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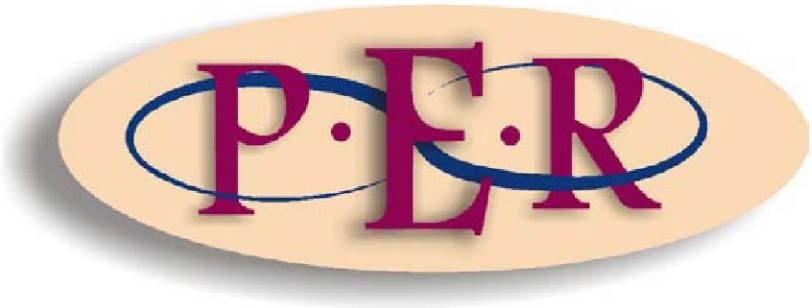

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THE DIFFERENT WORLDS OF LABOUR AND COMPANY LAW: TRUTH OR MYTH?

MM Botha*

1 General

The shareholder-stakeholder debate took central stage as early as in the 1930s in the United States of America with different viewpoints discernible from commentators like Dodd and Berle. The issue debated was whether the interests of other stakeholders should be addressed in corporate law or whether shareholder primacy and the maximisation of their wealth should be the only issue.[1] Multiple theories and models on the nature of the company and corporate governance stemmed from these different schools of thought. The shareholder-stakeholder issue is still often debated in South Africa and cannot be viewed as settled. Developments in corporate governance jurisprudence in South Africa, also including stakeholders other than shareholders, have been witnessed to by the publication of the various *King Reports*,[2] which paved the way to the highly anticipated *Companies Act*.[3]

The development of corporate law and corporate governance jurisprudence paved the way for the recognition of multiple stakeholders of a company with only one shareholder, but the full recognition of employees as stakeholders in a company is still a matter for debate in South Africa. In 1980, British law, for example, was changed to require that directors have regard "to the interests of the company's employees in general, as well as the interests of its members".[4]

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1 Berle 1932 *Harv L Rev* 1365-1372 and Dodd 1931-1932 *Harv L Rev* 1145-1163 for the respective viewpoints on the shareholder-stakeholder debate.

2 The King Report on Corporate Governance 1994 (Institute of Directors *King Report I*), King Report on Corporate Governance for South Africa in 2002 (Institute of Directors *King Report II*) and King Report on Corporate Governance for South Africa in 2009 (Institute of Directors *King Report III*).

3 *Companies Act* 71 of 2008 (the *Companies Act*). The *Companies Act* became operational on 1 May 2011.

4 Wedderburn 1993 *ILJ* (UK) 527.

Unfortunately the South African labour or company law does not yet provide clarity as to what the extent of the involvement and level of participation of employees should be in corporate decision-making. Although labour law provides for the extensive protection of employees the protection is limited, especially when it comes to employee participation in corporate decision-making. A relevant question (from a corporate law perspective) is should corporate law allow labour law to make inroads with regards to employee participation? This is especially relevant when due cognisance is taken of the level of employees' participation in corporate decision-making as well as the function of labour law and the theories and models of companies.

The purpose of this article is to investigate if and how contemporary South-African corporate law allows employees' interests into its realm, and to provide an overview of the different functions and/or models that apply in both labour and corporate law.

The topic is a multi-dimensional one. However, this article will not investigate in detail the various provisions in the *Companies Act* with regard to how employees are accommodated and if they are accommodated differently from other stakeholders. It will also not look in detail at the duties of directors and how or if these duties have changed with the introduction of the *Companies Act*. Finally, this contribution won't consider the different board structures and the possibilities of the participation of employees in these structures, and will also not address the issue of workplace forums and the collective bargaining framework in detail. These matters will be addressed in subsequent contributions.

2 Overlap between corporate and labour law

Even though developments in the coordination of labour and company law have taken place (in South Africa as elsewhere) they are still regarded as two distinct and separate worlds of legal thought, political reality,[5] fields of legal scholarship and regulatory policy.[6] Company law regulates the actions of companies in the market[7]

5 Zumbansen 2006 *Ind J Global Legal Studies* 272.
6 Mitchell, O'Donnell and Ramsay 2005 *Wis Int'l LJ* 417.
7 Smit 2006 *TSAR* 152.

and usually excludes labour law and employees.[8] Abram Chayes once observed that the concept of "corporation" not only has economic dimensions but also political, legal and social ramifications which extend beyond it.[9] The problem, however is that these dimensions as "appropriate academic disciplines remain largely unconcerned" with each other.[10]

Some authors have pointed out that corporate law is primarily about shareholders, the board of directors and the relationships between them, and that it occasionally concerns itself with other creditors and bondholders.[11] Corporate law courses only on rare occasions pause to consider the relationship between the corporation and worker because the "justification for insulating the concerns of workers from the attention of corporate law is that such concerns are the subject of other areas of the law, most prominently labour law and employment law."[12]

The following is thus evident:

> We infer from the teaching of both corporate governance theoreticians and legal scholars that debates on the regulation and conception of corporate governance within the framework of 'stakeholder-oriented vs. shareholder-oriented perspectives' or 'legal incorporation in company law and labour law vs. incorporation in company law or labour law' dichotomies mask a conflict concerning more fundamental representations of the world as they question the division of the world into an economic and a social sphere.[13]

Smit[14] addressed the issue of flexibility, her discussion highlighting important synergies that exist between the fields of labour and company law and the different objectives they have:

> It appears that any labour market reforms will have to take account of developments and trends in economic and social spheres as well. In this regard it is argued that there are still old unresolved problems relating to the role and place of employees in company law that must first be reconsidered before the issue of greater flexibility can seriously be entertained.

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8 Zumbansen 2006 *Ind J Global Legal Studies* 276.
9 Zumbansen 2006 *Ind J Global Legal Studies* 277.
10 Zumbansen 2006 *Ind J Global Legal Studies* 277.
11 Greenfield 1998 *BC L Rev* 283.
12 Greenfield 1998 *BC L Rev* 283.
13 Cochon 2011 http://etui.org/research/publications 12.
14 Smit 2006 *TSAR* 152-153.

> There are some cross-cutting issues concerning company and labour law as far as the issue of flexibility and workers' aspirations are concerned. Many prescriptions relating to the organisation of a workplace and rights and duties and employment contracts have an impact on the prerogative of management. It should also be noted that there are generally limitations to the scope and effect of legal provisions and, accordingly, employee protection derived there-from. ...
>
> Company law regulates the actions of companies in the market. Unfortunately, very little attention is bestowed on the interests of employees in company law, either nationally or internationally. As far as insolvency law is concerned, the position is not much different. There would thus seem to be a vacuum in research in this field, since it certainly cannot be argued that employees are not closely connected to the companies they work for and on which their livelihoods depend. Employees deserve to have more attention paid to their often precarious position. It should be evident that labour can only do so much and that other branches of the law, including company law, must address some of the new challenges facing markets.[15]

Glynn[16] adds (in his discussion of the American position) that corporate law, in simplified terms, usually purports to serve two kinds of functions. First, it establishes the legal form of the firm and it also provides whether its attributes can be waived or not. These attributes include its legal personality, equity ownership structure, decisional structure, and limited liability.[17] Second, corporate law potentially addresses three sets of "value-reducing forms of opportunism" or agency problems: first, a conflict exists between manager and shareholder interest; second, there is a conflict between the interests of controlling and non-controlling shareholders or shareholder groups interests; and third, there is a conflict between the interests of shareholders and of other stakeholders who may be viewed as outside the firm, including employees, creditors, customers, and society as a whole.[18]

Although what is said above is true, it does not mean that scholars and lawyers in labour law have expressed no interest in the field of company law and *vice versa*. It is thus clear that both corporate law and labour law have provided certain fundamental starting points for analysis, each of which shapes the regulatory scope of the other. Corporate law, for example, bestows legal personality on business entities, and allows such entities to enter into bilateral employment contracts with

15 Smit 2006 *TSAR* 152-153.
16 Glynn 2009 *IJCLLIR* 3-14.
17 Glynn 2009 *IJCLLIR* 6.
18 Glynn 2009 *IJCLLIR* 6.

workers.[19] Labour law, at the same time, subjects the corporation's actions in establishing, conducting, and terminating such employment relationships. Generally speaking the "separation" entails that the concerns and problems associated with corporate governance are regarded as separate from those problems associated with employment regulation.[20] It is evident that corporate and labour law affect each other, especially with regard to corporate governance and labour management, in that "labour law structures and limits what management can do in its relations with employees."[21] Glynn[22] also points out that relegated to the margins in corporate-law doctrine are the interests of other constituencies like employees - especially when we consider how narrow these concepts are reflected in the language that we use in corporate and employment law. This is evident in how firm "ownership" interests are described as well as in how the view of what constitutes corporate "internal affairs" is limited, and there is a tendency to characterise employment law as concerning the relationships between a firm and its employees, not as between employees and other stakeholders in the firm (for example managers and shareholders).[23] It is therefore important when it comes to employee participation in corporate decision-making to take cognisance of both labour and company law principles. In other words, a multi-disciplinary approach is preferable when researching the role, status and rights and obligations of employees in the corporation. It can thus be said that "while labour law and corporate governance could once have been thought of as discrete areas for analysis, it is clear that is no longer the case" as the relationship between them "has become both complex and paradoxical".[24]

19 Mitchell, O'Donnell and Ramsay 2005 *Wis Int'l LJ* 417.
20 Mitchell, O'Donnell and Ramsay 2005 *Wis Int'l LJ* 417.
21 Mitchell, O'Donnell and Ramsay 2005 *Wis Int'l LJ* 475.
22 Glynn 2009 *IJCLLIR* 6.
23 Glynn 2009 *IJCLLIR* 6.
24 Deakin "Workers, Finance and Democracy" 79.

3 The different "worlds" of company and labour law

3.1 The functions of labour law

Labour law is a concept that is difficult to define because no comprehensive and generally accepted definition exists. The notion of "labour law" thus needs explanation.[25] *What is labour law for?* is a question with a past and a future.[26] In some contexts it is understood to refer merely to collective labour relations, while in others it covers both individual and collective labour law. The terminological difference "is not only of semantic interest" but also indicates totally different approaches to labour law.[27] Labour law is different from other legal fields because it is often:

> promulgated through 'non-legal' (ie political, social, and cultural) processes, expressed in the form of 'non-legal' (ie non-state) norms and administered through 'non-legal' processes (ie those not normally employed by conventional courts).[28]

When labour law functions in actual workplaces it does not challenge the "hegemonic claims of state law and legal institutions" but it provides alternative approaches to law such as legal pluralism, reflexive law, and critical theory.[29] It is thus clear that when labour law is seen from this perspective, it is neither "non-law nor a mutant form of law but law incarnate", and constitutes an experiment in social ordering that reveals the true nature of the legal system in general.[30]

It is accepted, however, that the principal purpose of labour law "is to regulate, to support and to restrain the power of management and the power of organised labour".[31] This argument is based on the viewpoint that labour law acts as a countervailing force counteracting the inequality of bargaining power that can be found in the employer-employee relationship.[32] In their original meanings the words

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25 Davidov and Langille *Labour Law* 70.
26 Davidov and Langille *Labour Law* 1.
27 Davidov and Langille *Labour Law* 70.
28 Davidov and Langille *Labour Law* 36-37.
29 Davidov and Langille *Labour Law* 36-37.
30 Davidov and Langille *Labour Law* 36-37.
31 Kahn-Freund *Labour* 8; Davies and Freedland *Kahn-Freund* 15.
32 Kahn-Freund *Labour* 8.

"management" and "labour" do not refer to persons but activities,[33] which included the following: planning and regulating production, distributing, and co-ordinating capital and labour on the one hand, and producing and distributing on the other.[34] Today, though, "management" and "labour" are still abstractions and are used to denote not the activities but the people who use them. "Management" may be a private employer, company, firm, association of employers or an association of associations, public corporation, local authority or the state (government).[35] The word "management" can be used to identify the person or body who has the power to define policy, and to make rules and decisions, and can be a production or factory manager or the foreman of an assembly line or the head of department or the board of directors.[36] These persons command their subordinates through instructions given by them as managers. "Labour" on the other hand denotes the trade unions with which management negotiates, the shop stewards, and the subordinates who are members of trade unions.[37] A trade union is "an association of employees created principally to protect and advance the interests of its members (workers), through collective action, and to regulate reactions between employees and employers."[38] The primary function of these unions is to negotiate collective agreements on behalf of these members with employers. These negotiations cover issues such as wages and work conditions such as working hours, safety at work and benefits.

