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**Circumventing another Marikana Massacre: A look into the provisions of the Labour
Relations Amendment Act relating to the limitation on the right to strike**

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DECLARATION

I, Ntokozo Steven Nkonzo Mnyandu, hereby declare that **‘CIRCUMVENTING ANOTHER MARIKANA MASSACRE: A LOOK INTO THE PROVISIONS OF THE LABOUR RELATIONS AMENDMENT ACT RELATING TO STRIKE LAW’** is work (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

SIGNATURE

DATE

ACKNOWLEDGEMENT

Firstly, I would like to give glory to my Lord and saviour **Jesus Christ** for his continued effort in revealing the mysteries of God. Truly he lifted me out of the pit of fear, despair, and fatigue and gave me, secure footing, courage and the strength needed to research and write when it seemed unbearable. Through God the completion of this dissertation was made possible.

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DEDICATION

I dedicate this dissertation to my son, **Thandolwethu Mnyandu**. This work is my commitment to you, to working tirelessly in ensuring that your future is bright. I pray that one day on your way to fulfilling your ambitions that you take inspiration from this work.

ABSTRACT

This dissertation looks at the labour unrest that has fast become an increasing reality with perpetual scales of violence that is directed at property and person during strikes being witnessed with uncomfortable regularity. The violence of the Lomin strike that took place in 2012 on the Hills of Marikana is not unique. Through section 65 of the Labour Relations Amendment Act 6 of 2014 the legislative arm of government has taken steps to address these concerns. This sections aims to limit the scope of when one may resort to a strike with the aim of resolving a labour dispute. The purpose behind the amendments to the “Act is to respond to unacceptable levels of unprotected industrial action and unlawful acts in support of industrial action, including violence and intimidation.”

While it is easy at the outset to nod aggressively in the affirmative and hold that this is a perfect way to make certain that labour unrest and violence is a distant memory, anyone who is abreast with the history of South African labour disputes will understand that limiting the right to strike rarely off sets violence and protracted strikes. This discussion goes further by investigating whether there are other possible solutions to the conundrum that is labour unrest, other than those detailed in the Amendment Act. There dissertation also investigates underlying social orders in the form of divisions among trade unions and structural inequalities which are said to be key factors behind violent strikes.

Of significance to the discussion is a look at whether there is any merit in moving away from pluralistic and adversarial relations into strong social democratic corporatism that is built on trust and compromise. At the last, the effectiveness of institutionalising industrial conflict is also investigated.

LIST OF ACCRONYMS

AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
CCMA	Commission for Conciliation, Mediation and Arbitration
COSATU	Congress of the South African Trade Union
DA	Democratic Alliance
NEDLAC	National Economic Development and Labour Council
NUM	National Union of Metal Workers
RDOs	Rock Drill Operators
SACTU	South African Congress of Trade Unions
SAPS	South African Police Service

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CHAPTER ONE

GENERAL BACKGROUND

1.1 INTRODUCTION: BACKGROUND TO THE STUDY

Labour unrest has fast become a regular feature in the South Africa news.¹ The violence of the Lomin strike that took place in 2012 on the Hills of Marikana is not unique.² A perpetual increase in cases involving violence that is directed at property and person during strikes is now a norm in South Africa.³ Dispute resolution specialist John Brand contends that South Africa has the highest rates of industrial actions which are among the most violent in the world.⁴ Through section 65 of the Labour Relations Amendment Act 6 of 2014⁵ the legislative arm of government has taken steps to address these concerns. This sections aims to limit the scope of when one may resort to a strike or lock-out with the aim of resolving a labour dispute.⁶ Here the legislature has further restricted the rights to strike by adding that such a right does not exist when the dispute can be resolved through arbitration, or the Labour Court or in terms of any other employment law.⁷

It remains to be seen as to whether these amendments will have the desired effect. The purpose ‘is to respond to the unacceptable levels of unprotected industrial action and unlawful acts in support of industrial action, including violence and intimidation’.⁸ Whiles it is easy at the outset to nod aggressively in the affirmative and hold that this is a perfect way to make certain that labour unrest and violence is a distant memory, anyone who is abreast with the history of South African labour disputes will understand that limiting the right to strike rarely off sets violent and protracted strikes.⁹ This discussion goes further by investigating whether there are other possible solutions to the conundrum that is labour unrest other than the limitation of the right to strike.

¹ M Schutte & S Lukhele ‘The real toll of South Africa’s labour aggressiveness: Regular and prolonged violent strikes characterise endless labour strife’ (2013) *Africa Conflict Monthly Monitor* 69.

² A Rycroft ‘Strikes and amendments to the LRA’ (2015) 36 *ILJ* 1.

³ *Ibid.*

⁴ N Odendaal ‘SA One of the world’s most violent, strike-prone countries’ *Engineering News* 6 August 2014, available at <http://www.engineeringnews.co.za/article/sa-one-of-the-worlds-most-violent-strike-prone-countries-2014-08-06>, accessed on 18 April 2015.

⁵ Labour Relations Amendment Act 6 of 2014, hereafter referred to as ‘the Amendment Act’.

⁶ *Ibid.*, s 65.

⁷ *Ibid.*, s 65 (1) (c).

⁸ Memorandum of Objects on Labour Relations Amendment Bill, 2012 B16-2012 *GG* 35212 of 5 April 2012.

⁹ Rycroft (note 2 above) 3.

One such shared opinion which is canvassed and supported by this contribution notes that the introduction of stricter controls on strikes so as to circumvent violence is an approach that is misguided.¹⁰ The contribution holds that resurgent violence on the picket-line is a wakeup call to reconsider our system of dispute resolution, including strike law with the aim of doing away with the aim of doing away with stricter controls on strike law.¹¹ Another solution which has been suggested is that we should be focused on addressing structural violence within societies, as this is the primary reasons for violent strikes and labour unrest.¹² The discussion will look at whether this proposed solution has merit given the fact that structural violence is a culmination of decades of structural discrimination and as such it can only be addressed progressively and that there are already measures in place to address the same.¹³ At this point it suffices to say that most authors agree that until the underlying social orders are addressed, striking workers will continue to disregard the dispute resolution procedures of the Act.¹⁴ However the need for a solution is immediate; limiting the right to strike could conceivably bring an immediate end to violence strikes.¹⁵

This dissertation largely focuses on amendments to the right to strike and their impact on dispute resolution and labour unrest; this however cannot be done without situating them in the context of the Marikana massacre. The tragedy that unfolded in the platinum hills of Lonmin in 2012 provides a vantage point from which the usefulness of the amendments can be measured.¹⁶ At the final stage the discussion will look at whether it possible to reconstruct our labour relations framework, acknowledging that the current one is ineffective in dealing with labour unrest as it is currently built on pluralistic and adversarial relationships. The discussion will conclude by investigating whether we ought to fully adopt social corporatism, with the building of trust and compromise between the tripartite relationships being the main target by which we are to defeat violent labour unrest.

¹⁰ D du Toit & R Ronnie 'The necessary evolution of strike law' (2012) *Acta Juridica* 195.

¹¹ *Ibid.*

¹² T Ngcukaitobi 'Strike law, structural violence and inequalities in the platinum hills of Marikana' (2013) 34 *ILJ* 836.

¹³ The Constitution of the Republic of South Africa of 1996, hereafter referred to as 'the Constitution', Section 9 (2); Employment Equity Act 55 of 1998; Broad-Based Economic Empower Act 53 of 2003.

¹⁴ Rycroft (note 2 above) 3.

¹⁵ *Ibid.*

¹⁶ Ngcukaitobi (note 12 above) 858.

1.2 THE PURPOSE OF THE RESEARCH

The purpose of this research undertaking is to consider whether the amendments to the Act in regards to the right to strike will have the effect that the legislature intended; that is to circumvent another Marikana massacre and to determine whether an opportunity has been lost to refashion strike law so that it evolves in a way which takes cognisance of contemporary realities such as social inequalities and division among trade unions.¹⁷

The thinking behind this undertaking is aimed at providing a framework for how to best solve South Africa's high levels of labour unrest. This is to be achieved by way of critically analysing the amendments to the Act and then looking at whether there are alternatives that can be put in place to achieve the same purpose. The importance of undertaking this study is significant as it forms a building block in discussions which includes invaluable contributions from dispute resolution specialist Brand and Professor A. Rycroft.¹⁸ At its simplest, the task is aimed at providing a framework in terms of which we can tackle one of the greatest failing of our liberal democracy, this being increased industrial action that is characterised by perpetual scales of violence. Constant fighting between different trade unions¹⁹ impacts significantly on the social and economic development of the country.²⁰ This work will be imperative in finding a solution to these hostilities. In adding to the pool of research on how to best solve the conundrum of increasing level of violent strikes, this study can be useful to those writing labour policies.

1.3 THE STATEMENT OF THE PROBLEM

The purpose of the Act is to advance economic development, social justice and labour peace of which are to be achieved through the promotion of 'orderly collective bargaining' and 'effective resolution of labour disputes'.²¹ The provisions of the Code of Good Practice²² envisage a situation where violence in strikes is such a serious offence that it could necessitate dismissal.²³

¹⁷ K Good *Trust in the Capacities of the People, Distrust in Elites* (2014) 217.

¹⁸ A Rycroft 'What can be done about strike-related violence?' (2014) 30(2) *International Journal of Comparative Law and Industrial Resolutions*; J Brand 'Developing an effective strike avoidance strategy' 23rd Annual Labour Conference August 2010.

¹⁹ K Good *Trust in the Capacities of the People, Distrust in Elites* (2014) 217

²⁰ In 2014 the number of working days lost stood at 10.2 million while in 2013 only 1.8 million working days were lost due to labour unrest and in 2014 the monetary impact of strikes reported amounted to R6 170 768 282 compared to only R1 073 109 003 in 2011, South African Department of Labour *Annual Industrial Action Report* (2014) 4; J Du Toit 'Strikes in Numbers - 2013' *The South African Labour Guide* 2014, available at <http://www.labourguide.co.za/most-recent/1944-strikes-in-numbers-2013>, accessed on 10 June 2015.

²¹ Section 1 (d) of the Act.

²² Good Practice: Dismissal and Industrial Action of the Act: Schedule 8.

²³ *Ibid*, item 6 (1).

Notwithstanding this, violence continues to characterise a number of strikes including the Marikana massacre, this has led to uncertainty of the effectiveness of the Act in this vital area.²⁴ The contention advanced in this submission is that the violence that is widely apparent is more like a symptom of the problem at hand, the situation is a lot more precarious. The violence that is being witnessed during strikes is not entirely the result of disappointment in low wages or poor working conditions but rather it is a dramatic expression of the frustration in widespread social inequality, racial division, pluralistic labour relations and a failing justice system that promises the improvement of the quality of life for all citizens but which fails to deliver.²⁵

1.4 ASSUMPTION UNDERLYING THE STUDY

The study acknowledges the role of the government in the progressive realisation of economic justice for those who are marginalised and downtrodden. It further notes that the structural inequalities in the labour sector are being attended to. The Farlam Commission of Inquiry was largely aimed at investigating the mishaps that led to the Marikana massacre.²⁶ The Farlam Commission is meant to provide a vantage point for discussions about how to better avoid the tragedy that was. However through the Amendment Act, this discussion contends that the government jumped the gun. They sought to deal with the symptom of the problem either because they did not realise the cause or they choose to ignore it, the latter being more conceivable. The assumption is that the government through the Amendment Act is at best trying to deal with the fallout and international outcry in a manner that satisfies their immediate political needs and not the broader needs of society.

1.5 RESEARCH METHODOLOGY

A qualitative research methodology will be employed for this study. Reference will be made to primary sources in the form of legislation and case law relevant to the topic. Secondary sources such as journals, text books and internet sources will be also be consulted.

²⁴ Du Toit & Ronnie (note 10 above) 195-196.

²⁵ Ibid.

²⁶ GN 50 of GG 35680, 12/09/12; 1; I G Farlam Marikana *Commission of Inquiry: Report On Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Marikana, in the North West Province* (2015) 1, hereafter referred to as the 'Farlam Commission'.

