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**TITLE: INDUSTRIAL RELATIONS LAW IN TANZANIA: PAST
EXPERIENCE AND PROSPECTS UNDER THE NEW LABOUR
LEGISLATION**

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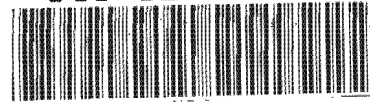
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I solely remain responsible for any shortcoming found in this dissertation.

TABLE OF ABBREVIATIONS

CCM	Chama Cha Mapinduzi
CCMA	Commission Conciliation, Mediation and Arbitration (South Africa)
CMA	Commission for Mediation and Arbitration
ELRA	Employment and Labour Relations Act 2004
ERP	Economic Recovery Programme
ILA	Institutions of Labour Act, 2004
ILO	International Labour Organisation
IMF	International Monetary Fund
JUWATA	Jumuiya ya Wafanyakazi Tanzania
LESCO	Labour, Economic and Social Council
NGP	Gross National Product
NUTA	National Union of Trade Association
OTTU	Organisation of Tanzania Trade Unions
PSRC	Parastatal Sector Reform Commission
SADC	Southern African Development Community
SAP	Structural Adjustment Programmes
TANU	Tanganyika Africa National Union
TAZARA	Tanzania Zambia Railway Authority
TFL	Tanganyika Federation of Labour
TUCTA	Trade Union Congress of Tanzania
WB	World Bank

DECLARATION

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the Masters of Law proved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Masters of Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature

Signed by candidate

12th February, 2006

Date

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INDUSTRIAL RELATIONS LAW IN TANZANIA: PAST EXPERIENCE AND PROSPECTS UNDER THE NEW LABOUR LEGISLATION

Abstract

The relationship between an employer(s) and employees constantly evolves and consequently the law changes in response to suit such evolutions. This is equally similar to industrial relations in Tanzania. Mainland Tanzanian industrial relations have passed through different social, political and economic epochs which have shaped it in a context it is now. Each of those periods came up with different legislation to suit the then prevailing situation. Soon after independence, the state adopted new social policies aimed at building socialism as a means of bringing social justice to all members of the society. The said social policies could only be achieved through legislation and thus, industrial relations did not flee from the effects of those changes because the legislation enacted during that time had to reflect socialist ideas.

The legislation enacted integrated labour movements as part and parcel of the ruling party. The situation became worse in 1967 when the then ruling party, Tanganyika African National Union (TANU) and later Chama Cha Mapinduzi (CCM), assumed supremacy over other organs of the state (i.e. the judiciary and legislature). The private sector ceased to exist as a result of nationalization. From 1967 to early 1990s, civil servants were obliged to belong to the ruling party. Workers were not free to form their own independent trade unions or organisations. The powers of the Registrar of trade unions were unchallengeable and he could register and unregister trade unions or federations at any time without giving any reason. As a result of the state's control of trade unions and interferences in collective bargaining weakened the working class struggle to demand good working conditions. Where the workers tried to resort to some legal remedies, they met a complex and lengthy procedure which did not assure them success at the end because even the legal system was pre-occupied by pro-government policies supporters.

However, up to mid 1980s socialist policies largely failed and the government had to take another course. It introduced several changes in the then existing industrial relations. It changed the mode of dispute resolution and introduced flexible freedom of association mechanisms. More remarkably was checking the powers of the Registrar and Minister of Labour who had absolute powers over existence of trade unions and employers' organisations.

The IMF and World Bank introduced the so-called Structural Adjustment Programme (SAP) which insisted on the shift of employment policies from planned economy to market economy. From 1995 the Government decided to change its labour legislation to cope with the global economic trends and regional integration. It initially enacted the Trade Unions Act of 1998 which freed the workers from the control of the state. The latter legislation did not match with demands of free global labour market where labour power is competitive. That necessitated the government to appoint a Task Force on Labour Law Reform to review employment laws, labour relations law, dispute resolution mechanism, occupational health, employment promotion, the legal structure and regulatory framework. The Task Force studied the existing labour law and made recommendations for change. Most of the recommendations made were adopted by the government hence the enactment of the Labour Institutions Act, 2004 and Employment and Labour Relations Act 2004, respectively. This paper deals with how Tanzania Mainland industrial relations have evolved during the said different periods since independence up to now. The main focus will be to discuss the current legislation and how it seeks to improve industrial relations as compared to its predecessors. Also it will discuss in a nutshell whether the new legislation has met the International Labour Organisation (ILO) standards. It further discusses the challenges facing Tanzania and its working class in the globalised labour market.

NB: In this paper the phrase "he" will also denote "she".

1. Social, Political and Economic Context of the Industrial Relations in Tanzania

1.1 Introduction

The United Republic of Tanzania is a union of two countries namely; Tanganyika and Zanzibar. United Republic of Tanzania has a total area of 945,000¹ square kilometres and a population of 34,569,232 according to the census conducted in 2002.² Tanzania is among the poorest countries in the world despite being endowed with abundant natural resources and being rated as a leading country in endowment of natural resources within SADC countries. The Gross National Product (GNP) stands at US \$265 per capita income and more than 50% of its population is living below marginal poverty line.³

In terms of labour force, the data differ greatly from different sources namely the World Bank reports and those provided by the government. While the World Bank reports show that about 50% of the labour force is under the age of 30, the data provided by the Ministry of Labour shows that labour force below the same age is 18.8%.⁴ Labour force growth rate stands at 3% and about 400,000 to 600,000 people seek job every year while job opportunities available can only absorb 30 percent.⁵ The labour force is mostly unskilled and has low level of education attained.⁶ The World Bank data shows that only 67% of the labour force is functionally literate and 32.1 never attended any formal education, 21.4 percent went to primary education but never finished, 43.1 percent finished primary education and only 3.2 percent went to secondary education and above.⁷

About 0.81 million people are estimated to be employed in the formal sector of whom about 60% are in public sector and only 10% of them employment are engaged in private firms.⁸ More than 80% of employment working age is engaged in agriculture.⁹

¹ Ndulu B. J *Tanzania at the Turn of the Century: Background Papers and Statistics*. (Washington, D.C: World Bank 2002) 5.

² <http://www.tanzania.go.tz/2002sensus.htm>

³ Ndulu B. J (note 3) 3.

⁴ Tanzania Ministry of Labour, Youth and Sports *First Report of the Task Force on the Labour Law Reform* 18.

⁵ World Bank Report 1996.

⁶ Ibid.

⁷ Ibid.

⁸ Ndulu B. J (note3) 3.

⁹ Ibid.

The economic growth currently is running between 6.0-6.5 percent, although the life of ordinary people is becoming worse than ever.¹⁰ Also it is estimated that over 2 million people are infected with HIV/AIDS; 70.5 percent of whom are in the age group 25 – 49 years, and 15 percent 15 – 24 years. By the end of 1999 there were some 600,000 cases of HIV/AIDS and a similar number of orphans.¹¹

1.2 Historical background of the labour regime in Tanzania Mainland

The history of labour regime in Tanzania can be traced back to the colonial rule under the Germany East Africa and successive British colonial rule. Each colonial state introduced and used different approach in order to recruit labour force. The Germany rule used direct forced labour.¹² The implementation of forced labour was through enactment of Labour Recruiting Ordinance and Legal Status of Native Labourers.¹³ Britain took over Tanganyika territory after the defeat of Germany during the First World War in 1918. Britain was restrained from use of forced labour by the mandatory provisions of League of Nations and later ILO Convention on Forced labour.¹⁴ Therefore, in order to comply with ILO Convention, the British regime enacted the so called Master and Native Servants Ordinance (Cap. 23) of 1923 followed by Native Authorities Ordinance 1926.

During that inter period, workers were not unionized. It was until 1930s when the struggle for unionization began and it grew step by step until it arrived at a solidarity and consciousness.¹⁵ Trade Unions type of organization formed during that period bore the stamp of grass-root democracy and militancy¹⁶. Despite of un-well unionized labour movements, the British colonial government enacted Trade Union Ordinance in 1932 in response to contemplated strong labour movements in the British colonies.¹⁷ Tanganyika government registered the first trade union namely the Union of Shop Assistances in 1933 and later on Labour Trade Union of East Africa.

¹⁰ The Budget of the United Republic of Tanzania 2005/6 (Available at www.parliamnet.go.tz (Accessed on 27th July, 2005).

¹¹ AIDS Statistics (Available at www.tanzania.go.tz/pdf/hivpolicy/pdf Accessed on 27th July, 2005).

¹² Shivji Issa G. *Law, State and the Working Class in Tanzania* (London: Currey, 1986) 7.

¹³ Rutinwa Bonaventure *Legal Regulation of Industrial Relations in Tanzania: Past Experience and Future Prospects* (Labour Law Unit, University of Cape Town, 1995) 3.

¹⁴ Shivji Issa G (note 13) 8.

¹⁵ *Ibid* 155.

¹⁶ *Ibid*.

¹⁷ *Ibid* 157.

Unionized labour movements gained more popularity between 1940 to 1950s whereby more trade unions were formed and registered. They were commonly formed by permanent workers in transport, domestic servants and tailors.¹⁸ Later on they were joined by the peasants who organized themselves through cooperative unions and politicians who were organized through political parties especially TANU.¹⁹ However, the Trade Unions were disbanded from engagement in political activities.²⁰

Following the rise of strong labour movements, the colonial state required an immediate solution to put down the strikes which started to occur. Force was no longer a viable solution to curb the growing labour movements. The colonial regime introduced the dispute resolution machinery in order to reduce social unrest of the growing trade unionism. The Trade Disputes (Arbitration and Enquiry) Ordinance 1947 was enacted.²¹ The Ordinance introduced a two-stage machinery for settlement of disputes namely conciliation and arbitration.²²

The rise and consolidation of organized trade unions strengthened the bargaining capacity of the employees. The trade unions were used as the bargaining agent of employees in certain industrial sector such as mining, plantations, transport and tailoring. The existing labour regulating provisions were no longer viable to cope with existing organized labour. Therefore, there was a need for reform. The Employment Ordinance, Cap 366 was enacted in 1955 replacing the Master and Native Servant Ordinance Cap 78, the Master and Native Servants (Written Contracts) Ordinance, the Master and Native Servants (Recruitment) Ordinance Cap 80 and Porters (Restriction on Employment) Ordinance Cap 171.²³ Enactment of Employment Ordinance and Wages and Terms of Employment Ordinance was a turning point to the labour regime in Tanganyika and the said two statutes became major instruments for regulating the terms and conditions of

¹⁸ Ibid 162.

¹⁹ Chris Maina Peter *Human Rights in Tanzania: Selected Cases and Materials* (Koln: Rudiger Koppe Verlag 1999) 170.

²⁰ Ibid.

²¹ Shivji Issa G (note 13) 172.

²² Ibid p.173

²³ Tanzania Bankers Association: Review of Selected Tanzanian Labour Laws (Submitted on October, 2001 to the Task Force for Review of Labour Laws in Tanzania.) 1.

employment²⁴. One year later the Trade Union Ordinance 1956 was enacted and the 1932 Ordinance referred above was repealed.²⁵ The new Ordinance provided a softer procedure for forming and registering trade unions and their participation in collective bargaining as compared to the former provisions.

Enactment of the Trade Unions Ordinance in 1956 motivated trade unions to form a federation among the registered trade unions. Tanganyika Federation of Labour (TFL) was formed with initial number of 17 trade unions with its first Secretary General Mr. Rashid Mfaume Kawawa.²⁶ The first task of the TFL was to create a small number of industrial organizations and direct towards labour unrest that culminated to strikes.

The relationship between TANU and TFL grew immensely and it could be analyzed in three different ways namely; overlapping leadership between TANU and TFL whereby Mfaume Kawawa was Secretary General of the latter and member of Central Committee of TANU, TANU support for TFL economic struggle and political struggle of TFL itself in relation to TANU.²⁷ The alliance and fraternal relationship between the two grew more and more and their functions supplementing each other until Tanganyika obtained its political independence in 1961.

Fraternal cooperation between TANU and TFL established during struggle for independence did not last longer though. Their relationship went sore when the government started dictation and subordination of the activities of the trade unions. TFL leaders could not tolerate such stance hence started to oppose TANU policies.²⁸ As put by Peter Maina, 'the friends of yesterday were the new enemies of the new ruling elite'.²⁹

The state started to enact laws completely throttling all forms of the working class organizations.³⁰ Among the pieces of legislation enacted to curb the labour movements were; Civil Service (Negotiating Machinery) Act no 52 of 1962, Local Government

²⁴ Ibid.

²⁵ Chambua Samuel E *Democratic Participation in Tanzania: The Voices of Workers Representatives* (Dar es Salaam: Dar es Salaam University Press 2002) 23.

²⁶ Ibid.

²⁷ Shivji Issa G (note 13) 178.

²⁸ Chriss Peter Maina (note 20) 170

²⁹ Ibid.

³⁰ Ibid.

Services (Negotiating Machinery) Act, Cap 542, Security of Employment Act, Cap 574, National Union of Tanganyika Workers Act, No. 18 of 1964, Trade Unions Ordinance (Amendment) 1962.³¹

The Trade Disputes (Settlement) Act narrowed the scope of industrial action by restricting disputes relating to works' conditions to employees involved in the dispute only.³² As a result, secondary strikes, a weapon to workers, were outlawed. The imposition of a complex and cumbersome procedure for compulsory arbitration made strike remedy to workers illusory.

The second enactment was the Trade Union Ordinance (Amendment) Act, 1962 which required the registration of trade union to be affiliated to federation of labour designated by the state.³³ The Secretary General of TFL was brought into the Cabinet as Minister for Labour.³⁴ Worse enough its top executives namely Secretary General and Deputy General Secretary became the Presidential appointees. The new Act empowered the Registrar of Trade unions to cancel registration of any union which failed within three months to become a member of the designated federation.³⁵

The government's movements to usurp powers and autonomy of trade unions movements did not end there. In 1962 the Parliament enacted Service (Negotiating Machinery) Act, 1962. All civil servants with earning of UK £ 702 per annum were excluded from becoming members of any trade union. This law was imposed purposely to undermine the leadership of trade unions because it was from civil service that the movement literates and articulate leaders came from.

The last nail to the coffin of the spinal leaders of trade union movements was through enactment of the Preventive Detention Act of 1962, designed to silence and

³¹ *Jumuiya ya Wafanyakazi Tanzania (JUWATA) v. KIUTA* (1988) TLR

³² Chambua Samuel (note 26) 27.

³³ Kapinga W "State Control of the Working Class" in Issa G. Shivji (ed) *The State and the Working People in Tanzania* (Dakar, Senegal Codesria, 1986) 89.

³⁴ Chambua Samuel "Tanzania People in Distress" in Gérard Kester and Ousmane Oumarou Sidibé (eds) *Trade Unions and Sustainable Democracy in Africa* (Aldershot: Ashgate 1997) 288.

³⁵ Ibid.

harass active leaders of the unions. In short it was designed to weaken the organized labour by starving it of educated and skilled organizers.

Later on, the state enacted a legislation to dissolve TFL. The dissolution of TFL came coincidentally as a result of the Tanganyika Rifles mutiny which took place in 1964.³⁶ The mutiny was suppressed by aid of British soldiers whereby about 200 leading trade unionists and about 300 other people were detained.³⁷ While the leaders of the unions were still in detention, their umbrella union TFL was dissolved and a single National Union of Tanganyika Workers was established by the National Union of Tanganyika Workers (Establishment) Act, 1964.³⁸ The Act required National Union of Trade Associations (NUTA) to affiliate with and promote the activities of the ruling party-TANU. Also the President of state was mandated to dissolve NUTA and establish another body which would be deemed to be a trade union.

After the state monopolised all the powers, it had to take necessary measures to gain support of the working class. It enacted Security of Employment Act of 1964 which was intended to improve industrial democracy.³⁹ It was required to establish the Workers' Committees at every workplace with at least ten and more employees.⁴⁰ The works' Committees were supposed to advise the employer on such matters as efficiency, safety and welfare arrangements for workers, redundancies and promotion of good relationship between employers and employees. As the title of the Act denoted, it was aimed at securing the employees' tenure of work against unjustified dismissal and unfair termination of the employment.