In order to trace the distribution of managerial power, society is tasked with a difficult assignment. This task is not easier when the means of production are publicly owned than when they are privately owned.[39] It is also difficult to determine where power lies on the side of labour.[40] It is thus important to look at the function(s) of labour law to see whether the widely formulated purpose is (still) met

33 Davies and Freedland *Kahn-Freund* 15.
34 Davies and Freedland *Kahn-Freund* 15.
35 Davies and Freedland *Kahn-Freund* 15.
36 Davies and Freedland *Kahn-Freund* 15.
37 Davies and Freedland *Kahn-Freund* 15-16.
38 Barker and Holtzhausen *South African Labour Glossary* 153. S 213 of the *Labour Relations Act* 66 of 1995 (LRA) define a trade union as follows: "A trade union is nothing other than an association of employees whose principal purpose is to regulate relations between employees and employers, including employers' organisations."
39 Davies and Freedland *Kahn-Freund* 17.
40 Davies and Freedland *Kahn-Freund* 17.

or not. It must be noted that concepts such as employer and employee and the boundaries that they create have a purpose and it is our task "to understand and define this purpose, indeed the *goal,* and thus the very idea, of labour law – and to develop the best *means* (conceptual boundaries and other legal techniques) to achieve it.[41] Langille,[42] a Canadian scholar, noted that the objective of labour law is "justice" in employment and productive working relations which will not otherwise be obtained if workers in the labour market were still "at a bargaining power disadvantage in that contracting process".[43] Labour law responds to this basic problem, in two ways: first, it secures justice by rewriting the substantive deal (mostly by statute) between workers and employers.[44] This is done by providing labour standards and thus providing for maximum hours, vacations, minimum wages, health and safety regulations, and so on. The second technique is "responding to the perceived problem … not via the creation of substantive entitlements, but rather by way of procedural protection", and thus protecting rights to a fair bargaining process.[45]

It must be pointed out that two main philosophies concerning the function of labour law exist. They are the market and protective views.[46] The market view is based upon the principles that government intervention plays a role in the attainment of prosperity and economic growth. Excessive government intervention can, however, lead to economic decline if the market forces are not left to attain economic growth and prosperity. The function of labour law is thus not to interfere in market forces but to assist them to ensure economic growth and the well-being of employees and employers.[47] When a successful partnership exists between employers and employees they not only have a mutual understanding of one another's needs but they also have the shared goal of developing a winning business.[48] In terms of the

41 Davidov and Langille *Boundaries* 10.
42 Langille 2005 *EJIL* 428-429.
43 Langille 2005 *EJIL* 428-429.
44 Langille 2005 *EJIL* 428-429.
45 Langille 2005 *EJIL* 428-429.
46 Creighton and Stewart *Labour Law* 2-3.
47 Creighton and Stewart *Labour Law* 5-6.
48 Wedderburn 2002 *ILJ* (UK) 99, where he refers to *The Partnership at Work Fund: Open for Applications* (DTI 2002 Application Form).

protective view, the imbalance of power places the employee at a disadvantage when it comes to bargaining power and resources, and due to this imbalance the function of labour law is to protect employees and assist them in redressing the imbalance to power.[49] It can thus be said that the overriding concern of labour law is the protection of employment and employees.[50] While labour law seeks to ensure the protection of employees it also contributes to organising the production of goods or services in firms, because while spelling out the rules that govern the master-servant relationship in terms of the individual employment contract it is also concerned with the centre of power and governed by labour relations.[51]

Labour law also addresses the paradox encapsulated in the principle "labour is not a commodity", because it regulates employment relationships for two principal purposes, namely "to ensure that they function successfully as market transactions, and, at the same time, to protect workers against the economic logic of the commodification of labour".[52] "Labour is not a commodity"[53] is perhaps one of the most recognised international labour principles and is still proclaimed by the International Labour Organisation (ILO) today. It has been argued that despite radical, socialist and right-wing economists having proclaimed and endorsed this principle, it presents us with a paradox because it "asserts as the truth what seems to be false".[54] In this regard, Collins[55] made the following statement:

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49 Creighton and Stewart *Labour Law* 2-3.

50 Zumbansen 2006 *Ind J Global Legal Studies* 277.

51 Morin 2005 *Int'l Lab Rev* 7.

52 Collins *Employment Law* 3.

53 O'Higgins 1997 *ILJ* (UK) 230 is of the view that three meanings can be attached to the principle "Labour is not a commodity": "As used by Ingram, it meant that pricing of labour could not be left solely to the operation of the labour market. The level of wages had to be such as to provide a reasonable standard of living for a worker and his or her family. The phrase, however, has other meanings, as in *Noakes v Doncaster Collieries.* It also means that a worker cannot be transferred from one employer to another without the worker's consent. In the history of the ILO it has been given a third significant meaning and explains why the ILO has dedicated so much effort to the outlawing of fee-charging employment agencies. It has also been used in the ILO as a justification for an ILO Convention outlawing illegal manpower trafficking in migrant labour." See also Langille 1998 *ILJ* 1011, where he points out that the "answer which 'old' labour gave to the proponents of market ordering was 'labour is not a commodity'" and that the "answer which 'new' labour law must give in a globalized economy is that it also follows that 'labour *law* is not a commodity'".

54 Collins *Employment Law* 3.

55 Collins *Employment Law* 3.

> Employers buy labour rather like other commodities. The owner of a factory purchases the premises, raw materials, machinery, and labour, and combines these factors of production to produce goods. A business does not own the worker in the same way as it owns the plant, machinery, and raw materials. As a separate legal person, the worker is free to take a job or not, subject of course to what Marx called 'the dull compulsion of economic necessity'. Without that freedom, workers would be slaves. Yet the employer certainly buys or hires the worker's labour for a period of time or for a piece of work to be completed. Workers sell their labour power - their time, effort, and skill - in return for a wage. As with other market transactions dealing with commodities, the legal expression of this relation between an employer and employee is a type of contract. The contract of employment, like other contracts, confers legally enforceable rights and obligations. It seems that labour is in fact regarded much like a commodity in a market society and its laws.

If labour may still be regarded as a "commodity", this does not necessarily have to be the case, as the "wage-work bargain" is still an unequal one. For the business the position will be as explained above, but for the worker the unequal nature of the bargain affects his status and livelihood, for instance. The inequality exists because the employer can accumulate material and human resources, whereas the individual employee mostly has very little bargaining power.[56] Labour law is in essence about power-relations: firstly it is concerned with the relations between the employer on the one hand and trade unions on the other, and secondly it is concerned with the decision-making power of the employer in the enterprise, which is met by the employees' countervailing power.[57] The main goal of labour, it appears, "always has been to compensate [for] the inequality of the bargaining power".[58] The language of a "contract" between an employer and an employee is often used, although the individual relationship between an employer and an employee is not based on contractual equality (or proportionality) of bargaining power but on subordination.[59] The contract of employment tends to "re-establish" (and not destroy) the status between an employer and an employee as it specifies the rights of the worker and the obligations of the employer, while the rights of the employer and the obligations of the worker remain at least in principle "open", "diffuse" or "status-like".[60] In addition it appears that four more insights (which were analysed by Sinzheimer and

56 Collins *Employment Law* 3.
57 Collins *Employment Law* 4.
58 Davidov and Langille *Labour Law* 71.
59 Wedderburn 1993 *ILJ* (UK) 523.
60 Wedderburn 1993 *ILJ* (UK) 523.

are relevant in the South African context) became the driving force for labour law regulation. These insights can be summarised as follows:

> First, the object of transaction in an employment relationship is not a commodity but the human being as such. Or as, later on, the Philadelphia Declaration of the International Labour Organization (ILO) listed as its first because it makes perfectly clear that the labour market is not a market as any other, and therefore cannot follow the same rules as other markets do. Second, personal dependency is the basic problem of labour law. Third, human dignity may be endangered by the employment relationship and, therefore, one of the main goals of labour law is the fight for human dignity. This already at a very early stage expresses the goal of the ILO's present decent work agenda. It should be stressed that the three above-mentioned factors – labour not being a commodity, personal dependency as a characteristic feature of the employment relationship, and the endangering of human dignity – are closely linked to each other. They are the three core aspects of the same phenomenon. And they explain why the employment contract is not just a contract among others: it establishes a relationship *sui generis*. Fourth, Sinzheimer stressed that labour law cannot be perceived as merely law for the employment relationship but has to cover all the needs and risks which have to be met in an employee's life, including the law on creation of job opportunities. In other words: Sinzheimer understood social security law in its broadest sense as also being an inseparable part of labour law.[61]

In *Naptosa v Minister of Education, Western Cape*[62] the court observed that labour law is fundamentally an important as well as extremely sensitive subject, which is based upon a political and economic compromise between organised labour and the employers of labour. These parties are very powerful socio-economic forces, which makes the balance between the two forces a delicate one. The court noted that when it comes to their experience with labour relations, as a general rule courts are not the best arbiters of the disputes which arise from time to time, and judges do not always have the expert knowledge helpful in and sometimes necessary to the resolution of labour problems.[63] The court then observed the following:

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61 Davidov and Langille *Labour Law* 71. Langille 2005 *EJIL* 429 points out that: "The ethic of substantive labour law is strict paternalism and the results are standards imposed upon the parties whether they like it or not. The ethic of procedural labour law is freedom of contract and self-determination – what people call industrial democracy – and its results are basic rights which, it is believed, lead to better, but self-determined, outcomes. These are two different approaches to securing the overarching goal of justice in employment relations. Taken together, they and the contractual approach they respond to, as joined by the narrative just outlined, are labour law - i.e., what makes labour law, labour law, and not family law, or tax law, or anything else for that matter."

62 *Naptosa v Minister of Education, Western Cape* 2001 ILJ 889 (C) 897.

63 *Naptosa v Minister of Education, Western Cape* 2001 ILJ 889 (C) 897.

> The words of McIntyre J[64] (reported at (1987) 38 DLR (4th) 161 at 232) are peculiarly apt in the case of judicial interference with matters which in labour law are regarded as matters of mutual interest; but they are also true, I think, where a court is, in a highly regulated environment, asked to fashion a remedy which the legislature has not seen fit to provide.[65]

3.2 South African labour law

3.2.1 Who is an employee?

For purposes of labour protection as well as the rights granted in terms of company law it is important to note that the definition of an employee is central to the discussion. Labour legislation has expanded the definition of "employee" beyond the common law definition of someone who places his or her labour potential under the control of another person, in order to extend protection to as many persons as possible.

In terms of section 213 of the LRA*,* an employee is defined as:

> *(a)* any person, excluding an independent contractor, who works for any person or for the State and who receives, or is entitled to receive, any remuneration;
>
> *(b)* any other person who in any manner assists in carrying on or conducting the business of the employer.

The common law definition of an employee has been expanded in order to extend protection to as many persons as possible. The definitions of "employee" in the LRA as well as the *Basic Conditions of Employment Act* 75 of 1997 (BCEA); the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993; (COIDA), the *Unemployment Insurance Act* 63 of 2001 (UIA); and the *Skills Development Act* 97 of 1998 (SDA) all expressly exclude an independent contractor from the definition of "employee". Our law has always distinguished between employees and independent

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64 McIntyre J in *Re Public Service Employee Relations Act* 1987 38 DLR (4th) 161, expressed the following view: "Labour law … is a fundamentally important as well as extremely sensitive subject. It is based upon a political and economic compromise between organised labour – a very powerful socio-economic force – on the one hand, and the employers of labour – an equally powerful socio-economic force – on the other. The balance between the two forces is delicate … Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time … Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems."