1.6 RESEARCH QUESTIONS

“Not knowing a question is to forfeit the answer. The following questions will be considered in this dissertation:

- 1) [To] what” extent does the Amendment Act limit the right to strike?
- 2) What was the intention behind the promulgation of these amendments?
- 3) Will the amendments have the desired effect?
- 4) Are there other ways in which to solve labour unrest?
- 5) The Marikana massacre, does it have anything to do with the amendments?
- 6) Is there a place for social corporatism in South Africa?

1.7 THE SEQUENCE OF CHAPTERS

This dissertation comprises of five chapters. Chapter one outlines the background to the study and the purpose behind the research undertaking. Chapter two essentially looks at the current legislative frame work and the likely effects the 2014 amendments to strike law will have on effective dispute resolution. The chapter concludes by using the Marikana massacre to contextualise the problems relating to strike violence. Following this is chapter three which looks at the current strategy of the institutionalisation of industrial conflict as an effective approach to labour unrest. Chapter four will then investigate the possibility of moving from pluralism towards social corporatism as a necessary reform of our labour relations system. The study then ends with Chapter five, a recommendations and conclusion chapter.

CHAPTER TWO

CIRCUMVENTING ANOTHER MARIKANA MASSACRE: LIMITING THE RIGHT TO STRIKE IN A BREAKING SOCIETY

‘Violence on the picket-line is a wake-up call not simply to introduce striker controls, but to re-examine our system of dispute resolution, including strike law, more generally with a view to eliminating dysfunctional barriers rather than introducing new ones’²⁷

2.1 INTRODUCTION

In South Africa, labour unrest is fast becoming an increasing reality with²⁸ perpetual scales of violence that is directed at property and person during strikes being witnessed with uncomfortable regularity.²⁹ In a bid to curb this surge of protracted and violent strikes, the Minister of Labour tabled in Parliament, the Labour Relations Amendment Bill 2012³⁰ for approval. It’s introduction was intended as an immediate response to the increasing levels of ‘unprotected industrial action and unlawful acts such as violence and intimidation’.³¹ Notwithstanding this position, a number of violent strikes followed in the same year, including the massacre of 34 miners in the Lonmin Marikana strike³² and the Farm Workers strike³³ that left three people dead in the Western Cape.³⁴ The 2012 Amendment Bill became part of our labour system when it was signed into law by the President, Jacob Zuma in the penultimate days of December 2014 and it came into operation on 1 January 2015.³⁵ Included in the amendments are additional limitations on the right to strike which are meant to be a response to the increasing levels of violence strikes.³⁶

²⁷ Du Toit & Ronnie (note 10 above) 195.

²⁸ Schutte & Sandile (note 1 above) 69.

²⁹ Rycroft (note 2 above) 1.

³⁰ Memorandum of Objects on Labour Relations Amendment Bill, 2012 B16-2012 GG 35212 of 5 April 2012 <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendmentsbills/memoofobjectsslra.pdf>, hereafter referred to as the ‘2012 Amendment Bill’.

³¹ Ibid, 4.

³² K Selala ‘The right to strike and the future of collective bargaining in South Africa: An exploratory analysis’ (2014) 3(5) *International Journal of Social Sciences* 121.

³³ M Bagraim ‘Counting the cost of the Cape farm strikes’ *Business Day Live* 16 November 2012, available at, <http://www.bdlive/business/agriculture/2012/11/16/counting-the-cost-of-cape-farm-strikes>, accessed 6 July 2015.

³⁴ Ibid.

³⁵ GN 38317 of GG 10336, 19/12/2014.

³⁶ Memorandum of Objects on the Labour Relations Amendment Bill (note 8 above) 4.

The discussion that follows concerns these very limitations that have now become part of the Act. Of particular interest are the amendments to s 65(1)(c) which seek to further limit the right to strike by excluding it in circumstances where the issue in dispute is one that could be referred to arbitration or to the Labour Court in terms any other employment law.³⁷ Prior to these changes s 65(1)(c) did not warrant exclusion of the right to strike in instances where the dispute concerned issues that could be referred to arbitration or to the Labour Court in terms of employment law. The effect of this is far reaching, for one, striking over claims of unfair discrimination is now proscribed because such matters can be referred to the Labour Court in terms of the Employment Equity Act³⁸ which falls under the ambit of employment law.³⁹ From this it is obvious that one of the solutions proposed by government in addressing the increasing levels of unprotected and violent strikes is by further proscribing the circumstances under which employees can strike. In the wake of continued violence on the picket-line, several commentators have started questioning this stance of the government.⁴⁰

One submission considers such an approach as one that is faulty in judgement.⁴¹ The argument holds that we ought to engage with our system of dispute resolutions with a view of attending to the underlying social disorders that continue to manifest in the form of violence strikes.⁴² Another contention considers the amendments as being inadequate if regard is had to the impact of industrial action on the socio-economic interests of the parties involved.⁴³ It concludes by holding that the burning problem that is violent strikes draws its fuel from dysfunctional industrial relationships and that s 65 does not attempt to address the broader issues affecting this relationship.⁴⁴ At the heart of these propositions are pleas directed at the government to look at the underlying social disorders in an effort of rebuilding our broken industrial relations from the ground up. These concerns further implore researchers to direct attention to structural

³⁷ The Act, section 65 (1)(c).

³⁸ No 55 of 1998, hereafter referred to as the 'Equity Act'.

³⁹ A Patel and K Letlonkane 'Limiting the right to strike' *The South African Labour Guide*, available at <http://www.labourguide.co.za/most-recent/16116-limiting-the-right-to-strike-section-65-of-the-labour-relations-act>, accessed 13 August 2015.

⁴⁰ Selala (note 32 above) 124; K Von Holdt 'Institutionalisation, strike violence and local moral orders' (2010) 72/73 *Transformation: Critical Perspectives on South Africa* 127.

⁴¹ Du Toit & Ronnie (note 10 above) 195.

⁴² Ibid.

⁴³ Selala (note 32 above) 124.

⁴⁴ Ibid.

inequalities with the aim of investigating the existence of a nexus between it and workers disregard of dispute resolution procedures.⁴⁵

The discussion clearly shows that entrenched social inequalities from the apartheid era are still present in our constitutional order.⁴⁶ The absence of meaningful social transformation to remedy structural inequalities has according to Professor Rycroft, left it to the police⁴⁷ and labour relations to deal with its unforgiving and violent consequences.⁴⁸ If indeed the violence in recent strikes is really just a dramatic expression of frustration with structural inequalities then there is merit in suggesting that the s 65 amendments will prove inadequate in dealing with the situation that is.⁴⁹ The police, and to some extent labour unions and managers of companies, will be left with the unenviable task of trying to restore order on the picket-line. Adding to this, non-striking workers will continue to be subject of intimidation and assault in a war that is political as opposed to being about matters of employment.

This chapter will concentrate on the amendments to strike law and the likely implications they will have on dispute resolution in particular on dispute matters that the Act proscribes. In this regard the focus will be on the added issues in which workers can no longer go to strike over as a result of the Amendment Act. Subsequent to this is a look at whether limiting the right to strike will have the effect of containing the increasing levels of unprotected and violent strikes. The point of departure in this chapter will be the events of the Marikana strike. It has been argued that the Marikana strike provides a unique vantage point from which the utility of the proposed amendments can be considered.⁵⁰ The killing of 34 workers by the police on 16 August 2012 almost two decades into democracy poses serious questions on the country's socio economic and political order and the integrity of our industrial relations system.

⁴⁵ M Samuel 'The mineworkers' unprocedural strike: Setting the path for redefining collective bargaining practice in South Africa' (2013) 10 *Journal of Contemporary Management* 239.

⁴⁶ B Dixon 'Waiting for Farlam: Marikana, social inequality and the relative autonomy of the police' (2014) 46 *SA Crime Quarterly* 7; A Padachee & A Desai 'Post-apartheid South Africa and the crisis of expectation – DPRN FOUR' (2011) *Rozenberg Quarterly*, available at <http://rozenburquartely.com/?=4597>, accessed 2 November 2015.

⁴⁷ Rycroft '(note 18 above) 215.

⁴⁸ Ibid 1.

⁴⁹ Ngcukaitobi (note 12 above) 836;

⁵⁰ Ibid.

2.2 THE LONMIN MARIKANA STRIKE

The tragic events of the Marikana strike were occasioned against the backdrop of unemployment, shortcomings in public service delivery and structural violence.⁵¹ Against this prologue the narrative unfolds with a three thousand strong protest by rock drill operators (RDOs) of the Lonmin Platinum mine on 9 August 2012.⁵² Improved working conditions and salary increases from R4500 to R12500 formed the initial point of contention.⁵³ The first trace of potency occasioned on the morning after the strike began, when Lonmin security opened fire with rubber bullets, allegedly firing more than 40 rounds at strikers who had amassed at the mine shafts where some workers were toiling.⁵⁴ In the aftermath, two of the protesters were seriously injured and hospitalised. It came to light that the National Union of Mine Workers Union (NUM) had assisted workers in attending to their shifts, this only agitated the growing number of protesters who showed their disconcert by marching with an array of menacing weapons to the offices of NUM with unforgiving intention.⁵⁵ Engagement on a violent level between the advancing crowd and NUM officials soon broke out, resulting in the serious injuries of two workers who were shot and bludgeoned by the officials.⁵⁶ At this juncture the atmosphere had become tenuous, relationships on all fronts had broken down. Division among trade unions added to an already volatile situation which lead to the bloodshed and violence that was to be witnessed in the following days.⁵⁷

In the three days that followed, violence on a perpetual scale became the order of the events that were to occur. In the days between the 12th and the 14th of August, a tally of 10 people would be killed in incidents related to the conflict.⁵⁸ The business of 12 August commenced with a stand-off between Lonmin security and an assembly of 1000 strikers.⁵⁹ Security officers responded with rubber bullets to a rock that had been hurled at them leading to an attack by the strikers,

⁵¹ C Twala 'The Marikana massacre: A historical overview of the labour unrest in the mining sector in South Africa' (2012) 1(2) *South African Peace and Security Studies* 66.

⁵² D Bruce 'Marikana: A summary and analysis of the Farlam report – CASAC' *Politic Web* 18 August 2015, available at <http://www.politicsweb.co.za/documents/marikana-a-summary-analysis-of-the-farlam-report>, accessed 5 November 2015.

⁵³ Selala (note 32 above) 121.

⁵⁴ N Davies 'Marikana massacre: the untold story of the strike leader who died for workers' rights' *The Guardian* 19 May 2015, available at <http://www.theguardian.com/world/2015/may/19/marikana-massacre-the-untold-story-strike-leader-who-died-for-workers-rights>, accessed 5 November 2015.

⁵⁵ Farlam (note 26 above) 96.

⁵⁶ Ibid 95.

⁵⁷ Good (note 17 above) 217.

⁵⁸ Ibid.

⁵⁹ Bruce (see note 52 above).

who slashed one guard from armpit to hip and hacked two others death.⁶⁰ By dawn, two miners had been killed, one in an ambush attack while on his way to work.⁶¹ Bloodshed then spilled over into the next day which saw the killings of two police officers and three strikers in a confrontation between the police and the striking workers.⁶² In a turn of events, the two days that followed were relatively peaceful, there were negotiations between Lonmin management, strikers and representatives from the South African Police Service (SAPS) on how to bring about a voluntary surrender of weapons. Plans to disperse strikers from the koppie were also discussed.⁶³ This however proved to be just a lull before the storm of 16 August.

The 16th of August began like any normal South African day but its end was anything but normal, it was unnerving.⁶⁴ The lives of 34 people were lost and by all accounts they had been shot by members of the SAPS.⁶⁵ In an attempt to continue with negotiations from the previous day, Joseph Mathunjwa, president of the Association of Mineworkers and Construction Union (AMCU), made attempts to meet with Lonmin executives to iron out details of a plan that would see the strikers return to work.⁶⁶ Alas, this proved futile as Lonmin management now refused to discuss anything.⁶⁷ The Farlam Commission report makes only a brief reference to this stance by Lonmin management, by going only as far as criticise it.⁶⁸ At this time the presence of the police had increased considerably, this was a move to carry out the endorsement of an extraordinary session by the SAPS which resolved that the strikers would be forcibly removed from the koppie if they did not lay down their arms.⁶⁹ In a final bid to end violence and return strikers to their primary purpose of wage negotiations, Muthunjwa spoke with passion to the hundreds of strikers that had gathered at koppie, pleading with them to put an end to the bloodshed.⁷⁰ The strikers heeded his call and as he led the crowd away, a hail of bullets were fired from all directions by the police. At the end of it all, 34 of the 112 miners shot were dead, this was to be one of the deadliest attacks in the post-apartheid regime. It became clear that there was more to this than initially met the eye, this was not just another strike about salary increases.

