Emerging Trends In Labour Legislation and Policy In The SADC Region: The Experiences of Botswana and Swaziland In The Context Of The ILO Convention On Freedom of Association And Protection Of The Right To Organise (C.87)

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DECLARATION

The work contained in this dissertation was completed by the author as a student at the University of Cape Town between January 2002 and May 2003. It is original work except where due reference is made and neither has been or will be submitted for the award of another degree at any other University.

E.K.B Ntumy

Dedicated to that OLD LADY

Who could wait no more,
Having waited so long.
May you have the respite
You so well deserve.

LIST OF ABBREVIATIONS

1.	BCSA	Botswana Civil Servants Association
2.	BOCCIM	Botswana Confederation of Commerce, Industry and Manpower
3.	CB	Collective Bargaining
4.	CCMA	Commission For Conciliation, Mediation and Arbitration
5.	COE	Committee of Experts
6.	COIDA	Compensation for Occupational Injuries and Diseases Act
7.	ECHR	European Commission For Human Rights
8.	ECJ	European Court of Justice
9.	EEC	European Economic Community
10.	ELS	Employment And Labour Sector
11.	GCHQ	General Communications Headquarters
12.	G.7	Group of Seven Industrialized Countries
13.	HC	High Commissioner
14.	HCTs	High Commission Territories
15.	HIV/AIDS	Human Immune-Deficiency Virus/Acquired Immune Deficiency Syndrome
16.	ICFTU	International Confederation of Free Trade Unions

17.	ILC	International Labour Conference
18.	ILO	International Labour Organization
19.	LAC	Labour Appeal Court
20.	LC	Labour Court
21.	LRA	Labour Relations Act
22.	NDC	National Development Corporation
23.	NEDLAC	National Economic Development and Labour Advisory Council
24.	NEMIC	National Employment, Manpower and Incomes Council
25.	NEPAD	New Partnership For Africa's Development
26.	OECD	Organisation For Economic Co-operation and Development
27.	PTA	Preferential Trade Agreement
28.	RC	Resident Commissioner
29.	SACU	Southern African Customs Union
30.	SADC	Southern African Development Community
31.	SATUCC	Southern African Trade Union Co-ordination
32.	UCT	University of Cape Town
33.	UNISA	University of South Africa
34.	UNDP	United Nations Development Programme
35.	USA	United States of America
36.	WTO	World Trade Organization

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ABSTRACT

The advent of the Southern African Development Community (SADC) brought with it a euphoric expectation of instantaneous transformation of the sub-region into a vibrant, viable economic haven for its inhabitants. Time and reality have since reduced this euphoria to disillusionment.

This state of affairs has resulted in a lot of introspection leading to vital questions about the readiness and capacity of the member states to let go of their national sovereignty as a price for more meaningful regional integration. Embedded in this is the major question of how the labour law regimes have lent themselves to change and whether they can be transformed into engines of growth that can facilitate employment within internationally acceptable environments. To attempt to answer this question, one needs to examine closely the individual domestic situations in order to determine how strong differences are in the context of international labour standards such as the very basic freedom of association and protection of the right to organise.

The examination of Botswana and Swaziland was therefore undertaken for this purpose. It has led us to the conclusion that essentially, labour legislation in these countries is common in many significant respects, unwilling to approximate to expected international standards but flexible enough for potential harmonization and transformation.

This dissertation is however fairly inconclusive given the size of the SADC itself. It is therefore only a pointer, a part of the critical foundation of enquiry. It is thus only part of the preliminary survey for the roadmap that needs to be drawn on which a workable integration in the SADC could be built in the future.

Chapter 1

1.0 Introduction

This research work is not a re-statement of law or a critique of any particular legal system. It is also not an affirmation of any existing legal practices, policy or system. This study is an acknowledgement of the changing events in the global economic and social order and the challenges it poses for labour law particularly in the SADC sub-region. It also recognises the need to investigate, and attempt to comprehend the dynamics of this change and how these are going to impact on society and the worker.

Of primary importance is the fact that, though fundamental freedoms, such as those of association and the right to organise and collectively bargain are universally accepted, they would appear to be selectively applied and interpreted. In addition, there is undue emphasis on the regulation of employment rather than work relations. There is a clamour for a return to neo-liberalist free market individuality or *laissez-faire* in work relations, which seeks to diminish the role of trade unions and emphasise the market logic of private contract even though it is clear that the generality of workers need some form of support, guidance, training and even protection in the power play characterising the inequalities of the work relations.

The purpose and function of labour law therefore needs to be re-examined and its effects on workers and society studied. Ideally, this should be done within a comparative contextual framework. Equally, the issue of breaking traditional barriers, implied in regional integration and the globalisation debate suggest a labour law regime which must also de-traditionalise. It can then advocate and sustain an enhanced capacity of the worker to actualise his potential anywhere, lawfully, as the fulfilment of the quintessential human liberty.

Regarding Botswana and Swaziland, there is a general perception that their legal regimes make provision for the pertinent International Labour Organisation Conventions and Recommendations. What is needed therefore, is an assessment of the motive forces behind labour legislation and whether these derive from the following;

a. social consensus between business, state and labour.

b. a structural relationship between a specific social need and the form of the regulation adopted to address it.

c. a desire to be open and ethically competitive in the development of the legal culture that avows international standards.

d. A regime of labour laws which seek to enhance collective economic development.

These socio-political manifestations or dialogue can then hopefully lead to same or similar approaches to how the workplace is re-understood and appreciated relative to other social formations.