65 *Naptosa v Minister of Education, Western Cape* 2001 ILJ 889 (C) 897.

contractors. The difference is important because the legal rights of each category vary considerably. Generally, employees are protected by labour law whereas independent contractors are not.[66] It is therefore clear that a contract of mandate, which involves an independent contractor, is specifically excluded for example from doctrines such as that of vicarious liability.[67] In 2002 the LRA[68] and the BCEA[69] were amended to include the rebuttable presumption of employment in order to assist persons who claim to be employees rather than independent contractors. These factors are: (i) the manner in which the person works is subject to the control or direction of another person; (ii) the person's hours of work are subject to the control or direction of another person; (iii) in the case of a person who works for an organisation, the person forms part of that organisation; (iv) the person has worked for that person for an average of at least 40 hours per month over the last three months; (v) the person is economically dependent on the other person for whom he or she works or renders services; (vi) the person is provided with tools of trade or work equipment by the other person; or (vii) the person works for or renders service

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66 See *Kylie v CCMA* 2010 7 BLLR 705 (LAC), where the court determined that an employment relationship existed between a sex worker and her employer, even if the contract of employment was void for illegality. In *Ndikumdavyi v Valkenberg Hospital* 2012 8 BLLR 795 (LC) the applicant was a Burundian refugee, trained and qualified in South Africa. The court in *Ndikumdavyi* found it necessary to indicate that it is necessary to distinguish that matter from *Kylie*, in that the court in *Kylie* was concerned with the rendering of illegal services in what the law regards as a criminal activity whereas in the latter matter the applicant was unable to continue the rendering of legal services because a permanent appointment was prohibited by statute (para 24). See also Smit and Botha 2011 *TSAR* 815-829, where they discuss whether or not members of parliament are employees and employers for purposes of the *Protected Disclosures Act* 26 of 2000.

67 See *Langley Fox Building Partnership (Pty) Ltd v De Valance* 1991 1 SA 1 (A) 8; *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A), where the court listed factors that are indicative of an employment relationship as well as *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 17 (SCA) 23. *Niselow v Liberty Life Association of Africa Ltd* 1998 *ILJ* 752 (SCA) dealt with the definition of "employee" in terms of the *Labour Relations Act* 28 of 1956. The court in the *Niselow* case held (753I) that an employee at common law undertakes to render a personal service to an employer. The court further held that regardless of the second part of the definition ("… any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer") it did not bring the individual in that case within the scope of the definition. The court based this decision on distinguishing a contract of work and a contract of service. Consequently, the appellant in that case, who was an agent contracted to canvass insurance business for the respondent, was carrying on and conducting his own business rather than assisting in the carrying on or conducting of the business of the respondent. In the labour appeal court the court noted, however, that the supreme court of appeal "did not have the benefit of argument on the second part of the definition of 'employee'" (see also Smit and Botha 2011 *TSAR* 815-829).

68 S 200A of the LRA.

69 S 83A of the *Basic Conditions of Employment Act* 75 of 1997 (BCEA).

to only one person. In this regard, however, what Acting Judge Van Niekerk stated in *Discovery Health Limited v CCMA* must be noted:[70]

> The protection against unfair labour practices established by s 23(1) of the Constitution is *not dependent on a contract of employment*. Protection extends potentially to other contracts, relationships and arrangements in terms of [which] a person performs work or provides personal services to another. The line between performing work 'akin to employment' and the provision of services as part of a business is a matter regulated by the definition of 'employee' in s 213 of the LRA. (own emphasis)

3.2.2 Perspectives on South African labour law

The purpose of the LRA is expressly set out in the Act, namely to advance economic development, social justice, labour peace and the democratisation of the workplace through the promotion of: (i) orderly collective bargaining, (ii) collective bargaining at sectoral level, (iii) employee participation in decision-making in the workplace and (iv) the effective resolution of labour disputes.[71] The function of South African labour law, it is submitted, is firstly to protect and promote the interests of employees in order to address this imbalance between them and employers. Before the enactment of the *Interim Constitution of the Republic of South Africa* 200 of 1993 and the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) there was a serious debate regarding whether labour rights should or should not be provided for in the Bill of Rights in the *Constitution*. In this regard Olivier[72] points out that:

> It is sometimes argued that labour rights are so-called second generation or socio-economic rights and that they place a duty upon the state to act in a positive manner. They have to be contrasted with rights that protect an individual against undue interference by the state. For this reason, it is said, labour rights should not be contained in a bill of rights, since the courts cannot enforce them without intruding upon the terrain of the legislature and/or the executive branch of government. The truth, however, is that some labour rights, such as the right to associate freely and the right to strike, do not essentially differ from other classical human rights and may be enforced in like manner.

As noted earlier when we discussed the market view of labour law, the Government or the state is an important role player involved in labour relations. The concept of state corporatism in the context of labour law becomes relevant. It represents "the

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70 *Discovery Health Limited v CCMA* 2008 ILJ 1480 (LC) 1494 para 41.
71 S 1 of the LRA.
72 Olivier 1993 *TSAR* 657.

growth of formalised links between the state and autonomous economic groups", such as labour and capital, ranging from consultation to more formal negotiation initiatives over economic outcomes.[73] The state plays a more interventionist role in economic management, on the one hand by limiting the autonomy of collective parties, and on the other by granting access to government policy-making to representative institutions of labour and capital.[74] Government "takes measures to protect the individual employee against possible abuses by the employer through protective labour legislation" and "may also try to develop rules to regulate to a certain extent the power relations between capital and labour with a view to protecting society as a whole."[75] There are two broad perspectives on the extent to which the state should intervene in the labour market.[76] They are the libertarian and social justice perspectives.

3.2.2.1 The libertarian perspective

The libertarian or free-market model regards the contract of employment and the accompanying "individual bargain, which it represents as the only legitimate mechanism to regulate the employment relationship".[77] Proponents of this view treat labour legislation "with the disdain normally reserved for an alien plant species, an unwelcome intruder invading the indigenous landscape of the common law and imposing unwarranted regulation on the freedom to contract on equal terms in the marketplace", and it is argued that statutory regulation in the labour market is inconsistent with what is referred to as a "right to work under any conditions".[78] They argue that laws intended for the protection of employees have the unintended consequence of protecting the employed at the expense of the unemployed, and thus legitimate protection for employees is afforded by the "effective and adequate common law and the resultant sellers' market in which employers will be required to compete for labour by offering ever-improving" terms and conditions of

73 Deakin and Morris *Labour Law* 27.
74 Deakin and Morris *Labour Law* 27.
75 Blanpain 1974 *ILJ* (UK) 5-6.
76 Van Niekerk *Law@work* 6.
77 Van Niekerk *Law@work* 6-7.
78 Van Niekerk *Law@work* 6-7.

employment.[79] The proponents of this view argue that when labour legislation is abolished it will be beneficial for employees and the broader society. A case for deregulation has been put in South Africa too, where it has been argued that the individual contract of employment as opposed to any form of collective agreement is the best means to ensure the greatest possible degree of flexibility and competitiveness.[80]

It appears that the denial or violation of core labour standards does not result in a comparative advantage. Research actually indicates that the contrary is true, and shows that poor labour conditions "often signal low productivity or are one element of a package of national characteristics that discourage foreign direct investment (FDI) inflows or inhibit export performance".[81] If labour economics are set aside, however, a number of external limitations on the nature and extent of any deregulation of the South African labour market can be put forward. First, as a member of the ILO South Africa has ratified all of the ILO's core conventions[82] and thus incurred international law obligations to uphold the rights to freedom of association, to promote collective bargaining, to ensure equality at work, and to eliminate forced labour and child labour.[83] The labour law reforms that were introduced in 1995 assured that South Africa met these obligations. The *Declaration on Fundamental Principles and Rights at Work*, 1998 obliges member states (including South Africa) to observe the principles that underlie certain core conventions. Second, the *Constitution* recognises certain core labour rights, in accordance with which the Preamble describes the aim of the *Constitution* to be to

79 Van Niekerk *Law@work* 7.
80 Van Niekerk *Law@work* 7.
81 Van Niekerk *Law@work* 7.
82 In terms of the ILO *Declaration on Fundamental Principles and Rights at Work* (1998) the members have a constitutional obligation to promote and realise four "core" or fundamental rights. These rights are freedom of association and free collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination. These rights must be promoted even though the relevant conventions were not ratified by member states. South Africa, however, ratified all the conventions relating to these four "core" rights. These conventions include *Freedom of Association and the Right to Organise Convention* (1948) (No 87); *Right to Organise and Collective Bargaining Convention* (1949) (No 98); *Forced Labour Convention* (1930) (No 29); *Abolition of Forced Labour Convention* (1957) (No 105); *Minimum Age Convention* (1973) (No 138); *Worst Forms of Child Labour Convention* (1999) (No 184); *Equal Remuneration Convention* (1951) (No 100); and *Discrimination (Employment And Occupation) Convention* (1958) (No 111).
83 Van Niekerk *Law@work* 8.

"[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".[84] In *Minister of Finance v Van Heerden*[85] the court in this regard stated as follows:

> Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.

The *Constitution* provides in particular for the right to fair labour practices as a fundamental right, and thus implies that "social justice is a necessary precondition for creating a durable economy and society, and places obvious limitations on the policy choices open to those who seek to regulate the labour market".[86] Labour market policy cannot be only a matter of economics, because the Constitution needs to be taken into account when choices are made and the limitation of constitutional rights is considered.[87] The social justice obligation is also provided for in the LRA and the BCEA.

3.2.2.2 A social justice perspective

According to the social justice perspective trade unions are regarded as primary vehicles through which social justice is achieved.[88] This notion is based upon Sir Otto Kahn-Freund's conception of labour law, which was put forward in the 1950s and 1960s as a means of counteracting the inequality of bargaining power between employers and employees (see the discussion above). This equilibrium, according to Kahn-Freund, can be best achieved and maintained through voluntary collective bargaining, and the law plays only a secondary role as "it regulates, supports and constrains the power of management and organised labour".[89] The interests of

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84 S 1 of the *Constitution.* See for example *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 1, where it was stated that: "[t]he people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble of the Constitution records this commitment".

85 *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) para 25.

86 Van Niekerk *Law@work* 8.

87 Van Niekerk *Law@work* 8.

88 Van Niekerk *Law@work* 8.

89 See Davies and Freedland *Kahn-Freund* 15 as well as Van Niekerk *Law@work* 9.

parties and their respective power drive the process of bargaining and the outcomes of the process. If a more recent social justice perspective were to be applied, it might not only "acknowledge collective bargaining as an important means to define and enforce protection for workers" but also "recognise rights as a complementary and perhaps more significant medium to promote social justice in the workplace".[90] The *Constitution* (as noted above) as well as the enabling legislation such as the LRA, BCEA and *Employment Equity Act* (EEA)[91] plays a very important role not only in the protection of the right to fair labour practices, but also with regard to rights to freedom of association, freedom of expression, privacy and equality. While statutory rights, their nature and scope, and how they are implemented and enforced are important in the protection of workers' rights, they are not absolute, however, and may often need to be balanced against the competing rights of employers and third parties.[92] Dispute resolution institutions such as the Commission for Conciliation, Mediation and Arbitration (CCMA) and labour courts (as well as other courts) play a fundamental role as labour rights are enforced, assessed, and if necessary balanced with other competing rights.[93] The acknowledgement of human rights, including fundamental labour rights, is an important corporate responsibility for companies in South Africa as well as for multi-national companies generally. Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights, "especially in host countries that have little in the way of labour market regulation, or where to attract investment or for want of resources, minimum labour standards are not enforced".[94] These developments may serve to promote collective bargaining (to the extent that basic labour rights include the rights to organise and to bargain collectively), especially in those environments where the legislative environment remains hostile.[95]

It can thus be said that labour law originated by focusing on employment relations in order to regulate the conditions of tangible labour and to extend protection to

90 Van Niekerk *Law@work* 10.
91 *Employment Equity Act* 55 of 1998.
92 Van Niekerk *Law@work* 10.
93 Van Niekerk *Law@work* 10.
94 Van Niekerk *Law@work* 10.
95 Van Niekerk *Law@work* 10.

workers' physical bodies. It then evolved to protect "employment" and to organise workers collectively within the enterprise (which is the economic locus of decision-making) to reach the point where workers' interests are taken into account and workers have input into decision making.[96]

It is therefore submitted that regardless of the view taken of the true function of labour law, the right of employees to participate in decisions affecting them and/or the enterprise is today included under the purpose and function of labour laws.