⁶⁰ Davies (note 54 above).

⁶¹ 'Marikana timeline of events' *News 24*, available at <http://news24.com/multimedia/timelines/marikana-timeline-of-events-20130815>, accessed 21 November 2015; Farlam (note 27 above) 118-122.

⁶² Farlam (note 26 above) 128.

⁶³ *Ibid* 151-176.

⁶⁴ Ngcukaitobi (note 12 above) 35.

⁶⁵ *Ibid*.

⁶⁶ Farlam (note 26 above) 177.

⁶⁷ *Ibid*.

⁶⁸ Davies (note 54 above).

⁶⁹ Farlam (note 26 above) 556.

⁷⁰ Davies (note 54 above).

It was apparent from the violence on both sides that it turned on larger issues, many of them political in nature.

This narrative is important as it helps us consider with clarity all the matters at hand, among these the right to strike, limitation of the right, underlying social orders and broken relations. Much of the discussion that follows considers these matters in an attempt to use the massacre as a foundation in which to find a solution to the problem that is violent labour unrest. From this narrative, a few important things become clear. We learn that underlying social orders include a lack of trust between unions and its members, there is total disregard of dispute resolution procedures of the Act and finally that the government is taking an increasing intolerance to unprotected strikes.

2.3 THE RIGHT TO STRIKE

Since the turn of our constitutional order, the right to strike has enjoyed a high degree of protection.⁷¹ This was affirmed by the Constitutional Court in the case of *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd*,⁷² where it held that the dignity of workers depends on it.⁷³ In light of this it will be hard to forget the words of O'Regan J where she said that, 'protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution'.⁷⁴ On the one hand, worker's organisations regard the right to strike as ultimate and as one of their inalienable prerogatives.⁷⁵ On the other hand employers see the right as a threat to the economic prospects of their business. On the backdrop of these conflicting attitudes to the right to strike, it is necessary to outline what the right entails, investigating its purpose, denotation and position in the context of violent protests. The discussion that follows is aimed at discerning the link between unprecedented levels of violence on the picket-line, the right to strike and the limitation thereof.

Section 23(2) (c) of the 1996 Constitution⁷⁶ guarantees that every worker has the right to strike. In reaffirming this the Act was enacted specifically to give effect to the labour rights of s 23 of

⁷¹ *National Union of Public Services & Allied Workers obo Mani v National Lotteries Board* (2014) 32 ILJ 1885 (CC) para 33.

⁷² (2003) 24 ILJ 305 (CC).

⁷³ *Ibid*, para 13.

⁷⁴ *S v Makwanyane* (1995) (3) SA 391, para 329.

⁷⁵ E Khan 'The right to strike in South Africa: An historical analysis' (1943) 11(1) *The South African Journal of Economics* 24.

⁷⁶ The Constitution.

the Constitution.⁷⁷ In doing so it provides procedures for the exercise of the right, and the protection of strikes. The Act provides in s 64(1) that ‘every employee has the right to strike and every employer has the recourse to a lock-out’.⁷⁸ A strike is then defined in s 213 of the Act as;

‘The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purposed of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory.’⁷⁹

It therefore becomes clear that only employee actions listed above may be termed a ‘strike’.⁸⁰ A considerable link between collective action and the right to strike exists. It is acknowledged that without the right to strike, unions will lack the foundation for voluntary negotiations and agreement.⁸¹ This means that collective bargaining in the absence of the right to strike becomes collective begging.⁸² Lastly, at the heart of any industrial action must be the aim of remedying a grievance that relate to matters of mutual interests. It follows that to meet this requirement of a strike; the stoppage must have a work related aim.⁸³ This requirement has been the subject of much debate with authors calling the recent strikes political in nature, these being couched under the guise of labour related issues.⁸⁴ Even if this proposition is accepted, there is still no explanation as to why violence continues to characterise recent strikes.

When one looks at the definition of a strike which contemplates some form of stoppage in work, it becomes clear that strikes by their nature, are intended to cause the employer economic harm.⁸⁵ By withholding their labour, the employees hope to bring production to a halt, causing the employer to lose business and to sustain overhead expenses without the prospect of income, in the expectation, that should the losses be sufficiently substantial, the employer will accede to their demands.⁸⁶ In the case of *Food & Allied Workers Union on behalf of Kapesi v Premier*

⁷⁷ Ibid, section 23.

⁷⁸ The Act, section 64(1).

⁷⁹ Ibid, Section 213.

⁸⁰ M Finnemore *Introduction to Labour Relations in South Africa* 8th ed (2002) 220.

⁸¹ Ibid 223.

⁸² Rycroft (note 2 above) 222.

⁸³ D Woolfrey ‘Strike and lock-outs’ in D du Toit (ed) *Labour Relations Law: A Comprehensive Guide* 3rd ed (2000) 231.

⁸⁴ A Myburgh ‘The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law’ (2013 23(1) *Contemporary Labour Law* 5.

⁸⁵ *Stuttafords v SACTWU* [2001] 1 BLLR 47 (LAC).

⁸⁶ H Cheadle ‘Strikes’ in M Brassey (ed) *The New Labour Law* (1987) 244.

Food Ltd t/a Blue Ribbon Salt River,⁸⁷ Basson J correctly finds that the aim of a strike is to persuade the employer to agree to their demands through the peaceful withholding of work.⁸⁸ Some degree of disruption to the employer's business operations is expected, however it is not accepted that violence and criminal conduct would be employed to force the employer to accede to the demands, as seen in recent times.⁸⁹ The purpose behind a strike does not contemplate that there be violence that is directed on non-striking workers and that there be damage to property

While some form of passionate engagement is expected in strikes there is no room for violence. Despite this a number of strikes have turned into a war zone between employees, employers and the police. In an attempt to deal with this fall out, the right to strike has been limited in various forms, some of which are considered below. However, it is believed that limiting the right to strike by making it unlawful to go on strike over certain added issues of dispute will not bring about peace on the picket-line, as anyone who is abreast with South African's labour history will understand that limiting the right to strike rarely offset violent strikes.⁹⁰

2.4 LIMITING THE RIGHT TO STRIKE

Underpinning the right to strike is a philosophical argument which holds that in the absence of power to affect the course of events, a group lacks the responsibility to reach a decision.⁹¹ Power is the source of responsibility. A strike is therefore seen as the most effective weapon for trade unions without which they lack the foundation for voluntary negotiation and agreement.⁹² As outlined earlier, worker's organisations regard the right to strike as ultimate and as one of their inalienable prerogatives.⁹³ Contrary to this belief, the right to strike is never absolute or unconditional since it does not operate in a vacuum.⁹⁴ The interests of the larger society dictate that there is some form of control on the right to strike.⁹⁵

The Amendments Act aims to give effect to this by limiting the right to strike even further, to achieve this the right is excluded in circumstances where the issue in dispute is one that could be

⁸⁷ (2010) 31 *ILJ* 1654 (LC).

⁸⁸ *Ibid*, para 6

⁸⁹ *Ibid*.

⁹⁰ Rycroft (note 2 above) 2.

⁹¹ Finnemore (note 80 above) 223.

⁹² D S Harrison *Collective bargaining within the labour relationship: In a South African context* (unpublished LLM thesis, North-West University, 2004) 94.

⁹³ Khan (note 75 above) 1.

⁹⁴ C Cooper 'Strikes in essential services' (1994) 15(5) *Industrial Law Journal* 903.

⁹⁵ J Grogan 'Of mutual interests when are strikes permissible?' 2015 *Employment Law Journal* 1.

referred to arbitration or to the Labour Court in terms of employment law.⁹⁶ Before the amendments were signed into law, workers could not go on strike over issues that could be referred to arbitration or the labour court in terms of employment law. The new amendments will limit the scope of issues in which employees can go on strike for. The passage that follows looks at the effect of these amendments but before then it is necessary to outline circumstances in which employees are generally prohibited from striking.

“Section 65(1) of the [Act] provides that no person may take part in a strike or a lockout or in any conduct in contemplation or furtherance of a strike or a lock-out if bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.⁹⁷ Similarly” where employees are “bound by an agreement that requires the issue in dispute to be referred to arbitration; or the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of [the] Act” they may not strike.⁹⁸ Lastly employees who are engaged in essential or maintenance services are also prohibited from exercising the right to strike.⁹⁹

2.4.1 Added issues of disputes.

As outlined earlier, the Amendments Act limits the right to strike further by excluding it in circumstances where the issue in dispute is one that could be referred to arbitration or to the Labour Court in terms of employment law.¹⁰⁰ Employment law can be explained as a system of rules and standards that regulate the workplace relations.¹⁰¹ If a dispute falls under employment law and such disputes could have been referred to arbitration or to the Labour Court and the ensuing strike action is on that issue, it will be unprotected because the prescribed dispute resolution procedures in terms of the Act would have not been followed.

The amendments therefore have far reaching consequences as employment law covers a number of issues that before the amendments, employees could go on strike for. Some of the issues that can be referred for adjudication or arbitration in terms of employment law¹⁰² are issues that fall under the;¹⁰³ Unemployment Insurance Act;¹⁰⁴ Skills Development Act;¹⁰⁵ Employment Equity

⁹⁶ The Act, section 65(2)(c).

⁹⁷ *Vodacom (Pty) Ltd v CWU* [2010] 8 BLLR 836 (LAC) para 10; Section 65 (1)(a) of the Act.

⁹⁸ The Act, section 65(1)(c).

⁹⁹ The Act, section 65(3)(a) of the Act.

¹⁰⁰ *Ibid*, section 65(2)(c).

¹⁰¹ A Patel and K Letlonkane (note 39 above).

¹⁰² J Grogan ‘The new dispensation, part 1: The amendments to the LRA’ (2014) 30(3) *Employment Law Journal* 8

¹⁰³ *Ibid*.

¹⁰⁴ No 63 of 2001.

¹⁰⁵ No 97 of 1998.

Act;¹⁰⁶ Occupational Health and Safety Act;¹⁰⁷ Compensation for Occupational Injuries and Diseases Act;¹⁰⁸ Unemployment Insurance Act¹⁰⁹ as well as issues regulated by the Basic Condition of Employment Act.¹¹⁰

The issue that is most contentious and is bound to be the subject of contested debate relates to claims of unfair discrimination. As a result of the amendments, employees are now prohibited from going strike over claims of issues of unfair discrimination because such issues can be referred to the Labour Court in terms of the Equity Act.¹¹¹ Trade unions have since expressed disconcert at these amendments.¹¹² The right to strike is seen as an important tool for trade unions who believe that the withholding thereof is an attack on unions and workers' constitutional right to strike.¹¹³ Trade unions believe that limiting the right to strike is an infringement of its right to bargain collectively and the right of its members to strike.¹¹⁴

2.5 CONCLUSION

The right to strike is an important one as it is aligned to the dignity of workers. Without the tool that is the ability to go on strike, unions are left with a compromised position of collective 'begging' rather than collective bargaining. In light of this it becomes imperative to explore alternative solutions to violent protests, to find answers that work but do not unnecessarily restrict constitutionally guaranteed rights.

The narrative above is detailed, this summation rounds up the discussion by highlighting some of the important points and attempts to provide responses to the many questions raised. One such question is whether introducing stricter controls of strike law is the proper response to the recent spate of violence in strikes. The contention advanced in this discussion is that these amendments are misguided. Limiting the right to strike cannot in any form curb violence on the picket line. Anyone who is abreast with recent labour unrest is privy to the fact that most of these strikes are unprotected. The trend is that workers go on strike regardless of whether there is a prohibition

¹⁰⁶ No 55 of 1998.

¹⁰⁷ No 85 of 1993.

¹⁰⁸ No 61 of 1997.

¹⁰⁹ No 4 of 2002.

¹¹⁰ No 75 of 1997.

¹¹¹ Equity Act, s 10(5)(a).

¹¹² M Parks 'COSATU's response to the Labour Relations Amendment Bill introduced in November 2014' (2015) 24(1) *The Shopsteward* 50.

