a union of your own and the right to demand that such union function independently.¹⁵⁰ Therefore, the union security arrangements, which demand agency fees paid by minority union members to a majority union, compromise such independence. This defies the rights of people with common interests to advance such shared interests.¹⁵¹ Trade unions exist to engage in collective bargaining.¹⁵² Thus, if a trade union is refused the right to exist in the workplace due to a security agreement, the right to freedom of association is undermined and the collective bargaining process is severely hindered. Essentially, the purpose of a trade union is rendered pointless if said union cannot be allowed to operate in the workplace to effectively represent its members.

Forcing workers to join a particular union does not promote the spirit of the Constitution. As Albertyn correctly pointed out, one should not be compelled to associate with those whom one does not want to meet.¹⁵³ This stance is supported by Justice Budd, who argues that if liberty is purported by freedom of association, workers are free to form and join unions as they wish.¹⁵⁴ The authors disagree with McCarthy¹⁵⁵ the limitation to freedom of association is the price to be paid for the practical existence of unions in the workplace..

Budeli states that close-shop agreements achieve three things for majority unions. They give unions more power, enabling them to control the pool of applicants for workplace posts.¹⁵⁶ With agency-shop agreements, the minority union members experience double subscription prejudice. Lastly, it is nothing but an infringement of the workers' right to freedom of association.¹⁵⁷ This is so true; again, these are the negative consequences of majoritarianism. In addition, this diminishes the impact of a minority union if its members are required to pay

¹⁴⁸ M Budeli 'Understanding the right to freedom of association at the workplace: components and scope' 2010 *OBITER* 17.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

agency fees. It leads workers to think there is no purpose in belonging to a union, with little to no say, or worse, they are entirely excluded in the workplace.¹⁵⁸

In *New Kleinfontein Goldmine (Pty) Ltd v Association of Mineworkers & Construction Union & Others* (2024) 45 ILJ 159 (LC), AMCU entered into organisational rights discussions with the Employer. Later, during these discussions, it was revealed that the Employer concluded a closed-shop agreement with NUM, precluding it from granting such rights to AMCU. In response, AMCU issued a notice to strike, which the Employer sought to interdict.¹⁵⁹

The Employer argued that the strike was unprotected on two grounds. First, the Employer and NUM concluded a wage agreement with a peace clause prohibiting the strike.¹⁶⁰ Prinsloo J held that until closed-shop agreements terminate, or employees resign from NUM, NUM was entitled to negotiate on behalf of all members. Therefore, both the wage agreement and the peace clause were binding.¹⁶¹ Consequently, the strike was declared to be unprotected.

One should note that the above occurred despite the fact that *AMCU* attained a significant increase in membership. This case confirms the validity of a closed-shop agreement, even in circumstances where other unions have garnered substantial membership. The validity of the agency-shop agreement was recently visited once again in *Association of Mineworkers and Construction Union v UASA (Formerly named the United Association of South Africa) and Others* [2023] 11 BLLR 1134 (LAC). The LAC was called upon to decide whether members of the minority union, a recognised bargaining agent within a bargaining council, should be liable for the payment of agency fees and whether an agreement to this effect is valid.

To reach its decision, the LAC had to answer the question, ‘Where a majority union is present in a bargaining council, how effective is the service provided by the minority union?’¹⁶² The LAC held that agency-shop agreements complied with s 25 of the LRA and dismissed AMCU’s application accordingly.¹⁶³ The LAC held that s 25 is rooted in the principle of fairness and that *AMCU* had not sought to benefit without carrying a concomitant burden that

¹⁵⁸ J Kruger and CI Tshoose, ‘The impact of the Labour Relations Act on minority trade unions: A South African perspective’, 2013 *PER* 16 295/487.

¹⁵⁹ *New Kleinfontein Goldmine (Pty) Ltd v Association of Mineworkers & Construction Union & Others* (2024) 45 ILJ 159 (LC).

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Association of Mineworkers and Construction Union v UASA (Formerly named the United Association of South Africa) and Others* [2023] 11 BLLR 1134 (LAC).