3.2.3 The employer (managerial) prerogative

The theory of the normative field of law proposes that "the law comprises of a multitude of – often conflicting - legal norms, and therefore forms all but a consistent and hierarchical legal 'system'".[97] Within this multitude of legal norms a number of basic normative patterns can be distinguished which reflect social as well as moral concepts that are central to human relations and society at large.[98] In the normative field of labour law "the market functional pattern (a composite pattern representing normative conceptions central to the functioning of the market economy) can be divided into two different normative patterns, *the managerial prerogative* and *freedom of contract*".[99] The managerial prerogative has its foundation in the right of property and the proprietor's right of disposition, whereas protection of the established position, "manifest as *employment protection*, [secures] the continued employment of those already employed (that is those who have already established a position in the company and in the labour market)".[100]

The managerial prerogative:

> signifies the power of the employer to regulate the issues pertaining to the organization and function of the undertaking aiming to attain its goals, and more

96 Morin 2005 *Int'l Lab Rev* 11.
97 Rönnmar 2004 *Int J Hum Resourc Man* 455.
98 Rönnmar 2004 *Int J Hum Resourc Man* 455.
99 Rönnmar 2004 *Int J Hum Resourc Man* 455.
100 Rönnmar 2004 *Int J Hum Resourc Man* 455. Original emphasis.

> precisely, to determine the kind, the place, the manner, and the time of labour provision by the worker specifying in this way his labour performance.[101]

In *BTR Dunlop Ltd v National Union of Metalworkers (2)*[102] the court stated that "the right to trade includes the right to manage that business, often referred to as the managerial prerogative".[103]

The decision-making power in employers (and thus corporations who are employers) is upheld in the free market economy by four notions:

(i) the right to property, which enables the owner to dispose of his property as he wishes in order to obtain benefit from it;
(ii) freedom of commerce and industry, where every citizen obtains the freedom to engage in commerce, profession, craft or industry;
(iii) freedom of association, which enables an individual to combine his resources in a trade or industry with that of others and form a corporation in order to share profits; and
(iv) obtaining power over people, where a worker has the freedom to enter into an individual labour contract with an employer he selected and where the employer obtains the power to command the employee to obey.[104]

It must be noted that in terms of these notions the power to manage the enterprise belongs to the employer. In this context of the managerial prerogative it is noteworthy to point out that:

> [t]he law give the employer the right to manage the enterprise. He can tell the employees what they must and must not do, and he can say what will happen to them if they disobey. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him. ... But, even given these constraints, he still has a wide managerial discretion. He can decide which production line the employees should work on; whether they should take their tea break at ten or ten fifteen; when they may go on leave; and countless other matters besides. He can also decide what will happen to the employees if they do not work properly, if they go to tea early and so on. In short, it is he who within the limits referred to, lays down the norms and standards of the enterprise. This – at

101 Papadimitriou 2009 *Comp Lab L & Pol'y J* 273.
102 *BTR Dunlop Ltd v National Union of Metalworkers* (2) 1989 10 ILJ 701 (IC).
103 *BTR Dunlop Ltd v National Union of Metalworkers* (2) 1989 10 ILJ 701 (IC) 705C.
104 Blanpain 1974 *ILJ* (UK) 6.

> least as far as the law is concerned – is what 'managerial prerogative' entails, no more and no less.[105]

It can also be pointed out that "prerogative" refers to the right to make decisions regarding the aims of the organisation as well as the ways in which the organisation will achieve these aims.[106] These decisions can be divided into two broad categories:

> The first relates to decisions about the human resources utilised by the organisation. Typically, but not necessarily, organisations will make use of employees to achieve their aims. Decisions will have to be taken as to the number and types of employees needed, their terms and conditions of employment, the termination of their employment, where and when and how they do their work, and the supervision of their work.
>
> The other category of decisions can be described as decisions of an 'economic' or 'business' nature. These include decisions relating to the acquisition and/use of physical assets needed by the organisation and decisions regarding the aims of the organisation, the products it produces or the services it provides.[107]

The managerial prerogative is usually seen as being of special importance when dealing with decisions about the human resources utilised by the organisation, because it is linked to the employer's ability to control the activities of employees in the workplace.[108]

3.2.4 Principles of fairness

The *Constitution* (as pointed out earlier) also, for example, provides that everyone has a right to fair labour practice.[109] The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town*[110] held that:

> Our Constitution is unique in constitutionalizing the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is not capable of precise definition. This problem is compounded by the tension between the interests of the workers and the interest of employers that is inherent in labour relations. Indeed what is fair depends upon the circumstances of a

105 Brassey *et al New Labour Law* 74.
106 Strydom 1999 *SA Merc LJ* 42.
107 Strydom 1999 *SA Merc LJ* 42.
108 Strydom 1999 *SA Merc LJ* 42.
109 S 23(1)(a) of the *Constitution*.
110 *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC).

> particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.[111]

This fundamental right is extended not only to employees but also to employers. With reference to fairness the Constitutional Court (in *National Education Health & Allied Workers Union v University of Cape Town*)[112] further held:

> Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organizations as the case may be, the Constitution says so explicitly. If the rights in s 23(1) were to be guaranteed to workers only, the Constitution should have said so. The basic flaw in the applicant's submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must apply either to all employers or none. It should make no difference whether they are natural or juristic persons.

It is thus clear that fairness is an underlying principle that is applied in labour law. This brings us to the LRA, which provides, for example, for the protection of employees against unfair labour practices and unfair dismissal. Section 186(2) of the LRA contains the definition of an unfair labour practice[113] whereas section 186(1) contains the definition of dismissal. Section 188(1) of the LRA provides that if a dismissal is not automatically unfair, it is unfair if the employer fails to prove substantive fairness (that the reason for dismissal is a fair reason related to the employee's conduct or capacity, or based on the employer's operational requirements) and procedural fairness (that the dismissal was effected in accordance with a fair procedure). Section 187 of the LRA provides for the category of

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111 *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) para 33.

112 *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) para 39.

113 In *National Entitled Workers' Union v CCMA* 2003 24 *ILJ* 2335 (LC) 2339 the court explained that the concept "unfair labour practice" recognises the rightful place of equity and fairness in the workplace and in particular that what is lawful may be unfair. The court refers to Poolman *Principles of Unfair Labour Practice* 11 where he summarises the strength and nature of the concept. He says: "The concept 'unfair labour practice' is an expression of the consciousness of modern society of the value of the rights, welfare, security and dignity of the individual and groups of individuals in labour practices. The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms. The law cannot anticipate the boundaries of fairness or unfairness of labour practices. The complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance. Labour practices draw their strength from the inherent flexibility of the concept 'fair'. This flexibility provides means of giving effect to the demands of modern industrial society for the development of an equitable, systematized body of labour law. The flexibility of 'fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid."

"automatically unfair dismissals". The section lists a number of reasons for dismissal that, if established, mean that the dismissal of the employee is unfair simply by virtue of the reason for the dismissal. It is therefore not open to the employer to justify its decision to dismiss the employee in terms of section 187 (with limited exceptions relating to the inherent requirements of a job and the employee reaching the agreed or normal retirement age).

3.2.5 Collective bargaining

One of the central themes of the LRA is the fact that collectivism rather than individualism is promoted. Democratic attributes can be found at the heart of collective action.[114] Collective rights such as the right to organise, the right to strike and collective bargaining are in addition to the fundamental status provided for by the *Constitution*[115] also underwritten by the LRA. The inequality in bargaining power in the employment relationship coupled with the incomplete nature of the employment contract[116] leads to the inability of employees to take part in decisions that directly affect their lives. This is evident from the fact that "employees are commonly subjected to control of their employers/managers over different aspects of their working lives" and thus the employment relationship is characterised by democratic deficits.[117] If employees are not allowed to associate and act collectively the unequal bargaining position between the employer and employees will remain.[118] Employees and their trade unions can become entitled to collective rights and their rights in formal equality only if these rights are guaranteed.[119] In *Minister of Finance v Van Heerden*[120] the court said the following with regard to the achievement of substantive equality:

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114 Davidov 2004 *IJCLLIR* 84.

115 See s 23(2)-(5) of the *Constitution.*

116 Kaufman *Theoretical Perspectives* 55 points out that not all terms and conditions and performance requirements can be anticipated and set down in writing "*ex ante*" when an employee starts work and an employment contract is entered into. The employment relationship thus requires ongoing "administration, negotiation and adjustment while the incomplete nature of the employment contract opens the door for conflict, misunderstanding, and opportunistic behaviour as the employer and employee seek to exploit contractual gaps and holes to their advantage".

117 Davidov 2004 *IJCLLIR* 84.

118 Olivier 1993 *TSAR* 658.

119 Olivier 1993 *TSAR* 659.

120 *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) paras 23-24, 31.

> For good reason, the achievement of equality preoccupies our constitutional thinking. … the commitment of the Preamble is to restore and protect the equal worth of everyone, to heal the divisions of the past and to establish a caring and socially just society. In explicit terms, the Constitution commits our society to 'improve the quality of life of all citizens and free the potential of each person'. … it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality – a duty which binds the judiciary too. … The achievement of equality goes to the bedrock of our constitutional architecture. … Thus the achievement of equality is not only a guaranteed and justifiable right in our Bill of Rights, but also a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance.

In addition, it has been said that:

> Promoting justice and dignity in the workplace should be perceived to be as important to the individual as promoting justice and dignity in society generally through protecting freedom of worship and freedom of expression and should thus stand at the core of fundamental human rights. Moreover, given the economic and social and even political power of employers, rights at work have an inherent collectivist dimension. Thus the ability of workers to organize collectively in a trade union should be seen as a fundamental freedom within a human rights framework.[121]

Collective bargaining plays a key role in social legislation (but not so in corporate law).[122] In a general sense collective bargaining refers to the process of negotiation between an employer or groups of employers and trade union(s) with the intention of creating collective agreements. Collective bargaining is still the principal way (in South Africa) in which trade unions seek to improve the working conditions of their members. The collective agreements which trade unions enter into with employers embody both fairness and efficiency and "help create a climate of good industrial relations which, in turn, leads to an increase in productivity and a reduction in staff

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121 Welch 1996 *ILJ* (UK*)* 1041-1042.

122 Deakin and Morris *Labour Law* 5 points out that the term *social legislation* in the broad sense refers to the field of employment law and may be one of two types, namely *regulatory legislation* or *auxiliary legislation. Regulatory legislation* "directly affects employment relationships, typically by laying down statutory norms that override the parties' own agreement" and can for example include minimum wage legislation and unfair dismissal legislation (that limits the power of the employer to terminate the employment relationship). *Auxiliary legislation* "consists of legal supports for the process of collective bargaining and other aspects of collective organisation; in this sense its impact on the relationship is indirect". Examples of *auxiliary legislation* include those which may require employers to recognise trade unions for the purposes of collective bargaining as well as those which oblige employers to consult with or provide representatives of the workforce with information.

turnover".[123] The benefits of collective bargaining are, of course, contested, "principally by neo-classical economists who see unions as 'labour cartel' organisers which are able to extract higher 'rents' for their members over and above the market rate for the job".[124] Through the incorporation of a social dialogue the value of collective bargaining to a well-functioning economy is recognised, as it also endorses the principle of collective autonomy. It can thus be said that collective agreements have two functions: "the procedural or contractual function of regulating the relationships between the collective parties themselves and the normative or rule-making function, which consists of the establishment of terms and conditions which are applicable to the contracts of individual workers".[125] The right to engage in collective bargaining by trade unions, employers' organisations and employers is also recognised by the *Constitution*. The Constitutional Court has pointed out that:

> [c]ollective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers.[126]

Collective bargaining can also take place at either company/enterprise/plant level or at sectoral level.[127] The unequal bargaining power that one individual has against that of the employer can now be addressed, when employees act collectively for example, through the process of collective bargaining, negotiations and strikes to mention only a few. Workers can rectify the inequality by "joining forces and acting in concert" because the employer can be expected (even for a limited time) to be more concerned about the prospect of losing the work of all (or some) its employees.[128] When it comes to the managerial prerogative of the employer the question, however, is how labour will influence this power.[129]

123 Barnard 2012 *E L Rev* 120.
124 Deakin and Morris *Labour Law* 5.
125 Deakin and Morris *Labour Law* 5.
126 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 17 ILJ 821 (CC) para 66.
127 Deakin and Morris *Labour Law* 5.
128 Davidov 2004 *IJCLLIR* 85.
129 Blanpain 1974 *ILJ* (UK) 7.

Decisions can be influenced in different ways involving disclosing and sharing information, advice and consultation, co-decision-making or the self-management of employees.[130] Employee participation should be evident on all of these levels.