¹¹³ *Ibid* 51.

¹¹⁴ *Ibid*.

against doing so.¹¹⁵ There is a tendency for those engaged in industrial action to disregard the requirements of labour legislation by embarking on wildcat strike action and in the process employing violence and intimidation in order to force the employer to accede to their demands.¹¹⁶ The employer accedes to the demands of the strikers as a way of responding to the violence and not necessarily the issues in dispute.

The combination of anti-strike provisions such as declaring collective organisations to be unconscionable restraints of trade and blandishment is not at all that effective.¹¹⁷ A spate of violence continued well into the seventies which saw a considerable increase in the number of strikes.¹¹⁸ The strikes were largely illegal but they happened all the same.¹¹⁹ Either the workers did not know about the prohibition or they did not care.¹²⁰ How then can it be that four decades later the only means of responding to violent strike remains unchanged? How can it be that the government believes that limiting the right to strike is going to work now when it has never worked before?¹²¹ It is the opinion of the writer hereof, that the current legislative framework does not provide solutions to the industrial problems facing the country. At this juncture the investigation of broader issues facing the employment relationship, fragmentation of worker organisation and underlying social disorders is imperative. The chapters that follow go on to investigate possible solutions to the problem of violent strikes.

¹¹⁵ Samuel (note 45 above) 239.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid, 8

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

CHAPTER THREE

INSTITUTIONALISATION OF INDUSTRIAL CONFLICT

3.1 INTRODUCTION

*'You (Honourable President) are a broken man, presiding over a broken society.'*¹²²

These are the scathing words of Democratic Alliance (DA) Parliamentary Leader Mmusi Maimane during the State of The Nation debate 2015. His response was at its simplest referring to a failed state that has become marred with violent, riddled with a dysfunctional labour system¹²³ and broken institutions among its other short comings. A comparison is more often than not drawn between the post-apartheid regime and its unfortunate predecessor with some holding that the latter was governed better.¹²⁴ One of the difference between this democratic era and the apartheid regime is that the institutions of the latter were not broken but rather built to break the nation. With our constitutional democracy still in its infancy, the newly formed government moved quickly to institutionalise industrial conflict,¹²⁵ this in a bid to curb the violent strikes that had characterised labour unrest since the early 1980s.¹²⁶ The system that had been ushered through promulgation of the Act was devised to advance labour peace through the advancement of 'orderly collective bargaining' and effective resolution of disputes.¹²⁷ There was urgency in change that was aimed at addressing the many strikes that left strikers frequently beaten at the hands of police brutality, intimidated and sometimes slayed by striking workers.¹²⁸ Von Holdt suggests that the thinking behind the strategy of institutionalising industrial conflict

¹²² M Maimane 'Broken man, presiding over a broken society' *Democratic Alliance* (17 February 2015), available at <http://www.da.org.za/2015/02/broken-man-presiding-over-a-broken-society/>, accessed 2 November 2015.

¹²³ G Naidoo 'The critical need for ethical leadership to curb corruption and promote good governance in the South African public sector' (2012) 47(3) *Journal of Public Administration* 678, here the author goes so far as saying that, 'Non-adherence to labour policies, dysfunctional labour forums and a breakdown in the labour and management interface are features of the majority of municipalities.' Not many would argue otherwise.

¹²⁴ A Sampear 'Kohle Barnard to keep MP position for now' *SABC NEWS* (31 October 2015), available at <http://www.sabc.co.za/news/a/40d341804a6971e9afb4ff6d39e0c/KohlerundefinedBarnardunderfinedtounderfinedKeepunderfinedMPunderfinedpositionunderfinedforunderfinednow20153110>, accessed 2 November 2015.

¹²⁵ Institutionalisation of industrial conflict is a strategy that is aimed at managing conflict by diverting disputes to arbitration and adjudication institutions which try and resolve the disputes.

¹²⁶ C Chinguno 'Marikana: fragmentation, precariousness, strike violence and solidarity' (2013) 40(138) *Review of South African Political Economy* 640.

¹²⁷ *Ibid.* The Act is purposed on the advancement of labour peace of which is to be achieved through the promotion of 'orderly collective bargaining' and 'effective resolution of disputes' (section 1(d)).

¹²⁸ Von Holdt (note 40 above) 127.

was so that disputes would be managed through democratic procedures and institutions which would ultimately bring about labour peace; he records the idea in these lines:

‘The perception had been that political incorporation of workers into a post-apartheid democracy, with the full institutionalisation of industrial conflict in a new post-apartheid labour legislation, strike violence and high levels of mass militancy which sustained it would decline.’¹²⁹

Alas this goal has failed to materialise, instead there has been widespread breakdown and disregard of the institutions that aim to deal with industrial conflict.¹³⁰ In a progressive attempt to deal with the fall out of post democratic violence in strikes, the government has thought it is best to deal with situation by further limiting the right to strike much to the dismay of trade unions and commentators.¹³¹ This stance by the government is an indication of its belief in that disputes can be best managed through arbitration and institutions of adjudication instead of allowing parties to bargain collectively. Simply put, the government wants to intervene as a mediator instead of allowing employers and unions to find a working solution on their own.

The situation on the ground is fragile, one gets the feeling that with every deadlocked negotiation, a wildcat strike marred by violence is on the horizon. It is the opinion of a pool of authors that the institutionalisation of conflict has failed to live up to what it was designed for.¹³² In response, some have called for a reform in the form of a ‘comprehensive overhaul of labour relations law;’¹³³ while others have inked together solutions that require us to look deeper into the underlying social orders that remain unsettled.¹³⁴ The contention advanced here is that for as long as the workforce is subjected to structural violence and social inequalities, violence will be an inevitable feature of strikes.¹³⁵ For as long as the relationship between the government, trade unions and businesses is broken and there is distrust between role players who are unwilling to compromise, the situation will persist. For now it suffice to say that the violence on the picket-line is really a wake-up call to re-examine our system of dispute resolution, including strike law

¹²⁹ Ibid.

¹³⁰ Ibid; R Rycroft ‘The Role of Trade Union in Strikes’ in B Hepple *Laws Against strikes: The South African Experience in an International and Comparative Perspective* (2015) 110.

¹³¹ S Evans ‘Limiting strike lengths threatens organised labour’ *Mail & Guardian Online* (19 January 2014), available at <http://www.mg.co.za/article/2014-06-19-limiting-strike-lengths-threatens-organised-labour-num>, accessed 2 October 2015.

¹³² G Hartford ‘The mining industry strike wave: what are the causes and what are the solutions?’ *Ground Up* (2012) available at <http://www.groundup.org.za/contnet/mining-inudstry-strike-wave-what-are-causes-and-what-are-the-solutions>, accessed 1 November 2015; Rycroft (note 118 above) 110; Von Holdt (note 37 above) 127.

¹³³ M Brassey ‘Labour law after Marikana: Is institutionalized collective bargaining in SA wilting? If so, should we be glad or sad?’ (2013) 34 *ILJ* 834.

¹³⁴ Von Holdt (note 40 above) 129.

¹³⁵ Ngcukaitobi (note 12 above) 836.

with a view to eliminate dysfunctional barriers instead of carving out new ones.¹³⁶ These barriers include limiting the right to strike and to bargaining collectively. The submission is that a broken society will continue to break for as long as underlying faults continue to cripple it and as long as they remain unattended to. It is against this narrative in which this chapter investigates the effectiveness of institutionalising industrial conflict.

The narrative is long, the prelude is quite clear; it holds that there is a problem, everyone agrees and the Marikana tragedy is tangible expression of these difficulties. The narrative continues in the form of discussions that attempt to understand the underlying conditions which include social inequalities¹³⁷ and lack of union cohesion.¹³⁸ The government has a chapter in this long play; it writes its story through various amendments of the Act of what it considers to be a way forward.

3.2 INSTITUTIONALISED INDUSTRIAL CONFLICT

Industrial conflict is said to be a dramatic expression of the relationship between employers and the workforce.¹³⁹ The existence of conflict is not troubling as there is acceptance that it is inevitable given the fundamentally different objectives between the two parties.¹⁴⁰ What is of concern is the bloodshed that has characterised a number of recent strikes.¹⁴¹ Institutionalisation of industrial conflict was thought to be capable of bringing a solution to the violence that was seen at the time it was introduced.¹⁴² Four decades have passed since South African adopted the strategy of institutionalising industrial conflict.¹⁴³ The question therefore is whether this strategy is effective in managing disputes. On this the jury is still out. Some commentators are of the belief that it is effective in managing and minimising a situation which could be much worse in

¹³⁶ Du Toit & Ronnie (note 10 above) 195.

¹³⁷ Ibid.

¹³⁸ Estreicher 'Collective bargaining or "Collective Begging"?: Reflections on antistrikebreaker legislation' (1994) 93(3) *Michigan Law Review* 578.

¹³⁹ W Korpi & M Shalev 'Strikes, industrial relations and class conflict in capitalist societies' (1979) 30(2) *The British Journal of Sociology* 164.

¹⁴⁰ Finnemore (note 80 above) 3.

¹⁴¹ Du Toit & Ronnie (note 10 above) 195; *Food & Allied Workers Union obo Kapesi & others v Premier Foods Limited t/a Blue Salt River* (2010) 31 ILJ 1654 (LC). In this strike Non-strikers were harassed and intimidated; physical harm and death were among some of the treats that were used to intimidate employees at their home; petrol bombs were hurled at the homes of non-strikers; The Lomin Marikana Strike of 2012 that lead to the brutal death of 34 miners.

¹⁴² Von Hodlt (note 40 above) 129.

¹⁴³ S Van Jaarsveld & B Van ECK *Principles of Labour Law* (1998) 4; 'Wiehahn Commission' *South African History Online*, available at <http://www.sahistory.org.za/article/wiehahn-commission>, accessed 2 December 2015.

its absence.¹⁴⁴ A view on the other side of the table holds that it is not, it concludes by holding that for as long as underlying social orders remain unattended to, the situation will persist.¹⁴⁵

Before one can pronounce on the effectiveness of the institutions that have been developed to regulate and manage conflict, one needs to first understand what institutionalisation of industrial conflict entails. Subsequent to this will be a review of the history of this strategy and whether it has achieved what it was designed for. This will be situated within a timeline that consists of pre-apartheid law, apartheid era law and post-apartheid law.

3.2.1 Definition

Institutionalisation of industrial conflict is the management of disputes through the development of procedures and structures to regulate and manage same.¹⁴⁶ The practice is really a set of forums and procedures such as the Labour Court and arbitration institutions which are empowered to manage disputes between employers and employees. However where law channels certain disputes to these institutions it is effectively limiting the right to strike and to bargain collectively. The reason for this is that the right to strike is essential to collective bargaining. It is said that ‘without the right to strike collective bargaining becomes collective begging’.¹⁴⁷ This is because the right to strike that is afforded to workers gives trade unions greater bargaining power as employers try to avoid a strike from taking place as this often would result in stoppage of work. The status quo was however different before the turn of the 1980s as seen from the narrative below.

3.2.2 Before-apartheid

Laws concerning labour were initially based on “common law, which emphasised freedom of contract (the ability of the parties to the employment relationship to regulate their respective rights and duties”) within the broad limits of legality and the public policy.¹⁴⁸ Under this free-market system labour was regarded as a product, subject to the laws of supply and demand.¹⁴⁹ It was believed that there was no basis for the special treatment of employees since it would affect

¹⁴⁴ Harrison (note 83 above) 161.

¹⁴⁵ Von Holdt (note 40 above) 127.

¹⁴⁶ Chinguno (note 126 above) 639.

¹⁴⁷ Estreicher (note 138 above) 578.

¹⁴⁸ J Grogan *Workplace Law* 6 ed (2001) 1.