¹⁶³ *Ibid.*

comes with a union's duty to bargain on behalf of members. The court emphasised that agency-shop agreements aim to remedy the issues caused by free riders. One submits that this principle is missing the fact that workers belonging to minority unions and their unions are prevented from advancing their efforts to represent their members due to majoritarianism mechanisms that extend to union security agreements.¹⁶⁴

The only consoling takeaway from this judgment is that should a minority union become a bargaining agent; its members should not pay an agency fee unless there are express terms to the contrary.¹⁶⁵ An article by The Daily Maverick, dated 15 November 2023, titled '*NUM Terminates closed-shop agreement at East Rand Gold One as violence continues*', details what transpired in October 2023 between AMCU, NUM and the Employer, Gold One. AMCU allegedly held approximately 500 employees underground, demanding that Gold One cancel the close-shop agreement concluded with NUM. It further demanded that Gold One recognise AMCU.¹⁶⁶ This recent experience is a clear indication that dangerous union security arrangements, such as close-shop agreements, can fuel violence and destruction in the workplace.

This begs the question of whether the LRA's exclusionary approach, based on its principle of majoritarianism, is a source of violence in the workplace. Several workplaces still have exclusive union arrangements. It is argued that a peaceful workplace can only be achieved through a genuinely inclusive participative democracy that supports multiple unionism.

c) Unsecured long-term wage agreements

After the three-year agreement signed by the Employer and NUM in 2012, NUM had internal disputes that led to the formation of AMCU.¹⁶⁷ Around that time, a group of Rock Drill Operators started to demand a special additional payment of R700.00 ex-gratia.¹⁶⁸ While NUM also started losing membership, and by the beginning of the two years of the three-year agreement, AMCU became a majority union.¹⁶⁹ When the group went on strike, they joined

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ed Stoddard 'NUM terminates closed-shop agreement at East Rand Gold One as violence continues' *Daily Maverick* 15 November 2023 at <https://www.dailymaverick.co.za/article/2023-11-15-num-terminates-closed-shop-agreement-amid-violence/>, accessed on 05th January 2024.

¹⁶⁷ Ibid.

¹⁶⁸ The Ratcher 'How much do rock drillers at Lonmin really earn?' *Politicsweb* 20 August 2012, available at <https://www.politicsweb.co.za/news-and-analysis/how-much-do-rock-drillers-at-lonmin-really-earn>, accessed on 19 April 2024.

¹⁶⁹ Ibid.

AMCU as the new majority union.¹⁷⁰ AMCU, as a majority, was still bound by the three-year agreement signed by the Employer and NUM. The Employer approached the court for an interdict against the strike.

The interdict was granted but did not end the strike. Instead, what followed was an intensification of violence, resulting in what is now known as the *Marikana* massacre.¹⁷¹ It is clear from this that both the Employer and NUM, now in the minority, failed to protect their three-year wage agreement.¹⁷² The collective bargaining regime was destroyed, and its credibility was questioned.

Judicial intervention failed to protect the collective agreement; instead, the voiceless took over, and anarchy prevailed. Majoritarianism became a source of workplace instability as dissent occurred within the majority union itself. The Rock Drill Operators who felt alienated within NUM had no alternative but to forge their path of struggle. The three-year wage agreement was unable to be secured.¹⁷³ This was observed during the framework agreement that was concluded by the representatives of government, organised labour, and business in the mining sector in October 2013 in the aftermath of the Marikana Massacre that was recognised.¹⁷⁴ This happened despite the fact that majoritarianism served South Africa in industrial relations effectively in the past; it appeared to be because of unintended consequences infringing upon the rights of minority unions.¹⁷⁵

d) Extending agreement by majority union to retrench

If there is any doubt regarding the negative consequences of workplace majoritarianism for minority unions and their members, the extension of retrenchment agreements to non-parties serves as clear evidence of this issue. This is supported by the case law outlined below.