1.2.1 From 1967 Onwards

On 5th February 1967 the party (TANU) pronounced the Arusha Declaration which outlined two principles of Socialism and Self-Reliance.⁴¹ One of the reasons for

³⁶ Ibid.

³⁷ Chambua Samuel (note 26) 27.

³⁸ Shivji Issa G *Law, State and the Working Class in Tanzania* (London: Currey, 1986).

³⁹ Chambua Samuel (note 26) 28.

⁴⁰ Ibid.

⁴¹ Kabudi and Mulimuka "The Party and the State" in Issa G. Shivji (ed) *The State and the Working People in Tanzania* (Dakar, Senegal Codesria, 1986) 67.

switching from its previous system was that, six years after independence no investment for Tanzania had been forthcoming.⁴² That being the case, the party decided to try to adopt another system not anchored in private foreign capital calculations.⁴³ Several policies were promulgated and on 7th February, two days after declaration, the Government nationalized all private enterprises.⁴⁴

Despite the fact that NUTA was a ruling party branch, its movement for improvement of labour conditions like higher wages and better terms of services continued. The government prepared a wage policy which was resisted by NUTA.⁴⁵ Negotiations on the policy were unsuccessful; hence the government hurriedly went to the Parliament and enacted the Permanent Labour Tribunal Act 1967 which repealed the existing Trade Dispute (Settlements) Act 1962. It set up machinery for controlling wage increase and introduced a new system for arbitration of industrial disputes.⁴⁶

The principles guiding the Tribunal was to maintain a high level of domestic capital accumulation, expand employment opportunities, preserve competitive position of local products in the domestic and overseas market; provide incentive for increasing productivity and the need to maintain fair relationship between income of different sectors of the community.⁴⁷ The Tribunal awards would have to consider the impact it would have on the balance of payment and on government's ability to finance development programmes and recurring expenditure in the public service.⁴⁸ This implies that the tribunal was not guided by the principles of justice but on the ability and willingness of the government to pay according to the award requirement. Furthermore, the Tribunal was entrusted with tasks which were out of reach and did not match with its expected functions.

⁴² Ibid 68.

⁴³ Rutinwa Bonaventure *Legal Regulation of Industrial Relations in Tanzania: Past Experience and Future Prospects* (Labour Law Unit, University of Cape Town, 1995) 28.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Kapinga W "State Control of the Working Class" in Issa G. Shivji (ed) *The State and the Working People in Tanzania* (Dakar, Senegal Codesria, 1986) 91.

⁴⁷ Section 22(e) of the Permanent Labour Tribunal of 1967.

⁴⁸ Ibid.

1.2.2 Workers' dissatisfactions with government policies on labour movements

The workers were not satisfied with Government policies and the way it dealt with workers demands. Their only last resort arsenal, the strike, was made cumbersome to exercise. Therefore, they started to engage in other forms of protest such as indiscipline, destruction of properties, and negligence.⁴⁹ More illegal strikes appeared to be on increase. The Government sought another way of "teasing" the employees. In 1970 it issued a Presidential Directive No.1 of 1970 which tried to blind the workers by stipulating that the working class should be regarded as an integral part of the industries where they are employed. The objectives of the Directive were among others, to give the working class the powers thereby solving the contradictions that existed between management and workers.

In the long run, however, the Government's efforts to nationalise the private enterprises did not yield the expected results. Many of those entrusted to manage the nationalised enterprises maladministered and swindled the revenues generated. With a combination of many factors, Tanzania economy and industrial sector faced a crisis in the 1970s. In 1980, the situation became acutely worse. There was a need to rescue the situation. The next section will deal with how that crisis arose and the means used to remedy the situation.

⁴⁹ Rutinwa Bonaventure (note 44) 20.

2. Social, Economic and Political Transformation and Its Impacts to Industrial Relations in the 1980-1990s

2.1 Introduction

The socio-economic plans by the ambitious post independence Government were not achieved up to early 1980s. The key goal, economic development, was hardly realized.⁵⁰ The income policy adopted in 1967 aimed at undermining the collective bargaining turned the economy into a miserable situation. Workers had to expect wage increase during May Day in the president's speech.⁵¹ Between 1970 and 1980s the average wage in Tanzania was dropping at annual rate of 14.4%.⁵²

Internal and external factors aggravated sharp economic crisis which Tanzania faced in 1970 and 1980s. The oil crisis in the world market caused a sharp in import expenditure. A severe drought also caused shortage of food and the increase of food prices at an unprecedented level.⁵³ Cereal imports became very necessary to reduce food shortage, which consumed about one fourth of total imports.⁵⁴ There was a decline in coffee export due to decline in prices in the world market, which resulted in trade deficit. The war between Tanzania and Uganda also contributed much as a result of depleted foreign reserve.⁵⁵ It is believed that during the war Tanzania spent an amount equivalent to more than half of 1977 export earning for arms and other imported war materials. At the helm, there was high rate of corruption. The accumulation of these factors forced a frustrated government to enact the Economic and Organised Crime Control Act⁵⁶ to fight the so called economic saboteurs who seemed to be the catalyst of the economic misery. In the early 1980s, the Tanzania economy collapsed after real per capita income had declined since 1975. Industrial output fell by 15%.⁵⁷ The balance of payment worsened dramatically.

⁵⁰ Task Force Report (note 6) 17.

⁵¹ Ibid 21.

⁵² Ibid 22.

⁵³ www.uni.hohenheim.de/1490/1999/pds/dp99-03/pdf

⁵⁴ Ibid.

⁵⁵ World Bank Report 1994.

⁵⁶ Act No.13 of 1984.

⁵⁷ Ibid.

In respect of working class, the situation was worse because of their inability to meet the basic social needs as a result of the low wages and not being paid timely. Tanzania was noted as one of three countries which paid the lowest compensation to minimum wage earners.⁵⁸ This necessitated Jumuiya, ya Wafanyakazi Tanzania (JUWATA) Congress to pass a resolution to distance itself from the party.⁵⁹ The resolution requested the government permission to elect its own leaders namely General Secretary and Deputy General Secretaries, formulate its own constitution and to end political affiliation to CCM.⁶⁰ The National Executive of CCM rejected this request because the Government was still afraid of potential opposition from outside.⁶¹

2.2 The introduction of Structural Adjustment Programme (SAP)

In the early 1980's, Tanzania tried its own Structural Adjustment Programmes. These included; the National Economic Survival Program in 1981 and the Structural Adjustment Program in 1983.⁶² The Government entered into negotiations with the International Monetary Fund and World Bank. The then President, Julius Nyerere, refused to accept the conditionalities imposed by those financial institutions.⁶³ That refusal caused most of multinational donors to cut off their financial aids to Tanzania.⁶⁴

In 1986 the new government under President Ali Hassan Mwinyi entered into other negotiations with the International Monetary Fund (IMF) and World Bank (WB). So, a donor-sponsored Economic Recovery Program (ERP) was decided upon. The aim was to achieve a sustainable growth in real income and output. Better pricing of crop production, improved product and input marketing, an increase in government outlays for agriculture, an increase in industrial capacity utilization by liberalizing raw material imports, a decrease in the balance of payments deficit through devaluation, export

⁵⁸ Rutinwa Bonaventure (note 44) 22.

⁵⁹ Chambua Samuel "Tanzania People in Distress" in Gérard Kester and Ousmane Oumarou Sidibé (eds) *Trade Unions and Sustainable Democracy in Africa* (Aldershot: Ashgate 1997) 290.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² <http://www.hartford-hwp.com/archives/36/347.html>

⁶³ Ibid.

⁶⁴ Ibid.

incentive schemes, foreign exchange liberalization and better control of the budget deficit and money supply were thought to be key ingredients necessary to achieve this goal. Structural Adjustment Programme came with several conditionalities rejected by Nyerere. The conditions included; trade liberalization, massive devaluation of the currency, privatization, removal or reduction of government subsidies, price decontrol, reducing the size of labour force within the public sector and promotion of private sector.⁶⁵ As a result of acceptance of these conditions, many donors came forward to aid the economic reform.

2.3 Status of trade unions organisations in the 1990s

As a result of new changes, the Government established a Commission to study and make recommendations on the law reforms to suit the changes. The Nyalali Commission was established and made several recommendations on the labour laws. The affiliation of JUWATA to the state party was no longer relevant as the government was obliged to alienate itself from labour movements and encourage private sector. Therefore, the government enacted Organisation of Tanzania Trade Union (OTTU) Act no. 20 of 1991⁶⁶ which repealed and de-registered JUWATA. However, OTTU remained a sole trade union federation. This can be extracted from section 4 of the Act which provided that; *OTTU shall be the sole Trade Union body representative of all employees in the United Republic.* Section 8 of the Act allowed the formation of eight other trade unions by OTTU itself or otherwise, but any trade union so formed had not only been required to affiliate to OTTU but also ought to be known as “OTTU Union” and to have been registered as such alongside with OTTU.⁶⁷ In other words OTTU played a double role as a trade union as well as a federation. However, as a federation it had immunity from application of several Trade Unions Ordinance such as section 7(3), 13(1) (f), 27 and 36, while other trade unions were subject to the governance of Ordinance. However, the immunity was limited under section 9(1) whereby the Registrar would cancel the federation with approval of the Minister.

⁶⁵ Ndulu B. J (note 3) 147.

⁶⁶ Chambua, Samuel (note 8) 34.

⁶⁷ Chambua Samuel “Tanzania People in Distress” in Gérard Kester and Ousmane Oumarou Sidibé (eds) *Trade Unions and Sustainable Democracy in Africa* (Aldershot: Ashgate 1997) 296.

Although OTTU was independent from the state party, it remained under control of the state. Even the Constitution which guaranteed the right of freedom of association contained a claw-back clause which totally abrogated that right. Article 20 of the United Republic of Tanzania Constitution provided thus;

21(1) Everyone is entitled freedom subject to the law of the land, to peacefully and freely assemble, associate with other people, express views publicly, and more specially to join or form associations or organization formed for the purpose of preserving or furthering his beliefs, or interests or any other interests

The above provisions entail that there is a right of association and organization but such right is *subject to the laws of the land*. One of those laws of the land was OTTU Act which required all other trade unions to be affiliated to OTTU. It is strange that the Constitution which is the basic law was subjected to other inferior laws. The right given in one hand was technically taken by the other hand. In short there was no right of freedom of association because the workers were compelled to organize only through the channels already established under Section 8 of the OTTU Act. Any organizations or associations out of those stipulated under the Act were illegal.

It is surprising that neither workers nor their organizations challenged the Act because the High Court in *Christopher Mtikila v. The Attorney General*⁶⁸ had clearly held that the Constitution, which is the basic law of the land, cannot be subjected to any law.

The OTTU Act was in breach ILO Conventions No 87 and 98 on the freedom of association. The Conventions provide that each Member of the International Labour Organisation for which the Convention is in force undertakes to give effect to the provisions of the Conventions.⁶⁹ It further provides that workers and employers shall

⁶⁸ (1995) TLR 35.

⁶⁹ Article 1 of Convention No.87.

have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.⁷⁰

However, labour movement's pressure against the government continued so as to restore the trade unions autonomy. The government decided to repeal the Trade Unions Ordinance and OTTU Act, basing its decision on the recommendations made by Nyalali Commission. It enacted in place Trade Unions Act, No.20 of 1998. This Act for the first time did not establish any trade union of federation.⁷¹ The Act provided the freedom of association never experienced before. Both workers and employees are free to organize and establish trade unions of their own and draw their own constitution, rules and elect their leaders. This Act is still in force until the new legislation comes into force on the date to be published in Government Gazette.

The Act contained the provisions for establishment of the office of the Registrar of trade unions and other labour organisations. It further provided the procedure for the registration of those organisation and powers of the registrar to that effect.

The Act authorises the Minister for Labour to appoint the Registrar and Deputy Registrar to be responsible for due performance of the duties and functions assigned to them under the Act.⁷² The Minister is also mandated to appoint other officers, who he might deem fit to appoint, to undertake the day to day duties as may be required by the Act. One may submit that these powers are without limitation, and there is no criterion for the one to hold the office as a Registrar or Deputy Registrar.

The powers of the Registrar and the Minister are impeccable under this Act. The Registrar has the powers to refuse registration of any trade union and to cancel or withdraw the certificate of registration of any trade union if he is satisfied that it has not complied with or conflicts with any provisions of the Act.⁷³ The Registrar is also

⁷⁰ Article 2 of Convention No.87.

⁷¹ Ibid 37.

⁷² Ibid.

⁷³

empowered to order suspension of a trade union branch, after consultation with the union concerned if he is satisfied that it has contravened the provisions of the Act.⁷⁴ The Act further mandates the Registrar to suspend any trade union or federation, by order published in the Gazette, for a period not exceeding six months, if in his opinion that trade union or federation is being used for the purpose prejudicial to or incompatible with the interest of security of the United Republic of Tanzania.⁷⁵ Worse still, where in the opinion of the Minister the exigencies of the situation require, the Minister may bring any order made under above mentioned provision into force immediately upon its being made, after publishing it in any manner which he thinks fit, even before its publication in the Gazette.⁷⁶ This provision presents an arbitrary use of law and it is subject to abuse by those in power. In short, it is contrary to the principles of rule of law and good governance.

The powers of the Registrar do not end there. He has the powers to control the finances of the trade unions. He has the powers, by an order in writing, to suspend from office either indefinitely or for a specified period of time the officers of the union or federation if he is satisfied that the funds of the union or federation are being used in unlawful manner or unlawful objectives or an object not authorised by the Act, or the accounts of the trade union or federation are not being kept in accordance with the provisions of the Act.⁷⁷ It may be submitted that members of the trade union or federation are the ones to discipline their leaders through the board meetings or executive meetings. Intervention of the Registrar amounts to interference with organisations' business prohibited under the ILO Conventions.

After coming into force of the Act, 11 trade unions were registered under the Act.⁷⁸ These 11 unions formed a federation known as the Trade Union Congress of Tanzania (TUCTA) on 29th April, 2001.

⁷⁴ Section 20(1) of the Trade Unions Act 1998.

⁷⁵ Section 21 of the Trade Unions Act 1998.

⁷⁶ Section 21(2).

⁷⁷ Section 72(1).

⁷⁸ Communication and Transport Workers (COWTU), Conservation, Hotels, Domestic and Allied Workers Union (CHODAWU), Research, Academicians and Allied Workers Union (RAAWU), Tanzania Local Government Workers Union (TALGWU), Tanzania Mines and Workers Union (TAMICO), Tanzania Plantation and Agricultural Workers Union (TRAWU), Tanzania Railway Workers Union

In respect of dispute resolution, the government enacted the Law to establish the Industrial Court through Permanent Labour Tribunal (Amendment) Act No. 3 of 1990. The Industrial Court was to be presided by a judge of the High Court, unlike the prior legislation where the Tribunal was presided by the Chairman who was not necessarily to be a judge of the High Court. Section 4(1A) of the Act extended the right to report a trade dispute by an employee who is not an employee in the meaning of Security of Employment Act 1964 or not a member of a registered trade union or though a member of trade union if he is not supported by a field branch in the dispute. Under that Act, the Labour Commissioner was not allowed to entertain the dispute unless it was first to be reported to the union branch at the workplace or where there was no field branch, to the local District Secretary of a registered trade union.

Further amendments for the Labour Court were made in 1993 which introduced categories of essential services and modified the procedure for conciliation and arbitration.⁷⁹ The Act modified conciliation and arbitration procedure by introducing the time limits which a trade dispute had to be dealt with at any stage.⁸⁰ Section 4 required a member of trade union to report the dispute to the field branch within 7 days and the latter had to report it to the Labour Commissioner within 14 days. Section 5 required the District Labour Commissioner and Labour Commissioner to submit any negotiated agreement to the Labour Court. The latter would examine whether it was consistent with wages, income and general economic policy. The agreement would be valid if and only if it was registered by the Labour Court.

2.4 Privatization of Public Corporations and its impacts to employees

Privatization programme started in early 1990s whereby all specified public utilities were put under Public Sector Reform Commission (PSRC) by virtue of Public Corporations

(TRAWU), Tanzania Seamen Union (TASU), Tanzania Teachers Union (TTU), Tanzania Union of Government and Health Employees (TUGHE) and Tanzania Union of Industries and Commercial Workers (TUICO).