¹⁴⁹ Finnemore (note 80 above) 2.

the interplay of market forces.¹⁵⁰ Intervention by government was also criticised.¹⁵¹ The courts had nothing to offer as employers could legally terminate the contract at will.¹⁵² As long as the necessary notice was given, courts could not intervene merely because the dismissal was unfair.¹⁵³ This is more or less the same free-market system which according to Martin Brassey is the best way of advancing the general welfare of society.¹⁵⁴ This system has however received much criticism.¹⁵⁵ Among the deficiencies cited, is that it is individualistic in character, it affords no regard to the collective relationship between employees and employers.¹⁵⁶

The strongest and most significant disapproval of the free-market system came from Karl Marx, during the mid-ninth century.¹⁵⁷ Marx believed that the continued alienation and exploitation of workers would lead to a situation where the working class would arrive at the ‘necessary consciousness’ and thereby form the unity needed for social revolution.¹⁵⁸ It at this point that “he supported the formation of trade unions and the struggle for higher wages and improved working conditions”.¹⁵⁹ Even at this early stage it was accepted that conflict is inevitable, naturally arising from the fundamentally different objectives of employers and employees. Institutionalisation of conflict was suggested as a way of resolving conflicting interests.¹⁶⁰

From the narrative above it is clear that employment law was governed according to the law of contract and subject to the prevailing *boni mores* of the community. It was left to the individual employee and employer to decide the terms on which they wanted to engage. Contracts that contained provision that were contrary to public policy were allowed. In instances where there was disputes between an employee and the employer, outside interventions in the form of a third party such as an arbitrator could not be sourced. It was believed that influences from adjudication and arbitration institutions would be a dramatic intervention which was to be avoided at all cost

¹⁵⁰ Ibid; Brassey (note 133 above) 827.

¹⁵¹ Finnemore (note 80 above) 2.

¹⁵² M Brassey. ...et al *The New Labour Law* (note 121 above) 6.

¹⁵³ Grogan (note 148 above) 4; *Paiges v Van Ryn Gold Mines Estates* 1720 AD 600, De Villiers JA in rejecting an argument that employment contracts should not be enforceable because they were oppressive to the employee held that even if it could be said that contract was contrary to the interests of the workman this could not be said to be against public policy.

¹⁵⁴ Brassey (note 133 above) 823.

¹⁵⁵ Among those who have refuted the idea of returning to a free-market system is Van Nierkerk; he argues that there is no empirical evidence to support the proposition that Brassey puts forward, see A Van Nierkerk ‘Is the South African law of unfair dismissal unjust? A Reply to Martin Brassey (2013) 34 *ILJ* 31.

¹⁵⁶ Grogan (note 148 above) 4.

¹⁵⁷ Finnemore (note 80 above) 2.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid, 3.

¹⁶⁰ Ibid.

as this would lead to the disruption of market forces. The reason for this was that the sanctity of the freedom of contract was held in high regard. The situations as most authors agree is that there was exploitation of the workforce because of unequal bargaining powers, this continued mistreatment lead to discussions that paved the way for the incorporation of collective action and institutionalisation of industrial conflict.¹⁶¹ In summation, one could say that the free-market system left it to the devise of the parties to the employment relationship to deal with their own dispute, however this was detrimental to the rights of the workforce as it gave employers the right to be arbitrary¹⁶² and rightfully so it was dismantled.

3.2.3 *Apartheid regime*

The narrative begins with the 1991 strikes at the Village Deep mines in Kimberly which at the time was known as Dutoispan. It is here that the workforces, as Marx had foretold, began to appreciate their collective power and went on strike.¹⁶³ This revolt was however short lived as they strikers were violently returned to work by the police with many being incarcerated under the Masters and Servants Act.¹⁶⁴ A decade later, larger and more violent strikes took place on the Witwatersrand as a result of the disparity in the scales of pay between white and black miners.¹⁶⁵ These labour unrest are well documented under the title of the Rand Rebellion. The Rand Rebellion became one of the most violent strike in South African history as it resulted in a considerable number of workers being killed and seriously injured.¹⁶⁶ In an attempt to control the violent outbreak, conciliation machinery in the form of the Industrial Conciliation Act¹⁶⁷ among others were promulgated in 1924.¹⁶⁸ The purpose of this piece of legislation was to control and prevent industrial conflict, by allowing collective bargaining and conciliation to take place in the event of a dispute.¹⁶⁹ However this proved to be a contradiction in terms because this Act caused further conflict through job reservation for white workers and segregation in terms of

¹⁶¹ Grogan (note 148 above) 4.

¹⁶² Braasey (note 152 above) 6.

¹⁶³ 'The 1913 Mineworkers' Strike' *South African History Online*, available at <http://www.sahistory.org.za/article/1913-mineworker-strike>, accessed 2 November 2015.

¹⁶⁴ Master and Servants Act 15 of 1856.

¹⁶⁵ M Budeli 'Workers' Right to freedom of association and trade unionism in South Africa: An historical perspective' (2009) 15(2) *Fundamina* 62.

¹⁶⁶ Ibid.

¹⁶⁷ The Conciliation Act 11 of 1924, hereinafter referred to as the "Conciliation Act".

¹⁶⁸ J Sithole & S Ndlovu 'The revival of the labour movement, 1970-1980' (2006) 2 *The Road to Democracy in South Africa* 188.

¹⁶⁹ C Jordaan & W Ukpere 'South African Industrial Conciliation Act of 1924 and the current affirmative action: An analysis of labour economy in history' (2011) *African Journal of Business Management* 10941097.

race, class and wages of the workforce at the time.¹⁷⁰ For this it received its fair share of criticism.¹⁷¹

It became a foregone conclusion that the Conciliation Act was a platform in which the government could control workers.¹⁷² This contention stands even though it was for the most part recognised as the most comprehensive labour law legislation which afforded many trade unions legal status.¹⁷³ The submission is premised on the fact that under the Conciliation Act, black workers were expressly excluded from the definition of employee which meant that the benefits afforded by the Conciliation Act were inaccessible to them.¹⁷⁴

Those hoping for a proper institutionalisation of the industrial conflicts were disappointed when in the wake of the Sharpeville massacre in 1960, the apartheid regime embarked on a wave of subjugation by banning a number of black owned political parties as well as driving the South African Congress of Trade Unions (SACTU) into exile.¹⁷⁵ Subsequent to this, South Africa was to experience long periods of labour peace but these were mere products of the economic and political forces that prevailed at the time as opposed to the working of statutory conciliation processes.¹⁷⁶ Despite this calmness, the struggles for recognition of unions for black workers continued in 1973 when ten thousand workers took to the streets of Durban to demand wage increases, in the process breaking the decade-old industrial peace.¹⁷⁷ These violent strikes culminated in the establishment of the Wiehahn Commission of 1997 which was created to investigate the state of industrial relations.¹⁷⁸ The Wiehahn Commission concluded that it would be better to allow African trade unions to register at an early stage in order to control the pace of union development.¹⁷⁹ It is submitted that the collective bargaining rights that surfaced were still lacking.¹⁸⁰ In particular, the right to picket, which was crucial for unions to exert moral pressures of the majority against the non-strikers was banned by legislation.¹⁸¹ Furthermore the law did not give unions the right to strike since legally striking workers were not protected from

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Van Jaarsveld & Van ECK (note 143 above) 10.

¹⁷⁴ Section 7 of the Industrial Conciliation Act of 1924.

¹⁷⁵ Ibid.

¹⁷⁶ The 1913 Mineworkers' Strike (note 163 above).

¹⁷⁷ Ibid.

¹⁷⁸ Van Jaarsveld & Van ECK (note 143 above) 11.

¹⁷⁹ E Webster 'A new frontier of control? Case studies in the changing of job control in South African industrial relations' (1984) Carnegie Conference Paper 9.

¹⁸⁰ Von Holdt (note 40 above) 129.

¹⁸¹ Ibid.

dismissal.¹⁸² Notwithstanding the new labour legislation, employers were frequently hostile in the face of union activity and political repression undoubtedly exacerbated industrial conflict, with incidences of non-strikers being targeted escalating after the State of Emergency was imposed in 1986.¹⁸³ The source of continued violence was soon linked with the failings of statutory conciliation processes as seen from Shane Godfrey's accounts.¹⁸⁴

Godfrey makes the submission that the primary dispute-settling forums that were present in the apartheid era, namely the conciliation boards, industrial courts and industrial councils had proved over time unequal to their tasks.¹⁸⁵ The author uses empirical evidence to sustain his claim. Drawing his findings from the statistics of the Department of Manpower which showed that the success rates of the industrial courts were less than 30 per cent and those of statutory conciliation machinery were at a measly 20 per cent.¹⁸⁶ This research possess serious question on the effectiveness of the institutionalisation of industrial conflict at the time.

Accounts of labour unrest in the apartheid era are in large numbers with some exhibiting violence at a perpetual level.¹⁸⁷ To deal with the many disputes that had occurred, the government blandished and criminalised industrial action of workers.¹⁸⁸ This stance by the government as a means to an end did not seem to be effective in dealing with labour unrest, it did not deter the violence outbreaks seen at the time and especially in the seventies.¹⁸⁹ This is because strikers were either unaware of the prohibitions that existed or they did not care.¹⁹⁰

The reality is that limitation to the right to strike rarely offsets violence and protracted strikes.¹⁹¹ On the other hand dispute-settling forums were failing to deal with that which they had been purposed for.¹⁹² Evident from the discussion is that even though to some extent there was institutionalisation of industrial conflict it could not be said that it was effective in managing disputes that often became violent. The submission is that a lack of political enfranchisement, the failings of dispute-settling forums and the limitation on trade union power lead to many

¹⁸² Ibid.

¹⁸³ Ibid; M Brassey (note 152 above) 8.

¹⁸⁴ S Godfrey 'Labour relations law in context' in Du Toit (ed) *Labour Relations Law* 3 ed (2000) 24.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ E Webster 'The promise and the possibility: South Africa's contested industrial relations path' (2013) 81(1) *Transformation: Critical Perspective on Southern Africa*; The 1913 Mineworkers' Strike (note 37 above).

¹⁸⁸ Brassey (note 152 above) 7.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid, 8.

¹⁹¹ Rycroft (note 2 above) 2.

¹⁹² Godfrey (note 184) 24.

violent and protracted protests. The idea was that in post-apartheid the situation would change given the fact that surely the government would make way for the development of strong trade unions and the newly formed rights of the nation to determine its own affairs under the Constitution of 1996¹⁹³ would settle the conundrum of violent disputes. This however has not occurred as seen in the narrative that follows.

3.2.4 Post-Apartheid

After the elections of 1994, a spirit of industrial democracy had to be crafted; labour peace and production had to be encouraged.¹⁹⁴ With this in mind the Act was drafted. The Act is designed to facilitate the advancement of economic development, social justice and labour peace all of which are to be achieved through the promotion of ‘orderly collective bargaining and ‘effective resolution of labour disputes’.¹⁹⁵ What is clear from this is that the newly formed government had prioritised industrial conflict with the aim of bringing an end to the wave of industrial actions that was witnessed in the late 1970s.¹⁹⁶ The strategy advanced entailed the institutionalisation of industrial conflict through strengthening the powers of the institutions designed to facilitate among others, orderly collective bargaining and effective resolution of disputes.¹⁹⁷ In post-apartheid South Africa a number of new forms of third party interventions were created by legislature to entertain industrial conflict.¹⁹⁸ Of these, the most important are bargaining councils, the Commission for Conciliation, Mediation and Arbitration (CCMA), and the Labour Court. However due to the number of violent strikes that have surfaced, the effectiveness of these institutions in dealing with industrial conflict has come under scrutiny.

One of the violent strikes that have brought about the debate on the effectiveness of institutionalised industrial conflict is the well documented Lonmin Marikana strike of 2012.¹⁹⁹ This strike like many others in recent time was marred with assault and intimidation all of which culminated into the massacre of 34 strikers by the South African Police.²⁰⁰ A lack of union cohesion is cited as the catalyst to the strike becoming protracted and engulfed with high levels

¹⁹³ The Constitution of 1996.

¹⁹⁴ G Ferreira ‘Developments in labour relations in South Africa: Ten years of democracy (1994-2004)’ 24(2) *Politeia* 201.

¹⁹⁵ The Act, section 1(d).

¹⁹⁶ Brassey (note 152 above) 8.

¹⁹⁷ J Grogan *Workplace Law* 11 ed (2014) 8.

¹⁹⁸ J Grogan *Labour Litigation and Dispute Resolutions* (2010) 1.

¹⁹⁹ Selala (note 30 above) 124.