In *AUSA and Others v SAA Soc Ltd and Others (J1506/15) [2015] ZALCJHB 258*, an application to interdict large-scale retrenchment was made. The Employer concluded a collective agreement with a majority union to retrench employees and extend the deal itself, in

¹⁷⁰ Lonmin Plc Regulatory release 'Joint Statement from Platinum Chief Executives', 21 January 2014.

¹⁷¹ David Bruce, 'Summary and analysis of the report of the Marikana Commission of Inquiry, (2015) *Open Society Foundation for South Africa*.

¹⁷² The Ratcher op cite note 168.

¹⁷³ Staff Reporter 'Lessons in wages from Marikana' *Mail & Guardian* 09 July 2015, available at <https://mg.co.za/article/2015-07-09-lessons-in-wages-from-marikana/>, accessed on 19 April 2024.

¹⁷⁴ Ibid.

¹⁷⁵ T Cohen, 'Limiting Organisational Rights of Minority Unions: POPCRU v Ledwaba 2013 11 BLLR 1137 (LC), *Potchefstroom Electronic Law Journal (PELJ)* (2013) 60.

terms of s 23(1)(d) of the LRA, to bind non-union employees.¹⁷⁶ The collective agreement also sought to settle potential disputes that were covered by the agreement.¹⁷⁷

The application was dismissed. The court held that s 23(1)(d) of the LRA makes provision for the extension of all collective agreements, not limited to those that do not involve deprivation of rights.¹⁷⁸ The court found that s 23(1)(d) is amongst numerous sections of the LRA which encapsulate majoritarianism.¹⁷⁹

In 2016, the *National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways Soc Limited and Another* (JA15/16) [2017] ZALAC 32 followed the above case. The principle of majoritarianism was applied once more when a retrenchment agreement, which resulted in job protection for the majority of union members, was extended to non-union members.¹⁸⁰

The LAC held that a retrenchment agreement between an Employer and a trade union settling a retrenchment dispute is a collective agreement capable of extension in terms of s 23(1)(d) of the LRA.¹⁸¹ It is undoubtedly clear that the principle of majoritarianism is expressed in s 23(1)(d), s 189(1), and 189(A).

The court confirmed the judgment in *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others* (CCT181/18) [2020] ZACC 1, concluding that the limitation of a minority union's rights is sufficiently justified. The fact that a majority union can decide the fate of non-members on issues such as job security is an unfortunate consequence of promoting the principle of majoritarianism.

As Brassey¹⁸² states:

'Democratisation is the process by which those to whom decisions relate are given a greater say in the process or decision-making, the right to vote which enjoys protection under Section 19(3)(a) of the Constitution is but one. Manifestation of the democratic process, others include the right to be consulted or heard before a decision is taken.'

¹⁷⁶ AUSA and Others v SAA Soc Ltd and Others (J1506/15) [2015] ZALCJHB 258.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ National Union of Metalworkers of South Africa (NUMSA) obo Members v South African Airways Soc Limited and Another (JA15/16) [2017] ZALAC 32.

¹⁸¹ Ibid.

¹⁸² MSM Brassey 'Employment and Labour Law: Commentary on the Labour Relations Act' *Employment and Labour Law* (1998) 3

The above five pitfalls reflect challenges with the principle of majoritarianism.

Cohen¹⁸³ alludes to a loss of confidence in existing bargaining structures and disappointed expectations, which have led to the alienation of unskilled and semi-skilled vulnerable employees from majority unions. Minority unions have taken up the cudgels of frustrated and disempowered employees who are tired of the ‘co-dependent comfort zone that majoritarianism has engendered.’

To this, Brassey¹⁸⁴ adds:

‘Majoritarianism, the leitmotif of both industry bargaining and plant-level organisational rights, is too crude to give proper expression to the interests of minority unions, which frequently represent skilled or semi-skilled workers but, as the Marikana experience demonstrates, may simply be acting on behalf of workers who feel alienated from the majority union.’

Stefan Van Eck¹⁸⁵ argues that measures promoting majoritarianism increase rather than defuse tensions within unions, encouraging conduct that goes beyond statutory regulations and the rule of law. This demonstrates that majoritarianism brings instability rather than labour peace in the workplace.