Statement of the problem

At the core of the problem is the assumption that, freedom of association and protection of the right to organise form the genesis of collective labour law. This law also deals with organised employees and employers. If this is so, then such laws ought to be universally acceptable and applicable. Therefore, by implication, in a situation where these rights are differentiated and selectively applied in different states such as Botswana and Swaziland it presupposes an opposition to subsequent meaningful cohesion and integration of social formations in national endeavours.

The issue then becomes whether the ratification of the relevant Conventions are one thing and their practical realization another. Such distinctions at the level of the state may carry serious implications. This may not only weaken the bargaining power of some but also operate to discriminate against others. Therefore, for labour law to ultimately assist as an instrument of regional integration, it must first be seen to have transformed the various domestic basic floor of rights within the SADC States into a commonly acceptable pillar of collective labour law vis-à-vis internationally accepted standards. Such transformation must essentially begin at the internal, local levels. This need is not only implicit in the recently adopted Social Charter of SADC but inherently strategic for primary collaboration in the workplace both nationally and regionally.

In effect, where individual States selectively utilize the ILO Conventions, their universality and inherent attributes cannot be reflected in the role labour law would be playing as part of the basis for regional integration.

The search for a solution begins with a contextual understanding of labour law. Collective labour law refers to that body of legislation, norms, conventions and constitutional stipulations relating to both organised employees, commonly

referred to as Trade Unions and organised employers. It is premised on the fundamental freedoms of association, expression and the right to organise.

Although there is an overlap between individual and collective labour law, there are conceptual and practical distinctions. The rules of individual labour law deal with the rights and duties arising from an individual contractual employment relationship. The rules of collective labour law on the other hand, concern the regulation of employers and employees as distinct interest groups, who seek, through collective organisation, to promote, secure and enhance their interests (1).

Collective labour law is thus the outcome of the hitherto historical displacement of individualism by collective bargaining and the perceived need to regulate the relationship between these groupings in an orderly and equitable manner. Underpinning this is also the realisation that the common law notions of commodity exchange implied in the employment relationship must give way to democratic values and collective responsibility for the good of an economic enterprise as a function of the common growth and development of any community. The reproducibility of one's productive energy is not a detachable commodity that can be independently priced without impacting on the person. This is what makes international labour standards critical and attractive as a safeguard for the worker.

The Southern African Development Community (SADC) which was established by Treaty in 1992, commits its members to the fundamental principles of, inter alia, equity, balance and mutual benefit through the co-ordination, harmonisation and rationalisation of their policies and strategies for sustainable development (2).

In this context, standard frameworks in labour law could imply an ultimate goal of borderless worker alliances across the sub-region which, through a common mechanism, could bargain better, more democratically and more effectively with the equally strengthened employers' alliances. To achieve this, an environment needs to be created in which a Swazi employer would not see Botswana as better suited for him to practice his Unitarian logic of Management. A Motswana employee in Swaziland should also not see his associational and related rights diminished.

While accepting the sovereign equality of member states and their need for peace and security, the SADC Treaty also sets out principles and protocols and sanctions for wilful failure to

implement them. Therefore while taking cognisance of these, bold steps need to be taken to move further towards the goals of the SADC community.

A comparative study of Botswana and Swaziland will examine the salient, common cornerstones of aspects of the labour law in these countries. It will also identify the points of divergence and the degrees of critical and potentially destabilizing differences where there are any. In this case, the levels of associational and organisational rights enjoyed how the Courts have impacted on workplace relations become important. In addition, the study also explores the fears and rationales behind the selective application of such provisions or their conscious emasculation.

Primarily however, any problems encountered would be mainly political in nature. This is because legislation or the regime of laws in each given context serve and reflect the structural differentiations that characterise each country. (3) While assuming therefore that a mutually beneficial labour law framework is desirable for the SADC, the countries themselves could, for various reasons, be opposed to a common framework of labour law. This is what we need to test.

By definition, a framework is a structure upon or into which casing or contents can be put. In essence therefore, a framework law would identify the strong, internationally accepted building blocks on which common aspects of a legal regime could be established, while making room for local peculiarities such as there may be, to be satisfactorily addressed at appropriate levels without detracting from the principles of equality of access and consistency in practice.

Historically, formal, institutionalised labour law in Southern Africa traces its roots to both the Roman/Dutch Calvinists from 1652 and to the British Colonial Government's penchant for uniformity and order. The Passville Memorandum of 1930 is generally considered the watershed in the formation and recognition of worker organisations in the areas that were at some time under one form or another of British rule.

Between 1911 and 1918, there had been passed legislation dealing piecemeal with various industrial sectors in South Africa. With wide unrest on the Witwatersrand in 1922, a comprehensive effort started to regulate relations between management and organised labour. This resulted for example in the Industrial Conciliation Act (11) of 1924. The objective then was containment and control of any form of organised worker activity and thus a severe impairment of the enjoyment of the provisions of Convention No. 87 (4).

In Botswana, the genesis of labour law was the incorporation of Bechuanaland into the Cape Colony in 1895 and the *de facto* assimilation of all existing laws thereof. Until 1965 therefore, labour law in Botswana was the same as for South Africa. Unlike South Africa however, the first labour organisation, the Francistown African Workers Union, came into existence much later in 1948 under very austere, constricting and discriminatory circumstances (5).

In Swaziland, the evolution of labour law occurred within the context of monarchical governance but dates back to the period before the Anglo-Boer War. The actual influence of the monarchy in this regard came later and was underpinned by the State of Emergency of 1973. As in Botswana, the influences were both British and Roman-Dutch law. Though there was the ubiquitous Trade Union and Trade Disputes Proclamation of 1942, there were no unions then. In 1976, Swaziland joined the ILO and ratified 16 Conventions including those on Freedom of Association and the Right to Collective Bargaining. In 1980, the Industrial Relations Act was enacted. Subsequently, significant elements of the 1973 Decree have been reactivated. Though the Industrial Relations Act was amended twice in 2000, labour legislation is still perceived as restrictive.