⁷⁹ Chambua, Samuel (note 8) 34.

⁸⁰ Rutinwa Bonaventure (note 44) 30.

Act, 1992.⁸¹ The Finance Minister is mandated, by Order published in the Gazette, to declare a public corporation to be a *specified public corporation* in which the provisions of the Act apply.⁸²

After enactment of the above-mentioned Act, most of multitude State owned firms with dominant influence on the economy were declared specified public corporations.⁸³ The Government established Public Sector Reform Commission (PSRC) to supervise the reform and restructuring the parastatals ready for privatization.⁸⁴ Measures taken during this process included divesture (whole or partial privatization) and disabling those parastatals no longer considered useful, particularly those which were inefficient and major drain of public resources.⁸⁵ These measures were taken as a fulfilment of Briton Wood conditions insisting on the States' withdrawing from controlling economic activities.

2.5 The Battle in Court against redundancy

Restructuring of the public corporations started immediately after the government acceded the Briton Wood conditionalities. The workers employed in the public sector whose corporations were not economically performing well were to be retrenched. The exercise was highly resisted by employees. The workers were actually not resisting against retrenchment as such, but rather the process in which the exercise was carried out. They wanted due process of law to be abided. This required an employer intimating to exercise redundancy to consult the Workers' Committees (or representative trade union) as provided by the Security of Employment Act. They also wanted their terminal benefit entitlements to be spelt out before the process started.

Applications for injunctions to restrain the employers from carrying the exercise of retrenchment were very common to the courts. Section 6(1) (g) of the Security of

⁸¹ Act No 2 of 1992

⁸² Section 14 of the Public Corporation Act of 1992.

⁸³ National Insurance Corporation, National bank of Commerce, Tanzania Telecommunication Ltd are giant corporations to be privatized.

⁸⁴ Ndulu B. J (note 3) 15.

⁸⁵ Ibid. 16.

Employment Act provided the procedure to be followed when there was impending or apprehended redundancy. It stated that:

(1) The functions of a Committee in relation to the business for which is established are:-

(g) to consult with the employer concerning any impending redundancies and the application of any joint agreement on redundancies.

The first landmark case for workers to protest against redundancy is the case of *Hamis Ally Ruhondo & 115 Others v. TAZARA*.⁸⁶ In this case, TAZARA terminated the employees' services on the ground of redundancy without consulting the workers' committee as required by section 6(1) (g) of the Act. The workers were dissatisfied by the unilateral decision of the employer and applied to the Permanent Labour Tribunal which inquired the dispute and made a report to the Minister who re-instated the employees. The Respondent was dissatisfied and applied for an order of certiorari to the High Court which actually granted the application. The workers appealed to the Court of Appeal. The Court of Appeal held that:

".... we think the requirement of consultation with JUWATA field branch should be beyond controversy. Consultation means to take counsel with a person or to seek information or advice from him."

After the court was satisfied that no consultation was made as required by law it ordered re-instatement of the employees until a meaningful consultation was done.

In the other case of *TUICO-OTTU UNION and Johns Ndokile Mwakarwale v. Tanzania and Italian Petroleum Refining Co. Ltd*⁸⁷ the workers applied for declaratory and temporary injunction, perpetual injunction from terminating their services on the ground of redundancy before consulting them and mandatory injunction directing their employer to hold a meaningful consultation with employees' representatives on impending redundancy as required by section 6(1) (g) of the Act. The High Court

⁸⁶ Civil Appeal No. 112 of 1998 Court of Appeal of Tanzania at Dar es Salaam (Unreported)

⁸⁷ Civil Appeal No. 34 of 2000.

dismissed the application on the ground that the workers' fear of redundancy without consulting them was "unfounded and that to grant such orders would mean to restrain the employer from doing that which was lawful, and to do so would constitute an unlawful act on the part of the court." The workers having been aggrieved by the decision of the High Court appealed to the Court of Appeal. The Court confirmed its decision in *Ruhondo* but went a step further and held that:

".... in the case of Ruhondo this court interpreted this provision (i.e. section 6(1)(g)) to mean that consultation must be held prior to deciding on any impending redundancy..... Our understanding of 6(1) (g) is that not every consultation on impending redundancy will result to joint agreement. Some will and some will not. When consultation results in a joint agreement then further consultation will be held to consider the application of such joint agreement. But where joint agreement is not reached the consultations on impending redundancy alone will, nevertheless, constitute sufficient compliance with section 6(1) (g).

The legal procedure to institute the suits was not clear to workers and their legal advisers. They started *forum shopping* to the High Court and to the Industrial Court to seek jurisdiction. The law was not clear as to what forum was proper to deal with redundancy cases. Even the High Court was not certain whether it had jurisdiction or not. Three conflicting decisions can be put forward as examples. The conflict stemmed from different wordings of Section 4(1) of the Industrial Tribunal Act, 1967 and Section 9A (1) of the same as amended by Act No. 18 of 1977. In *Njombe, Ludewa & Makete Cooperative Union Ltd v. Minister of Labour Youth Development and Culture*⁸⁸ Mwalusanya J, (as he then was) held that

"... In short, on matters of redundancy the decision of Workers' Committee is final. They can not appeal to the Industrial Court... the only remedy available to employees who have been unlawfully declared redundant by employer is to file a suit in an ordinary court."

⁸⁸ Civil Case No. 8 of 1994

Bubeshi, J in *Tambueni Abdallah & 89 Others v. National Social Security Fund*⁸⁹ decided that all disputes including redundancy are exclusively under jurisdiction of the Industrial Court. The workers were aggrieved by the decision and challenged it to the Court of Appeal. The Court of Appeal admitted its previous error for entertaining two appeals originating from the High Court that:

Admittedly, this court determined two appeals from the High Court exercising original jurisdiction over trade disputes. However, it did not decide whether or not the High Court had such jurisdiction or not for simple reason that that matter was not canvassed before it."

After the Court of appeal went through the two provisions of the Act concluded that:

"It is clear to us that trade disputes have to follow that prescribed procedure and there is no room for going to the High Court straight. The High Court has no original jurisdiction to entertain trade disputes."

The decision of the Court of Appeal put the procedure clear but after workers had used some years and wasted resources in court seeking jurisdiction. For those who followed a wrong procedure by going straight to the High Court found themselves without remedies because what they were fighting for had already been privatised. They had to bow and get what remained and what managements deemed was their entitlements.

2.6 Consequences of privatisation

There are different data regarding the number of the workforce pushed away by the retrenchment exercise. While the World Bank Report shows that between 1992-2000 the workforce reduced was 77,000 workers out of 270,000 the data from the International Federation of Trade Unions indicate that about 177,000 of workers from public service were retrenched out of 355,000 up to 2002.⁹⁰

All the same, the number of retrenched employees is high as compared to the chances of creation of new employment opportunities. The retrenched employees had to

⁸⁹ Civil Appeal No. 33 of 2000, Court of Appeal of Tanzania at Dar es Salaam (unreported).

⁹⁰ http://www.icftu.org/www/pdf/pub_survey2002en.pdf

find alternative ways of life, to which they were not prepared to face. Even those who were lucky to remain in public service their standard of life did not change as they thought. The Minimum wages have remained as low as Tsh. 60,000/= which is equivalent to \$ 50 per month.⁹¹

Conclusion

As discussed above in this section, the industrial relations in Tanzania between 1970s and 1990 were not impressive. Trade unionism remained dormant because of the prevailing social, political and economic set up for the said period of time. The next section will discuss the developments and improvements brought by the new labour legislation in the industrial relations as compared to the former ones.

⁹¹ www.parliament.go.tz

3. Recent Developments in the Industrial Relations under the New Legislation

3.1 Introduction

Tanzania has recently enacted the new legislation in the industrial relations as result of the wind of change in the global economic trend, forces from the foreign investors, international donors as well as forces of workers and employers' organisations. There are other factors such as the unification, uniformity and integration of labour regulations in the regional co-operations such as SADC and the East African Community. The new legislation are the Labour Institutions Act, (Act No. 6) of 2004 and its sister Employment and Labour Relations Act, (Act No.7) of 2004. These two new legislation have brought major changes in the labour market trend in Tanzania, although there are some considerable areas which have not been addressed properly and therefore need greater attention. However, only the Labour Institutions Act has come into force on 1st July, 2005. The Employment and Labour Relations Act has not yet force despite the fact that both were assented by the president in 11th June, 2004.

In this section the main focus will be a discussion of the new legislation in light of industrial relations particularly; the procedure for registration of trade unions, powers of the Registrar, recruitment of members by the trade unions and federations, freedom of association, collective bargaining, rights and duties of the employers and employees, the right to engage industrial actions, workers' participation and dispute resolutions. A brief reference of the former provisions will be made in order to gauge the developments introduced by the new legislation. Similarly, a general overview of the ILO standards will be made during the discussion of the above items.

It should further be stressed from the outset that currently there are no published literatures on the new legislation. Therefore, some foreign literatures, cases and some provisions from different jurisdictions, especially South Africa where the Tanzania new legislation is based, will be referred for emphasis and clarification of the concepts.

3.2 Freedom of associations

3.2.1 Introduction

Freedom of association is the most basic of all principles underlying the work of ILO and the activities of those who toil for social justice.⁹² The principle assures the employees to form or join a trade union without prior authorisation.⁹³ Nevertheless such right is not absolute. The government has the powers to regulate operations of the associations in order to promote orderly collective bargaining. The government does this through legislation by outlining the formalities regarding the establishment and running those associations.⁹⁴ The main purpose of the government intervention is to ensure that only bona fide organizations are registered and run their business in a manner compatible with national labour policies.

The fundamental rights to freedom of association can be extracted from two Conventions mentioned above namely Convention No. 87 and 98, and can be summarized as follows from the provisions:

- (a) The right of employers and employees to form and join organizations of their own choosing, subject only to the rules of the organizations.
- (b) The right to exercise these rights without prior authorization of the state.
- (c) The right of the employer organization and trade unions:
 - (i) To draw up their constitutions and rules;
 - (ii) To elect their representatives in full freedom;
 - (iii) To organize their administrations and activities;
 - (iv) To formulate their programmes.
- (d) The right of workers' and employers organizations to establish and join federations and confederations.

⁹² Collective Bargaining (Available <http://www.dol.gov/ilab/webmils/compliance/collectivebargaining.html> Accessed on 27th August, 2005).

⁹³ Task Force Report (note 6) 107.

⁹⁴ Ibid.

- (e) The right of any organization, federation or confederation to affiliate with international organizations of workers or employers.
- (f) Protection of workers against victimization.
- (g) Protection of workers and trade unions against any interference by the employers or employers' organization.
- (h) Measures to promote collective bargaining.

3.2.2 Freedom of association under the new legislation

The legislation has introduced celebrated rights of association never experienced before in the history of labour laws in Tanzania. These rights are found in Part two, sub part D of the Act No 6 and are identified as "Fundamental Rights." It provides that:

9 -(1) Every employee shall have the right-

(a) to form and join a trade union;

(b) to participate in the lawful activities of the trade union.

As indicated under paragraph (a) of section 9(1) above, freedom of association by workers is usually exercised through trade unions. Essentially, a trade union is a continuous association of wage earners for the purpose of maintaining or improving the conditions of workers' lives.⁹⁵ It is an organisation of workers who by means of collective bargaining endeavour to improve their working conditions; both economically and in terms of social positions.⁹⁶

Freedom of association under the new legislation has extended even to the members of judiciary like Magistrates and Prosecutors who were formerly excluded from joining or organizing unions. The Act provides that Magistrates may only form or join a trade union that restricts its membership to judicial officers. The reason for exclusion of these two categories of employees is logical in the sense that, if allowed to organize with other trade unions their independence and neutrality may be compromised.⁹⁷ The inclusion of Magistrates was made on the ground that they are employees within the

⁹⁵ Milanzi M C (Mzumbe University class handout) 61.

⁹⁶ Ibid.

⁹⁷ Task Force Report (note 6) 30.

meaning ILO Conventions and exclusion from those provisions would be breach of the Convention No.87 because they could have no where to belong in terms of categorization of judicial officers. The judges are not covered by the Act because their employments are created under the Constitution which gives them privileges and immunities which are not available to Magistrates.

The Act further provides that Prosecutors may only form or join a trade union that restricts its membership to Prosecutors or other court officials. However, it excludes the member of Defence Forces namely; the Tanzania People's Defence Forces, the Police Force, the Prison and National Services⁹⁸. This brings confusion because Public Prosecutors are members of the Police Force. It is not clear whether when they form their own organization they cease to be members of the Defence Force or they play a double role. The Act should make a proviso, for the purpose of the Act, that Prosecutors are deemed not to be members of the police force in terms of organizational rights referred by the Act.

Exclusion of the members of the Police Force and Defence Force by the Act is a distinctive approach from the one taken by the South African legislation. Initially, the Labour Relations Act 1995 contained a provision restricting the members of Police Force, Intelligence and Defence Force from the ambit of the definition of "employees". This definition Section 126B(1) of the Defence Act No. 44 of 1957 which prohibited employees in the Defence Force to join trade unions were challenged in the case of *South Africa Defence Union v. Minister of Defence & Another*⁹⁹. The Constitutional Court looked at section 23 of the Constitution of South Africa and other international instrument to evaluate the validity of the said provisions. The Court first considered Convention No. 87 of 1948 ratified by South Africa in 1995.

The government defended the said provisions on the ground that the members of the forces are not covered by the word "worker" referred to in section 23 of the Constitution and in the alternative that even if they qualified to be classified as such, such

⁹⁸ Section 2(1) of the ELRA.

⁹⁹ (1999) 6 BCLR 615 CC.

exclusion was justified in terms of section 36 of the Constitution because of the nature of their work. The Court purposively interpreted the provisions of the Constitution and held that:

It is clear from reading section 23 that it (Constitution) uses the term "worker" in the context of employers and employment. It seems therefore from the context of section 23 that the terms "worker" refers to those who entered a contract of employment to provide services to such employer. In many aspects, therefore, the relationship between members of the permanent force and the Defence force is akin to employment relationship."

The Court declared section 126B (1) of the Defence Act unconstitutional. In arriving at that decision, the Court felt to adopt a purposive approach in order to give individuals concerned full measures of fundamental rights and freedom provided by the Constitution.

Nevertheless, Tanzania new legislation excludes senior management employees from organisational right if the latter represent the interest of the employer.¹⁰⁰ The exclusion is allowed in two circumstances namely; where the employee who, by virtue of that employee's position makes policy on behalf of the employer; and is authorized to conclude collective agreements on behalf of the employer.¹⁰¹ The rest of other managerial employees are allowed to join the trade organisations.

It can be submitted that the Act complies with the ILO convention unlike the former provisions where senior managers were totally excluded from joining or belonging to a trade union.

The freedom of association is not only available to employees, but also to employers. Section 11 of the Act provides that;

Every employer shall have the right-

(a) to form and join an employer's association;

¹⁰⁰ Section 9(1) of the ELRA.

¹⁰¹ Section 9(4)(b) of the ELRA.

*(b) to participate in the lawful activities of an employers' association,*¹⁰²

Like freedom of association to employees, employers are also free to organize and to determine their own constitution, plan and organise their own administration and lawful activities, join and form a federation, participate in the lawful activities of a federation, affiliate with, and participate in the affairs of any international workers' organisation or international employers' organization.¹⁰³ Therefore, it can be submitted without hesitation that the new legislation has improved the freedom of association and it complies with the minimum requirements of the ILO Convention No.87.

What is not clear is whether the right of freedom of association under the new legislation includes freedom to disassociate as argued by some scholars.¹⁰⁴ In principle there is no consensus on whether the right to freedom of association includes the right to be free not to associate.¹⁰⁵ The ILO Conventions themselves do not expressly stipulate freedom not to associate. Here is where the debate by some scholars centres. While Convention 87 recognises only the positive right to association, the Committee of Experts has found that the Convention leaves it to the practice and regulation of each state to decide whether it is appropriate to guarantee the right to workers not to join an occupational organisation or, to authorize and where necessary to regulate the use of union security in practice.¹⁰⁶

Von Prondzynski argues that the protection of freedom to associate would reasonably entail the freedom not to associate.¹⁰⁷ He argues that there is a distinction between a right and freedom, and that freedom to associate implies freedom not to associate. This view is criticized by some other scholars like Benedictus and Bercusson who hold the views that there is no logical link between positive and negative freedom of association. They regard positive freedom of association as the safeguard of the ability of

¹⁰² <http://www.newschool.edu/admin/labor/qanda.html>

¹⁰³ Section 11 of the ELRA.