Theron and others argue that while stability is important, which is the justification for majoritarianism, it should not trump the ability of workers to exercise their democratic rights to join and be represented by the trade union of their choice. Furthermore, the goal of the LRA regarding organisational rights should be to balance the need for stability with the need to accommodate change. They conclude that workers should be entitled to do so when they feel that their interests are best served by belonging to a smaller rather than a larger union.¹⁸⁶

In another article with Temogo and Van Eck,¹⁸⁷ concludes that they are not convinced that amendments to s 18 do enough to establish a multi-party democracy in the workplace, which the Constitution requires. Furthermore, they argue that the limitations imposed by the

¹⁸³ Cohen op cite note 175.

¹⁸⁴ M Brassey ‘Labour law after Marikana: Is institutionalised collective bargaining in SA wilting: If so, should we be glad or sad’ *ILJ* (2013) 23-35.

¹⁸⁵ S Van Eck, In the Name of ‘Workplace and Majoritarianism’: Thou Shalt Not Strike Association of Mineworkers & Construction Union & Others v Chambers of Mines & Others (2017) 38 *ILJ* 831 (CC) and National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd, Another (2003) 24 *ILJ* 305 (CC), *ILJ* (2017).

¹⁸⁶ J Theron S Godfrey and E Fergus ‘Organisational and collective bargaining rights through the lens of Marikana’ (2015) 36 *ILJ* 2.

¹⁸⁷ TG Esitang and S van Eck ‘Minority trade union, and the amendments to the LRA: Reflections on thresholds, democracy and ILO Conventions’ (2016) 35 *ILJ*.

LRA on minority unions seem disproportional in that they limit the constitutional rights to associate and organise.¹⁸⁸

These authors¹⁸⁹ argue that an amendment may address some of the problems outlined in s 21¹⁹⁰ to give the Commissioner greater flexibility in determining the scope of the workplace and to develop a code of good practice to assist them when faced with disputes regarding organisational rights. Maybe this can be one solution to the challenges currently caused by the principle of majoritarianism.

In the AMCU case, representing the majority judgment, Foreman J dismissed the matter and held that s 189(1) of the Constitution, which enshrines the right to fair labour practices, did not give individuals a right to be consulted in the retrenchment process.¹⁹¹ Therefore, individual consultation is not required.¹⁹² Further, the non-inclusion of an individual right in s 189 was rational.¹⁹³ As such, the process set out in s 189 of the LRA was procedurally fair and in accordance with international practice and standards.¹⁹⁴ The court further held that even if s 189 could be interpreted as a limitation of a constitutional right, such limitation would be justifiable.

Representing the minority judgment, Ledwaba AJ held that there was authority for fairness requiring consultation with all employees who are affected by retrenchments,¹⁹⁵ and that s 189(1) of the LRA limited the right to fair labour practices of employees excluded from consultation.¹⁹⁶ The Judge's view is that such a limit was unreasonable and unjustifiable¹⁹⁷ and that an obligation existed for inclusive consultation which would not affect an Employer's right to dismiss nor prevent the conclusion of collective agreement on retrenchments.¹⁹⁸ However, non-consultation would negate the LRA's aim to create the democratisation of the workplace and labour peace.¹⁹⁹

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ 66 of 1995.

¹⁹¹ Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others (CCT181/18) [2020] ZACC 1.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

Supporting the minority judgment, Jafta J argued that in the absence of a consultation with AMCU, the right to fair labour practices, freedom of association, the right to form and join a trade union, and equality were violated.²⁰⁰

Thereon, J, in support of the majority judgment, held that it would be appropriate to test s 189(1) of the LRA against a standard of rationality rather than reasonableness. Both majority and minority judgments concluded that the constitutional challenge to s 23(1)(d) of the LRA had to be dismissed for different reasons.

IV. WORKPLACE POLITICAL INTERFERENCE

South African collective bargaining is characterised by political parties' attempts to be embroiled in workplace issues. The main culprits in this instance have been the Economic Freedom Front (herewith referred to as 'EFF'), particularly around 2017/218.