The core components of labour law which one would expect in a given regime of employment law also imply the essential ingredients of good industrial relations. These are issues of freedom of association, freedom of expression, employers' associational rights, trade unions and recognition, collective bargaining and agreements and dispute prevention and resolution. Embedded in these are references to fundamental human rights as enshrined in the respective constitutions and ratification of the relevant conventions of the International Labour Organisation. That these perceptions have not yet translated into common employment policies and legislation is in itself indicative of the ground realities that qualify the desideratum of a common framework of labour employment law.

At the moment, it would appear that this is a newly evolving area of study. The SADC Tribunal, the nearest to a supranational regulatory institution and intended to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty, has just been constituted. More importantly, we are mindful of the very few seminal works undertaken since 1990. These include Woolfrey's work on Harmonisation, Kalula et al on labour standards and regional integration and Hepple's admonitions among others. (6)

1.1 Objectives of the Study

This study is based on a comparative approach to labour law and industrial relations in Botswana and Swaziland. The overriding aim is to study, examine and identify ways in which the ILO Convention 87 has been implemented. This would enable us to draw certain conclusions regarding the possibility of achieving a mutually acceptable and workable framework for labour law at least in the area of association and organisational rights.

This study traced the history of the development of labour law in both Botswana and Swaziland and differentiated between the labour law regimes in these countries. It then compared them . The study also attempted to identify the core and strategic commonalities, philosophy and ethos that can constitute the corner posts for a potential common platform for full enjoyment of the freedom of association by all workers within the SADC in future.

Specifically, the main focus of this study has been the following achievable objectives.

- to examine the historical continuum, functions, actors and effects of labour law in Botswana and Swaziland with particular focus on the implementation of the provisions of ILO Convention No 87.

- to review existing literature in order to establish an appropriate conceptual and jurisprudential framework for the study of labour law in Botswana and Swaziland in the context of regional integration the SADC.

- to conduct a detailed comparative study of the systems and regimes of labour law currently applicable in Botswana and Swaziland in order to draw up inferences that can lead to a potential harmonisation, review or transformation of provisions relating to freedom of association and the protection of the right to organise.

- to ascertain what the real and potential obstacles are and the ramifications thereof of a proposal to find common ground for labour law within the SADC Community with Botswana and Swaziland as test cases.

- to propose some theoretical framework and modalities that could lead to a synthesis of the existing systems so as to achieve, strengthen and sustain the attainment of industrial peace and stability such as can accelerate mutual intra-

regional growth and development.

- to provoke interest in the further examination of and research into this area, given the realities of the history of social power relations and the levels of competitive industrialisation in Africa in general and the SADC Sub-region in particular.

Review of Related Literature

Comparative labour law enables us to gain a more extensive knowledge of the law in the broader sense of other countries through scientific analysis of the content and practice of labour law. By so doing, we identify, study and understand the similarities and differences. Having understood, we can then also explain these similarities, differences and the causes of such phenomena. We are thus able to see the eventual trends and developments across national borders.

Comparative labour law aims at identifying and comparing the ways in which power relationships are set up, how power is distributed and how the balance of power is achieved and sustained in different legal systems (7). It also seeks theoretical foundations for resolving fundamental questions regarding among others;

- long-term extensive effects of legal regulation on collective labour relations.

- how labour strife is controlled and the impact thereof.

- the methods invariably adopted and at what social and political cost.

- how worker participation is effected and the forms it takes.

- how to derigidify labour law without losing its protective elements and

- analyzing the impact of government interventionist policies in the economy on labour relations.

Comparative labour law therefore does not only see similarities and differences. As an analytical tool, it is intended to help identify the social phenomena, examine the legal system and its operative scope bearing in mind the socio-political dynamics of the state.

It is believed that modern labour law is larger than both labour law and the issue of employment per se because it deals with work in a manner in which work is and will be organised in today's world and the work world of the future (8). The issue becomes one of a distinction between what the law is and what it does or should do. For some, labour law serves to preserve industrial peace by acting to confine and contain the manifestations of conflict which are endemic to the entire system of industrial relations. According to Davis its function is the "preservation of the social and economic structures prevailing in society at any given moment for restraining the conflictual relationship between employers and employees (9). However, it could also function as a liberator of the creative energies of workers and employers in their search for mutual advantages.

Traditional labour law was protective because it was premised on the understanding that labour was often sold under special disadvantages arising from the fact that labour power was perishable and its sellers commonly poor and having no reserve fund and could therefore not easily withhold it from the market. This perception explains Kahn-Freund's theory of the relationship between law and industrial relations and the restraining parameters of the law within which the collective *laissez-faire* of the times was practiced (10).

Essentially, modern labour law is an amalgam of terms and principles, concepts and rules of common law and statutes. Statutes therefore do not redefine the employment relationship per se but deal interstitially although having the effect of changing the legal content and effect of the relationship (11). Therefore in examining labour law, there should be the need to look at both the statutory framework and principles of contract, property and obligations (12) Labour legislation is not only a process of conferring rights but of regulating business activity by attempting to strike a balance between management autonomy and worker protection. It does this by providing obligations which, characteristically, leave a scope for common law principles and judicial decisions.