By bargaining collectively, employees gain some countervailing power to that of the employer.[131] Collective bargaining can thus address the inequality that flows from the power relationship between employers and employees. This does not necessarily mean that the parties at the negotiation table possess equal bargaining power, but the "imbalance of power can be expected to be much less dramatic under a regime of collective bargaining", and once the position of the employees improves at the bargaining table, "the problem of democratic deficits is also to be expected to be alleviated".[132] It is thus clear that the pluralist philosophy[133] is central here. According to this philosophy the main object of labour law has always been and will always be "to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship".[134] On this point Du Toit[135] elaborates:

> It may well be true that functions of 'labour' (direct production) and 'management' (co-ordination of production) will need to be fulfilled in any economic system ... What pluralism fails to establish, however, is that inequality of wealth, knowledge and power must necessarily exist between members of society fulfilling these respective functions.

Collective bargaining, however, does have its limits. A growing number of individuals are excluded from collective bargaining because their work status falls outside the

130 Blanpain 1974 *ILJ* (UK) 7.
131 Davidov 2004 *IJCLLIR* 85.
132 Davidov 2004 *IJCLLIR* 85.
133 Own emphasis. The pluralist industrial relations paradigm works as follows: it analysis "work and the employment relationship from a theoretical perspective rooted in an inherent conflict of interest between employers and employees interacting in an imperfect labour market. The employment relationship is viewed as a bargaining problem between stakeholders with competing interest; employment outcomes depend on the varied elements of the environment that determine each stakeholder's bargaining power. Modelling the employment relationship as a bargaining problem raises central questions about distribution of resources and the rules governing interactions between employers and employees. As a result, corporations, labour unions, public policies, and dispute resolution procedures are important in pluralist industrial relations. Moreover, individual employees, managers, owners, and union leaders are viewed as human agents rather than purely economic, rational agents" (Kaufman *Theoretical Perspectives* 195).
134 Davies and Freedland *Kahn-Freund* 18.
135 Du Toit 1993 *Stell LR* 335.

[formal] employment model and they are thus not covered by collective agreements.[136] Collective bargaining also fails to take into account a wide range of regulatory influences that fall outside the labour law framework, and thus:

> the debate which affects the interests of 'labour' and 'workers' today, in addition to the debate concerning employment conditions and job regulation (labour law), substantially occurs in legal and regulatory categories that do not directly regulate the employment relationship itself.[137]

The right to strike accompanied by the freedom of association are integral in attaining industrial democracy and are also fundamental to achieving successful collective bargaining. Four justifications exist for the right to strike:

> the equilibrium argument – labour needs a tool to resist the otherwise total prerogative of management; the need for autonomous sanctions to enforce collective bargains – self-government being better than legal regulation and enforcement; the voluntary labour argument – that compulsion to work is nothing else than serfdom; and the psychological argument – that strikes are a necessary release of tension in industrial relations.[138]

The right to strike is thus a powerful economic weapon in the hands of employees.[139] It must, however, be stressed that the "operation of collective bargaining would be undermined if trade unions did not have the power to put pressure on employers or employers' associations to enter into collective agreements on reasonable terms".[140] Because collective action is the means of equalising the power of the employer and it is the most important and effective way that employees have to express their concerns, it can thus be said that "strike action is the corollary of collective bargaining".[141]

It is noteworthy that the notion of employees being able to control or influence decisions affecting their working lives is central to industrial democracy, in that

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136 Deakin 2007 *MULR* 1166 where he refers to Mitchell *Redefining Labour Law*.

137 Deakin 2007 *MULR* 1167.

138 Kahn-Freund and Hepple *Laws against Strikes* 5-8; Van Niekerk *Law@work* 399.

139 The court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 17 ILJ 821 (CC) para 65 held that "the effect of including the right to strike does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers". The court noted that the right to bargain collectively is expressly recognised by the text of the Constitution.

140 Barnard 2012 *E L Rev* 121.

141 Barnard 2012 *E L Rev* 121.

employees have the opportunity to participate in decision-making.[142] Furthermore, industrial democracy includes not only employee participation but also issues such as participative management, employee involvement and workers' control, and thus emphasises particular forms of industrial democracy. These forms of industrial democracy can range from human management techniques, where boxes are set up to receive employees' written suggestions, to more fundamental forms such as participation on supervisory boards.[143] Industrial democracy can also be divided into two categories: control through ownership and control against ownership.

i. Control through ownership initiatives "accept[s] the right of capitalists/shareholders to exercise direct control, but seek[s] to acquire this right by converting the workers themselves into owners", where they obtain more or less control of the company by acquiring shares.[144]
ii. Control against ownership initiatives "challenge[s] the belief that ownership of a firm gives capitalists/shareholders the right to exercise control, and seek to expropriate those rights for the workers".[145]

In a democratic firm, control can be vested in the hands of employees in at least two ways:

The first way is influence. This refers to the extent to which employees influence decision-making, and the extent can range from no employee influence on one end of the spectrum to unilateral influence at the other end. Between these two extremes, employers may advise employees on decisions they have already made regarding the operation of the firm, consult with them, or bargain with them.[146] Consultation must, however, not be confused with collective bargaining. In *Metal & Allied Workers Union v Hart Ltd*[147] the court noted that there is a distinct and substantial difference between consultation and bargaining. The court explained this difference as follows:

142 Mitchell 1998 *IJCLLIR* 5.
143 Mitchell 1998 *IJCLLIR* 5.
144 Mitchell 1998 *IJCLLIR* 6.
145 Mitchell 1998 *IJCLLIR* 6.
146 Mitchell 1998 *IJCLLIR* 7.
147 *Metal & Allied Workers Union v Hart Ltd* 1985 6 ILJ 478 (IC).

> To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise and agreement.[148]

Consultation in terms of the LRA appears to be "identical to what was previously understood as 'good faith' bargaining" where consensus must be reached.[149] The employer must also disclose relevant information and consider all representations by the consulting partner, and where it does not agree with the consulting party provide reasons for the disagreement.[150] It can thus be said that consultation involves "representatives of management seeking and listening to employee suggestions and opinions, considering these opinions but then making the final decision themselves" whereas bargaining "involves management and employees compromising to reach a mutually acceptable decision".[151] The LRA, for example, also makes provision for workplace forums. This is one of the mechanisms that were introduced by the LRA to provide workers with a voice in the workplace. Workplace forums[152] drew upon the model of the German works council system and were enacted to "introduce a form of participatory workplace governance" and to create a system of participatory decision-making in addition to or alongside (adversarial) collective bargaining.[153] Consultation (in the context of workplace forums), for example, is required for the matters listed in section 84 of the LRA, whereas joint decision-making is required for the matters listed in section 86. Consultation requires the employer "to do more than notify the forum of any proposal and in good faith to consider any suggestions it may make."[154] The idea of the drafters of the LRA (and a novel one it seems to be) was to depart from the tradition of collective bargaining between trade unions and employers, to provide instead for "more co-operative interaction between management and labour alongside collective bargaining" in

148 *Metal & Allied Workers Union v Hart Ltd* 1985 6 ILJ 478 (IC) 493H-I.
149 Godfrey *et al Collective Bargaining* 231.
150 Godfrey *et al Collective Bargaining* 231.
151 Godfrey *et al Collective Bargaining* 231.
152 See ss 78-94 of the LRA. Workplace forums are provided for in chapter V of the LRA. See also Grogan *Workplace Law* 330-335 in this regard.
153 Davis and Le Roux 2012 *Acta Juridica* 318.
154 Grogan *Workplace Law* 332.

order to allow non-wage issues "that previously fell within the scope of managerial prerogative"[155] to be dealt with through consultation and joint-decision-making.

The second dimension is the level at which employees are involved in the decision-making process as well as the level at which they are allowed to participate. Two variables determine the level of employee participation, namely the manner or directness of worker control and the scope of the matters, which are decided with worker input. The directness of control varies from a direct or participatory level of interaction between the management and the employees at the workplace to an indirect or representational level of interaction between employee representatives (who are elected or nominated by the employees) and the management.[156] The scope of matters that can be dealt with varies from employee influence at higher levels of the organisation such as the distribution of profits, investments, financing and budgets, to lower levels such as annual leave entitlements, the administration of welfare services *etcetera*.[157]

It must thus be noted that due cognisance must not only be given to representation at workplace/enterprise level but also to collective bargaining. From this it is thus evident that the function of labour law traditionally relies significantly on collective bargaining to address the inequality of the relationship between employers and employees. Much of the debate today is concerned with placing the company (the corporation) in a greater social context, and by doing this labour law and the rights of employees are slowly becoming part of corporate responsibility agendas.[158] Consequently, some submit that where a wider perspective on the business corporation is taken, labour law not only meets employee-ownership theories but also takes stakeholder capitalism models into account".[159] When the split between labour and company law is made, a division between "economic" and social matters is often made. It has been pointed out that this should not be taken for granted but should rather be considered to be a social construction, because "this distinction

155 Godfrey *et al Collective Bargaining* 231.
156 Mitchell 1998 *IJCLLIR* 7.
157 Mitchell 1998 *IJCLLIR* 8.
158 Zumbansen 2006 *Ind J Global Legal Studies* 278.
159 Zumbansen 2006 *Ind J Global Legal Studies* 278.

does not explain why employee participation should be acceptable in the social sphere but not in the economic sphere, when the reality is that measures adopted in the social sphere will have an impact on the economic sphere"[160] and *vice versa.*[161] It is thus evident that there is indeed an integration of company and labour law principles when it comes to the employees' voice in companies. It is evident that corporate law can no longer primarily focus on shareholders and ignore employees as stakeholders.

These purposes and functions of labour law can thus be contrasted to those of company law, which will be addressed below.

3.3 Company law perspectives and theories

3.3.1 Theories and models of companies

Modern corporate law[162] has progressed significantly. The impact of globalisation has had an impact on how corporations conduct themselves when they do business. This is also the case in South Africa, where there was a need to rejuvenate the corporate law landscape to keep up with trends locally and internationally. The *Constitution* has had a fundamental impact on law in general, as it states that "[t]he Republic of South Africa is a sovereign, democratic state" founded on values such as human dignity, the achievement of equality and the advancement of human rights and freedoms, as well as non-racialism, non-sexism and the supremacy of the constitution and the rule of law".[163] In *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa*[164] it was pointed out that "the Constitution is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to the constitutional control". It is clear that corporations should not only subscribe to the principles of the

160 Villiers *European Company Law* 190.
161 Cochon 2011 http://etui.org/research/publications 12.
162 The concepts "company law" and "corporate law" are used interchangeably and the same meaning should be attached to them.
163 S 1 of the *Constitution*.
164 *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

constitution but that as legal persons they are also afforded rights such as dignity and privacy, for example.[165]

Recently the South African company law landscape underwent a dramatic overhaul with the introduction of the *Companies Act* 71 of 2008. Developments in corporate governance jurisprudence have taken place not only in South Africa but worldwide in countries such as the United States, the United Kingdom and Australia. The *Companies Act* 61 of 1973 was repealed by the 2008 Act. Central to company law is the promotion of corporate governance. The 1973 Act, however, did not deal with matters of corporate governance. Developments in corporate governance jurisprudence in South Africa have seen the publication of the *King I Report* in 1994[166] and the *King II Report* in 2002.[167] Due to changes in international governance trends and the need to reform South African company law, the *King III Report* saw the light. This paved the way for the highly anticipated *Companies Act*, which was a product of the Department of Trade and Industry's (the DTI's) policy paper,[168] which envisaged the development of a "clear, facilitating, predictable and constantly enforced governing law".[169] Corporate governance matters were dealt with exclusively as voluntary codes by *King I* and its successor *King II.*[170] The 2008 Act "not only sets out how a company acquires legal personality and raises funds, but incorporates issues of corporate governance for the first time since the limited liability company was introduced in South Africa by the *Joint Stock Companies Limited Liability Act* 23 of 1861 in the Cape".[171] Companies must now apply a triple bottom-line approach by taking due cognisance not only of the economic

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165 See for example ss 8-9 and 14 of the *Constitution.* It is also trite law that a corporation can sue on the grounds of defamation where its reputation, good name or *fama* was infringed (see for example *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) as well as *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 1 SA 945 (A); *Post and Telecommunications Corporation v Modus Publications (Pty) Ltd* 1998 3 SA 1114 (ZS); *Treatment Action Campaign v Rath* 2007 4 SA 563 (C) as well as *Media 24 Ltd v SA Taxi Securitisation* 2011 5 SA 329 (SCA)). See also in this regard Neethling and Potgieter 2012 *THRHR* 304-312.