The LC took a strong stance against EFF in two reported judgments in this regard, as discussed below.

In the case of *Calgan Lounge (Pty) Ltd v National Union of Furniture and Allied Workers Union of South Africa (NUFAWSA) and Others* (J2648/18) [2018] ZALCJHB 334; (2019) 40 ILJ 342 (LC); [2019] 4 BLLR 393 (LC) (9 October 2018) a memorandum with demands on EFF letterhead was submitted to the Employer, after EFF representatives met with employees during business hours in June 2018 to discuss workplace issues.²⁰¹ The Employer responded that the EFF lacked the legal status to engage. The EFF was not pleased with the response and instigated a go-slow and refused to follow instructions, which ended in a strike.²⁰² The employer applied for an urgent interdict. In response to the Employer's request for an interdict, which stated that the strike was unprotected, the EFF told the LC that the strike would go on regardless of the court ruling. The interdict was issued with costs.²⁰³

The LC ruled that political parties have no place in an employment relationship and that political influences should not be allowed in the workplace.²⁰⁴

²⁰⁰ Ibid.

²⁰¹ *Calgan Lounge (Pty) Ltd v National Union of Furniture and Allied Workers Union of South Africa (NUFAWSA) and Others* (J2648/18) [2018] ZALCJHB 334; (2019) 40 ILJ 342 (LC); [2019] 4 BLLR 393 (LC) (9 October 2018).

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

Furthermore, the subject of workplace interference by a political party was examined in *Brightstone Trading 3 Closed Corporation t/a Gordon Road Spar v Economic Freedom Fighters and Others* (J 605/21) [2021] ZALCJHB 122; (2021) 42 ILJ 1953 (LC); [2021] 9 BLLR 913 (LC) (18 June 2021) where the dispute was about the demotion of an employee on the 15 April 2024 and the employee was an aggrieved EFF employee who sought assistance from the party. On 12 May 2021, the Employer received a letter from the EFF containing various demands relating to working conditions and seeking an audience.²⁰⁵

On the 16 May 2021, Mr Sono, the branch secretary of EFF, met management with other employees, while other employees forced the store to be closed.²⁰⁶ The Employer did so to avoid further volatile situations. On 28 May 2021, EFF and employees protested again at the store and under pressure, the Employer agreed to meet with EFF.²⁰⁷ However, after obtaining legal advice, the Employer cancelled the meeting; the Employer advised EFF, that should they continue with the protest at the store, they would seek an urgent interdict. On 1 June 2021, another protest occurred at the store, and the Employer approached the Labour Court for an interdict.²⁰⁸

The Employer sought an interdict that EFF should stop interfering with its business. The EFF denied involvement, arguing that it did not give any mandate to Mr Sono and his employees nor the authority to speak and act in its name, nor did it give them a mandate to protest.²⁰⁹ The Court was not impressed with such an argument.²¹⁰

No substance to the argument that the EFF could not be held liable for the conduct of its members who ostensibly acted on their behalf, therefore an interdict was granted with costs.²¹¹

In the case of *CCI South Africa (Pty) Ltd v African National Congress Youth League and Others* (DA31/22) [2024] ZALAC 7; [2024] 5 BLLR 435 (LAC); (2024) 45 ILJ 969 (LAC), the facts were that, on the 15 February 2022, CCI obtained an interim interdict from LC against ANCYL, shortly thereafter, on 23rd February 2022, CCI notified of the second proposed march to its premises, scheduled to start at the public area and end at CCI's premises, permission to march was secured under the Regulation of Gatherings Act 205 of 1993 (RGA).

²⁰⁵ *Brightstone Trading 3 Closed Corporation t/a Gordon Road Spar v Economic Freedom Fighters and Others* (J 605/21) [2021] ZALCJHB 122; (2021) 42 ILJ 1953 (LC); [2021] 9 BLLR 913 (LC) (18 June 2021).