Labour law in the main can thus be considered as the result of a felt need to legislate for an effective combination of individual and industrial justice with collective representation. There is the further need however, to integrate that combination with state responsibility for engineering a socially balanced and reasonably humane allocation of national resources. (13) In addition to the conventional issues of employment relations, dismissal, wages, health and safety, compensation, trade unions, employers organisations, collective bargaining, the

thinking is that labour law ought to include location of industry, industrial organisation, education and training and labour market regulation, migration and immigration issues (14).

We have seen the situation in which law has assumed that the collective and individual aspects of work relationship should be treated separately. However, it is becoming increasingly clear that the individual and the collective must go together. Unions have been considered by law as legal persona distinct from the individual membership. Further, this situation has been aggravated by the perception of the worker collective as a bureaucracy of its own, spawning its own aristocracy which may not be in communion with the worker's desire to be treated as a person and consulted about issues affecting his welfare (15).

These mass groupings exhibit a chronic lack of presence and organisation at the workplace which suggests that different levels of agreements need to be reached at plant, industry and sectoral levels and coalesced into what will cater for individual aspirations. In effect, the individual contract must see its fruition in the voluntary collective agreement. Therefore, where a collective agreement mechanism is prescribed by law, the Union becomes meaningless as it functions only as a means of demonstrating the existence of collective bargaining as an indicator of stability not mutuality or consensus.

At the root of these considerations is the assumption then that freedom of association and expression, together with the right to organise permeate, indeed define the quality of the industrial relationship whether one is dealing with private or public labour law. It is understandable that certain restrictions are unique and required for state employees as opposed to private employees. However, any qualifications or detractions from the full realisation of the benefits of full implementation of Convention No. 87 regarding freedom of association, speech and organisation need to be critically assessed and adequately justified.

Labour law has, as of right, its own massive literature as attempts have been made since the Webbs, to locate worker organisation and the related issues within the milieux of both the sociology of work and the juridification of property and work relations (16). In the past, worker collective aspirations reflected the polarisation of relations between capital and labour, what Khan – Freund referred to as "relations of power". (17) Today, it is postulated that the role of trade unions is dwindling in terms of their countervailing power because of individualized worker economic affluence. However, this is not

yet the case in Botswana and Swaziland (18). It is noted that unlike in South Africa, the degree of influence of the Union in Botswana and Swaziland is weak because of several factors, including the political and the legislative and the economic weakness of the worker both at individual and collective levels.

As shall be shown, the common law supremacy of the employment contract has, since the era of the Master and Servant Acts, long given way to a debatably more pragmatic and humane intervention through legal regulation of the employment relationship and the effects of collective agreements. (19) This is amply illustrated today by the Labour Relations Act (1995) of South Africa follow up amendments, and its the Employment Act (Cap. 47:01) of Botswana as amended, the Labour Relations Act (2000) of Swaziland and the Labour Code (Amendment) Order (1999) of Lesotho meant to regulate and streamline employer and employee relations in these countries.

For the purposes of this study, what is in need of discursive and probative documentation is the scope of acceptance of minimum international labour standards followed by the desirability of a given standard framework law and how this may impact on the realities of workplace relations. How these affect national sovereignty and ultimately translate into growth, development and the requisite quality of life of the people within the SADC community are not immediately clear. They are however key factors that need to be grappled with.

Recent literature contends that because of strategies such as "outsourcing" and the use of the "atypical worker", collective employment law has not much of a future. Reality however suggests that basically, and essentially, the march towards economic affluence for the worker must begin with an acknowledgement of the real vulnerability of the individual worker relative to the starkly clear material advantage of the employer. Added to this is the incontrovertible fact that democratising the workplace cannot occur where individual workers are overwhelmed by the sheer dependency on the employer (20). We are also mindful of the historical tendency of employees to recognise at one stage or the other that their strength lies in their collective organisation and action. This is evidenced by the initial emergence of craft guilds and later trades and unions and the replacement of individualism with collective bargaining (21). Thus, individual and collective labour law depend on each other; one to initiate the employment relationship and the other to consolidate the gains thereof.

We reiterate Kahn-Freund's assertion that law is primarily a technique for the regulation of social power which is inherent in labour relations. This social power is manifested in the inequality of bargaining power in the employment relationship. The need to collectively bargain and the advisability of regulating this potentially fractious process gives rise to different regimes of labour law [22]. Collective action and legislation are also indicators of the legal fiction of the sanctity of the private contract. In the main however, it is the collective agreement rather than legislation that tries to provide and anchor the realism that must underpin the employment contract (23).

To some extent therefore, collective labour law is the law governing collective agreements. Essentially, the reality is that in bargaining collectively with organised labour, employers seek to ensure that their legitimate expectation of uninterrupted production is maintained. Similarly, by so doing, employees also ensure that their legitimate expectations that wages and work conditions will guarantee a meaningful existence are secured (24). This mutuality of expectations could flourish more with less aggressive state intervention to regulate and control the process.

Historically, the inability to achieve betterment through either the corporate Unitarian logic or the total control paradigm of scientific management resulted in "the most important marginal modification of all – collective bargaining" (25). Initially, some employers perceived collective bargaining as a threat resulting in greater assertion of the employer prerogative through coercion and manipulation. The corollary was more determined resistance by workers. An urgent need therefore arose for an arbitral mechanism prescribed through legislative intervention.

Workplace arrangements cannot always be legitimized and justified as being grounded in consent. As such, insecurity is often engendered by the contract model of employment and the unilateral rights of termination. Arguably, to obviate this, collective agreements grounded in consent but institutionalised by laws is the best and most permanent way to industrial peace and harmony. (26) This, in any case has helped to prevent and to manage the risks arising from workplace disputes.

Labour law may also be described as part of the institutional and legal superstructure within which the work relationship is accommodated. That being so, as long as work relationships persist, workers would seek to improve their lot through more meaningful participation in decisions that affect their lives and often militate against their self-esteem and self-actualisation.