166 Institute of Directors *King Report I*.

167 Institute of Directors *King Report II.*

168 South African Company Law for the 21st Century: Guidelines for Corporate Law Reform (GN 1183 in GG 26493 of 23 June 2004) (the DTI Policy Paper).

169 DTI Policy Paper 13.

170 King 2010 *Acta Juridica* 446.

171 King 2010 *Acta Juridica* 446.

implications of their actions but also the social and environmental implications.[172] Before we look at what is covered under corporate law and corporate law principles it is important to look at exactly what corporate governance entails.

Corporate governance is a broad concept, and there is no general and universally accepted definition thereof.[173] The concept is "ambiguous" and "depends on the historical and cultural background of the country defining it."[174] It deals not only with the common-law and statutory duties of directors[175] but also includes structures and processes that deal with control, management and decision-making in organisations.[176] Corporate governance can also be said to be "the whole set of legal, cultural, and institutional arrangements that determine what publicly traded corporations can do, who controls them, how that control is exercised, and how the risks and returns from the activities they undertake are allocated".[177] Another useful definition of corporate governance that is proposed is as follows:

> The system of regulating and overseeing corporate conduct and of balancing the interests of all stakeholders and other parties (external stakeholders, governments and local communities) who can be affected by the corporation's conduct, in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.[178]

Taking note of the role of companies in the promotion of corporate governance, it is important to revert to exactly what constitutes a company. A company[179] is a juristic person that exists separately from its management and shareholders. A company (or corporation) has broader existence than in a simply legal context, as it also has

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172 Institute of Directors *King Report III* para 9.
173 Cohen, Krishnamoorthy and Wright 2010 *Am J Comp L* 757.
174 Flay 2008 *Waikato L Rev* 308.
175 Esser and Delport 2011 *THRHR* 449.
176 Cassim *et al Contemporary Company Law* 472.
177 Clarke 2011 *Am J Comp L* 78.
178 Du Plessis, Hargovan and Bagaric *Principles* 10.
179 A company is defined in s 1 of the *Companies Act* as: "a juristic person incorporated in terms of this Act, a domesticated company, a juristic person that, immediately before the effective date- (a) was registered in terms of the- (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2; (b) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act No. 61 of 1973); or was registered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act".

political, sociological and economic aspects.[180] The "separateness" of a company forms one of the foundations of company law, because several consequences flow from it - such as the limited liability of shareholders; the fact that the company can sue and be sued in its own name; the fact that the property, profits, debts and liabilities of the company belong to it and not the shareholders; *etcetera*.[181] Although shareholder primacy seems to be the underlying theme when it comes to the beneficiaries of wealth creation, in company law other stakeholders have also become important. The question "to whom does the corporation account?"[182] is an important one to ask.

It must be noted that the basic legal characteristics/attributes of the business corporation must be identifiable in order to determine what the function(s) of corporate law entail. These characteristics are those of legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership,[183] and must "respond … to the economic exigencies of the large modern business enterprise".[184] Corporate law must out of necessity provide for these features. From this it is clear that two important functions of corporate law can be identified: the principal function of corporate law is to provide business enterprises with a legal form/structure that possesses these five core characteristics/attributes, whereas the second function reduces the on-going costs of organising business through the corporate form.[185] The latter outcome is achieved by facilitating coordination between the participants in the corporate enterprise, and by reducing the scope for value-reducing forms of opportunism among the different constituencies,[186] such as conflicts between managers and shareholders, conflicts among shareholders, and conflicts between shareholders and the corporation's other

180 Bone 2011 *CJLJ* 283.
181 Cassim *et al Contemporary Company Law* 28.
182 Bone 2011 *CJLJ* 284.
183 Armour, Hansmann and Kraakman 2009 http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf 2.
184 Armour, Hansmann and Kraakman 2009 http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf 2.
185 Armour, Hansmann and Kraakman 2009 http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf 3.
186 Armour, Hansmann and Kraakman 2009 http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf 3.

constituencies, including creditors and employees.[187] These generic conflicts are usually characterised by economists as "agency problems".[188]

Commentators have developed many theories and models in order to determine the nature of a company.[189] It is therefore important to note that companies play an important role in the creation of wealth in societies and nations. This is a universal truth. Millions of people are dependent on the income they receive from corporations in the form of wages (salaries). Their livelihoods depend upon these wages because in most instances it is their only source of income. This dependency on wages has resulted in society becoming a generation of "wage earners". It is therefore important for society as a whole and not just for corporations and their shareholders that wealth creation takes place in a continuous and sustainable manner. In this context corporate accountability plays a very important role. According to Bone,[190] corporate accountability "defines who is a recognized stakeholder, and what substantive legal rights stakeholders have in relation to the board of directors". Corporate accountability is modern civil society's response to impeding social and environmental impacts from corporate power.[191] It is therefore important to look at the different theories on the nature of a company. Three theories that can be identified are the contractual, communitarian and concessionary theories.

3.3.1.1 Contractual theory

According to the contractual theory two or more parties come together and come to an agreement with regards to the commercial activity they want to get involved in.[192] The company is born from this pact between the various contracting parties and the "interests of the company" are limited to the interest of the contractors.[193]

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187 Armour, Hansmann and Kraakman 2009 http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf 3.

188 Armour, Hansmann and Kraakman 2009 http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf 3.

189 See the general discussion earlier.

190 Armour, Hansmann and Kraakman 2009 http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf 3.

191 Armour, Hansmann and Kraakman 2009 http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_643.pdf 3.

192 Dine 1998 *TSAR* 246.

193 Dine 1998 *TSAR* 246.

This theory stipulates that various operational contracts exist between various corporate constituents and that the corporation is not accountable except to shareholders and any other constituent it has a contract with.[194] The company is seen as a "nexus of contracts, with a series of ongoing negotiations between management, shareholders, employees and the various corporate constituents".[195] The creation of the corporation is seen as a right, and the corporate constitution is a contract between the shareholders and the directors of the corporation, which recognises the shareholders as corporate owners who delegate authority to the directors of the corporation. The directors hold in theory the corporate property in trust and thus the managers' act as trustees or agents in accordance with their fiduciary obligation.[196] The supremacy of the shareholder is upheld by this theory. Some variants of this theory include shareholder primacy, stakeholder theory and the team production model.[197]

3.3.1.2 Communitarian theory

In terms of the communitarian theory the company is granted the status of an instrument of the state itself and not merely a concession of the state.[198] Corporate obligation, according to this theory, is extended to include shareholders, creditors, labour, suppliers, customers and the public, as well as the environment. The company is regarded as a community of constituencies where directors owe duties to all these stakeholders and not only to the shareholders as the dominant constituency.[199] It is based on political rather than an economic theory.[200] Two consequences stem from this theory. Firstly, the company does not have a strong commercial identity, even though the company might have a strong social responsibility and secondly, the corporate veil will be more or less non-existent as the state uses the corporate tool merely to further its ends.[201] Communitarian theory

194 Bone 2011 *CJLJ* 285.
195 Bone 2011 *CJLJ* 285.
196 Bone 2011 *CJLJ* 285.
197 Bone 2011 *CJLJ* 284. Attention will only be given to the shareholder primacy and stakeholder models. These models will be discussed below.
198 Dine 1998 *TSAR* 247.
199 Dine 1998 *TSAR* 293.
200 Smit 2006 *TSAR* 158.
201 Dine 1998 *TSAR* 247.

is needed "to make the best society we can aspire towards, and give individuals a richer sense of identity and self".[202] Corporate obligations should include ethical aspects that enhance and protect the welfare of all corporate constituents and thus embrace the corporate social responsibility ideals.[203] This theory is the leading example of corporate theory. Corporate theory acknowledges the public role of corporations, as opposed thinking a corporation to be a mere nexus of private contracts, and thus corporations are seen as individuals that are created by law with certain rights and obligations.[204] At the heart of the communitarian theory is the belief that "there is a role for public regulation of corporations to ensure that the public trust is not abused by corporate power". Corporate influence should therefore be used in the broad public interest.[205]

3.3.1.3 Concession theory

The concession theory has two branches:[206] firstly, the company is viewed as a concession by the state, which provides it with the ability to trade as a corporation.[207] This is especially the case where limited liability is afforded.[208] The state has the power to revoke corporate powers because the company was afforded limited liability by the state and because the concession of authority could be legitimised only through a public purpose.[209] The difference between the communitarian and concession theories is that the latter "accept[s] that the state has a limited role to play in ensuring that corporate governance structures are fair and democratic, but do[es] not force the company to realign its aims to reflect the social aspirations of the state".[210] According to Dine, the concession theory "does not give a clear signal as to the 'interests of the company' although it may remove some of the more extreme emphasis on the interests of the founders and thus be

202 Bone 2011 *CJLJ* 292.
203 Bone 2011 *CJLJ* 293.
204 Bone 2011 *CJLJ* 293.
205 Bone 2011 *CJLJ* 293-294.
206 Dine 1998 *TSAR* 246.
207 Bone 2011 *CJLJ* 293; Dine 1998 *TSAR* 245.
208 Bone 2011 *CJLJ* 293; Dine 1998 *TSAR* 245.
209 Bone 2011 *CJLJ* 293.
210 See Lombard *Directors' Duties* 20 where she refers to Dine Governance of Corporate Groups 21.

responsible for a more equitable mix of interests".[211] The state is thus encouraged to interfere with the corporate veil because the company is essentially a creation of the state, particularly where the public interest is to be at stake.[212] The second branch is the "bottom-up concessionary theory".[213] In terms of this branch the company is an extension of the contracting parties' or partners' original agreement. It seeks to show that the contracting parties have created an instrument, which has a real identity that is separate and quite distinct from the original contracting parties. This is done when they come together and make use of the corporate tool to create the company. The company stands free from its founders and becomes a separate person with its own interests.[214] It also enables the use of a constituency model, because the interests of the company are no longer limited to those of the contracting party but are extended to include its employees, creditors and customers.[215] These parties will join the original contracting parties as part of the commercial concern. The concession model provides for the constituencies, but is limited in the fact that it does not provide for an explanation of "how to balance the competing interests and arrive at the interests of the company as a whole".[216]

Those models relevant to employee participation in decision-making are now considered.

3.3.2 Overview of shareholder and stakeholder models

Before the enactment of the *Companies Act* little attention was given in legislation other than labour legislation to the voice of employees. It has been said that in order to enhance the position of employees within the field of corporate law various avenues must be pursued. These avenues, generally speaking, should firstly "seek to ensure that corporations pay attention to the interests of their employees, communicate with them (particularly on day-to-day issues that concern them) and act in ways that sustain and enhance their reasonable expectations", and secondly

211 Dine 1998 *TSAR* 246-247.
212 Dine 1998 *TSAR* 247.
213 Dine 1998 *TSAR* 247.
214 Dine 1998 *TSAR* 247.
215 Dine 1998 *TSAR* 247; Smit 2006 *TSAR* 158.
216 Dine 1998 *TSAR* 247.

should involve "attempts to provide employees with positions of influence in terms of corporate decisions that affect them and thus accord[s] them a role in corporate decision-making".[217]

Quite a number of models stemmed from the theories discussed above. The development and recognition of stakeholder models as alternatives to the shareholder primacy models will now be discussed.