²⁰⁰ *Ibid*, 121.

of tension.²⁰¹ It is observed that leading to the massacre was fierce competition for bargaining rights between the NUM and AMCU.²⁰² The reality is that there was already a two-year collective agreement in place which NUM (the majority trade union), had entered into with the management of the Lonmin Platinum mine.²⁰³ Notwithstanding the subsisting collective agreement, 3000 workers disregarded collective bargaining procedures set out in the Act and embarked on a strike in an attempt to force negotiations with management.²⁰⁴ Venter, through empirical evidence, argues that what is evident from the strike is the current trend of “workers to disregard requirements of labour legislation and to breach existing collective agreements [that have been] duly executed by elected union officials by embarking on wildcat strike actions, in the process employing violence [and] intimidation in order to force [employees] to accede to their demands.²⁰⁵ This [he concludes ‘poses] “grave danger for peaceful and harmonious industrial relations practice in” South Africa’.²⁰⁶ This trend is apparent in a number of strikes before and after Marikana of these the 2012 Farm Workers Strike²⁰⁷ and the 2014 Platinum Strike²⁰⁸

Towards the end of the 2012, farm workers in the in the Boland farming town of De Doorns went on strike over low pay and poor working conditions. This strike was illegal as it was organised by workers outside the trade union structure.²⁰⁹ Violence, arson, intimidation and killings characterised this strike from beginning to end.²¹⁰ The events led to the death of three workers, R150 million in damages as well as a 53 per cent increase in the official minimum wage.²¹¹ What is of significance about this strike is that the ordinary dispute resolution procedures were abandoned to an extent that the agreement between the farm managers, Congress of South African Trade Union (COSATU) and government was defied.²¹² This then leads one to agree

²⁰¹ Chinguno (note 126 above) 641.

²⁰² J Venter ‘Conflict in the trade union environment in South Africa: Implication for the ANC and the 2014 election: Reconnaissance’ (2014) 53(425) *Word and Action* 21.

²⁰³ Ibid.

²⁰⁴ Ibid, 245.

²⁰⁵ Ibid, 239.

²⁰⁶ Ibid.

²⁰⁷ Venter (note 177 above) 23.

²⁰⁸ I Solomons ‘Platinum strike consequences starting to take shape’ *Mining Weekly* 22 August 2015, available at <http://miningweekly.com/article/platinum-strike-consequences-starting-to-take-shape-2014-08-22>, accessed 11 February 2016.

²⁰⁹ Venter (note 202 above) 23.

²¹⁰ Ibid.

²¹¹ Bagraim (note 33 above).

²¹² Ibid.

with the submission of Martin Brassey when he argues that institutionalised collective bargaining in South Africa is wilting.²¹³

It is clear that many have decided to disregard the dispute resolution procedures that are detailed in the Act. Strikes that are in contempt of the Act and court orders as well as being violent have become a norm.²¹⁴ This suggests that labour unions are fast losing confidence of their members and workers are no longer willing to trust unions to negotiate on their behalf. The reality is that striking workers are taking matters into their own hands this is a result of a combination of division among unions and structural inequality. Chapter five looks at how these issues can be addressed.

3.3 CONCLUSION

At the onset this chapter set out to investigate the effectiveness of institutionalisation of industrial conflict. It sought to pronounce on whether the institutions that are designated to deal with labour dispute are successful. The narrative above leads one to the following unequivocal conclusion, this being the fact “that several factors continue to undermine the institutionalisation of healthy industrial relations.”²¹⁵ Among these factors is the disregard for dispute resolutions procedures by striking workers²¹⁶ and underlying social disorders such as structural inequalities.²¹⁷ These factors have resulted in collective violence by the workers as seen in a number of recent strikes. Research shows that there is a trend that is being employed by strikers to continuously disregard labour law dispute resolution procedures.²¹⁸ The reality is that, whether the law prescribes that workers cannot go on strike over certain issues, workers will continue to go on strike nevertheless. This trend however is not new, it was evident in the late 1970s where workers went on strike even though these were illegal.²¹⁹ Four decades later the government has through the limitation of the right to strike thought it best to limit the right to strike over added issues such as unfair discrimination.²²⁰

²¹³ Brassey (note 133 above) 828.

²¹⁴ P Benjamin ‘Beyond Dispute Resolutions: The Evolving Role of the Commission for Conciliation, Mediation & Arbitration (2014) 35 *ILJ* 10.

²¹⁵ Von Holdt (note 40) above 129.

²¹⁶ Samuel (note 45 above) 239.

²¹⁷ Von Holdt (note 40) above 129.

²¹⁸ Samuel (note 105 above) 239.

²¹⁹ Brassey (note 152 above) 8.

²²⁰ Equity Act, s 10(5)(a).

The submission is that like in the 1970s, and in recent times, strikers will not be deterred by laws that prohibit them from going on strike. It safe to conclude that forcing workers into set procedures and structures of resolving conflict has failed since there is a trend to disregard dispute resolution procedures by going on strike even though the right over that particular issue is limited, this will continue to happen for as long as underlying conditions are unsettled. The idea is to now look at the underlying conditions such as a lack of cohesion between the government, trade unions and businesses as reasons behind the prevalence of violence during strikes.

CHAPTER FOUR

REFORMING LABOUR RELATIONS LAW ACCORDING TO THE IDEALS OF SOCIAL CORPORATISM

4.1 INTRODUCTION

The conundrum that is industrial conflict has been alive for as long as the workplace has existed.²²¹ Given the diverging interests and objectives of employers and employees, conflict becomes inherent.²²² Notwithstanding this, it cannot be accepted that there is violence on a perpetual scale that is being witnessed on the picket-line. The current position threatens the maintenance of harmonious labour relations and the economic stability of the country.²²³ In response to the wave of industrial action currently facing the country, Martin Brassey has called for a complete reform in the labour system in the form of a ‘comprehensive overhaul of labour relations law’.²²⁴ The discussion that follows calls for a theoretical reframing of attitude towards the labour relations system that is currently operating in South Africa as a vehicle in which to mobilise unity, deliver labour peace and inspire economic stability.

The discussion in the previous chapters has established that the government has chosen to respond to increasing violence during strikes by limiting the right to strike and thereby diverting disputes into institutions that allow for third party interventions in the form of judges and commissioners of bargaining councils. The current system is premised on achieving labour peace through the channelling of disputes into arbitration and adjudicative institutions which are mediated by judges or commissioners of bargaining councils, this in turn weakens collective rights as it limits the right to strike which is seen as an important tool in collective bargaining.²²⁵ The submission advanced in this chapter holds that this approach is largely pluralistic²²⁶ in

²²¹ Clyde Summers ‘Patterns of Dispute Resolution: Lessons from four countries’ in A Rycroft (ed) *The Private Regulation of Industrial Conflict* (1987) 5.

²²² Finnemore (note 80 above) 1.

²²³ Jordaan & Ukpere (note 169 above) 1101.

²²⁴ M Brassey (note 133 above) 834.

²²⁵ Rycroft (note 18 above) 3.

²²⁶ The pluralist industrial relations system is a school of thought that analyses work and the employment from a theoretical perspective rooted in an inherent conflict of interest between employers and employees. The “employment relationship is [seen] as a bargaining problem between stakeholders with competing interest”, see J W Budd, R Gomez and N Meltz ‘Why a balance is best: The pluralist industrial relations paradigm of balancing competing interests’ (2004) *Theoretical Perspective on Work and Employment Campaign, IL: Industrial Relations Research Association* 195.

character.²²⁷ According to this approach, industrial peace can be best achieved through the balancing of power between unions and employers in isolation from environmental factors such as prevailing socio-economics conditions.²²⁸

However, recent violence on the picket line outlines a failure to manage industrial conflict; in light of this, emphasis on set procedures and institutions alone cannot be the answer.²²⁹ The argument avers that in order to deal with violence on the picket line, collective bargaining must work in partnership with broad political transformation.²³⁰ Webster and Simpson call this the ‘constitutionalisation of the working class’.²³¹ Employers and employee representatives must be engaged continuously in an effort to improve the lives of the working class outside the shop floor. In South Africa this has not happened in its totality.²³² The argument holds that the creation of harmonious industrial relations depends on other, non-legal means. When different role players are attempting to manage conflict they must be considerate of the broader socio-economic conditions of society.²³³ Furthermore, the socio-economic needs of society must be considered and attended to even when there is no conflict. This also calls for pre-emptive collective bargaining, which calls for the representatives of trade unions and employers to introduce detailed action plans on negotiation strategies, which will include discussions on anticipated issues over which a strike might take place.²³⁴ When this is done social corporatism (also called social democratic corporatism)²³⁵ becomes the system that is adopted. The arguments advanced hold that we are to adopt social corporatism as a substitute for pluralism, for reasons detailed below.²³⁶

²²⁷ Finnemore argues that the country has moved from an adversarial pluralist labour relationship and has since moved to a societal corporatism labour relationship. The argument advanced in this discussion argues that the political transformation of 1994 was intended to achieve a social corporatism system of labour relationship but that this has not happened for reasons detailed later in the chapter, see Finnemore (note 80 above) 16.

²²⁸ E Webster and C Simpson ‘Crossing the picket line: Violence in industrial conflict: the case of the Afcol strike’ (1990) 11(4) *ILJ* 19.

²²⁹ N Kumari and R Ratna ‘Study of Factories Act and industrial relations in manufacturing sector’ (2014) 1(1) *Journal of Public Policy and Governance* 46

²³⁰ Webster and C Simpson (note 221 above) 19.

²³¹ Kumari and Ratna (note 229 above).

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ Brand (note 18 above) 11.

²³⁵ Social corporatism emphasises ongoing dialogue between the employer, trade unions and the state. Social corporatism is sometimes referred to as tripartite co-operation or social dialogue, see Finnemore (note 73 above) 8. The argument advanced in this discussion holds that while there is some dialogue it is often separate and existing outside the labour relations system.

²³⁶ Finnemore (note 80 above) 13.

Social corporatism understands that the continued working of labour relations and industrial peace depends on larger welfare provisions that work in a lock and key combination with pre-emptive collective bargaining.²³⁷ As things stand, in South Africa these two features work in isolation. The social corporatism perspective further understand the place of employers, trade unions and the state as going beyond the bounds of the labour market.²³⁸ Employers and employees share a common interest in maintaining a more equal society.²³⁹ The effect of this stance is that the management of industrial conflict is confronted holistically²⁴⁰ and is not sidelined as merely issues of supply and demand; instead violence in industrial conflict is seen as the manifestation of a breaking society in the form of structural violence and social inequalities.²⁴¹

Pre-emptive collective bargaining and the strengthening of the relationship between the government, trade unions and businesses are approaches which will be key to the fixing of our disintegrating industrial system that continues to be charged with unrest and entrenched social inequalities.²⁴² Violence on the picket-line cannot be solved by the introduction of striker controls that merely force disputes into arbitration institutions instead of allowing for constructive engagement and collective bargaining on these.²⁴³ Arguably, s 65(1)(c) of the Act does not speak to the broader issues relevant to the industrial relationship.²⁴⁴ Perpetual increase in violence is instead a call to re-examine our system of dispute resolution with a view of eliminating stricter controls on strikes rather than introducing new ones.²⁴⁵

The discussion that follows aims to put into perspective the importance of moving from pluralism into social corporatism by situating it in the context of lessons to be learnt from the Marikana massacre.

²³⁷ Ibid.

²³⁸ Wester and Simpson (note 228 above) 32.

²³⁹ Ibid.

²⁴⁰ Rycroft (note 18 above) 1.

²⁴¹ Ngcukaitobi (note 12 above) 858.

²⁴² Ibid.

²⁴³ Selala (note 32 above) 124.

²⁴⁴ Ibid.

²⁴⁵ D Toint and Ronnie (note 10 above) 196.

4.2 PLURALISM AS AN APPROACH TO INDUSTRIAL CONFLICT

The labour relations framework that is currently operating in South Africa has characteristics of past apartheid structures that are based on adversarial and pluralist relationships.²⁴⁶ It was hoped that the political transformation of 1994 would be a catalyst for a move into a social corporatism of industrial labour system.²⁴⁷ Propositions advanced in this dissertation argue that this has not happened. For one, the relationship between the unions, businesses and the government which forms the basis of social corporatism is faulty and adversarial.²⁴⁸ The argument advanced here therefore holds that one major part of social corporatism is still lacking. There is a need for those in the employment relationship and the government to reach agreements on labour law provision that not only satisfy the immediate needs of their own but also take into account the broader society and its needs.²⁴⁹ Our labour relations system has failed to transform into social corporatism instead it is still pluralistic and adversarial with remnants of social corporatism here and there. Remnants of social corporatism in South Africa include the existence of a socio-political organisation of society by major interest groups such as the government, trade unions and employers. The discussion that follows details the faults in our current labour relations framework. Preceding this is an analysis of what pluralism entails.