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

Newspaper articles, posters, and fliers were used to publicise the march, which called for the closure of CCI and listed a number of employment-related issues²¹². CCI requested an interdict against the ANCYL, claiming it breached the Labour Relations Act 66 since it was not a registered union.²¹³

ANCYL objected to LC's jurisdiction, arguing that the march was not a strike, protest action, or conduct in furtherance of either as employees continued to work. However, the LC found that it lacked jurisdiction.²¹⁴ On appeal, LAC upheld LC's decision, the reasons being the absence of an employment relationship between CCI and the ANCYL, the authorisation of the march under RGA, the lack of CCI employees seeking assistance from the ANCYL (which is different from other cases referred to above), the absence of involvement from a trade union, the court acknowledged that the almost exclusive focus on labour issues did not inherently categorise the march as a matter governed by employment laws.²¹⁵

The court affirmed that under s 17 of the Constitution, individuals can protest against labour rights violations as long as it is conducted lawfully under the RGA.²¹⁶ However, if such protests involve employees and their unions, they must adhere to the provisions of employment law.²¹⁷

The politicisation of the workplace is not something uncommon; however, political parties' encroachment in the workplace is a new phenomenon that will be around for a long time.²¹⁸ Most political parties see the workplace as a new terrain for their membership mobilisation, as the ANC did all the years with COSATU.²¹⁹ The National Teachers Union (NTU) is perceived to be affiliated with IFP.²²⁰ With the loss of hegemony of COSATU after its split, the proliferation of unions in the workplace will result²²¹. This is evident by the current

²¹² CCI South Africa (Pty) Ltd v African National Congress Youth League and Others (DA31/22) [2024] ZALAC 7; [2024] 5 BLLR 435 (LAC); (2024) 45 ILJ 969 (LAC).

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Imraan Mahomed 'Political parties' involvement in workplace affairs' (2024) *Employment Law Alert* 8 April 2024, available at <https://www.cliffedekkerhofmeyr.com/news/publications/2024/Practice/Employment/employment-law-alert-8-april-Political-parties-involvement-in-workplace-affairs>, assessed on 18 November 2024.

²¹⁹ Ibid.

²²⁰ National Teachers Union v Department of Education and Culture KwaZulu-Natal and Others (LD110/06) [2006] ZALC 8; [2006] 10 BLLR 941 (LC) (31 March 2006).

²²¹ Bridget Kenny, 'The South African labour movement, a fragmented and shifting terrain' *Sicelo Brazil* 11 May 2020, assessed at from <https://www.scielo.br/j/ts/a/z9bfxnkcmmrvztWSFmCK8hwJ/#>, accessed on 31 July 2024.

union forming their political parties. This practice put into question the concept of majoritarianism.

On the other side, political parties form their trade unions. For example, the EFF established its Labour Desk and union,²²² the Workers Socialist Union of South Africa (WSUSA). The MK party founded its teacher organisation, the Teachers and Education Workers Union of South Africa (TEWUSA).²²³ This will lead to total disruption of the Collective bargaining structure in the workplace. Hence the necessity for a relook at the concept of majoritarianism.

V. LESSONS FROM OTHER JURISDICTIONS

The experiences of other countries may provide valuable insights for the South African collective bargaining framework.

(a) *United States of America*

In their work, Harcourt and Lam²²⁴ discuss the concept of Compulsory Proportional Representation (CPR). They view CPR as a mechanism aimed at integrating diverse representation within the workforce. Their assertion highlights that CPR prioritizes worker representation over union representation, ensuring that all workers—regardless of whether they belong to majority or minority unions—are granted a voice in direct proportion to their numbers.²²⁵

Harcourt and Lam²²⁶ deal with the approach of compulsory proportional representation (CPR), which they regard as an attempt to integrate various others. The authors contend that this approach has the potential to mitigate the challenges of the winner-takes-all dynamic that characterises majoritarian systems.²²⁷ By allocating representative seats on a bargaining forum based on the proportion of worker votes, CPR strives to create a more equitable and inclusive

²²² Kgothatso Madisa 'EFF working on establishing a labour union: Malema' (2022), *Sowetan Live* 01 May 2022, accessed at <https://www.sowetanlive.co.za/news/south-africa/2022-05-01-eff-working-on-establishing-a-labour-union-malema/>, accessed on 10 August 2024.