To this extent therefore, regulatory mechanisms would be required to mediate in this interaction with employers. The problem however is the strangulation and emasculation of worker organizations that result from over-regulation in some cases.

As said by Shivji, the institutions constructed to regulate social relationships such as employment, mirror the society's most basic economic and philosophical beliefs. As such, where the law creates room for greater play of democratic values in the work place, it implies that there is a shift in state perception of labour relations. This is manifested in the profound changes encapsulated in the new Labour Relations Act of South Africa for example. [27] Equally, it is evident in the unwillingness of some states to create the environment for such democratic interplay. There are other role players outside the law of contract and the common law in the employment relationship. As expected, Olivier mentions legislation and the courts. Regulation by juridification enables collective agreements to be legalised and enforced. These often take precedence over the traditional terms in a contract (28).

The importance of labour law then, is not as an intrusion into the contract but as an instrument in redefining the status of the parties in the employment relationship. We observe that the imposition of rights and duties irrespective of volition of the employee is subservience and subordination in practice. Equally, the inequality of bargaining power between the employer and employee is a fact qualified only in certain cases. This is why labour law assumes the obligation to regulate and enforce presumably collective agreements so as not to suggest the submission of one party to the other. To this extent, its intrusion is justifiable.

Collective labour law provides the framework for both statutory and non-statutory collective agreements. It hopefully enables the achievement of effective collective bargaining. This being arguably a voluntary process, it fulfils two major functions; economically, it serves as a device for regulating both individual and collective workplace relations and institutionalizes industrial conflict. (29). Politically, it brings a degree of democracy into the industrial processes, giving employees a say in what affects them.

Industrial conflict or dispute is considered as an issue that qualifies for legislation and policy formulation obviously because of its destabilizing potential. Collective labour law therefore procedurally and substantively deals with industrial action, providing restriction policies which aim at ensuring that social

and economic life do not grind to a halt in the event of mass industrial action in key sectors or even in individual enterprises (30). More importantly, a recognition of the inherent place of disputes in the workplace provides a better attitude towards dispute resolution. In doing so, the law needs to ensure that the border between its positive and negative effects is not crossed through excessive regulation of details. The relevance of a collective labour law regime is thus indisputable as long as employers and employees continue to engage each other constructively in the workplace.

As to whether the SADC community ultimately requires standard aspects of collective labour law, it is common cause that migrant labour from all its component States has been the backbone of the South African economy as much as imports from and exports through South Africa have sustained the other economies in a collaborative dependency. [31, 32, 33) This symbiotic relationship requires some forms of common regulatory framework.

The Community, according to the then Chairman of the Council of Ministers, Hidipo Hamutenya (Namibia) has indicated that a restructuring is under way with emphasis on trade, industry social and human development. (34) It is expected that the issues of dispute resolution, common treatment, access to common rights and privileges would be a logical corollary of free access to the regional labour market in the future.

Conceptual Framework

As earlier said, comparativism enables one to have a better insight into different national legal systems. In doing so, it facilitates an analysis of foreign systems that help put one's own into proper perspective regarding problems and methods of resolving them. (35).

The *'relativisierung'* of the local system results in an objective and incisive examination through the mechanisms of interpretation offered by foreign theoretical and doctrinal perspectives. Therefore while contributing to the formulation of theory away from dogmatic discourse, it enables some degree of forecasting in the light of emerging trends. While comparative labour law may not serve an immediate, daily functional end such as the formulation, administration and interpretation of national laws, it does, for purposes of development and standardization, perform a critical informative and normative function.

The concepts of Freedom of Association and Expression and Protection of The Right to Organise are central to this study. Also central is the question of the applicable common law, bill of rights, international labour conventions, domestic legislation and policy. Since labour law deals with organised labour, trade unions and their activities as provided for are discussed also. At the core of this is the assumption that strikes form part of the freedom of expression and the right to organise. Dispute resolution and the role of the courts and administrative or quasi-judicial tribunals also form part of the discourse.

Freedom of Association and by implication the freedom of expression coupled with the right to organise fall under the core ILO Convention No 87. Compliance with this convention is not only through ratification and moral persuasion. Respect for these provisions emanates from an inherent obligation through membership and the municipal constitutional provisions and Bill of Rights. In effect, the principles evoked here form the foundation of the Governing Body's Committee on Freedom of Association. They are generally binding irrespective of ratification. However, these principles are generally interpreted by reference to the Conventions i.e. 87, 98. The question of how much limitation to these human rights are sufficient for compliance purposes is difficult to answer as some less developed countries would rather not be bothered (36).

On the other hand, the question of multiplicity and proliferation of weak unions resulting in competition and acrimony needs to be addressed. In effect, an unfettered enjoyment of this right could lead to greater individualisation, lesser collective bargaining and a more vulnerable employee. Adeogun posits that the presumption of equality tends to ignore social and economic realities informing the employment relationship particularly in the face of excess supply of labour (37). Roper believes that trade unions prefer integrative legislation as their best guarantee against abuses by the employer (38). The nagging question however is, the true function of legislation and whether the state uses it to assert its imperative neutrality or its economic and political interests. (39) The parameters set and modalities prescribed so that unions and their collective agreements are given legal effect, may indicate what is at stake for the state (40)

Labour law is also aimed at dispute prevention. It is agreed that workers would go on strike, whatever the law may have to say about it. (41) This is essentially because a strike is a concerted stoppage of work by workers done with a view to improving their wages or conditions of employment or giving vent to a grievance (42). Strikes trace their legitimacy more to the principles of the

ILO regarding association and organization than to statutes. This is not to say that the key objective of domestic labour laws is to proscribe strikes and punish any form of social protests. (43)

A future commonly agreed framework law in the area of freedom of association and the right to organise will, it is hoped, first rationalize and synthesize the emerging schools of thought. It could then attempt a contextually workable approach to enabling industry maximise its potential and workers to achieve greater security and actualization of their human dignity and worth. In the short term, Botswana and Swaziland would become the torchbearers for the SADC community.