¹⁰⁴ Olivier MP and Potgieter O The Right to Associate freely and the Closed Shop TSAR 2 (1994) 389.

¹⁰⁵ Ibid 300.

¹⁰⁶ ILO General Survey, 1994 para 99.

¹⁰⁷ Von Prondzynski "Freedom of association and the closed shop" (1982) *Cambridge Law Journal* 264.

individual to associate while the negative freedom of association is seen as a protection of individual against compulsory grouping with others.¹⁰⁸ However, Olivier criticizes such proposition as unconvincing because, if an individual could be forced to join a specific group, he would logically not be free to associate jointly with popularity of other individual.¹⁰⁹ Nevertheless, all writers do agree that there are certain rights necessary to ensure the efficacy of right to freedom of association and those rights are embedded in the fundamental rights of freedom of association.

The Constitution of United Republic of Tanzania seems to hold the view that there is freedom to association and disassociation. Article 20(1) provides that:

Every person is entitled to freedom, to freely and peaceably associate and cooperate with other persons, and more specially to form or join associations or organisation formed for the purpose of preserving or furthering his beliefs or interests.

(4) Subject to the relevant laws of the land, it shall be unlawful for any person to be compelled to join any association or organisation ”

The above constitutional provisions clearly illegalize any act of compelling an individual to join an association. This clearly expresses positive and negative right of freedom of association. One may fairly conclude by submitting that an individual can not be said to have the freedom to association if he is unable to choose not to associate with a particular union. But it should be noted that freedom of association has some limitations and the said limitations apply to agency shop agreement, which falls within the ambit of the exceptions of Article 32 of the Constitution.

3.3 Registration of associations

Unlike the former legislation where registration was subject to prior authorization by the state, registration under the new Act is voluntary and without prior authorization. The new legislation only requires a trade union or employers' association to register itself

¹⁰⁸ Ibid.

¹⁰⁹ Ibid 300.

within six months of its establishment.¹¹⁰ Failure to register within that stipulated time amounts to an offence which is punishable by a fine not exceeding Tsh. 1,000,000/=.¹¹¹ The period of six month is extended from one month in the former legislation which in fact was very short to process registration of the association.

3.3.1 Formalities of registration

An application for registration by any organisation or federation is made by submitting to the Registrar, an application in a prescribed form. The form must be properly completed and signed by the Secretary of the organisation or federation.¹¹² An application must also be accompanied by a certified copy of the attendance register and minutes of its establishment meeting and a certified copy of its constitution and rules.¹¹³ The trade union, employers' association or the federation, as the case may be, applying for registration must make a declaration that it is a bona fide association and it is not for gain.¹¹⁴ It must also declare that it has been established at a meeting of its members. The association must declare and show that it has adopted a constitution and rules that comply with the provisions of the law. The name of an association applying for registration must not resemble with the name of any other organisation or federation so as to mislead or create confusion. Finally, it should have an address in the United Republic of Tanzania.¹¹⁵

Unlike the previous legislation where the Registrar had unfettered powers, under the new legislation the Registrar's powers are limited to determining whether the requirements for registration have been complied with or not.¹¹⁶ The Registrar may require further information in support of the application.¹¹⁷ The information is limited to those related to the application made to him. The information may be for ascertaining whether the main purpose of the applicant is to regulate relations between employers and

¹¹⁰ Section 45(1) of the ELRA

¹¹¹ Section 45(2) of the ELRA

¹¹² Section 48(1) of the ELRA.

¹¹³ Section 48(1) (a &c) of the ELRA.

¹¹⁴ Section 46(1, 2 and 3) of the ELRA.

¹¹⁵ Section 46(3)(g) of the ELRA.

¹¹⁶ Section 102(4) of the ELRA.

¹¹⁷ Section 48(2) of the ELRA.

employees or between employer's associations and trade unions.¹¹⁸ He has no powers to require information which are not related to the application. If he does so, the applicant may refuse to give such information. Where the Registrar is satisfied that the organisation or federation has complied with the requirements he shall register the organisation or federation.¹¹⁹ This is a mandatory requirement. The Registrar has no discretion to refuse registration where the organization has met all the requirements. This is unlike former provisions where the Registrar had discretion either to register or refuse registration. If the Registrar is not satisfied that the requirement for registration have been met he must notify the applicant (organisation or federation applicant) and give the applicant an opportunity to rectify its application within a stipulated period of time which is 30 days.¹²⁰ It should be noted that the Act does not specify the time within which the Registrar should undertake the registration or refuse it. The ILO comments on the new legislation is that registration procedure may take long time and may thus amount in practice to obstacle to free establishment of employers' and workers' organisations.¹²¹

Where the Registrar is not satisfied with application to comply with requirements of registration he may refuse the application and send to the applicant a written notice of the decision and the reasons.¹²² This provision is more transparent unlike the previous provision which gave the Registrar unconscionable power upon refusal of registration.

If the application is successful then the Registrar is supposed to enter the name of the organisation or federation in the appropriate register and issue a certificate of registration to that organisation or federation.¹²³ The Registrar is supposed to publish a notice in the gazette stating that an organisation has been dully registered. The purpose of the notice is to enable the public aware of existence of such organisation, and if there is any objection to the registration of such organisation it has to be logged immediately. The notice should also state that any person may view the constitution of that organisation or

¹¹⁸ Task Force Report p.111

¹¹⁹ Section 48(3) of the ELRA.

¹²⁰ Section 48(4) (a) of the ELRA

¹²¹ International Labour Office: Memorandum of Technical Comments on the Employment and Labour Relations Bill 7.

¹²² Section 48(4)(b) of the ELRA.

¹²³ Section 48(4) of the ELRA.

federation at the Registrar's office.¹²⁴ The effect of registration of an organisation or federation is to make it a body corporate with perpetual succession and a common seal and with the capacity to sue and be sued, contract, hold, purchase or otherwise acquire and dispose of movable or immovable property.¹²⁵

Where the Registrar refuses the application, the aggrieved organisation or trade union may appeal to the Labour Court against that decision.¹²⁶ The Labour Court shall assess the application, hear both parties and make a decision. The Act is silent about whether there is further appeal against the decision of the Labour Court, but it seems that any aggrieved party in the proceedings before the Labour Court can appeal to the Court Appeal as provided under section 57 of the Labour Institutions Act.¹²⁷

In case the organisation or federation wants to change its name or constitution and rules must apply to the Registrar to that effect. The application must be signed by the Secretary and accompanied by a copy of the resolution containing the wording of the changes sought.¹²⁸ Also, it must contain a certificate duly signed by the Secretary of the organisation or federation stating that the resolution passed complied with its Constitution.¹²⁹ Like in the application for registration the Registrar may require further information and a similar procedure is applicable in the application for change of name.¹³⁰

In case the trade union, employers' association or federation, as the case may be, resolves to amalgamate with one another must apply to the Registrar for registration of the amalgamated organisation or federation and the provisions of section 48 discussed above relating to registration process shall *mutatis mutandis* apply in relation to that application.¹³¹ After the Registrar has registered the amalgamated organisation or

¹²⁴ Section 48(3) of the ELRA

¹²⁵ Section 48(5) of the ELRA.

¹²⁶ Section 57 of the ELRA

¹²⁷ Act No.7 of 2004 of the ELRA.

¹²⁸ Section 50(2) of the ELRA.

¹²⁹ Ibid.

¹³⁰ Section 50(4) of the ELRA.

¹³¹ Section 54(2) of the ELRA.

federation, is supposed to cancel the registration of each of the amalgamating organisations or federations by removing their names from the appropriate register.¹³² Where an amalgamated organisation or federation is registered the latter shall succeed any right that the amalgamating organisations or federations enjoyed. More importantly the amalgamated organisation succeeds any collective agreement or other agreement entered before such amalgamation.¹³³

The procedure for amalgamation of associations under the new legislation are clear and presents a democratic changes in the trade freedom of association unlike the former provisions which contained a bureaucratic characters and interference by the state organs especially where the prospective amalgamation aimed at challenging the government labour policies.

To that end, the process of registration of labour organisations meets the requirement of ILO Convention which require the member states not to impose prior authorisation in the process of registering the organisation. In this regard, although the Committee of Experts of ILO on Freedom of Association has repeatedly stated that a genuinely discretionary power to grant or reject a registration request is tantamount to a requirement for prior authorisation, which is actually not compatible with Article 2 of Convention 87, the Committee recommends that where the regulation provides a possibility of appealing to courts against administrative decision rejecting registration, such court's intervention is considered as an important safeguard against abuse of such powers.¹³⁴ Therefore, the new legislation inclusion of provisions to appeal against discretionary powers of the Registrar is compatible with ILO Convention No.87.

However, an apparent drawback of the new legislation is that there is no threshold for the formation of the trade union or federation. The definition for a trade union states, and a quote for the purpose of clarity.

¹³² Section 54(3) of the ELRA.

¹³³ Section 54(5)(iii) of the ELRA.

¹³⁴ Lee Swepton "Human Rights Law and Freedom of Association: Development through ILO Supervision" *The ILO Survey* 1996.

"trade union" means any number of employees associated together for the purpose, whether by itself or with other purposes, of regulating relations between employees and their employers or the employers' associations to which the employers belong.

While the Task Force recommended the minimum requirement for the establishment of the organisations, the Act does not stipulate that threshold. The Task Force was of the view that trade unions must have a minimum of 30 members in order to register.¹³⁵ This is different from the former legislation which set the threshold of twenty members to form a trade union.¹³⁶ It further recommended the threshold for establishing the employer's association should be at least three employers. For establishment of federations it recommended the threshold to be three trade unions or three employer's associations, as the case may be.¹³⁷

Although the definition above seems to be compatible with the views of the Committee of Experts on Freedom of Association which states that a requirement for a minimum number of workers or of a certain proportion of workers for the creation of a trade union may be incompatible with the Convention, it however, advises that the number or proportion should be kept at a reasonable level so as not to constitute an obstacle to the creation of organisations. It observes that a requirement for 30 founding members of a trade union is excessive while the minimum number of 20 members does not seem to be excessive.¹³⁸

In that regard, it is submitted that the omission of setting the minimum number of members for establishment of an organisation is apparent and it should be addressed immediately because without such limitation there will be a mushrooming of organisations which will defeat the whole purpose of freedom of association. The size of the

¹³⁵ Task Force Report (note 6) 112.

¹³⁶ Section 8(1) of the Trade Unions Act No. 10 of 1998.

¹³⁷ Ibid.

¹³⁸ Lee Swepston "Human Rights Law and Freedom of Association: Development through ILO Supervision" *The ILO Survey* 1996, 182.

organisation is very important to measure its effectiveness and meeting the objectives of its members.

Another drawback is that the Act does not provide the establishment of the confederation of trade unions. It should have provided that the registered federations may form a confederation in the United Republic of Tanzania. This would aim at promoting solidarity of all unionised workers in the entire United Republic of Tanzania. On this aspect the Committee of Experts states that prohibition on the creation of a national confederation which would group organisations representing different economic sectors or regions is incompatible with Article 5 of Convention 87 which guarantees organisations to establish and join federations and confederations of their own choosing.¹³⁹

3.3.2 Cancellation and dissolution of associations

It should be noted at the outset that the new legislation presents positive prospects to the future and existence of the trade organisations. In case of cancellation of the organisation the Registrar has very limited powers. Unlike the former provisions, under the new legislation the Registrar can not cancel the association at will. He is supposed to apply to the Labour Court for an order to cancel registration of a registered organisation or federation if that organisation fails to comply with the requirements for registration or any other mandatory requirement of the Act.¹⁴⁰ Upon application for the cancellation, the Labour Court may make an order giving an organisation or federation an opportunity to remedy any failure to comply. If allegations of non-compliance are serious then the court may make an order for cancelling the registration of an organisation or federation.¹⁴¹

Where any organisation contravenes a procedure for registration, the Registrar may apply to the Labour Court for the dissolution of such organisation.¹⁴² Apart from the Registrar, an organisation or federation may apply to the Labour Court for its

¹³⁹ ILO General Survey, 1994 para 191.

¹⁴⁰ Section 55(2) of the ELRA.

¹⁴¹ Section 55(3) of the ELRA.

¹⁴² Section 55(1) of the ELRA.

dissolution.¹⁴³ However, the Act does not stipulate in what circumstances the organisation itself can apply to be dissolved. This lacuna should be address by express provisions of law.

Where the Labour Court makes an order for cancelling registration of an organisation or federation under section 55(2), it may in addition, make an order dissolving the organisation or federation.¹⁴⁴ In case the court makes an order for dissolution of organisation any person having interest (for example the creditor or guarantor) in such organisation may apply to be joined in that proceeding.¹⁴⁵ The laws of bankruptcy apply in those proceedings. The Court is also empowered to appoint a liquidator to manage the assets of a dissolved organisation. It is submitted that these provisions are aimed at eliminating endless and tedious litigations which would result from making further applications for bankruptcy to the ordinary division of the High Court which previously had exclusive jurisdiction to adjudicate bankruptcy proceeding. Simultaneous proceedings introduced by the new Act also reduces multiplicity of the proceedings where the Registrar might initiate the proceedings for cancellation to the Labour Court while other creditors might initiate bankruptcy actions against the same party to the different forums.

Although the new legislation has taken a step further, unlike the old one in dissolution and suspension by involving the intervention of the Court, that step is not sufficient. There must be a political will by the government. First, the Court may make a decision but the relevant authorities may discretionary opt not to enforce it. Secondly, the judges may side with relevant authorities and rule out that the legislation has been correctly applied. Judicial inaction or to side with authorities is not a new phenomenon in Tanzania. Sometimes, the judges receive some instruction from higher authorities to decide a case on a certain way, on the ground that such a case involves “a matter of public interest”.

¹⁴³ Section 56(1) of the ELRA.

¹⁴⁴ Section 56(3) of the ELRA.

¹⁴⁵ Section 56(4) of the ELRA

3.4 Deduction of trade union dues

Under the new legislation, there are two ways in which trade unions may raise fund to operate and manage their activities. First is voluntary agreement by employees to authorize an employer to deduct fees from his/her salary; and second is through union security arrangement (agency shop).

3.4.1 Voluntary agreement

Regarding the first category, employees may authorize an employer, in the prescribed form, to deduct the dues of a registered trade union from his/her wage.¹⁴⁶ The employer so authorized is supposed to make such deduction and remit the same to the relevant trade union within seven days after the end of the month in which deductions are made.¹⁴⁷ The employer has an obligation to make sure that remissions of those dues are timely paid to the trade union. If he fails to do so within the time and without reasonable grounds, the employer is liable to pay a union the equivalent of five percent of the total amount due for each day the dues remain un-remitted.¹⁴⁸

Since the deductions are voluntary, an employee may revoke such authorisation by giving one month's written notice to the employer and his trade union. Once the notice becomes effective the employer must cease to make any deductions.¹⁴⁹

The Act, nevertheless, does not provide the grounds upon which an employee(s) may make revocation for deduction of the trade union dues. It can be submitted that, the Act should stipulate the grounds for revocation of such authorization in order to avoid arbitrary revocation. Such stipulation will guarantee stability of trade unions and reliable availability of funds for its operation. Further the law should provide the mechanism to settle disputes where a trade union concerned is not satisfied with such revocation.

¹⁴⁶ Section 61(1) of the ELRA.

¹⁴⁷ Section 61(2) of the ELRA.

¹⁴⁸ Section 61(3) of the ELRA.

¹⁴⁹ Section 61(4) of the ELRA

3.4.2 Closed shop and agency shop

The second mechanism for raising funds to run the activities of the trade unions is through agency shop and closed shop. Although in Tanzania only agency shop is authorized by the new legislation, it is important to discuss about closed shop in order to find out why it is not permitted under the new legislation.