Pluralism in broad terms accepts that society consist of competing interests groups and it extends to each of these the right to free association and to further the interests of their constituents by negotiation.²⁵⁰ Conflict is therefore expected but it is believed that it should be pre-empted as it is destructive to the economy.²⁵¹ Pluralism is therefore concerned with the idea of how we are to distribute power around role players.²⁵² In the labour relations framework it aims to bring labour peace and stability in the economy through the balancing of power between unions and employers.²⁵³ Conflict is to be managed through (institutionalisation) structures and procedures. What this means is that arbitration and adjudicative procedures are at the forefront to the management of industrial conflict. One such example would be to limit the right to strike by

²⁴⁶ Finnemore (note 80 above) 16.

²⁴⁷ Ibid.

²⁴⁸ Estreicher (note 138 above) 217.

²⁴⁹ Ibid.

²⁵⁰ J Grunig 'Collectivism, collaboration, and societal corporatism as core professional values in public relations' (2009) 12(1) *Journal of Public Relations Research* 41.

²⁵¹ Finnemore (note 80 above) 13.

²⁵² Ibid.

²⁵³ G George 'Industrial relations and labour laws' (2012) *Slide Share*, available at www.slideshare.net/geenogeorge/industrial-relations-14860116, accessed 1 December 2015.

forcing workers to use set structures and procedures which involve third party intervention to resolve a dispute instead collective bargaining.²⁵⁴

4.3 SOUTH AFRICA'S CURRENT LEGISLATIVE FRAMEWORK

South Africa's difficult labour history started with a decade of increasing labour unrest and inadequate statutory provisions all of which resulted in the revolt by white mineworkers on the Rand in 1922.²⁵⁵ In response the government introduced the Industrial Conciliation Act of 1924²⁵⁶ which was the first labour legislation that structured relationships between employers and unions in South Africa. This Act was modelled on the pluralist principles of resolving dispute through institutions that are provided by the government. Three decades later a more comprehensive piece of legislation was promulgated in the form of the Labour Relations Act of 1956.²⁵⁷ The 1956 Act sought to promote collective bargaining and eliminate unfair labour practices through the development of forums such as industrial councils. These councils had the power to conclude collective agreements that are binding on all parties and in certain instances non-parties.²⁵⁸ In terms of the 1956 Act, disputes were largely settled either by agreement, assisted by voluntary mediation or by third-party intervention in the form of arbitration or adjudication or as a last resort by industrial action.²⁵⁹

Despite the efforts of the 1956 Act, in the seventies there was a considerable increase in the number of strikes, all of which were illegal but they happened just the same.²⁶⁰ The Labour Relations Act of 1995 was then introduced. The Act is purposed on the advancement of labour peace and collective bargaining by enhancing the powers of the forums designed to facilitate those objectives.²⁶¹ In keeping with the pluralist ideology, the Act much like its predecessor accepts that conflict is natural and functional but believes that it must be managed through set structures and procedures.²⁶² The argument is that the country has not escaped the pluralist relationship of the apartheid regime is supported by the fact that the Amendment Act show that the government still believes that the best way to deal with conflict is in the form of diverting

²⁵⁴ Ibid.

²⁵⁵ Van Jaarsveld and Van Eck (note 143) 10.

²⁵⁶ Industrial Conciliation Act of 1924.

²⁵⁷ Labour Relations Act 28 of 1956.

²⁵⁸ J D Fourie 'The role of the state in the regulation of industrial agreements' in A Rycroft (ed) *The Private Regulation of Industrial Conflict* (1989) 67-68.

²⁵⁹ Ibid.

²⁶⁰ Brassey (note 138) 8.

²⁶¹ The Act, s 1(c).

²⁶² Ibid.

anticipated conflict on an extended array of issues falling within employment law into arbitration and adjudication.²⁶³

4.3.1 Remnants of Social Corporatism

It is accepted that social corporatism is founded on a tripartite relationship that consists of the government, trade unions and businesses.²⁶⁴ It follows then that for social corporatism to function there must be a strong and working tripartite relationship.²⁶⁵ The arguments advanced here suggest that even though it was thought that after 1994 there would be a move away from the adversarial and pluralistic relationship that characterised the apartheid regime into a spirit of political transformation,²⁶⁶ this has not happened. Rycroft considers one such blatant example of failed relationships between the government and social parties which became apparent in the process leading to the adoption of the Amendment Act, in part signalling a lack of political transformation and cohesion among the government, trade unions and businesses.²⁶⁷

Soon after the country had ushered in a new political dispensation there was a deep need for social parties and the government to work collectively to ensure that a fallout is avoided as it would have fuelled an already tense transition, in this manner the relationship between, the state, trade unions and businesses became strong and constructive. In the 1990s, a healthy tripartite relationship was apparent from the collective compromise of social parties and the government in the adoption of labour legislation.²⁶⁸ The Act was drafted and approved by the National Economic Development and Labour Council (NEDLAC) and subsequently signed into the law with minimal changes.²⁶⁹ This position showed a healthy relationship of tri-partisan cooperation built on trust and most importantly compromise.²⁷⁰ Alas nearly two decades later the situation changed considerably as evident from the development of the Labour Relations Amendment Bill of 2012 all the way to the enactment of the Amendment Act. This submission is premised on the fact that Parliament deleted and amended a number of the provisions that were agreed at NEDLAC.²⁷¹

²⁶³ The Act, s 65(1)(c).

²⁶⁴ Grunig (note 213 above) 41.

²⁶⁵ Finnemore (note 80 above) 10.

²⁶⁶ *Ibid*, 16.

²⁶⁷ *Ibid*.

²⁶⁸ J Macee 'Trade unions and corporatism in South Africa' 21 *Transformation* 21.

²⁶⁹ Rycroft (note 2 above) 1.

²⁷⁰ M Moussouris 'Between class struggle and the developmental state: COSATU and the Sector Job Summits, a lesson in corporatism.

²⁷¹ Rycroft (note 2 above) 4.

NEDLAC is an essential feature of the tripartite relationship as it is an institution in which representative and collaborative consideration of ‘all proposed labour legislation relation to labour market policy’ must take place ‘before being introduced to Parliament’.²⁷² NEDLAC is a state funded body comprising of state representatives, union representatives, members who represent organisation of community and development interests, organised labour representatives and those who representing organised business.²⁷³ Constructive engagement on labour issues such as increasing violence during strikes should be addressed at NEDLAC on their way to subsequent approval with necessary but minimal changes from Parliament. The argument holds that the governing party should not usurp the work done at NEDLAC by using its majority powers in Parliament to make significant changes to the agreements concluded at NEDLAC. Given the representatively and importance of this institution it would have been thought that a discussion on the Amendment Act would have gone along the same line from Bill to Act as did the 1995 Act. This however did not happen. Instead there were substantial amendments and deletion by Parliament of several important sections that were agreed at NEDLAC.²⁷⁴ It was the view of the ANC lead government that ‘Parliament has the right to consider and deliberate on the recommendations and legislate.’²⁷⁵

One cannot help but concur with Rycroft in holding that the ability of Parliament to unilaterally overrule the outcome of the negotiations and deliberations of NEDLAC pushes it to a position of growing irrelevance.²⁷⁶ The situation then leads one to think that while South Africa purports to be a country built on a strong tripartite relationship, the reality is that the relationship is fragmented, this largely as a result of a government that continues to usurp collective work through its majority power. The reality is that we are a pluralist state under the guise of a socio-political state consisting of the government, employers and trade unions.

4.3.2 Marikana Massacre: A case in point

The tragic events of the Marikana massacre are set out in detail in the previous chapter. The discussion that follows uses the Marikana strike to contextualise the argument of the current legislative framework being pluralistic in character. The discussion aims to show that the tragedy

²⁷² National Economic Development and Labour Council Act 35 of 1995, section 5.

²⁷³ Ibid, section 3.

²⁷⁴ Ibid, 4

²⁷⁵ Statement issued by the office of the ANC Chief Whip 6 June 2013, available at <http://www.politicsweb.co.za/politicsweb/en/page71619?Oid+381499&sn+Detail&pid+71619>, accessed 20 November 2015.

²⁷⁶ Rycroft (note 2 above) 4.

that occurred in the Platinum Hills of Marikana can be explained by the disregard of the structures and procedures put in place to manage conflict, this failure is also linked to ‘social distance’.²⁷⁷ Social distance in this context refers to the position in which those in power become more concerned with staying in power as opposed to the challenges of those they are representing.²⁷⁸ Chinguno explains the current situation of violent and protracted strikes as one stemming from social distance.²⁷⁹ This continued adversarial relationship between the state, trade unions and employers threatens harmonious industrial relations, contributes to structural violence and ultimately leads workers to become quick-tempered as they start to feel the effects of social distance.²⁸⁰ The discussion will show that the failed tripartite relationship has left workers with no choice but to use strikes as means of protest which are in turn ‘fuelled by a rage against continuing poverty and unmet expectation after years of liberation from apartheid’.²⁸¹ The unilateral usurping of power by the government on collective work by social structures, like NEDLAC, also undermines labour peace. A look into the events of Marikana now follows to explain these arguments.

The first propellant to the flames that engulfed the Marikana tragedy came in the form of a refusal by Lonmin management to engage or recognise representatives put in place by the striking workers.²⁸² Labelling these workers as arrogant exploiters only worked in fuelling an already volatile situation.²⁸³ The stance of Lonmin management of not being open to negotiations by sticking to the collective agreement in place affirms the position of employers in believing that conflict should be institutionalised. Instead of insisting compliance with the collective agreement that was in place which prohibited a strike at the time, management should have been open to hearing the concerns of its employees, at the very least. The Farlam Commission report concludes that bloodshed would have been avoided if the mines had been closed.²⁸⁴ However the immediate needs of Lonmin to make profit over the safety of its workers played into a pluralistic objective. A total of 44 people had to first lose their lives before the state and social parties could

²⁷⁷ C Chinguno ‘Unpacking the Marikana massacre’ (2013) 124 *Global Labour Column2*, available at <http://column.global-labour-university.org>, accessed 2 January 2016.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Schutte & Sandile (note 1 above) 74.

²⁸² Samuel (note 45 above) 249.

²⁸³ Ibid.

²⁸⁴ Farlam (note 26 above) 471.

agree to re-open negotiations through the CCMA, a procedure which was a clear departure from conflict management procedures of the Act.²⁸⁵

Swelling tension between NUM and workers contributed immensely to the strike.²⁸⁶ Striking workers felt that NUM had failed to advance their interest during the wage negotiations with Lonmin management.²⁸⁷ Their dissatisfaction went from rejecting representation from NUM to an attempted attack on its officials on 14 August 2012.²⁸⁸

Government has also not escaped scathing criticism for its approach to the dispute. The brutal force employed by the police was condemned in the strongest manner.²⁸⁹ For his part Deputy President and non-executive director and shareholder at Lonmin, Cyril Ramaphosa saw blame being imputed on him by the representative of the victims.²⁹⁰ It was contended that his call for ‘concomitant action’ in the days leading to the Marikana tragedy was a catalyst for the hostile stance taken by police on the morning of the tragedy.²⁹¹ The government is working towards dousing any resistance against it by introducing stricter controls on strikes, there is also adversarial competition among the different unions and the employers are on a mission of making as much profit as possible while the country is profitable. This is not consistent with social corporatism.²⁹²

4.4 TOWARDS SOCIAL CORPORATISM

Two years into the new millennium, Finnemore predicted the trajectory of South Africa’s labour relations system.²⁹³ In his discourse he entertains the idea that in light of the country’s ‘unique state of political and economic transformation’, two possible outcomes exist.²⁹⁴ The first prediction holds that it is possible that the country might adopt social corporatism which may influence effective social dialogue and decision-making.²⁹⁵ On the other hand the author believes that the economic factors such as the need to attract investment and attend to growing

²⁸⁵ Samuel (note 45 above) 251.