It is noted that co-operative management and co-ownership are some of the concepts aimed at putting the issues of quality worker participation on the social agenda. Workers need to be empowered to identify with the future prospects of the organizations employing them by helping them to run the companies they work for. This could result in industrial stability. Yet even though all European countries have some form of works councils, only Germany, Luxembourg, Denmark, Greece and the Netherlands offer employees a say in corporate decisions (44).

This trend ought to be the direction of the future. For now however, what prospects there may be for common labour law and other frameworks can be energised through greater education and internalization of the substance and social import of the relevant laws and its potential for greater mutual progress within the sub-region.

1.2 Hypotheses

The study tackles the hypotheses that follow:

- that Botswana and Swaziland as SADC countries are not anxious to liberalize sufficiently by loosening controls over work, associational and organisational rights. They appear reluctant to standardize their employment practices and legislation because they fear an erosion of managerial control, loss of sovereignty and a volatile industrial environment.

- that given the historical relations between these countries and their economic dependence on South Africa, most of what pertains as functional human rights in collective labour law is already similar and can therefore be acceptable if rationalised.

- ❖ that employers, including the state who are not conversant with local and international collective labour practices and norms feel safer with the time-worn theories of management practice and see innovations as only employee – friendly and anti-business. In addition they are wary of social clauses that define minimum standards.

- ❖ that standard, clear, simple and feasible frameworks such as in the area of freedom of association and organisation augur well for industrial democracy, employment creation, industrial stability and easy access to quality manpower.

1.3 Methodology

This research is essentially a socio-legal one. As such, the approach is functional. A "functional" approach facilitates comparative study because it focuses on what is occurring and the motives for a particular form and content of legislation or law. It is not intended to compare institutions and structures but their organic roles because while structures may differ, their functional, raison d'etre could be the same.

The functional approach also enables us to go beyond an analysis of the juridified texts and take into account agreements founded on norms and workplace practices, rules, judicial decisions and stake-holder opinions. Thus, studying a problem within the total context and content of legal and industrial relations enriches the experience.

The functional approach is complemented by the "model" approach in which paradigms or theoretically contrived models are examined to ascertain the distinct ways particular problems have been addressed, not only in Botswana and Swaziland but also in the wider international context. Ultimately it is expected that one could harvest a panorama of types of approaches used to solve problems like the ones addressed.

In effect, whether a common framework or harmonization is attainable in the long term could depend on for example;

- ❖ the key short-term factor of how Botswana and Swaziland actually implement aspects of international labour standards using any of the following:

- ❖ the transplantation of foreign juridical phenomena

- ❖ the acceptability of a common social charter

- ❖ adoption *in toto* of the ILO framework
- ❖ constitutionalism and an integrated Bill of Rights
- ❖ binding treaties and protocols

The study mainly involved a documentary analysis of the socio-legal context of labour law in Botswana and Swaziland. This provides a tableau of the regimes of law currently applicable. This necessitated a concise demarcation of the key elements, points of convergence, lapses and differences based on very clear jurisprudential and conceptual approaches applicable to a functional structure of collective labour law. In so doing, it has been hoped to capture not only the letter but also the spirit of the laws. A broad survey of public documents such as those from the Department of Archives and National Records, Departments of Labour, reports of the Economic & Labour Sector (ELS) of SADC and other relevant works was also undertaken.

We also benefited from examined Awards and Agreements and other information reflecting efforts at, complaints, restraints and documented strategies intended to stimulate the full implementation of Convention No 87. Industrial Court and other tribunal proceedings were also examined. In depth interviewing was also utilised in preference to quantitative surveys of non-critical elements. This enabled access to rich and selective sources of data from key social actors for the study. This multi-level survey was carried out cutting across all sectors of society but focussing mainly on employers associations, trade unions, SADC functionaries, officers in the Departments of Labour and ordinary citizens. Questionnaires were used to solicit responses on diverse areas of the research. The questionnaires also solicited suggestions towards achieving this goal. The responses have been integrated into the write-up although the questionnaires are attached as appendices.

Questions on the questionnaires were drawn to conform in part to the 'five point Likert scale 'attitude items' adapted from a study carried out by Gerald T. Gabris. (45) Gabris carried out the study at Biloxi in the State of Mississippi, United States of America (USA). The city of Biloxi had just changed its system of government from a commission or 'weak mayor' form to a 'strong mayor' council (46). With a new form of government, the Biloxi bonus system which was awarded to employees on an annual basis following an appraisal of their performance was based on merit ratings. Gabris wanted to find out if 'employees accepted the changes and organizational reforms just introduced, whether the organizational reforms and changes

had been well planned and thought out, if supervisor had trust and confidence in their subordinates and whether the indicators developed to assess employee effectiveness were accurate and valid. These questions were modified to suit the circumstances of the study of the need for change and its potential effects in the employment law milieu within these countries.

The five point Likert scale attitude items technique offers respondents a choice of answers ranging from 'strong disagreement' through just 'disagreement', being 'neutral', or in 'agreement' to having a 'strong (intense) agreement' with any given statement of the study. The responses were categorised separately for comparisons of the perceptions of the various groups of respondents. The comparisons were used to draw up inferences on their attitudes concerning the changes envisaged in the standard framework.