“Closed shop” is an agreement in terms of which all employees to whom such an agreement is extended are required to be members of union.¹⁵⁰ However, employees to whom closed shop agreements extend are not precluded from joining or remaining members of another union, if that union permits dual membership.¹⁵¹

The agency shop agreement, on the other hand, does not require employees to join the union, but they authorize an employer to deduct an agency fee from wages of employees who are not union members and pay it to the union which is acting as their bargaining agent.¹⁵² This is intended to deal with the so called “free rider problem” i.e. employees in a workplace who enjoy the benefits of collective bargaining without paying union dues or participating in union activities.¹⁵³

Generally, the purpose of the union security arrangements is to promote orderly collective bargaining by strengthening the position of trade unions, stabilizing union membership and avoiding destructive inter-union rivalry.¹⁵⁴

3.4.3 Experience from other jurisdictions

“Closed shops” are perceived with a mixed grill in different jurisdictions and it is debatable among the scholars. There are countries in which they are permitted in all forms, some permit it in some forms and others prohibit it altogether.¹⁵⁵ For example, in South Africa both closed and agency shop agreements are permitted under Labour Relation Act although with strict limitations. Even in the United States of America,

¹⁵⁰ John Grogan *Workplace Law* 8th Ed (Cape Town: Juta & Co. Ltd 2004) 325.

¹⁵¹ *Ibid* 326.

¹⁵² Task Force Report (note 6) 129.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid* 129.

¹⁵⁵ C J Albertyn *Freedom of Association and the Morality of the Closed Shop*, (1989) 10 ILJ 982

where so much reverence has historically been paid to the freedoms of speech and association guaranteed by the First Amendment to the Constitution, the Supreme Court has recognised that forms of closed shop, even though interfering with an employee's freedom to associate. For example, in *Abood v Detroit Board of Education*¹⁵⁶ it was stated by Stewart J, who delivered the opinion of the Court (at 221-2), that:

'A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" - to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.'

However, closed shop agreements are not permitted in the European Union. For example, the European Court of Human Rights held in *Young, James and Webster v The United Kingdom*¹⁵⁷ that a pre-entry closed shop was hit by art 11 of the European Human Rights Convention which guarantees, *inter alia*, freedom of association including the right to form and to join trade unions for the protection of an employee's interests. The court by majority of 18 by three held thus:

*The requirement on the applicant to join one of the unions specified in the closed shop agreement between the British Rail and the Railway Unions, amounted to interference in the freedom guaranteed to them under Article 11 of the Human Rights Convention because the alternative to their joining was that they would lose their jobs; they were for all practical purposes prevented from belonging to any other trade union of their choice; and were being compelled to join an association contrary to their convictions*¹⁵⁸.

Others argue that compulsory agency shop is against freedom of association, while others argue that it is within the spirit of having strong unionized movements because without the member's contribution, the trade unions cannot be able to run the

¹⁵⁶ 431 US 209 (1976).

¹⁵⁷ 1981 IRLR 408.

¹⁵⁸ *Ibid* 209.

business of the organizations and hence not able to defend the rights of its members. In lieu of union dues, agency shop fees provide the unions with the resources they need to provide those services to all bargaining unit members.¹⁵⁹ This sounds logical because the bargaining unit bargains on behalf of all industrial members in a sector. It would be unfair if bargaining is successful, and the one who refused from paying fees to benefit from the fruits derived from his fellow employees. It would amount to “harvesting where one has not sown”.

From the above discussion it can be submitted that there is no absolute right. Every right should be assessed in relation to every countervailing right. It is argued that assessment of one right in relation to another should be made from a particular principle and the principle reveals what right is to be preferred.¹⁶⁰ Therefore, since trade unions operate for the interest of all employees in the bargaining unit without exclusion, it would be anomalous to allow other employees who are not contributing fees to benefit similarly with those who have tirelessly made contributions.

3.4.5 Agency shop and closed shop under the new legislation

The new Act expressly prohibits closed shop.¹⁶¹ It only permits agency shops with strict limitation. The Task Force on Labour Law Review was of the view that permission of the closed shop could be contrary to Article 20(4) of the Constitution which guarantee the right to freedom of association. It therefore, recommended permission of agency shop only.

In agency shops, employees wishing not to join a union must pay an agency fee equivalent to the union dues with other employees who have joined the union.¹⁶² In order for the agency shop to have effect, the recognized trade union and employer must conclude an agreement.¹⁶³ A relevant provision states that, an agreement that compels an employee to become a member of a trade union is not enforceable. Even if a trade union

¹⁵⁹ <http://www.goer.state.ny.us/faq.html#2>

¹⁶⁰ Albertyn “Freedom of Association and the Morality of the Closed Shop”(1989) 10 *ILJ* 986.

¹⁶¹ Section 72(1) of the Employment and Labour Relations Act No.6 of 2004.

¹⁶² Section 72(3)(c) of the ELRA.

¹⁶³ Section 72(2) in R. Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 8th ed (The Hague : Kluwer Law International 2004).

concludes an agency shop agreement with an employer, that agreement binds only employees in that particular bargaining unit only.¹⁶⁴ It does not extend to other bargaining units even if they belong to the same employer especially in multi-corporation enterprises. However, where an agency shop agreement concluded is supported by majority members of a bargaining unit and it complies with the provisions of the Act, then notwithstanding the provisions of any law or contract, an employer may deduct an agency fee under an agency shop agreement from an employee's wages without consent of that employee.¹⁶⁵

There is a contradictory provision regarding the concept of agency shops. For example, whereas section 67(3)(b) provides that employees who are not members of the trade union are not compelled to become members of the agency shop agreement, a definition of the concept "agency shop" under the Act indicates otherwise. The definition states that:

"agency shop" means a union security arrangement in terms of which employees in a bargaining unit, who are not members of the recognised trade union, are required to pay an agency fee to the trade union.

The implication of the definition is that once an agency shop agreement has been concluded, employees in that bargaining unit *ipso facto* become members of that agreement and an employer is mandated to deduct fees from their salaries, notwithstanding that those members are not compelled to be members of the trade union. It is therefore submitted that section 67(3) (b) should be deleted because it conflicts with definition of the agency shop.

An agency shop agreement may be suspended when a trade union is no longer a representative of the bargaining unit.¹⁶⁶ It may also be terminated once recognition of its representation is withdrawn. This may happen when the trade union ceases to represent majority employees in the bargaining unit, or where a number of its member's falls short

¹⁶⁴ Section 72(3) of the ELRA.

¹⁶⁵ Section 72(4) of the ELRA.

¹⁶⁶ Section 72(6)(a) of the ELRA.

of the minimum requirement and the trade union fails to acquire majority at the expiry of three months.

The fees collected are carefully protected by the Act from being misused by trade union for unauthorized purpose. The amount deducted from both members and non-members is required to be paid into a separate account administered by the trade union.¹⁶⁷ Unlike the former system where the monies of contribution from members' fees were used to support the ruling party, Chama Cha Mapinduzi, the new legislation prohibits use of fees to pay an affiliation fee to a political party or to make contributions to a political party.¹⁶⁸ In order to regulate proper use of fees, a trade union which concluded an agency shop agreement is required to appoint a registered auditor to audit the account prescribed annually.¹⁶⁹ Where an auditor makes a report of the account, such report must be submitted to the Labour Commissioner and to the Registrar within thirty days of the date when the report was submitted by the auditor.¹⁷⁰ The Act further encourages transparency in the management of the fees and therefore permits any interested person to inspect the report at the union's offices during office hours.¹⁷¹

However, some of these requirements are criticised by the Committee on Freedom of Association which states that in accordance with the principle of trade union autonomy, provisions which give authorities the right to restrict freedom of unions to administer and use their funds as they wish for normal and lawful trade union purposes are incompatible with the principles of freedom of association, which presupposes financial independence.¹⁷² The ILO office in Tanzania, comments that the Registrar should be able to request a written explanation from the organisation on the auditor's report or the financial statements only in exceptional circumstances when there are serious grounds for believing that an organisation has infringed the law or at the request

¹⁶⁷ Section 72(3)(d) of the ELRA.

¹⁶⁸ Section 72(3)(e)(ii) of the ELRA.

¹⁶⁹ Section 72(5)(a) of the ELRA.

¹⁷⁰ Section 72(5)(b) of the ELRA.

¹⁷¹ Section 72(5)(c) of the ELRA.

¹⁷² Lee Sweptson "Human Rights Law and Freedom of Association: Development through ILO Supervision" *The ILO Survey* 1996, 185

of the organisation's member.¹⁷³ The supervision of the union's fund by Registrar is taken as a radical departure from compatibility with Convention No. 87.

3.5 Other organisational rights

3.5.1 Recruitment of members

Unlike the former legislation which did not contain provision on how organisations can recruit members, the new legislation makes express provisions for trade unions or organisations to have access to the employer's premises without interference. The Act provides that any authorised representative of a registered trade union shall be entitled to enter into the employer's premises in order to recruit members and communicate with members.¹⁷⁴ A representative trade union in the context of the preceding section means a registered trade union that is most representative trade union.

A representative trade union may also meet with members and hold meetings on the employer's premises and vote in any ballot under the union constitution.¹⁷⁵ While accessing premises or holding meetings with its members, it must ensure that there is minimum disruption of production. This provision's aim is to remove arbitrary refusal by employer to give access of premises to union representatives to discuss matter pertaining to members' affairs. Employers were formerly reluctant to allow unions to use normal working time to hold meetings with members. The members were either meeting out of working time and outside the premises of employers. In turn trade unions were not able to recruit new members and discuss employment affairs with their members. The reason behind is that, it is usually very difficulty for employees to attend meetings out of working hours and especially during weekends. As a result the unions remained weak for lack of active members.

The Act further provides that a registered trade union may establish a field branch at any workplace where ten or more of its members are employed.¹⁷⁶ It should be

¹⁷³ ILO comments

¹⁷⁴ Section 60(1)(a&b) of the ELRA.

¹⁷⁵ Section 60(b & c) of the ELRA.

¹⁷⁶ Section 60(2) of the ELRA.

remembered that the Act does not set out the threshold for the formation of the trade union, but here it is giving a threshold for establishment of a field branch. Notwithstanding to such anomaly, it can be submitted that the said minimum number is reasonable having regard to the level of industrial development in Tanzania. This is unlike South Africa where the threshold for establishment of a workplace forum is 100 employees.

More importantly the Act goes a step further to require an employer to provide a trade union recognised as exclusive bargaining agent of employees, reasonable and necessary facilities to conduct its activities at a workplace.¹⁷⁷ Nevertheless, this requirement is not absolute. It is subject to conditions that are reasonable and necessary to safeguard life or property or to prevent undue disruption of work.¹⁷⁸ It is expected that both employer and employees will use this provision with judicial mind without causing detriments to each other. The extent of what is to be provided will depend on the circumstance of each individual case. For example Convention No. 135 emphasises that access to employer's premises and granting the facilities for the trade union activities must not impair the efficient operation of the enterprise.

Sometimes, depending on the nature of the enterprise, in order to limit disruption of production a trade unions may require to hold the meeting outside working hours but within the premises of an employer.¹⁷⁹ This is because in other enterprises there may be a requirement to secure the premises. In those circumstances a representative trade union may be required to give sufficient notice to access the premises. This is in line with section 64 of the Act which requires that any registered trade union intimating to exercise any of the organisational rights should notify an employer in the prescribed form that it seeks to exercise a right. Within 30 days of the receipt of a notice the employer is obliged to meet with a trade union to conclude a collective agreement granting the right and regulating the manner in which the right is to be exercised.¹⁸⁰

¹⁷⁷ Section 60(3) of the ELRA.

¹⁷⁸ Section 60(4) of the ELRA.

¹⁷⁹ Task Force Report P. 117

¹⁸⁰ Section 64(2) of the ELRA.

3.5.2 Trade union representation

The importance of trade union representation at the workplace can not be overemphasised. First it is aimed at promoting collective bargaining at workplaces with other related industrial sectors. Secondly, it is aimed at stabilising trade union presence in the workplace and to foster and facilitate democratic unionism.¹⁸¹

Unlike the former legislation, the new legislation provides a requirement for democratic representation. Section 62(1) provides that a registered trade union shall be entitled to:

- (a) one trade union representative for one to nine members;
- (b) three representatives for ten to twenty members;
- (c) ten representatives for twenty one to one hundred members; and
- (d) fifteen representatives work places with more than one hundred members.

More importantly (as stated in section 62(1) (d) above) the new legislation imposes a gender balanced representation. It requires that in workplace with more than one hundred members, at least five of trade union representatives shall represent women employees, if any who are employed and belong to the union.¹⁸²

The Act also stipulates the functions of trade union representatives to perform the following functions:¹⁸³

- (a) to represent members in grievance and disciplinary hearings;
- (b) to make representations on behalf of members in respect of rules, health and safety and welfare;
- (c) to consult on productivity in the workplace;
- (d) to represent the trade union in enquiries and investigations conducted by inspectors in terms of any labour laws;
- (e) to monitor employer compliance with labour laws;
- (f) to perform trade union functions under the union's constitution;

¹⁸¹ Ibid.

¹⁸² Section 62(2) of the ELRA.

¹⁸³ Section 62(4) of the ELRA.

- (g) to further good relations; and
- (h) to perform any function or role agreed to by the employer.

The Act obliges employers to grant reasonable paid leave to trade union representatives referred above to attend training courses relevant to their functions.¹⁸⁴ It further requires employers to give a similar reasonable leave to office bearers of the registered trade unions or registered federation to perform the functions of their offices.¹⁸⁵ It is submitted that such obligations against employers will strengthen trade unions which have remained weak for decades as a result of state dominance and interferences. Also, it curtails the prerogative of employers to grant such representatives a paid leave. Where an employer unreasonably withheld such permission the representatives can opt to take legal actions against such an employer, as will be seen in the succeeding paragraph below.

3.5.3 Dispute resolution for exercise of organisational rights

Where there is a dispute for exercise of the organisational right then an aggrieved party must refer the dispute to the Commission for mediation. For example, in case a representative trade union gives a 30 days notice to exercise the right and an employer fails to meet with trade union within 30 days, the latter may refer the dispute to the Commission for mediation.¹⁸⁶ The Commission shall try to mediate the dispute. Where mediation fails to resolve the dispute, the trade union may refer the dispute to the Labour Court which is empowered to make appropriate orders.¹⁸⁷ Any dispute over interpretation of the agreement between a trade union and an employer shall be referred to the Labour Court for decision.¹⁸⁸ As seen above, this procedure does not involve arbitration. If mediation fails the dispute is referred directly to the Labour Court. It is aimed at solving the disputes efficiently and without undue delay.

¹⁸⁴ Section 63(a) of the ELRA.

¹⁸⁵ Section 63(b) of the ELRA.

¹⁸⁶ Section 64(1) of the ELRA.

¹⁸⁷ Section 64(2) of the ELRA.

¹⁸⁸ Section 64(5) of the ELRA.

Although the new legislation provides wide range of rights to freedom of association, if they are not exercised properly, can defeat objectives of the Act. For example, the Act does not give the threshold of forming a trade union, which gives a room to any number of employees (which may be two or less than five) to form a trade union. This in turn makes it possible to have several trade unions at a same workplace which may have different objectives. This might not be in the best interest of workers and as a result it may weaken trade unions in terms of organisation and in terms of finances. In that circumstance, it is possible for some unions to be formed as puppets of an employer. The multitude of trade unions in the same workplace with different objectives can not aim at fighting a common enemy. What might be seen as an evil by one trade union may be seen as good by the other. An employer in turn is likely to use such weakness to divide and rule workers.

A similar problem appears to form a federation. The new act allows any number of trade unions or employers' association to form a federation. For example, as explained above, if a trade union comprises less than five members and a workplace has at least 30 employees, that workplace is likely to have five trade unions. As a result, trade unions in such a single workplace can form a federation. It is submitted that the legislature might have overlooked such possibility. It is therefore advisable that the Act should set a threshold for establishing the trade unions and federation as recommended by the Task Force.