3.3.2.1 Shareholder primacy model

The shareholder primacy model (also known as the contractual model) deems the interests of shareholders to be the only consideration on which management of the company should act, because they are required to act "in the best interests of the company".[218] The goal of the corporation is to maximise shareholders' wealth, and by doing so also to benefit society.[219] This model is unconcerned with the interests of creditors and employees because the company is the sole property and concern of the contracting parties.[220]

3.3.2.2 Stakeholder theories

The stakeholder model of company law (also known as the constituency model) considers other interested parties in the decision making of the directors. Other stakeholders that should be considered include the employees, consumers, the general public, and the environment. Because the stakeholder theory specifically includes shareholders, creditors and other groups who contribute towards corporate profitability, it acknowledges "a moral obligation" to these stakeholders in the form of a "social contract".[221] The social contract "reduces the corporation to an entity of relations between corporate constituents" and the corporation can be seen as "a nexus of associations that imports stakeholder rights and social obligations under the banner of a business enterprise".[222] In the light of this, it is submitted that the

217 Smit 2006 *TSAR* 153.
218 Dine 1998 *TSAR* 248; Bone 2011 *CJLJ* 286; Millon 1990 *Duke LJ* 201, 220.
219 Botha 1996 *SA Merc LJ* 26, 33.
220 Dine 1998 *TSAR* 248; Smit 2006 *TSAR* 160.
221 Bone 2011 *CJLJ* 288.
222 Bone 2011 *CJLJ* 288. See also Davies 2000 *Comp Lab L & Pol'y J* 138.

existence of a "new concept of a company" must be acknowledged. This new concept has been expressed in the following terms:

> There was a time when business success in the interests of shareholders was thought to be in conflict with society's aspirations for people who work in the company or in supply chain companies, for the long-term well-being of the community and for the protection of the environment. The law is now based on a new approach. *Pursuing the interests of shareholders and embracing wider responsibilities are complementary purposes, not contradictory ones*.[223]

A strong basis for this model is the "bottom-up" concessionary theory (discussed above). Two variants can be identified: the first variant sees the company run in the interests of shareholders assumes that it is the interests of shareholders to take account of other interest groups, because to ignore them would damage the interests of shareholders.[224] Legislation creates and details the interests that must be considered when directors exercise their duties, but enforcement is left in the hands of the shareholders.[225] This theory is very closely related to the so-called "enlightened shareholder value"[226] approach, which provides for the maximal protection of shareholders but also considers other stakeholders. The interests of these stakeholders are, however, subordinate to those of shareholders, and in the end profit-maximisation is the main goal of the directors. Shareholder interests still retain primacy and the interests of other stakeholders are therefore considered only insofar as they would promote the interests of shareholders.[227]

In terms of the second variant "the company is seen as encompassing interests other than those of the shareholders" and the "interests of the company" are seen to

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223 My emphasis. Margaret Hodge, Minister of State for Industry and Regions (UK Department of Trade and Industry, 2007 2), as quoted in Brammer, Jackson and Matten 2012 *Socio-Economic Review* 12.

224 Dine 1998 *TSAR* 249.

225 Dine 1998 *TSAR* 249.

226 Rogers 2008 *Comp Lab L & Pol'y J* 95, 101; Esser 2007 *THRHR* 410; Esser 2009 *THRHR* 192; Esser 2005 *Obiter* 720. Lombard *Directors' Duties* 20 articulates the view that the enlightened shareholder value approach would seem to be in line with the notion of the company as proposed by commentators such as Goldenberg 1998 *Company Lawyer* 34, 36-37, whose view is as follows: "This obligation to have regard to the interests of shareholders is *not* related to the actual shareholders at any particular moment in time, but to the general body of shareholders from time to time ... Accordingly, the duty of directors is to maximise the company's value on a *sustainable* basis. There is nothing in law to prevent directors from having regard to the interests of third parties with whom the company has a relationship ... if they judge, reasonably and in good faith, that to do so is conducive to the success of the company."

227 Lombard *Directors' Duties* 18-19.

include at least shareholders, employees and creditors.[228] The directors should consider all constituents of the corporation.[229] The directors thus have direct fiduciary duties to the different stakeholders of the company. This is called the school of "pluralism".[230] It asserts that "co-operative and productive relationships will only be optimised where directors are permitted (or required) to balance shareholders' interests with those of others committed to the company".[231] This approach directly benefits the "company as a whole".[232] This inclusive approach is in line with *King I, II* and *III*. The theory recognises that a company is represented by the interests of shareholders, employees and creditors, and directors "should act in the best interests of the company as a separate legal entity" because an interest that "may be paramount at one point in time in a company's existence" may become secondary at a later stage.[233] As noted earlier, an important question in company law still today is in whose interest the company should be managed. One view is that a company can be best described as "a series of contracts concluded by self-interested economic actors".[234] These actors include equity investors (shareholders), managers, *employees*[235] and creditors. When these contracts are taken together they make up the structure of the company and when these contracts are evaluated the contracts with the shareholders hold sway and the company ultimately operates to serve their interests.[236] According to this view it is also clear that these shareholders expect the company to be profitable and that the company's directors and managers are tasked primarily with the duty of creating corporate governance structures "which ensure[s] that the company conducts its business so as to maximise the returns of these investors".[237] Viewed differently, it can thus be said that a corporation "cannot be reduced to the sum of a series of contracts" because it

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228 Dine 1998 *TSAR* 249.
229 Bone 2011 *CJLJ 287*.
230 Esser 2007 *THRHR* 411; Esser 2009 *THRHR* 192; Esser 2005 *Obiter* 720. See also Charreaux and Desbrières 2001 *Journal of Management & Governance* 107-128, where they discuss the pluralist view of the firm and stakeholder value.
231 DTI Policy Paper 24; Lombard *Directors' Duties* 18.
232 Smit 2006 *TSAR* 160; Esser 2009 *SA Merc LJ* 317, 323.
233 Esser 2009 *SA Merc LJ* 323-324.
234 Davis and Le Roux 2012 *Acta Juridica* 307.
235 My emphasis.
236 Davis and Le Roux 2012 *Acta Juridica* 307.
237 Davis and Le Roux 2012 *Acta Juridica* 307.

is vital to take into account a wide range of stakeholders, whose interests may overlap or be in conflict with one another.[238] It is thus important to note when applying corporate governance principles that "the board and management of corporations strike a balance between the interests of their various stakeholders".[239] It is necessary for any corporation to determine which groups will be regarded as "stakeholders". Different weights need to be attached to the interests represented in a company and thus the interests of some groups of people connected with the corporation must be weighed at the various stages of the company's existence.[240] Directors should be aware of the interests of various stakeholders afforded to them by legislation, in order to properly balance the interests of stakeholders.[241] The interests of employees as stakeholders of the company may, for example, receive preference over those of shareholders collectively.[242] In this regard Davies[243] posts an important question: are there any good arguments for privileging employees over other stakeholders in the company in respect to corporate governance: suppliers, customers, creditors, for example? Davies[244] then addresses this dilemma as follows:

> Although stakeholder theories of corporate governance appear to give the case for worker representation a way of breaking down the supremacy of shareholders, in some ways stakeholder theories go too far from the point of view of employee representation. Stakeholding, at least in the economic form of the argument, suggests that governance protections are needed for all those who make firm specific investments against the expropriation of which by the controllers of the firm contractual protections are ineffective. Employees may be the paradigm example of such a group, but they are not the only example ... Modern stakeholding theories have thus generated a problem for labor lawyers, which, it seems to me, they have not yet squarely addressed. Talk of 'the two sides of industry' or of 'labour and capital' or, even 'the social partners' does not fit well within the pluralism of stakeholding, which embraces all those contracting with the company who cannot specify in advance a complete set of contractual terms to govern their relationship. It may be possible to distinguish workers from other stakeholders, not on the basis that other stakeholders can effectively rely on other bodies of law, insolvency law or commercial law, for example, to protect them. However, it is a matter for further analysis whether insolvency and commercial law contain effective mechanisms, which labor law lacks and cannot develop.

238 Davis and Le Roux 2012 *Acta Juridica* 307.
239 Rossouw 2008 *Afr J Bus Ethics* 29.
240 Dine 1998 *TSAR* 249; Smit 2006 *TSAR* 160; Esser 2009 *SA Merc LJ* 324.
241 Esser 2009 *SA Merc LJ* 324.
242 Esser 2007 *THRHR* 411.
243 Davies 2000 *Comp Lab L & Pol'y J* 138.
244 Davies 2000 *Comp Lab L & Pol'y J* 138-139.

As indicated earlier one of the underlying philosophies of *King III* is that companies should be regarded as good corporate citizens if they subscribe to the sustainability considerations that are rooted in the *Constitution*. This assessment of worth also entails that they should adhere to the basic social contract which they have entered into as South Africans, and their responsibilities to promote the realisation of human rights.[245] This social contract implies some form of altruistic behaviour, which in essence is "the converse of selfishness", whereas self-interest connotes selfishness.[246] The *Companies Act*, in its purpose provision, *inter alia* commits to promoting compliance with the Bill of Rights in the application of company law as well as the development of the South African economy, by "encouraging transparency and high standards of corporate governance".[247] These principles are further enhanced by the fact that the Act acknowledges the significant role of enterprises within the social and economic life of the nation,[248] aims to balance the "rights and obligations of shareholders and directors"[249] within companies, and encourages the efficient and responsible management of companies.[250]

It has been argued that the traditionalist view of company law based on notions that "corporations are voluntary, private, contractual entities, that they have broad powers to make money in whatever way and in whichever locations they see fit"[251] and that management has an obligation to its shareholders and shareholders alone, is quite narrow and out-dated. It is suggested that a new set of principles and policies for corporate law should be developed.

These principles are as follows:[252]

(a) The ultimate purpose of corporations should be to serve the interests of society as a whole[253]

245 Institute of Directors *King Report III* 11.
246 Crowther and Jatana *International Dimensions* viii.
247 S 7(a)-(b)(iii) of the *Companies Act*.
248 S 7(b)(iii) of the *Companies Act*.
249 S 7(i) of the *Companies Act*.
250 S 7(j) of the *Companies Act*.
251 Greenfield 2005 *Hastings Bus LJ* 87-88.
252 This section of the discussion borrows heavily from Greenfield 2005 *Hastings Bus LJ* 89.

A company cannot be considered to be successful if the "total social value it creates is less than the social costs it throws off".[254] If the interests of society as a whole matter more than the profit of the company, then profit cannot be the only indication of its success, as the cost side of the equation is also important.[255] This is regarded as the foundational principle, and not shareholder primacy (which is regarded as one of the potential conclusions). The way in which the success of corporations is measured should also change in order to determine if the best interests of society as a whole have been served.[256] The financial reports of companies should not be the only tool for measurement, as they tend, for example, not to take into account externalities such as the value of the company to its workers or to the communities in which it does business or the environmental costs of the company's products or services (other than the costs relevant to the shareholders).[257] These reports also do not take human rights violations into consideration. This information is important not only to general citizens but also to decision-makers. If society requires corporations to be more accountable, a broader view should be taken of their responsibilities, and the focus should not be only on shareholders' returns.[258] The sustainability of the company is another issue that needs to be considered, as the ability of the business to survive over time is important not only to the company but also to society at large.[259] Companies should for example not only maintain safe and healthy work environments but should extend this requirement in order to survive over time. It can thus be said that a corporation "creating wealth for society" must sustain itself.[260]

253 Greenfield 2005 *Hastings Bus LJ* 89.
254 Greenfield 2005 *Hastings Bus LJ* 90.
255 Greenfield 2005 *Hastings Bus LJ* 90.
256 Greenfield 2005 *Hastings Bus LJ* 91.
257 Greenfield 2005 *Hastings Bus LJ* 91.
258 Greenfield 2005 *Hastings Bus LJ* 92.
259 Greenfield 2005 *Hastings Bus LJ* 92.
260 Greenfield 2005 *Hastings Bus LJ* 93.

(b) Corporations are distinctly able to contribute to the societal good by creating financial prosperity[261]

The transferability of shares, limited liability, specialised and centralised management, and perpetual existence as creations of law are but a number of the characteristics that distinguish modern public corporations from other kinds of businesses.[262] Society establishes not only the framework of corporate law within which these corporations create wealth in the economy. Even when society acts collectively, decisions are often made that put other values ahead of wealth.[263] For example, we strive to end racial injustice even though it will "cost" us in terms of financial health, or we prohibit companies from discriminating against potential employees on the basis of their disability even if such accommodation of disability is costly.[264] It thus follows that "[w]e collectively *value justice, fairness, equality, and human rights*[265] even though it 'costs' money and resources to protect them".[266]

(c) Corporate law should further principles one and two[267]

The concept is that law is necessary to ensure that corporations serve the interests of society (principle one) and create wealth (principle two).[268] Agreement should thus be reached on the fact that corporations should be measured on how they advance the interests of society as well as the fact that corporations have a comparative advantage in building wealth for all of their stakeholders. If corporate law reinforces these principles, the question becomes "how specifically corporate governance might advance these goals".[269]

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261 Greenfield 2005 *Hastings Bus LJ* 93.
262 Greenfield 2005 *Hastings Bus LJ* 94.
263 Greenfield 2005 *Hastings Bus LJ* 96.
264 Greenfield 2005 *Hastings Bus LJ* 96.
265 Own emphasis.
266 Greenfield 2005 *Hastings Bus LJ* 96.
267 Greenfield 2005 *Hastings Bus LJ* 99.
268 Greenfield 2005 *Hastings Bus LJ* 98.
269 Greenfield 2005 *Hastings Bus LJ* 106. Principles four and five focus on this question.