²²³ Soyiso Maliti, 'Labour department registrar rejects application from teacher union affiliating itself to MK Party' *News24* 05 July 2024, accessed at (2024) retrieved from <https://www.news24.com/news24/politics/labour-department-registrar-rejects-application-from-teacher-union-affiliating-itself-to-mk-party-20240705>, accessed on 10 August 2024.

²²⁴ M Harcourt and H Lam 'How much would US union membership increase under a policy of non-exclusive representation?' (2008) 1 *Employee Relations* 32.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

environment for all workers involved.²²⁸ The National Labour Relations Act of 1935 governs the collective bargaining structure.²²⁹ It allows for a union with thirty per cent worker interests to seek recognition rights.

The union, with fifty percent employee support, will be entitled to full bargaining rights, including a seat on the bargaining table.²³⁰

The provision for worker-proportional representation assists in ensuring that there is no majority union abuse based on the concept of majoritarianism. Instead, US labour policies encourage both employee voice on the one hand and self-organisation, i.e. union on the other hand.²³¹

Another important distinction between South Africa and the United States is that the US imposed a statutory right to bargain and additional unfair labour practice rules about bargaining practices on both the employer and union. Furthermore, the US limits the scope of strict lockout activities. There is a very formal approach that qualifies direct and indirect forms of control over employment conditions.²³²

There has been a public policy debate between the concept of majoritarianism and minorities in the USA. People like Mark Harcourt and Helen Lam have actually argued that the low private sector union density that has been experienced in the USA was a clear indication that the majority rule system is failing to address the workers' needs for representation effectively, hence they support the union automatic right to bargain for their members but not solely meaning that should workers who may be in some instances minority would have the right to also represent their members in the bargaining process.²³³

The system facilitates dual representation for employees through works councils and trade unions.²³⁴ Thus, employees receive direct representation while also having the

²²⁸ Ibid.

²²⁹ 29 U.S.C.

²³⁰ Orly Lobel and Anne Marie Lofaso 'System of Employee Representation at the Enterprise: The US Report' (2012) *JILPT Comparative Labour Law Seminar Number 12* System of Employee Representation at the Enterprise, The Japan Institute for Labour Policy and Training.

²³¹ Ibid.

²³² Ibid.

²³³ Harcourt & Lam op cit note 224.

²³⁴ Bernd Wass 'Employee Representation at the Enterprise in Germany' (2012) *JILPT Comparative Labour Law Seminar Number 12* System of Employee Representation at the Enterprise, The Japan Institute for Labour Policy and Training.

opportunity to engage with multiple trade unions.²³⁵ This structure ensures that employee interests are effectively represented and advocated within the workplace environment.²³⁶

(b) Japan

The Labour Union Act governs collective bargaining.²³⁷ A plural representation system is adopted, which allows each union the right to bargain collectively concerning matters affecting its members irrespective of its size or number of members.²³⁸ In addition, a Labour Management Committee System exists through which all the establishment's employees are represented. This implies that unions do not have exclusive rights to represent employees during the bargaining process.²³⁹

(c) Germany

The German collective bargaining system is governed by the Workers Protection Act of 1891 and the Works Constitution Act of 1972.

The system provides for dual worker representation by councils and trade unions.²⁴⁰ In it, employees are represented directly and by several trade unions.²⁴¹ The trade unions are not in a position to control the works council, and the works council cannot go on strikes as such actions would be unlawful. What this means is that only the trade unions can strike out of the bargaining process; however, the work council members can participate in a strike called by the trade union.²⁴²

(d) Sweden

Every trade union with a member in the workplace enjoys the right to negotiate with the Employer on issues concerning business management and changes in working or employment conditions based on the concept of core determination entered into by any union and the Employer.²⁴³

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ 174 of 1949.