3.5.4 Strike and Lock-Outs

The right to strike is generally seen as necessary element of collective bargaining because it corrects the inequality inherent in the employment relationship.¹⁸⁹ It is a means of last resort and presupposes that the duty to bargain in good faith has been fulfilled and other voluntary modes of dispute settlement have been tried and exhausted.¹⁹⁰ A strike must be approved by a majority vote of members of Union and a lockout must be approved by a majority vote of members of the Board of Directors of the Corporation or

¹⁸⁹ H.M Seady and PS Benjamin 'Right to Strike and Freedom of Association: An international Perspective' (1990) 11 ILJ 439.

¹⁹⁰ <http://www.ncmb.dole.gov.ph/Publications/Manual%20on%20Strike/MOS.HTM>

Association or of partners in a partnership, obtained by secret ballot in a meeting called for that purpose.¹⁹¹ There should be a procedural requirement before the parties can exercise that right. The procedure is to mediate the dispute within a stipulated period of time. If mediation or arbitration as the case may be, is not fruitful then the party intending to take an action has to give the notice. The procedure should not be so complex or slow to render a lawful strike or lock-out impossible or useless in practice.¹⁹² Such restrictions should be acceptable and the conditions to be fulfilled to render it lawful should be reasonable.¹⁹³

Although neither the ILO Conventions nor Recommendations provides for right to strike, the International Covenant on Economic, Social and Cultural Rights (1966) provides such rights. The implication is that, so long as a certain state is a member of United Nations and has ratified the said Convention it becomes obliged to comply with that Convention as part of its obligation to the United Nations. On the other hand the ILO supervisory bodies have had dealt with this question more often than any other subject in labour relations.¹⁹⁴ The ILO derived principle is that the right to strike is an intrinsic corollary of the right of association protected by Convention No.87 and therefore it can not be dealt in isolation from industrial relations as a whole. In 1973, the General Survey of ILO stresses that “a general prohibition of strikes constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members.”¹⁹⁵

3.5.5 The right to strike under the new legislation

Unlike the former legislation, the new legislation provides the right to strike and lock-out to at least acceptable terms. The Act allows the right to strike or lockout in respect of the

¹⁹¹ Ibid.

¹⁹² Task Force Report (note 6) 132.

¹⁹³ A.T.M Jacobs *The Right of Strike and Lock-Outs* in in R. Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 8th ed (The Hague : Kluwer Law International 2004) 549.

¹⁹⁴ Lee Swepston “Human Rights Law and Freedom of Association: Development through ILO Supervision” *The ILO Survey* 1996, 187.

¹⁹⁵ General Survey, 1973 para 107.

dispute of interest only.¹⁹⁶ However, there are some individuals excluded from these rights. These restrictions are found under section 76 which excludes the following individuals; those engaged in essential service, or engaged in a minimum service, a person bound by an agreement that requires the issue in dispute to be referred to arbitration; magistrates, prosecutors or other court personnel. It further excludes employees who are bound by a collective agreement or arbitration award that regulates to issues in dispute.¹⁹⁷ The Act also prohibits employees to take industrial action if there is an agreement that require the matter to be referred to arbitration.

Tanzania's stance on lock-outs is different from other countries like France, Portugal, Italy and South Africa where lockouts are constitutionally outlawed.¹⁹⁸ In *Certification of the Constitution of the Republic of South Africa 1996*¹⁹⁹, for example, the Constitutional Court constitutionalised the right to strike but not right to lock-out. It was argued that such exclusion is justified on the ground that strike and lock-outs are not equivalents. It was decided that while rights to collective bargaining and strike are necessary for workers to counteract the greater social economic power of employers, employers have a range of other economic weapons at their disposal including the right to dismiss, to engage or replace labour, to exclude workers from the workplace and unilaterally to impose new terms of employment.²⁰⁰

It is unfortunately the Labour Task Force did not make a review of the above subject matter. The Trade Union proposal for reform of the new legislation addressed such issue especially to unorganized labour in small enterprises who actually do not meet the threshold for formation trade unions.²⁰¹ Being non-members, they would not be defended by trade union officers. Most likely, as it is happening now, this unorganized labour would not be able to afford legal representation.

¹⁹⁶ Section 75 and 80 of the ELRA.

¹⁹⁷ Section 76(1)(d) of the ELRA.

¹⁹⁸ The Right to Strike: A Case Study in Constitutionalisation (class notes handouts).

¹⁹⁹ 1996 (4) SA 744.

²⁰⁰ Op cit 2.

²⁰¹ Shivji I. G Comments and Observations on the Employment and Labour Relations Bill and the Labour Institutions Bill. 15.

3.5.6 Procedure for engaging in strikes or lockouts

In order to engage in lawful strike or lockout the parties must follow a procedure contained in section 80. Employees may do so if at all the dispute has been referred to the Commission for Mediation.²⁰² After referral of the dispute to the Commission, the Commission is supposed to appoint a mediator to resolve the dispute.²⁰³ The mediator shall try to resolve the dispute within 30 days. If mediation fails, then the dispute must be referred to arbitration. There is no specific time within which arbitration should be concluded. However, an arbitrator is supposed to issue an award within 30 days after conclusion of arbitration proceedings. In this regard it is submitted that thirty days is excessively long in making an award. It is suggested that a less period of 14 days might suffice. If arbitration is unsuccessful a trade union is supposed to conduct a ballot under the union's constitution.²⁰⁴ Thereafter, the trade union has to give the 48 hours notice to an employer before commencement of strike.

The Act provides immunities to employees engaging in strike. Engagement in lawful strike is not a breach of contract, or tort or criminal offence.²⁰⁵ An unlawful strike will no longer be a criminal offence but simply a labour dispute, in which any aggrieved party must follow a procedure laid down for initiating any dispute under the Act. The Labour Court has jurisdiction to determine whether the strike was lawful or not.²⁰⁶ This stance is similar to South Africa, but section 187(1) (a) of the LRA goes a step further and provides that a dismissal by reason of an employee's participation in a lawful strike is automatically unfair dismissal.

Although an employer under the new legislation is not obliged to remunerate an employee for services that an employee does not render during a lawful strike or lawful lockouts, he is obliged to continue to make its contribution and the employee's contributions to any funds that an employee is required to belong to by law or under

²⁰² Section 80(1) (b) of the ELRA.

²⁰³ Section 86(2) of the ELRA.

²⁰⁴ Section 80(1) (d) of the ELRA.

²⁰⁵ Section of the ELRA.

²⁰⁶ Section 84 of the ELRA.

contract of employment during the strike.²⁰⁷ However, after the end of strike an employer may deduct any of the employee's contributions. An employee may contest deduction of his wage by the employer. In that event the employer must refer the dispute to mediation and if remain unresolved it may be referred to the Labour Court.²⁰⁸

3.5.7 Strike in essential services

Areas which are regarded as “essential services” under the Act include; water and sanitation; electricity, health services and associated laboratory services, fire-fighting services, air traffic control and civil aviation telecommunications, any transport services required for the provision of these services.²⁰⁹ Further, an Essential Services Committee is empowered to designate a service as essential if the interruption of that service endangers personal safety or health of the population or any part of it. However, the Act curbs arbitrary designation of some services as essential by requiring that before a certain service can be declared as such, must give notice inviting interested parties to make representations and hold a public hearing at which the interested parties in may make oral representations.²¹⁰

Employees engaged in essential services are not allowed to take industrial action until a prescribed procedure has been exhausted. Employers and employees in essential services may conclude collective agreements on a procedure to be adopted for employees to take an industrial action. Such collective agreement must be approved by the Essential Services Commission.²¹¹ The collective agreement must indicate that there shall be a provision of minimum services during strike. If there is no collective agreement any party to a dispute of interest in an essential service may refer the dispute to the Commission for mediation. If mediation fails, any party may refer the dispute to arbitration. This is unlike disputes of right where if the dispute remains unresolved in mediation is supposed to be referred to the labour Court.

²⁰⁷ Section 83(3)(a) of the ELRA.

²⁰⁸ Section 83(5) of the ELRA.

²⁰⁹ Section 77(2) of the ELRA.

²¹⁰ Section 77(4) of the ELRA.

²¹¹ Section 78(2)(b) of the ELRA.

3.5.8 Secondary strike

Like the former legislation, the new legislation provides the right to engage in secondary strike. Secondary strike is defined as an industrial action in support of a lawful strike (the primary strike) by other employees against their employer (who is the primary employer) or in opposition to a lockout imposed by another primary employer against its employees.²¹²

The procedure for engaging the secondary strike is, however, relaxed under the new legislation as compared to the former legislation. What is required is for the trade union to give a fourteen days notice to an employer before commencement of the secondary strike.²¹³ The trade union calling for secondary must indicate that there is a relationship between the secondary and primary employer that may warrant the exercise of pressure.²¹⁴ The new legislation modifies the former legislation by requiring that secondary strike must be proportional having regard to the effect of strike to employer. The Act further authorises trade unions and an employers or an employers' association from agreeing to their own requirements and procedure for engaging secondary strike in a collective agreement.²¹⁵ Nevertheless, the right to engage secondary is not available to employees engaged in the essential services unless there is an approved collective agreement to that effect.

The Act does not allow picketing in labour disputes. This was strongly recommended by the Task Force. However, picketing should be allowed with strict regulation and Code of Good Practice being put in place. This would make Tanzania legislation consistent with other SADC countries like South Africa and Namibia. For example, in South Africa picketing is allowed under the Labour Relations Act, subject to the rules determined by the collective agreement, absence of which the matter is to be determined by the Commission of Conciliation, Mediation and Arbitration.

²¹² Section 81(1) of the ELRA.

²¹³ Section 81(2) of the ELRA.

²¹⁴ Section 81(2)(b) of the ELRA.

²¹⁵ Section 82(4) of the ELRA.

3.5.9 Protest action

Protest action is a new concept in the labour regime in Tanzania. The concept means action by workers over social and economic issues affecting workers. This action is to be distinguished from other forms of strike.

The procedure for engaging in a protest action under the new legislation is that; the protest action must be called by a registered trade union or registered federation of trade unions.²¹⁶ The union or federation must serve at least a fourteen days notice on the Labour, Economic and Social Council stating the reasons for protest action, the duration and form of protest action.²¹⁷ Thereafter, thirty days must elapse from the date when the notice was served. Upon receiving the notice, the Council is supposed to convene a meeting within thirty days of the notice to resolve the matter giving rise to protest action.²¹⁸ If it is unable to resolve the matter, the Council shall try to secure an agreement with the trade unions or federation of trade unions calling for the protest action on the duration and form of protest action in order to minimise the harm that may be caused by the intended protest action.²¹⁹

Further the Council may establish a tripartite committee to try resolving the matter. It may also appoint a mediator after consultation with the Commission to mediate the dispute.²²⁰ Any person who is likely to be, or has been, affected by the protest action may apply to the Labour Court for an order to restrain any person from taking part in protest action or in any conduct in contemplation or furtherance of an action that does not comply with the provisions of the Act.²²¹ In determining the application, the Labour Court is supposed to be guided by the nature and the duration of a protest action, the importance of the reasons for the protest action and the steps taken by the union or the federation to minimise the harm caused by the protest action.²²²

²¹⁶ Section 85(1)(a) of the ELRA.

²¹⁷ Section 85(1)(b) of the ELRA.

²¹⁸ Section 85(3)(a) of the ELRA.

²¹⁹ Section 85(3)(b) of the ELRA.

²²⁰ Section 85(4) of the ELRA.

²²¹ Section 85(5)(a) of the ELRA.

²²² Section 85(5)(b) of the ELRA.

Employees participating in a protest action are immuned from unjustified embarrassments. The provisions of immunity relating to engage a lawful strike apply *mutatis mutandis* in engaging protest action.

From the discussion above concerning protest action it can be submitted that, the mechanism for exercising that right is excessively long. The requirement of 30 days notice is awfully and unnecessary long time. A reasonable time of 14 days is sufficient to enable the Council to meet with the parties contemplating to take protest action. Also, before the court can make a declaratory order, all interested parties must be given sufficient notice to appear and to be heard. Otherwise, the provisions will remain ceremonial rather than serving the purpose intended.

3.5.10 Illegal strikes and lockouts and their consequences

Where a strike or lockout has been engaged without complying with the provisions of the Act, any aggrieved party may refer the dispute directly to the Labour Court which has exclusive jurisdiction to industrial actions. The Court may issue an injunction to restrain any party contemplating to engage in a prohibited action. However, an order for injunction can not be issued against any party unless a forty eight hours notice of application has been given to the respondent.²²³ In exceptional circumstances the Court remains with discretion to grant a shorter period upon good cause being shown only if the respondent is given a reasonable opportunity to be heard.²²⁴ To that end, it is submitted that the provision requiring proper notice before an injunction can be issued is proper one to avoid the parties who want to delay the process even if there is no cause to warrant injunction. Injunction is one of the court processes which are commonly abused in Tanzania by many litigating parties, because the courts have discretion to issue an ex-parte injunction without affording opportunity to the other party to present its case.

²²³ Section 84(1) & (2) of the ELRA.

²²⁴ Section 84(3) of the ELRA.

Where either party has engaged an illegal industrial action and the matter has been referred to the Court, the Court may make an order for payment just and equitable compensation for any loss attributable to the strike, lockout or conduct, having regard to:

- (i) the degree of fault;
- (ii) the cause of the strike, lockout or conduct;
- (iii) any prior history of non-compliance;
- (iv) the ability to pay;
- (v) the extent of the harm;
- (vi) the interests of collective bargaining; and
- (vii) the duration of the strike, lockout or conduct.

The court may not make an order of compensation that may cause a trade union, employer or employer's association to become bankrupt, unless there is an exceptional circumstance which may warrant such an order. The purpose of an order is to maintain good industrial relations between the parties and keep production growing rather than punishing the loosing party.

3.5.11 Discussion

At this juncture it can be argued that, the legislation has tried to meet some international requirements on the rights to strike and lock-outs. To allow strike to “disputes of interest” only is justified in the sense that other disputes of right can be resolved through court action, rather making the whole process of the industrial production to a stand still. However, some of the provisions are not free of criticisms. The procedure to strike for employees engaged in essential services is rather cumbersome and unrealistic to be exercised. Furthermore, the procedure for workers to engage in strikes is lengthy and tiresome.²²⁵ Thirty days for referring the dispute to mediation is along time. A reasonable time of 14 days or 21 days would be reasonable. A similar time should apply for an arbitrator to make an award.

²²⁵ Section 80 of ELRA.

Another aspect which requires attention is the exclusion of magistrate and other court personnel to engage in a strike. As observed above, magistrates have a right to organize but not to engage in strike. This legal department is of unfortunate nature because; they are not included in the essential services just like other sectors. There is no procedure on how they can exercise their right to collectively bargain. It is submitted that this sector should be declared an essential service so that it cannot be left in isolation.

3.6 Collective bargaining

3.6.1 Introduction

Collective bargaining, which involves negotiation and conclusion of collective agreements, is the principal means by which employers and workers' organizations determine terms and conditions of employment which utilizes the process of negotiation and agreement between representatives of management and employees.²²⁶ Once workers' and employers' organizations have been freely established, collective bargaining is therefore central to exercise freedom of association and others systems of industrial relations.²²⁷ Collective bargaining may be voluntary or compulsory owing to legal tradition of the labour relations in a particular country.

Collecting bargaining can be advantageous for both workers and employers. For workers, collective bargaining, more so than individual employment relations, ensures adequate wages and working conditions by providing them with a "collective voice". It also allows them to influence personnel decisions and to achieve a fair distribution of gains from technological progress and productivity increases.²²⁸ For employers, collective bargaining helps to stabilize industrial relations by maintaining industrial peace that otherwise may be disrupted by labour unrest. Through collective bargaining employers can also address the need for adjustment to facilitate modernization and restructuring.²²⁹

²²⁶ Milanzi M C 85

²²⁷ Available at <http://www.ilo.org/public/english/dialogue/ifpdial/l/g/noframes/ch3.htm> Accessed on 15th September, 2005.

²²⁸ Available at <http://www.ilo.org/public/english/dialogue/themes/cb.htm> 15th September, 2005

²²⁹ Ibid.