²⁸⁶ Selala (note 32 above) 122.

²⁸⁷ Ibid.

²⁸⁸ Chinguno (note 126 above) 641.

²⁸⁹ A England South Africa’s police slammed over deaths of Marikana miners’ *Financial Times* 25 June 2015, available at <http://next.ft.com/content/2b801bf6-1bd6d-11e5-a130-2e7db721q996>, accessed 11 February 2016.

²⁹⁰ Farlam (note 26 above) 412.

²⁹¹ Ibid.

²⁹² Maree (note 268 above) 27.

²⁹³ Finnemore (note 80 above) 16.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

unemployment crisis could lead the government into controlling trade unions strictly.²⁹⁶ The second of these predictions has since come true, the second prediction was that limiting the right to strike effectively reduces the ability of trade unions to bargain collectively.²⁹⁷ The proposition is that limiting the right to strike is erroneous. Research shows that there is a trend by strikers to continuously disregard labour law dispute resolution procedures which in some instances prohibit the right to strike.²⁹⁸ This trend existed in the 1970s and it evident in the current political dispensation, therefore there is a need to move away from institutionalisation of conflict as our main resolution to dispute. A new approach needs to be adopted, this approach is social corporatism.

It is understood that social corporatism is perceived to provide less strike-prone society, Sweden being one such example.²⁹⁹ The discussion will advance two proposition as to why this contention is true. The first proposition holds that one essential feature of social corporatism is still missing, this being compromise.³⁰⁰ In this tripartite relationship that exists, the government is the only one that is not willing to forego anything.³⁰¹ This situation is in stark contrast to the unfolding of events of the early 1990s. In September of 1990 there was constructive and swift accord between COSATU, National Council of Trade Unions (NACTU), the Department of e Department of Manpower and other interested parties on the 1991 Labour Relations Amendment Act.³⁰² A decade later the situation has changed, the government is no longer willing to compromise on labour provisions that do not satisfy their immediate needs. A tangible example of this is the government's total disregard of provisions of the Amendment Act that were agreed to at NEDLAC.³⁰³ The question however still remains as to why there is increasing violence on the picket line.

The answer to this question is short yet profound, the reality is that workers have lost trust in, trade unions and employers.³⁰⁴ Workers believe that it is only they who can force change and there protests we see are effectively fuelled by rage against continuing poverty and unmet

²⁹⁶ Ibid.

²⁹⁷ Rycroft (note 18 above) 4.

²⁹⁸ Samuel (note 105 above) 239

²⁹⁹ Maree (note 228 above) 27.

³⁰⁰ Finnemore (note 80 above) 13.

³⁰¹ Rycroft (note 2 above), the submission of the governments unwillingness to compromise is made on the basis that there were substantial deletion and amendment by Parliament on the provisions of the Labour Relations Amendment Bill of 2012 which were in large agreed to at NEDLAC.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Estreicher (note 138 above) 217.

expectation that have persisted notwithstanding two decades of democracy.³⁰⁵ Workers in Marikana attacked their representative, government refused to classify the events as a protest instead calling it criminal acts and employers labelled those on strikes as arrogant exploiters.³⁰⁶ Social corporatism aims to bring back parity by forcing all parties into some form of compromising and calling the state and interested parties to work together to reach agreements that satisfy the needs of the broader society.³⁰⁷

4.5 CONCLUSION

Failed corporation and compromise between trade unions, businesses and especially by the government is a major part of the problem that contributes to violent strikes. The argument here holds that all the members of this relationship are ineffective in attending to the broader economic and social issues of the workers. Social corporatism calls on the tripartite members to work progressively towards this. Simply put, parties in social corporatism aim to reach agreements that satisfy the broader needs of society as opposed to the immediate need of their. This however has not happened; the Marikana Massacre is a case in point.

Lastly, in order to restore labour peace we need move away from adversarial and pluralistic industrial relationships and into a spirit of social corporatism. In order for this to be happen it is proposed that the government should not use its majority power to usurp the collective work of social parties. As explained in the discussion above, the government is using it majority power in parliament to make substantial amendments to provisions that were agreed at NEDLAC, this has to change as representatives from business and employees are starting to feel as if they are wasting their time in contributing to discussions at NEDLAC.³⁰⁸

³⁰⁵ Ibid.

³⁰⁶ Samuel (note 106 above) 249

³⁰⁷ Finnemore (note 80 above) 16.

³⁰⁸ Rycroft (note 2 above) 4.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 RECOMMENDATIONS

A number of problems in the current labour relations framework have been made apparent from the discussion on the previous chapters. Among these; trade union division,³⁰⁹ disregard of dispute resolution procedures;³¹⁰ entrenched social inequalities;³¹¹ the growing irrelevance of NEDLAC³¹² and the lack of cohesion between the government; trade unions and employers.³¹³ Consequently there is a need for a holistic response to the problems at hand.³¹⁴ The government must approach the situation with a view of eliminating the violence that is employed during strikes, this being first priority. Through the solutions suggested in this chapter, it is also possible to reduce the number of strikes and thereby bring much needed economic stability and harmonious labour relations. However it is worth mentioning that the responsibility of encouraging labour peace does not rest solely with the government. There is a need for trade unions, businesses and the government to work collectively in ensuring that there is no further loss of life and damage to property on the picket-line.

5.1.1 Building a strong tripartite relationship

There is a resounding agreement between authors on the limitation of the right to strike having no effect on the wave of industrial action facing the country.³¹⁵ The findings are, that unless the faults in the industrial relationship are attended to then there will continue to be violent strikes.³¹⁶ The idea is to look at fixing the broader issues affecting this relationship. There is an urgent need for trade unions and employers to reach agreements that aim to satisfy the broader needs of society instead of looking to only fulfil their own immediate needs.³¹⁷

³⁰⁹ Good (note 55 above) 217.

³¹⁰ Samuel (note 111 above) 239.

³¹¹ Ngcukaitobi (note 13 above) 836

³¹² Rycroft (note 2 above) 4.

³¹³ Ngcukaitobi (note 13 above) 836

³¹⁴ Rycroft (note 18 above) 1.

³¹⁵ Selala (note 30 above) 124.

³¹⁶ Ibid.

³¹⁷ Chinguno (note 277 above).

The greatest responsibility rests with the government. There is an urgent need for it not to use its majority power in parliament to usurp the collective work of social parties. A failure to do this will lead trade unions and employers to feel undermined thereby disconnecting themselves from the social inequality that continues to plague the working class, this has already started to occur as seen from Lonmin management and NUMs unwillingness to re-open negotiation.³¹⁸ If we are to achieve labour peace, the government has to compromise and yield when necessary to the provisions agreed at NEDLAC. In turn this will create a strong relationship that is built on trust and compromise between government, trade unions and employers. This in turn will lead to workers regaining trust in their unions and the government. Ultimately striking workers will not resort to violence in an attempt to force the hands of the employer because they will be under the belief that the unions and employers are working collectively for their interests instead of collaborating on self-serving interests.³¹⁹

5.1.2 Pre-emptive collective bargaining

Having established that the best solution to industrial conflict is to allow for engagement between social parties and the government, it is now important to consider how to make these discussions constructive. One suggestion advanced here is that there should be pre-emptive collective bargaining even in instances where there is no dispute. In order to fulfil these commitments the union and employer negotiation teams will have to gather around the bargaining table with the aid of an independent and trusted facilitator. The role of the facilitator apart from the obvious will be to bring trust and to improve communication between the parties. The biggest hurdle that this study has identified is in the lack of trust and communication between employers, employees and their representatives. The idea of pre-emptive collective bargaining will ensure that there is adequate communication between all parties involved, this in turn will instil trust. Once more, employers and unions will be kept abreast with the difficulties that continue to face the working class thus feeding into social corporatism. Explained differently, pre-emptive collective bargaining will call for the representatives of trade unions and employers to introduce detailed action plans on negotiation strategies, which will include discussions on anticipated issues over which a strike might take place.³²⁰ A proper explanation of this is provided by Finnemore, who describes social corporatism as a strategy that promotes effective social dialogue and decision

³¹⁸ Ibid, 249.

³¹⁹ Chinguno (note 277 above).

³²⁰ Brand (note 18 above) 4.

making on issues that affect the working class.³²¹ Through these various discussions there will be discussions on issues that affect employers and will help in keeping those in the employment relationship abreast with these difficulties, forcing them to try to find solutions so as to avoid a strike.³²²

5.1.3 A new look: Amendment Act

The imposition of stricter controls on strike law is a misguided approach.³²³ A knee-jerk reaction from the government that aims to deal with the fall out of violent strikes by prohibiting the right to strike over issues that can be referred to arbitration or the Labour Court in terms of employment law. This approach has the same characteristics as those employed by the apartheid regime in trying to deal with violent on the picket line. Striking workers will soon realise that this approach is no different from those employed by a government that oppressed them a little over two decades ago. This will only anger the working class who will start to feel disconnected from those who represent them.³²⁴

To reverse this effect there needs to be fresh discussions between the government and social parties. First and foremost the 2014 amendments to s 65(1)(c) need to be removed. The study has showed that limiting the right to strike is not a proper approach as striking workers in any event will disregard dispute resolution procedures that have been put in place. In this regard the submission is that there should be research on how to improve the problems identified in this study, this is to be followed by discussions at NEDLAC on provisions that will not look to limit the right to strike but rather aim to address division among trade unions and create cohesion between the government and businesses and trade union need to be focused on. There is an immediate need of addressing social inequalities this can either be in the form of amendments to the Act which will impose continued obligation on those in the employment relationship to work towards addressing the social disorders of workers.

³²¹ Finnemore (note 80 above) 16.

³²² Ibid.

³²³ Du Toit and Ronnie (note 11 above) 196.

³²⁴ Chinguno note 277 above).

5.2 CONCLUSION

The reality that exists is that there are frightening levels of labour unrest. More concerning than this is the increasing violence that characterises a number of these recent strikes. To be more descriptive, there is damage to property, intimidation of non-striking workers, constant feud between the police and strikers and distrust between social parties, the government and labour. There is a growing trend that is being employed by striking workers of disregarding dispute resolution procedures of the Act, while employing violence to push for their demands. In response there is now a trend in which employers are acceding to the demands of the workers in an effort to end destruction to property as opposed to responding to the dispute at hand. Both these trends pose serious threats to harmonious industrial relations and to the economic stability of the country. The government has heeded the call and as a result it has made attempts to respond to these concerns, this in the form of the Amendment Act.

As outlined earlier in the discussion, the Amendment Act further increases the number of issues that workers cannot go to strike over. This, the discussion accepts is an approach that is misguided.³²⁵ The strategy here is to limit the right to strike by diverting conflict into set procedures and structures of arbitration and adjudication. The argument advanced in this discourse is that, much like in the seventies the working class will continue to disregard the laws that preclude them from going on strike. In response, the findings of this research makes two propositions.

The first being the need of breaking down pluralistic and adversarial industrial relationships. In order to achieve this social parties and the government need to work collectively in addressing not just their immediate political and economic needs but also be mindful of the broader needs of society. In doing so they need to adopt social corporatism which as outlined earlier is based on social partnership between businesses, trade unions and government. The continued and concerted effort between these parties will ensure that all parties gain the trust of the working class in turn they will see that these parties are working towards improving the social inequality they are faced with, workers will then in response find other means other than violence to resolve dispute. This submission is premised on the fact that in a number of strikes identified in this study, striking workers employed violence to force the employers hand because they believed that their union representatives were colluding with the employers and that the government sees

³²⁵ Du Toit and Ronnie (note 11 above) 196.

them as nothing but criminals. The second proposition finds that we are to eliminate stricter controls on the right to strike as these have no influence on attempts to curb violent strikes

At the last the words of Darcy Du Toit and Roger Ronnie help summarise the study, they also help provide a response to the main research question.³²⁶ However the study then goes one step further by proposing solutions to the problem of violent strikes. Indeed the government through limiting the right to strike is aiming to circumvent another Marikana massacre. However,

‘violence on the picket-line is a wake-up call not simply to introduce stricter controls, but to re-examine our system of dispute resolution, including strike law, more generally with a view to eliminating dysfunctional barriers rather than introducing new ones.’³²⁷

³²⁶ Ibid.

³²⁷ Ibid.

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