Given the fact that some administrators, mindful of security considerations, did not respond to questionnaires, confidential, personal interviews were also undertaken as indicated above. (47)

1.4 Significance of the study

This study is about the emerging trends in labour legislation in Botswana and Swaziland within the context of SADC. It used the implementation of ILO Convention 87 as the instrument of measurement of the potential for a long-term common labour law framework for the SADC. Generally speaking, this may not be the first of its kind. Given the context and the focus however, the study will enrich the store of data in this area and provide additional new vistas. The study also has a long-term intention. This is to test the viability of harmonizing the assorted body of labour legislation through the comparative study of the labour law regimes in all the SADC countries as a step towards practical regional integration. This is apparently the direction of thinking within SADC itself. It is expected that the recommendations will be of benefit to the SADC community as a whole in its march towards integration. In addition, it might have a certain attraction in terms of historical continuity for practitioners of industrial relations and labour law within the sub-region. The study should also serve as a theoretical base for further research in the field. Since the problems of differentiated treatment, structured privation and deprivation are not limited to Botswana and Swaziland, the study should equally raise useful information for other African brothers and sisters.

Comparative labour law has several advantages and naturally, some limitations. While it may not impact significantly on local legal practice and even juridification, it offers an informative window to the non-tourist student and persuasive examples in judicial interpretation and jurisprudence.

South Africa has had a marked influence on the legal systems of its Southern African neighbours who, at different times were satellite states and labour reservoirs. Moreover, given the more advanced labour law systems in South Africa, it is a natural referent point.

In international private law, globalisation and labour migration within regional and international spheres make comparative law mandatory. Issues of the laws of countries of origin and the location of work and therefore of applicability are becoming increasingly critical in resolving contractual disputes. In line with this, multi-national corporations and international trade union structures such as the International Confederation Of Free Trade Unions (ICFTU) closely monitor legal systems to identify cheaper production environments for abuses of workers.

The normative position of the ILO ensures that even the liberal democracies are policed in terms of compliance with basic rights. More importantly, there can be interplays between countries and international organizations. For example, the ILO Recommendation 119 of 1963 was influenced by the German law requiring justification for dismissals. Recommendation 119 then influenced the British law on Unfair Dismissals. The OECD's Voluntary Guidelines For Multinational Enterprises (1976) relied on the EEC Directive on Collective Redundancies (1975). The ILO Declaration of Social Principles For Multinational Enterprises (1977) would appear to be in full agreement with the OECD guidelines (48).

Local legislative efforts, particularly in developing economies have tended to find imitation, transplantation or very close interpretation and assimilation or integration of international laws and principles as practical approaches to evolving their labour law systems. South Africa's new Labour Relation Act (LRA) would appear to be a case in point.

Chapter II of the LRA (Freedom of Association and General Protection of the Right of Organise) is closely modeled on ILO Convention No. 87. Chapter III (Collective Bargaining) and Chapter IV (Strikes and Lockouts) would indicate that the Italian preference for strong organizational rights and the right to strike were opted for instead of the American mode of Duty To Bargain At Plant Level. Regarding Essential Services, it would

appear that the Italian and Quebequoi laws were modified and adapted. Chapter V (Workplace Forums) owes much to German and Swedish ideas on Co-Operative Workplace Consultation.

The Commission For Conciliation, Mediation And Arbitration would appear to draw on the Australian Industrial Relations Commission and the Conciliation and Arbitration Services of Britain. The exclusive jurisdictions of the Labour Court (LC) and the Labour Appeal Court (LAC) in South Africa are influenced by German and Israeli models. (49) The Industrial Court in Botswana also enjoys exclusive jurisdiction over trade disputes as a court of law and equity similar to Britain.

Limitations of Comparative Research

The main draw back to the comparative approach is the dearth of resources, both human and material. For example, the University of South Africa (UNISA) and the Institute of Development and Labour Law in the University of Cape Town (UCT) are the few repositories of rich material for research, in the areas of compiled comparative literature, journals and occasional papers. The material source of information is not readily available such as collective agreements and case law from other parts of the world.

Often, the terminology of discourse is conceived and couched in ideological contexts as dictated by the episodes of national socio-political evolution and accompanying philosophy and diction.

1.5 Outline of the study

The study is divided into seven chapters. Chapter 1 deals with the introduction to the broad range of issues to be raised in the study. Chapter 2 deals with the conceptual framework of labour law in the context of the study. Chapter 3 focuses on the evolution of labour law in Botswana, followed by that of Swaziland in Chapter 4. Chapter 5 covers the ground realities of implementing freedom of association and protection of the right to organize in both Botswana and Swaziland. In Chapter 6, we examine the theoretical and practical issues involved in designing a viable framework for a common labour law regime. General observations, findings and recommendations are tendered in Chapter 7.

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Chapter 2

2.0 Towards a Contextual Understanding of Labour Law

This chapter intends to deal with a range of theoretical issues that underpin labour law. It is not only advisable but structurally appropriate to seek an acceptable context for the purposes of the study.

It attempts an admixture of an overview and analysis, the purpose of which is to explicate the myriad theoretical issues that seem to define and locate labour law within a particular milieu. It is not intended as a critique per se but more of an exploration and affirmation of the ideas that have helped to shape labour law. This conceptual context would assist in examining more closely the various underlying currents in Botswana and Swaziland .