²³⁸ Hirashi Takeuchi-Okuno 'The System of Employee Representation at the Enterprise in Japan' (2012) *JILPT Comparative Labour Law Seminar Number 12* System of Employee Representation at the Enterprise, The Japan Institute for Labour Policy and Training.

²³⁹ Ibid.

²⁴⁰ Wass op cite note 236.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Jenny Julen Votinius 'Employment Representation at the Enterprise – Sweden' (2012) *JILPT Comparative Labour Law Seminar Number 12* System of Employee Representation at the Enterprise, The Japan Institute for Labour Policy and Training.

(e) *France*

The French system of employee representation can be described as a dual channel of workers' compensation. Historical reasons can explain this dual channel. The French system was built gradually, and the present system results from an accumulation of representative bodies that appeared at various stages in the history of the French industrial relations system.²⁴⁴

The important lesson from France is the several criteria that have been laid down for a particular union to be afforded representation. For instance, the employer looks at aspects of respect for Republican values, independence, financial transparency, a minimum of two years of seniority, and influence that is mainly characterised by activity and experience and the votes at both local, national, and industry levels.

VI. CONCLUSION

This study has demonstrated that the principle of majoritarianism does not align with the South African paradigm of diversity. It creates workplace instability and undermines the credibility of collective bargaining. A functional democracy necessitates the participation of all stakeholders in the decision-making process. Proportional representation can ensure inclusivity, and the examples set by other countries allow South Africa to learn and develop a truly inclusive, democratic, and stable workplace. As discussed in this report, majoritarianism fails to promote the three foundational pillars of democracy: participation, consent, and voluntarism.²⁴⁵

The democratisation that focuses solely on size while neglecting specific interests is unsustainable.²⁴⁶

The report indicates that the suitability of the majoritarian system in South Africa is questionable, especially given the declining confidence in majority unions among unskilled and semi-skilled workers.²⁴⁷

Collective bargaining is an essential tool for advancing members' interests. Therefore, any organisational rights that exclude participation in this process are meaningless.²⁴⁸

²⁴⁴ Sylvaine Laulom 'System of Employee Representation in Enterprises in France' (2012) *JILPT Comparative Labour Law Seminar Number 12* System of Employee Representation at the Enterprise, The Japan Institute for Labour Policy and Training.

²⁴⁵ Arend Lijphart op cit note 22.

²⁴⁶ Ian Macun op cit note 12.

²⁴⁷ D Abrahams *et al* op cit note 48.

²⁴⁸ MS Vettori op cit note 51.

The report has also shown that the threshold agreement between the employer and the majority unions resembles a closed-shop agreement, creating a monopoly by excluding rival minority unions.²⁴⁹

Closed-shop agreements inherently exclude unions from the workplace, leading to societal exclusion in which these unions are denied participation in promoting social justice.²⁵⁰

Majoritarianism has failed to secure agreements with the unions, as evidenced by the events at Marikana, where a three-year wage agreement could not be reached despite judicial interventions.²⁵¹

The encroachment of political parties in the workplace is a new phenomenon that is likely to persist, further complicating the implementation of majoritarianism in this context.²⁵²

This report proposes considering an approach of compulsory proportional representation, similar to the system observed in the USA.²⁵³ Additionally, we advocate for a plural representation system that allows each union to negotiate collectively regarding matters that affect its members, regardless of its size or membership numbers

Although an attempt was made in 2014, under the Labour Relations Amendment Act 6 of 2014, to grant limited rights to minority unions, it ultimately failed to provide them with a seat at the negotiating table despite representing unique key interests in many cases.²⁵⁴

The proposals outlined above may require further amendments to enhance their effectiveness.

²⁴⁹ Esitang & Van Eck op cit note 2.

²⁵⁰ Van Niekerk *et al* op cit note 31.

²⁵¹ Staff Reporter op cite 173.

²⁵² Mahomed 'op cit note 218.

²⁵³ Harcourt & Lam op cit note 224.

²⁵⁴ Temogo Geoffrey Esitang *The impact of threshold agreements on the organisational rights of minority trade unions* (Doctoral dissertation, University of Pretoria 2017).

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