3.6.2 Collective bargaining under the new legislation

Collective bargaining under the new legislation is made compulsory owing to the legal tradition of the Tanzania industrial relations.²³⁰ However, the Act leaves a room for registered trade unions, employers, and registered employers' associations to establish their own collective bargaining arrangements by collective agreement, notwithstanding the provisions of the Act to be discussed below.²³¹

Under the new Act, collective bargaining is to be exercised through the bargaining units of the registered and recognized trade unions.²³² The bargaining is made at enterprise level, though it may be extended to industrial level where there is a multi-employer bargaining unit.²³³ A registered trade union may notify an employer or employers' association to seek recognition as exclusive bargaining agent within an appropriate bargaining unit.²³⁴ Once an employer or employers' association receives a notice, must within 30 days of the notice meet with a recognized trade union to conclude a collective agreement to recognize that trade union. In order to have recognition, a trade union must be representing majority employees which it is acting on behalf. An employer is not bound to recognize a trade union as exclusive bargain unit if it does not represent majority employees.²³⁵ If a recognized trade union no longer represents majority of employees in the bargaining unit, an employer is supposed to give a three months notice to the trade union failure of which an employer is free to withdraw its recognition.²³⁶ The Tanzania course on recognition of representative trade union is quite different from that in England and South Africa. For example, in the case of *Wilson & Others v. United Kingdom*²³⁷ the European Court of Human Rights had an opportunity to consider the question on freedom of association whereby trade unions which are not supported by the majority employees seek to represent and promote the interest of their members. It held thus:

²³⁰ Task Force Report (note 6) 123.

²³¹ Section 67(10) of the ELRA.

²³² Section 66 and 67 of the ELRA.

²³³ Task Force Report (note 6) 124.

²³⁴ Section 67(3) of the ELRA.

²³⁵ Section 67(2) of the ELRA.

²³⁶ Section 69 of the ELRA.

²³⁷ (2002) IRLR (UK) 128.

The essence of voluntary system of collective bargaining is that it must be possible for a trade union which is not recognized by an employer to take steps, including, if necessary, industrial action with a view to persuading the employer to enter into collective bargaining with the union on whose issues which the union believes are important for its members interests.”

Moreover, in Britain currently there is a statutory duty to recognize unions when certain conditions are met and every worker has right to be accompanied in a grievance and disciplinary proceedings by a trade union representative, even if that union is not recognized by the employer.²³⁸

Under the new legislation, any dispute pertaining to collective bargaining is supposed to be referred to the Commission for mediation. If mediation fails, there is no arbitration in matters relating to collective bargaining. If a dispute remains unresolved at mediation it should be referred to the Labour Court which is required to give the direction on how the matter is supposed to be handled.²³⁹ The Labour Court may decide any dispute over the representativeness of a trade union by arranging any appropriate person to conduct a ballot of the affected employees.²⁴⁰ While determining the appropriateness of a bargaining unit and making orders the court has the duty to regard several factors among them are:²⁴¹

- (i) the wishes of the parties;
- (ii) the bargaining history of the parties;
- (iii) the extent of union organisation among the employees of the employer or employers;
- (iv) the employee similarity of interest;
- (v) the organisational structure of the employer or employers;
- (vi) the different functions and processes of the employer or employers and the degree of integration; and

²³⁸ Sir Bob Hepple *The Right to Strike: A Case Study in Constitutionalisation* (Class Notes).

²³⁹ Section 67(6) of the ELRA.

²⁴⁰ Section 67(7) of the ELRA.

²⁴¹ Section 70(1) of the ELRA.

(v) promote orderly and effective collective bargaining with a minimum of fragmentation of an employer's organisational structure.

It seems the discretion given to Court is aimed at giving the Court an opportunity to assess the nature of dispute having regard to the infancy of bargaining capacity of trade unionism in Tanzania, owing to the fact that collective bargaining is not common to the private sector which is currently growing substantially in Tanzania.

The mechanism of collective bargaining in Tanzania is different from the one in South Africa. In South Africa there are bargaining councils which are permanent institutions of statutory collective bargaining.²⁴² They operate in public and private sectors. Private sector bargaining councils are established voluntarily by trade unions and employers' organisations for a trade or industry and their jurisdiction may be national or to cover a more limited geographical area and sometimes to cover an individual enterprise.²⁴³ The councils have two main functions: first, to regulate employment relations in the industry through collective agreement; secondly, to resolve disputes between the parties to the council that arise from the collective agreements concluded in the council and other statutory instruments. They are obliged to resolve the disputes between the parties to the councils. They are also encouraged to use the process of accreditation by the Commission of Conciliation Mediation and Arbitration (CCMA) between the parties who are non-members to the council. The CCMA gives subsidy to councils according to the disputes that are resolved, as an incentive to the councils.

Some of these councils are highly influential because if the unions and employers employ majority of employees within the relevant industry, the parties can apply to the Minister of Labour to have outcome of collective bargaining within the council to be extended to non-parties within the scope of the council.

²⁴² Isabel Manley *Dispute Resolution* Class Notes Handout 10.

²⁴³ *Ibid.*

3.6.3 The duty and obligation to disclose and bargain in good faith

The duty to bargain and disclose information is very important element in the process of collective bargaining. Collective bargaining is likely to fail if either of the party is not well informed. Access to relevant information is necessary to enable trade unions to give effect reasonable expectations regarding wages and working conditions. If they are not well informed they make their own judgement which is not based on reliable source or unjustified.

Owing to the necessity of bargaining faithfully, the Act imposes a duty to employers to bargain in good faith with recognised trade unions. Bargaining in good faith means that the parties are required to explore issues with open mind and with intention to reach an agreement.²⁴⁴ Although parties are not compelled to reach an agreement, the conducts which leads an inference that the party has no desire to reach an agreement then that person may be deemed to bargain in bad faith. Further, a party bargaining in bad faith may not rely on his conduct to terminate the bargaining process.²⁴⁵ Any party in the bargaining process may refer a dispute concerning failure to bargain in good faith to the Commission for mediation for mediation.²⁴⁶ If the dispute remains unresolved, any aggrieved party may refer the dispute to the Labour Court for decision.²⁴⁷ The Act also imposes an obligation to employer or employers' association to disclose relevant information to the recognized trade union.²⁴⁸ This is aimed at allowing the union to engage effectively in collective bargaining.

Traditionally, employers usually regard the demand for disclosure as an intrusion upon the managerial prerogatives and unjustified invasion of privacy rights. In this aspect, Thompson and Benjamin argue that the employer and management regard disclosure as if it would undermine the security, competitiveness or viability of the enterprise.²⁴⁹ The Act imposes an obligation for not disclosing any confidential

²⁴⁴ Para 7(1) of the Code Good Conduct.

²⁴⁵ *ibid* para 7(5).

²⁴⁶ Para 7(7).of the Code of Good Conduct.

²⁴⁷ *Ibid*.

²⁴⁸ Section 70(1) of the ELRA.

²⁴⁹ Clive Thompson and Paul Benjamin *South African Labour Law* (Juta: Cape Town 1995) 195.

information acquired during negotiations.²⁵⁰ Therefore, a trade union that receives confidential or private personal information is obliged not to disclose such information to any person other than its members and advisors. Further, the Act requires the trade union to undertake reasonable measures to ensure that the information disclosed is kept confidential.²⁵¹

In case a dispute arises over disclosure of information, any party to the dispute may refer the dispute to the Commission for mediation. If the mediation fails, any aggrieved party may refer the dispute to the Labour Court for decision. The Labour Court has very wide powers when a dispute is referred before it. It may decide to hold the proceedings in camera.²⁵² If the parties have ever brought a similar dispute relating to disclosure, the court may take into account any such previous breaches of confidentiality by the trade union or its members.²⁵³ It may also order the disclosure of information on terms designed to limit any harm that may be caused by disclosure. If disclosure of the information has caused damage to the employer, the court may order the trade union to pay damages for any breach of confidentiality.²⁵⁴

3.6.4 Binding nature of a collective agreement

A collective agreement is supposed to be in writing and signed by the parties and it is binding on the last signature, unless the agreement state otherwise.²⁵⁵ This is a progressive measure unlike the previous provisions which required the collective agreement to be compulsory registered by the Labour Court. The only requirement is to serve a copy with the Labour Court for record.²⁵⁶

²⁵⁰ Section 70(3) of the ELRA.

²⁵¹ Section 70(3) of the ELRA.

²⁵² Section 70(6)(a) of the ELRA.

²⁵³ Section 70(6)(b) of the ELRA.

²⁵⁴ Section 70(6)(c) of the ELRA.

²⁵⁵ Section 71(1) of the ELRA.

²⁵⁶ Section 71(7) of the ELRA.

3.7 Workers' participation

3.7.1 Introduction

Workers' participation is the term that signifies the involvement of the workers in the production system in the industrial area or any other workplace of the employment.²⁵⁷ It involves workers' participation in decision-making, consultation and any other undertakings at the workplace. Workers' participation may take different forms that may be direct or indirect. Direct participation includes the right to consultation in respect of certain issues, such as the right to participate in joint decision making and sharing of the information relating to production at a workplace.²⁵⁸ Indirect participation includes representatives of workers through organizations such as trade unions and employer(s) or employer's organization to discuss the terms of employment and other matters of interest such as collective bargaining.²⁶⁰ Actually the notion is that labour management relations should distinguish between bargaining over distributive issues (i.e. wages and benefits) and consultation over other matters of mutual interest such as strategic business decisions, the introduction of new technology and health and safety.²⁶¹

The International Labour Organisation on the other hand has passed several recommendations regarding consultation and cooperation between employees and workers at the level of undertaking.²⁶² The ILO recommendations provide that appropriate steps should be taken to promote consultation and cooperation at the enterprise or plant level on matters of mutual interest not within the scope of issues usually dealt through collective bargaining.²⁶³ In 1960, the ILO issued a recommendation concerning communication between management and workers for recognition of the importance of a climate of mutual understanding and confidence in the enterprise as being favourable to efficiencies and worker aspiration.²⁶⁴

²⁵⁷ Chambua Samuel (note 2).

²⁵⁸ Summer C 'Workplace Forums: Critical Questions From a Labour Perspective' 17 (1996) *ILJ (S.A)* 804.

²⁶⁰ *Ibid.*

²⁶¹ Clive Thompson and Paul Benjamin *Labour Relations Act 66 of 1995 Overview* (Class notes handouts).

²⁶² *Ibid* 84.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

Although there are some arguments against the workplace forums/councils, there are many advantages attainable from establishing the forums. Those who argue against, maintain that the forums attempt to separate collective bargaining issues from production issues and that they weaken rather than strengthening unions. These arguments do not hold water because the forums have proved positive to countries where they have been practiced like Germany.

3.7.2 Workers' participation under the new legislation

Although workers' participation is not a new phenomenon in Tanzania, it is new for its extension to the private sector. The existing document regarding workers participation is Presidential Order No.1 of 1970. This document does not extend to the private sector. As observed before, workers participation in Tanzania is organized at an industrial level of at least twenty employees. The Directive is very clear in this aspect.

Under the new legislation there is only one provision which is specifically dealing with workers' participation. This is section 73 and it is quoted for ease of reference.

71(1) A recognised trade union and an employer or employer's association may conclude a collective agreement establishing a forum for workers in the workplace.

(2) If a registered trade union, employer or employer's associational wishes to establish a forum for workers' participation in any workplace, the union, employer or association may request the assistance of the Commission to facilitate the discussion between the union, employer or association.

(3) The Commission shall facilitate any discussion concerning the establishment of a forum for workers participation in any workplace taking into account any code of good conduct practice published by the council on workers' participation.

This is the only provision in the new Act, which deals with workers participation. Even the Task Force report did not deal with this aspect, although it is mentioned in the highlight of the report to be one of the aspects which was under its consideration. It is not well established whether such omission was deliberate or an oversight. It is strange that

the existing Presidential Order is more elaborate than the provisions of the new legislation. The proposed Bill by the task Force contains some Code of Good Practice, but it is silent on the aspect of workers' participation.

Furthermore, the Act does not provide the purposes and functions of the workplace forums. It is also silent about the threshold number of employees to establish the workplace forum. The Act also does not provide the matters which the forums and employers should discuss together for the purpose of maintaining good industrial relationship. There is no demarcation of the powers of the trade unions and the forums. All of these matters need answers for proper functioning and operation of the forums. It is submitted that urgent review of this provision should be undertaken so as to remove confusion about how the workplace forums will be established and undertaking their functions.

Unlike the Tanzanian legislation which is not comprehensive, in South Africa the Labour Relations Act²⁶⁵ stipulates expressly the functions of the workplace forums under section 79 to include; seek to promote the interests of all employees in the work place, whether or not they are trade union members, to enhance efficiency in the workplace and the workplace forum is entitled to be consulted by the employer, with a view of reaching consensus and it is entitled to participate in joint decision making. The LRA is very comprehensive on workers' participation and Tanzania should borrow and bend some of its provisions which are relevant to the Tanzania circumstances.

3.8 Dispute resolution under the new legislations

There are three mechanisms for dispute resolution established under the new legislations which includes: mediation, arbitration and adjudication. The Labour Institutions Act deals specifically with establishment of dispute resolution bodies while Employment Labour Relations Act regulates the methods and procedures for resolution of the disputes.

²⁶⁵ Act No.66 of 1995.

The Act establishes the Labour, Economics and Social Council²⁵⁶ (**hereinafter called LESC**). The Council's functions is to promote economic growth, promotion of labour policy, to advise the Minister on the labour market policy, prevention of unemployment, code of good conduct, any issue arising from ILO, to nominate the assessors, to evaluate the efficacy of the labour legislations affecting social policy²⁵⁷ and so on.

Down to the hierarchy, it is established the Commission for Mediation and Arbitration (hereinafter called **CMA**).²⁶⁷ The Commission is independent of government. It is composed of six members and the Chairperson. Among them, two members should represent the interests of the employees, two others representing the interests of the employers and remaining two members representing the interest of the government.²⁶⁸ Apart from that it is established the Labour Court for adjudication of the disputes and other matters exclusively reserved to it.²⁵⁹

3.8.1 Dispute resolution under the CMA

The Act provides that the main functions of the Commission are *inter alia*; to mediate any dispute referred to it in terms of any labour law, determine any dispute referred to it by arbitration if the labour law requires the dispute to be determined by arbitration or if the parties in dispute agree to being determined by arbitration, or if the Labour Court refers the matter to the Commission to be arbitrated.²⁷⁰

The CMA also is mandated to appoint a director, mediators and arbitrators. It may also assign mediators and arbitrators to mediate or arbitrate any dispute, establish offices in areas as it may determine, establish divisions of the commission, to make internal regulations and publish the code of ethics for mediator and arbitrator.²⁷¹ The CMA is also

²⁵⁶ Section 3 of Labour Institution Act (Act No 6) of 2004 (*hereinafter called ILA*).

²⁵⁷ Section 5 of LIA.

²⁶⁷ Section 12 of LIA.

²⁶⁸ Section 16 (2) of LIA.

²⁵⁹ Section 50 and 51 of LIA.

²⁷⁰ Section 14 (a) and (b) of ELRA.

²⁷¹ Section 15 (1) of LIA.

empowered to appoint as many mediators and arbitrators as are necessary for the purpose and the latter may be appointed on full time or part time basis.²⁷²

The first method under the Employment and Labour Relations Act is mediation as provided under Part VIII sub-part A. It provides that disputes shall be referred to the Commission in the prescribed form and a copy to be served to the respondent.²⁷³ Upon receiving referral, the Commission shall appoint a mediator to mediate the dispute and it shall decide the time, date and place of mediation hearing.²⁷⁴ A mediator is required to resolve the dispute within thirty days of referral or any other longer time as the parties may agree and the mediator shall decide the manner in which the mediation is to be conducted.²⁷⁵ This mechanism is unlike the former legislation which had a very tedious process of referring the dispute to the Labour Commissioner and ultimately to the ordinary courts (any ordinary subordinate court presided by a Resident Magistrate). In the former mechanism there was no time limit within which the dispute should had to be concluded. However, whereas there is a time limit within which mediation should be concluded (i.e. 30 days), there is no time limit provided for conclusion of the matters referred for arbitration and that referred the Labour Court for adjudication.

At mediation, a member or official of the party's trade union or an advocate may represent the party to the dispute. If the dispute remains unresolved if it is a dispute of interest, the party may give notice of its intention to commence strike or lockout and if a dispute is a complaint refer the matter to arbitration or the Labour Court.²⁷⁶ The Acts do not provide whether the parties are entitled to costs, but it may be deemed as there is no order as costs at mediation level.