(d) A corporation's wealth should be shared fairly among those who contribute to its creation[270]

To explain this principle we must commence with the non-controversial idea that corporations are collective enterprises:[271]

> Corporations require a multitude of inputs, all of which are essential. The firm needs financial capital, which they get from equity investors, debt creditors, consumers who pay money for the firm's goods and services, and sometimes from government. The firm depends on labour, which they get from salaried employees, hourly-wage workers, and independent contractors. The firm depends on infrastructure, which comes from governments of various stripes. Finally, the firm depends on a social fabric of laws and norms that create and sustain the marketplace and enable a stable society in which the company can operate. The notion that corporations depend on multiple stakeholders is implicit in most theories of the firm and is not particularly contentious. The difficulty, of course is what to do with that insight.
>
> The mainstream view of what to do with the insight is nothing; the shareholder is supreme and should be the sole beneficiary of the management's fiduciary duties. The management's sole obligation within corporate law is to serve the shareholder, usually by maximizing the share price. The others that contribute to the firm protect themselves through contract or government regulation. The management has no obligations to these additional stakeholders other than those that arise from their market power, from contractual commitments, or from some non-corporate source of law.
>
> Once we take Principle One to heart, however, this fixation on shareholder gain is revealed as a mistake. It is not based on a shareholder 'right' to the exclusive attention of the management, and it is unlikely to further the interests of society as whole. Rather, the real reason for shareholder primacy in corporate *law* has to do with the primacy of shareholders in the market. Capital is much more mobile than labour or infrastructure, so it can extract in the corporate 'contract' the right to be the sole beneficiary of management's fiduciary duties. This does not settle, of course, the normative argument. The market is a creature of law, and law can certainly constrain it. The law need not mimic the market's power hierarchy. Indeed, if the purpose of corporate law is to serve society as a whole, the law emphatically should not mimic the market.[272]

It thus follows that fairness plays an important role in society due to the fact that society is not exclusively concerned with the maximisation of aggregate wealth but also with the equability of its distribution.[273] Economic justice is mostly ignored in mainstream corporate law due to the fact that when "people use bargained-for

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270 Greenfield 2005 *Hastings Bus LJ* 106.
271 Greenfield 2005 *Hastings Bus LJ* 106.
272 Greenfield 2005 *Hastings Bus LJ* 106-107.
273 Greenfield 2005 *Hastings Bus LJ* 109-110.

exchange to distribute goods, the weaker bargainer will be less able to extract concessions from the other".[274] Even if the less-well-off party is marginally better off, the more powerful party to the contract will tend to be much better off, so unless there is "some explicit constraint on the ability of corporations to pass along the lion's share or profit to shareholders, the nation's inequality will worsen over time".[275] Corporate law, it appears, is very suited to and an efficient means to promote fairness, and to redistribute wealth and income, rather than other areas of regulation.[276] A stakeholder-oriented corporate law "would work at the initial distribution of the corporate surplus and would benefit stakeholders up and down the economic hierarchy".[277] This thus implies that when we take fairness seriously as a value, a corporate law framework that doesn't promote fairness could not be blindly accepted.[278]

(e) Participatory, democratic corporate governance is the best way to ensure the sustainable creation and equitable distribution of corporate wealth[279]

The fair allocation of the corporate surplus (as discussed under principle four above) "is essential to sustaining socially-beneficial corporations over time, but allocative decisions are extremely difficult, especially *ex ante*".[280] It appears that corporate governance should instead focus on procedural fairness (rather than trying to reach agreement *ex ante* about substantive fairness), as its crucial objective is "to create methods of decision-making"[281] that offer procedural fairness among the various stakeholders. In order to make it a real possibility that a corporation serve its stakeholders by creating wealth in a sustainable way and then share the wealth in an equitable way, the management needs to be subjected to different constraints. The fiduciary duty of directors and management should thus be changed and should be owed to the firm as a whole, and it should empower stakeholders with some

274 Greenfield 2005 *Hastings Bus LJ* 111.
275 Greenfield 2005 *Hastings Bus LJ* 111.
276 Greenfield 2005 *Hastings Bus LJ* 111.
277 Greenfield 2005 *Hastings Bus LJ* 112.
278 Greenfield 2005 *Hastings Bus LJ* 112.
279 Greenfield 2005 *Hastings Bus LJ* 112.
280 Greenfield 2005 *Hastings Bus LJ* 113.
281 Greenfield 2005 *Hastings Bus LJ* 113.

enforcement mechanisms.[282] This could be made possible, by empowering non-shareholder stakeholders to bring civil action for a breach of duties of care, for example, or by providing for the election of their own representatives to the board.[283] Or employees could elect a portion of the board.[284] An example of the latter can be found in German co-determination, where half of the supervisory board of major companies consists of worker representatives.[285] This composition calls upon the board to be "pluralistic", and could actually "retard those selfish impulses because any behaviour that benefits one stakeholder at the expense of the firm must be done in the view of the others" and the probable effect of such a broadening of the composition of the board could be that non-shareholder stakeholders could speak for other stakeholders so that they would in effect get a "larger share of the pie than they now get".[286] If boards thus stand to benefit from "a greater openness and diversity", such "openness would not only make for better decision-making but likely fairer decision-making as well".[287]

4 Conclusion

From the discussion on the functions of labour law and the theories and models on the nature of companies, it is quite evident that labour law largely still provides for and applies a protective view when it comes to the advancement of employees' rights. It is also apparent that the managerial prerogative is still important in the sphere of both labour and company law, but that this prerogative is not absolute. This is judged to be the case because employees can restrict such a prerogative by acting in concert and making use of collective bargaining structures to prevent their exploitation by their employer. This does not, however, mean that the employer's prerogative has been lost. Employees are still obliged to work and act in good faith and the employer still has the right to direct and allocate the work in terms of this prerogative.

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282 Greenfield 2005 *Hastings Bus LJ* 114-115.
283 Greenfield 2005 *Hastings Bus LJ* 115.
284 Greenfield 2005 *Hastings Bus LJ* 115.
285 Greenfield 2005 *Hastings Bus LJ* 115.
286 Greenfield 2005 *Hastings Bus LJ* 116-117.
287 Greenfield 2005 *Hastings Bus LJ* 118.

Industrial democracy has also provided employees with the tools to have a say in what goes on in the corporation so that they do not just have to accept demands made by the employer with regard to changes in conditions of employment, for example. Although labour law protects employees with regard to unilateral changes to their employment contracts, employers are still entitled to change work practices unilaterally. The managerial power of employers grants them this power. The collective bargaining process and consultation are valuable tools that grant employees the power to address inequality in the management-labour power struggle. Central to the collective bargaining process is the right to strike. If one views participation in decision-making as a continuum, one would find the disclosure of information and consultation on one end of that continuum whilst joint-decision-making would be on the other end. The right to strike, it is submitted, would usually be utilised in order to achieve a form of participation that is higher on the continuum, where employees do not have a legal right as such to participate in decision making. The right to strike plays an important role in South Africa, not only because it is given the status of a fundamental rights in the *Constitution* but also in more practical terms because it provides employees with a powerful economic weapon in the collective bargaining process, especially when a deadlock is reached in the negotiation process with their employer.

The changing role of companies as members of society cannot be overstated. Although corporate law traditionally focused on shareholder wealth creation, developments in corporate law and corporate governance jurisprudence clearly show that the belief in shareholder primacy is out-dated. Shareholders can no longer be treated as if they were the only stakeholders or even the most important stakeholders in companies. It is evident from the development of the different theories and models on companies that the shareholder primacy model is no longer the preferred (and appropriate) model. It is also evident from the pluralist approach that employees as stakeholders have an important role to play in advancing the interests of the company as a whole. This is also unmistakable from a reading of the various reports on corporate governance in South Africa as well as the *Companies Act*. Companies can no longer just make decisions without taking note of the

protection and rights granted to employees by other legislation, including the rights afforded to employees by the *Companies Act* itself.

A question still remains about the extent and the level(s) at which employees should participate in corporate decision-making. This question will be analysed in subsequent contributions - by looking at the types of processes and norms already in place in labour and company law and by looking at other jurisdictions for guidance. What is clear is the fact that companies can no longer ignore employees and their voice on what goes on in the organisation.

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LIST OF ABBREVIATIONS

Afr J Bus Ethics	African Journal of Business Ethics
Am J Comp L	American Journal of Comparative Law
BCEA	Basic Conditions of Employment Act
BLLR	Butterworths Labour Law Reports
BC L Rev	Boston College Law Review
CCMA	Commission for Conciliation Mediation and Arbitration
CJLJ	Canadian Journal of Law and Jurisprudence
COIDA	Compensation for Occupational Injuries and Diseases Act
Comp Lab L & Pol'y J	Comparative Labour Law and Policy Journal
Duke LJ	Duke Law Journal
LRA	Labour Relations Act
EEA	Employment Equity Act

EJIL	European Journal of International Law
E L Rev	European Law Review
FDI	Foreign Direct Investment
Hastings Bus LJ	Hastings Business Law Journal
Harv L Rev	Harvard Law Review
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILO	International Labour Organisation
ILJ	Industrial Law Journal
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies
Int J Hum Resourc Man	International Journal of Human Resource Management
Int'l Lab Rev	International Labour Review
MULR	Melbourne University Law Review
SA Merc LJ	South African Mercantile Law Journal
SDA	Skills Development Act
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch-Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
UIA	Unemployment Insurance Act
Waikato L Rev	Waikato Law Review
Wis Int'l LJ	Wisconsin International Law Journal

THE DIFFERENT WORLDS OF LABOUR AND COMPANY LAW: TRUTH OR MYTH?

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SUMMARY

Recently the South African company law landscape underwent a dramatic overhaul with the introduction of the *Companies Act* 71 of 2008. Central to company law is the promotion of corporate governance. It is clear that companies are no longer accountable just to their shareholders but also to society at large. Leaders should, for example, direct company strategies and operations with a view to achieving the triple bottom-line (economic, social and environmental performance) and should thus also manage the business in a sustainable manner. An important question in company law still today is in whose interest the company should be managed. Different stakeholders of importance to companies include shareholders, managers, employees, creditors *etcetera.* The *Companies Act* aims to balance the rights and obligations of shareholders and directors within companies, and it encourages the efficient and responsible management of companies. When considering the role of employees in corporations it must be noted that the *Constitution* grants every person a fundamental right to fair labour practices. Social as well as political changes were evident after South Africa's re-entering the world stage in the 1990s. Changes in socio-economic conditions within a developing country were also evident. These changes had a major influence on the South African labour law dispensation. Like company law, labour law is to a large extent also codified. Like company law, no precise definition of labour law exists. It is clear from the various definitions of labour law that it covers both the individual and collective labour law and that various role-players are involved. Some of these role-players include trade unions, employers/companies, employees, and the state. The various relationships between these parties are ultimately what will guide a certain outcome if there is a power

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play between them. In 1995 the South African labour market was transformed with the introduction of the *Labour Relations Act* 66 of 1995. The LRA remains the primary piece of labour legislation that governs labour law in South Africa. The notion of industrial democracy and transformation of the workplace are central issues in South African labour law. This is due to the constitutional changes that have taken place in South Africa, where the protection of human rights and the democratisation of the workplace are advanced. Before the enactment of the LRA, employee participation and voice was a much-debated topic not only locally but also internationally. It is therefore essential when considering employee participation to take due cognisance of both the labour and company law principles that may be pertinent, as well as the need for workers to have a voice in the workplace and for employers to manage their corporations. This article will attempt to indicate how the different functions, theories and models of labour and company law accommodate and promote the interests of employees in corporations and will also attempt to reconcile these differences.

KEYWORDS: corporate governance; corporate law; labour law; employee participation; employee voice; employees; employers; industrial democracy; collective bargaining; fairness, equality; decision-making; stakeholders; shareholders; managerial prerogative; social justice.