In this aspect one can make a comparison from other jurisdictions. In South Africa for example, there are four mechanisms of resolving the disputes namely; conciliation, arbitration, a combination of conciliation and arbitration popularly known as con-arb and adjudication. Under the LRA there are four institutions established to deal

²⁷² Section 19(1) & (2) of LIA.

²⁷³ Section 86(1) & (2) of ELRA.

²⁷⁴ Section 86 (3) of ELRA.

²⁷⁵ Section 86 (4) & (5) of ELRA.

²⁷⁶ Section 86 (7) of ELRA.

with dispute resolutions namely, the Commission for Conciliation, Mediation and Arbitration (CCMA) which is established under section 112, accredited councils and private agencies established under section 127, the Labour Court established under section 151 and the Labour Appeal Court which is established under section 167.

Although the CCMA has original jurisdiction over most disputes of right, there are some disputes that do not fall within its jurisdiction. For example, the disputes that falls within the scope of a registered accredited bargaining council or private agencies. In the absence of the registered accredited bargaining council the dispute is resolved through conciliation by CCMA.²⁷⁷ However, any bargaining council must apply to the CCMA in order to perform its functions of resolving disputes and the Commission may require any further information about that application.²⁷⁸ The accredited council must perform its functions according to the terms of reference in which it is registered.²⁷⁹

Unlike Tanzania, in South Africa the law prohibits appearance of attorneys and advocates at conciliation level. In arbitration they are allowed generally except in a dispute arising from dismissal for misconduct or incapacity, unless an arbitrator is of the opinion that due to circumstances of the case either of the parties is unable to defend himself.²⁷⁰ However, the parties may be represented by their fellow employees or trade unions or employer's association as the case may be. In Britain, the ACAS arbitration hearing is informal. There is no cross examination though parties may request that questions be directed through a mediator.²⁷¹ Legal representation by advocates or attorney is prohibited.

In Tanzania if the dispute referred for mediation remain unresolved the Commission is supposed to appoint an arbitrator to decide the dispute and to determine the time, date and place of arbitrating.²⁷² The arbitrator is empowered to conduct decide the appropriate forms of the proceedings and parties are allowed to call witness, question

²⁷⁷ Jaarsveld, (supra), p. 346.

²⁷⁸ Section 127 and section 52 of LRA (S.A).

²⁷⁹ Du Toit étal *Labour Relations Law* 2003 Butterworths p.83

²⁷⁰ Section 140 of LRA (S.A).

²⁷¹ "The Acas Arbitration Scheme for Disputes of Unfair Dismissal",

²⁷² Section 88(2) of ELRA.

witness and present arguments. However, due regards should be made to substantial merits of the dispute with minimal legal formalities.²⁷³ The parties may be represented by members or officials of their respective organizations or by an advocate. An arbitrator is not empowered to order for costs unless the party or his/her representative acted in frivolous or vexatious manner.²⁸⁴ After hearing the parties and their arguments, if any, an arbitrator is supposed to issue an award within 30 days and the award may be executed to the Labour Court as if it was a decree of a court of law. However, execution of decree should be left to be executed to the District or Court of Resident Magistrate because the divisions of the Labour Court will be far away from the ordinary litigants in the countryside areas.

3.8.2 The Labour Court

The jurisdiction of the Labour Court is established under section 94 of the ELRA to have exclusive jurisdiction over application, interpretation and implementation of the provisions of the Act. It has powers to decide the appeals from the decisions of the Registrar, review and revise the arbitrators' awards made under the Act, decisions of Essential Service Committee, complaints other than those decided by arbitration, applications for injunction or declaratory order.²⁷⁵ The Court may refuse to hear a complaint if it had not been referred to arbitration while it was supposed to refer the matter to arbitration. However, the court may decide the case if a matter is not referred to the proper channel but the court shall order costs for one who did not follow the proper channel.²⁷⁶

There is no right to appeal from an award of the arbitrator but any party who alleges a defect in arbitration under the governance of the Commission may apply to the Labour Court for revision of the arbitration award.²⁷⁷ An application must be made within six weeks when such defect is discovered. However, the grounds for reviews or revision are restricted to only two grounds namely; if a party alleges misconduct on the part of

²⁷³ Section 88 (4) of ELRA.

²⁸⁴ Section 88(8) of ELRA.

²⁷⁵ Section 94(1) of the ELRA.

²⁷⁶ Section 94(3) of ELRA.

²⁷⁷ Section 91(1) of ELRA.

arbitrator or that the award was improperly procured.²⁷⁸ Then the court shall determine the allegation and make appropriate awards, which includes setting aside the award.²⁷⁹

The mechanism of appeal in Tanzania is different from the one that applies in England. In England there is a right of appeal on a point of law from the Employment Tribunal to the Employment Appeals Tribunal.²⁸⁰ From the latter one may appeal to the Court of Appeal and then to the House of Lords. If a party is not satisfied with the decision of the House of Lords may make reference to the European Court of Justice where European Law is under consideration.²⁸¹

4. Conclusion

From the discussion above, it can be argued that the new Tanzania legislation has at best complied with ILO minimum standards, apart from some provisions criticised above in the course of discussion. It is a new wake in the industrial relations in Tanzania to witness such a comprehensive legislation. Unlike the previous legislation, organizational rights guaranteed under the new legislation is meaningful and it poses a challenge to workers to exercise them. However, there must be a political will from the state to encourage employees to exercise those rights. The next chapter will discuss the challenges facing Tanzania labour relations and the prospects of the new labour legislation.

²⁷⁸ Section 91(2) of ELRA.

²⁷⁹ Section 91(3) of the ELRA.

²⁸⁰ Susan Corby and Ian Newall, at p.8.

²⁸¹ Ibid.

4. Challenges Facing Tanzania Industrial Relations and Future Prospects of the New Legislation

4.1 Challenges facing the trade unions in the global market

In a globalised economy, trade unions' movements in many countries are facing a time of profound change. They are faced with a necessity to undergo metamorphosis in order to cope with the changing global labour market trends. They are forced to make necessary adjustment to the economic, technological, legislative and attitudinal changes.²⁸² As a result, the current problems confronting trade unions have generated a host for new changes requiring innovative strategies.

One of the principal factors which have created fear about the state of the trade unions is the decline of the union membership.²⁸³ It is undisputable fact that in order for the union to survive and be more active it must have a good number of active members. Globally membership has fluctuated greatly especially in the mid 1980s as a result of shift of structural changes. Tanzania has not survived the blow of such blowing waves. The number of trade union members has declined significantly especially after introduction of structural adjustment programme in the 1990s. Most of workers were retrenched. Decline of membership level not only jeopardize the strength and influence of unions but also reduces the income which might be available through membership subscriptions.²⁸⁴ This means shortage of funds reduces the level of services which the union can provide to protect the interest of its members. Another reason which has grounded the fall of union's membership is the high rate of unemployment that has curtailed the willingness of the employees to organize for fear of their employer's reaction and fear for loosing their jobs. New techniques must be adopted in order to face the changing nature of the employment.

²⁸² Shauna L Olney *Unions in the Changing World: Problems and Prospects in the Selected Industrialized Countries*. ILO Office Geneva (1996) v.

²⁸³ *Ibid* 1.

²⁸⁴ *Ibid*.

Another challenge facing trade unions is the rise of proportion of higher educated, higher skilled salaried workers.²⁸⁵ It is argued that skilled and highly educated labours are more individualized personnel with virtually no affinity to the trade union movements. In one of the surveys made in the industrialized countries, it was revealed that majority of this type of workers agree that unions are necessary but they can manage to work without them.²⁸⁷ Their confidence stems from the fact that they have higher standard of living, more educational and occupational opportunities. Further, they view themselves as being in control of their own upward mobility.²⁸⁸ Therefore, the challenge facing trade unions is to show them that unionism is the benchmark of the solidarity and individualism attract unfair bargain with the employer.²⁸⁹

Another challenge facing trade unions is the mushrooming of multinational corporations. The increase of multinational enterprises impose another challenge in the sense that individual national unions will be in less position to defend the interests of the members located in different countries. Most Multinational Corporations are usually prepared to accept a single union for the purpose of collective bargaining. Therefore, there must be international ties among the unions in order to develop a united strategy to deal with internationalization of business. The ILO Commission in Social Dimension considered this approach. It stated that:

... the international community has frequently reaffirmed the role of the ILO in setting and dealing with the standards concerned. This has avoided a situation in which different organizations work on the basis of different sets of labour standards, with conflicting interpretations of their meaning and application. In both the WTO Singapore Ministerial Declaration of 1996 and the ILO Declaration on Fundamental Principles and Rights at Work of 1998, the member

²⁸⁵ Ibid. 6.

²⁸⁷ Ibid.9.

²⁸⁸ Ibid 10.

²⁸⁹ International Federation of Chemical, Energy, Mining and Factory Workers: available at [http://www.itcilo.it/english/actrav/telearn/global/ilo/seura/icem.htm#g\)%20privatisation](http://www.itcilo.it/english/actrav/telearn/global/ilo/seura/icem.htm#g)%20privatisation)

States of both organizations affirmed their commitment to the observance of the core labour standards.

All in all, the powers and strength of the trade unions lies in the strength of its membership, solidarity and unity. But these in turn assumes that there is fairly stable working class. If the law creates conditions which results to uncertainty, sense of impermanency and insecurity of employment then the sense of working class solidarity is difficult to develop.²⁹⁰

4.2 The future of industrial relations in Tanzania

There are some indications that Tanzania industrial relations regime has prospects in the future as compared to the previous regime. Some of those tangible features are;

4.2.1 The establishment of the tripartite organ

The establishment of Labour, Economics and Social Council to monitor and advise the government on social and economic issues, is one of the prospects that industrial relations will triumph. The Council is composed of representatives of employees, employers, the Government and other independent professionals appointed according to their expertise knowledge in labour issues. The purpose of the Council is to shift policy making from politicians to professionals. The Council itself is independent of any governmental department and it is not subject to any direction or control from the government, organization or any political party.²⁹¹ Its functions are aimed at transforming the labour industry and to promote economic development and social equity. If the Commission will discharge its function in accordance with its objectives, it will reduce social and economic hardships to workers and the rate of unemployment.

²⁹⁰ Shivji I G (note 202) 16.

²⁹¹ Section 13 of LIA.

4.2.2 Establishment of the Commission for Mediation and Arbitration (CMA) and the Labour Court

The establishment of the CMA and the Labour Court as a division of the High Court is another aspect glaring the prospects of industrial relations under the new labour legislation. The two will reduce caseload from ordinary Courts where there is congestion of cases. Further, labour cases will be dealt with attentively and expeditiously. The jurisdiction vested into the Labour Court is substantial for retaining good relationship between employer and employees. The Act also has expressed a clear procedure to settle the disputes and which forum has jurisdiction over specific matters, unlike the former legislation which brought confusion to workers and legal practitioners as to whether the Labour has exclusive jurisdiction over labour disputes. However, the objectives for establishment of the CMA and the Labour Court can turn nugatory if the court will not be equipped with competent staff and necessary facilities.

Therefore, the success or failure of this alternative mechanism will depend on the provisions of adequate resources, integrity of mediators and arbitrators and more importantly whether the disputes will be dealt with expeditiously. Further, it will be odd if no Registries will be initially established to every zone, and later on to every region. If there will be only one Registry, as usual in Dar es Salaam, no substantial achievements will be gained because most employees are scattered in various regions. It is further submitted that execution of the decree of the arbitrators or mediators should be executed by the District Court or the Court of Resident Magistrate. If the jurisdiction on the execution of decrees will remain with the Labour Court alone it will be burdensome for decree holders to execute the decrees where the labour court is not located.

4.2.3 Ratification of Core Conventions

The ratification of the Core ILO Conventions, especially Convention No.87 and 98, is a revelation that Tanzania is keen and fully committed to accomplish its international obligations under public international law. Ratification is a necessary step towards implementation of those obligations. Failure to discharge or violation of those obligations may be sanctioned by the UN or alternatively Tanzania can be put into task by ILO.

Therefore, ratification is an indication of the prospects of implementation of the said Conventions. However, ratification alone is not sufficient; there must be a political will for discharge of those obligations. Good policies and their implementation are preferred to give effect to the new legislation.

4.4.4 Procedure for registration of the trade unions

Unlike the former legislation which required prior authorization and gave immutable powers to the Registrar, the new Act requires that where the Registrar is not satisfied that the organisation or federation complies with the requirements of for registration he- may refuse the application and send the applicant a written notice of the decision and the reasons. If the reasons given are not satisfactory the organization or federation may appeal to the Labour Court.²⁹²

The existence of trade unions is no longer at the prerogative of the Registrar. Where the Registrar wants to cancel any union or federation or worker's organization federation has very limited powers. The provisions of section 55 require him/her to make an application to the Labour Court for an order to cancel the registration of a registered organisation or federation if that organisation or federation fails to comply with the requirements for registration. The Labour Court, on the other hand may make any appropriate order including cancelling the registration of an organisation or federation after affording such organization or federation an opportunity to remedy any failure to comply with its objectives. This provision is aimed at curbing arbitrary cancellation of the organization which existed at the former provisions where the Registrar was mandated to cancel the organization without giving reasons.

Further, unlike the former legislation, where the Registrar wants to dissolve the organization or federation he must apply to the Labour Court for the dissolution of such organisation that contravenes its objective or contravenes its constitution in which it is registered.²⁹³

²⁹² Section 57 of the ELRA.

²⁹³ Section 56 of the ELRA.

5. Conclusion

This paper has dealt with industrial relations in Tanzania from past experience and its future prospects under the new legislation. It was not possible to cover extensively all areas which the new legislation has encompassed but the most important areas in the labour relations have been highlighted.

As seen from the discussion above, Tanzania industrial relations has evolved through different periods. It started the struggles for independence expecting to reap a share of the piece of cake after independence, but only to find itself an arch enemy of the new independent government regime. After independence, labour movements lost the direction because it was institutionalized as part of the then ruling party, TANU and later Chama Cha Mapinduzi (CCM). The situation became worse after Arusha declaration when the ruling party abrogated supremacy of the other state organs. The adoption of the SAP scheme ember the life standards of the working class. The redundancies swapped them out unprepared. Consequently, there was a downfall of social services delivery by the state. Most redundant workers entered into the informal sector.

However, as seen above, with liberalization of economy the working class is gaining momentum. Enactment of the new legislation will make industrial relations more competitive than before. Also, the establishment of a tripartite Labour, Economic and Social Council will assist the policy makers to take into account the interest of the working class. Further, ratification of core labour Conventions is symbolic indicator for the future of industrial relations in Tanzania.

Nevertheless, Tanzania industrial relations is facing major challenges as indicated above. Globalisation is one of the major challenge which the policy makers should deal with, having due regard to the infancy and historical nature of the labour relation in Tanzania and its people. Tanzania should put in place a policy which shall serve the best interest of its citizens to participate fully in all aspects pertaining to globalization;

otherwise the current trend will make most of Tanzanians to be the servants of globalisation instead of globalization being their servant.

Nevertheless, three important issues deserve attention in this paper. The legislation has failed to address transfer of employment contract. Such failure ought to be addressed immediately because of current industrial trend especially the emerging multilateral corporation operating across the borders. Most of companies are merging forming joint ventures. Such mergers put the workers at the cross-road whether they should retain their employment or otherwise their employment contracts automatically expire. Active consultation of the workers and their representative trade unions is very crucial in this aspect.

Another issue deserving attention is the absence of workers' participation guidance to establish workplace forums. The Act does not provide a viable solution what matters are to be dealt at workplaces and which are reserved to the trade unions/federations. Even the proposed code of good conduct does not deal with those issues. The Act will be odd if it does not remedy that area. With current global trend of industrial democratization of the working place, the new legislation should provide express provisions in order to enable workers and their representatives to take active role in decision making especially in matter which are likely their working condition at the workplace.

Lastly, the legislature should revise provisions of the law to allow the lower courts namely; the District Courts and Courts of Resident Magistrate to execute awards on arbitration and mediation. Reserving jurisdiction to execute the decrees exclusively to the Labour Court, will turn arduous to most of workers who are away from the main registries of the Labour Court.

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