The presumption is that, for labour law to help in the future attainment of closer cohesion and integration at regional level, it must first seek to understand the individual dynamics of the communities whose social interactions it intends to affect. To do this implies a fine affinity to both the historical and contemporary needs of the worker and the environment in which he operates. Secondly, we assume a premise that though worker aspirations will differ according to levels of socio-economic development, there are fundamental commonalities historically, socially and economically which these societies shared prior to specific nationhood and its environmentally determined trajectories. These commonalities such as poverty and deprivation, communal bonds, family loyalty and traditional practices could indicate certain common aspirations of man to be gleaned from the world of work and other social formations.

2.1 Introduction

The job of the development of a jurisprudential science is to get nearer to life, social reality and to analyse experiences so far gained and elaborating on new elements. By implication, the development of a branch of science such as labour law is characterized by its ability to grasp the complex character of tasks presenting themselves and solve them with the co-operation of other branches of science (1).

Law, particularly comparative labour law requires an appreciation of the inter-disciplinary nature of its study. The issues involved deal more with social effects than abstract rules. To this extent therefore, while the law makes greater social sense in given contexts, nevertheless, the philosophy informing

it is equally important.

To grasp this, one cannot ignore the roots of law and for that matter the lessons and directions such origins offer to the students. One also needs to identify the connectivity of history, law and social development and the interrelatedness of laws of those countries in particular who have at certain stages in their social development, experienced same or similar forms of economic exchanges, including political and other forms of administration.

Pollock and Maitland consider that the discussion of laws in general belongs to theoretical politics, not the dogmatic science of law because, while a philosopher may be able to learn the art of law from a lawyer and become good at it, a lawyer may not necessarily be that good in philosophy. This is because legal science is ideally not the result of political or ethical analysis. Rules of law derive from facts of human nature and history (2). Rules derive from perceived public authority rather than social custom which may derive from personal authority, whims or caprice. Herein lies the legitimacy of legislation. In an ordered society, we see laws and institutions for seeking redress and imposing penalties. Law therefore is a matter of fact for the conduct of social life.

Rules of law are not rules of morality even if their logic and authority may emanate from collectively experienced norms and morals. For example, the concept of vicarious responsibility of an employer for an employee's actions is not rooted in moral equity but the legal fact of the instrumentality of supervision and subordination arising under the common law employment relationship.

Morality is often wrapped in arguments and subjective interpretations of the law of nature or of God. But morality in itself, becomes contentious when the God becomes hostage to the dogma of a given religious sect or association. In a community therefore, there can be different levels and strands of morality as there are theonomous, animist, and antinomous groupings. On the other hand, legal precepts apply to the generality of that community as conditioned by the socio-economic basis and the prescribing political superstructure.

The theme of comparativism and interconnectivity of legal regimes applies not only to Botswana and Swaziland but to the generality of legal systems. English law before the Norman era was purely Germanic and its original form as British Custom, though existent, is now overshadowed by the organic mix of Celtic and English law. To this, we may add the Greek, Roman,

Slavonic and other influences just as the Dutch brought Roman/Dutch law into an amalgam of English law and local custom in Southern Africa. (3)

Romanic law influence survived all the post Roman invasions not as imperial law but as ecclesiastical or Canon Law. This heralded the Augustinian era and the role of such rules as the Latin Charters in the *Codex Diplomaticus*. With the Norman conquest came the modes of governance adopted from the French who had their own Roman influences. This led to what is referred to as scholarly revival of the classical Roman Law as encoded by Justinian.

Thus between 1150 and 1250, English law was reshaped and modified but never completely obliterated by the Romans, just as those of the French and Germans. In a similar vein Roman/Dutch law in South Africa as the name implies is the operative legal system which acknowledges both English law and the indigenous customs and rules in a functional mix. It is within this background and framework that the labour law regimes of Botswana and Swaziland evolved.

Legal history performs a necessary linkage function also as it explores and explains the commonalities. Roman law as received in South Africa came through a merged process with Germanic law which was dispersed throughout Western Europe prior to the arrival of Jan Van Riebeeck from Holland in 1652. This comprised mainly of Justinian *Corpus Juris Civilis* and Canon law or the *Corpus Juris Canonici* which was based on Roman law as initially codified and later assembled by the glossators (4) Roman/Dutch law (placaaten) was later codified and applied in South Africa through the works of De Groot, Voet and Van Leuwen among others. The English influence began in 1806 and culminated in the passing of the South African (Union) Act in 1910. Thus British legislation and *stare decisis* or precedent became applicable to South Africa and neighbouring states of Swaziland, Lesotho and Botswana where Roman/Dutch law had earlier been exported including the quite iniquitous Master and Servant Acts.

Labour legislation and industrial relations law as manifested were thus invariably initially dictated by the history and socio-political episodes occurring in Southern Africa. Generally speaking, individual and collective work relations and the industrial relations system would appear to be more exposed than other sectors of economic and social relations to a multiplicity of sources of legislation and regulation. The industrial relations system would normally experience the regulatory influence of the Constitution, Codes, special statutes,

collective bargaining agreements, rules and regulations, custom and practices. Each source of rules traces its roots to a legal entity equipped to generate such a rule. Such an entity then exercises social power aimed at influencing other entities or persona with which it creates or shares a relationship.

This institutional co-existence operates within a given order of social power which in itself is dynamic because labour law and industrial relations are subject to the throw-ups of the wider socio-economic and political variables. For example, collective agreements may be episodic, subject to changes in work conditions. Trade disputes could also be resolved in innovative ways that typify the sub-cultural norms and ethos of a plant or workplace (5).

This constantly shifting chimera of work relations tends to reduce the durability and relevance of laws which then poses the question of how best labour law could anchor itself on a platform of concrete and operational legislation that can lend it the elasticity to continue to function effectively as a rule of behaviour. The measurement, it would appear, has to come from the legitimizing constituency such as workers and citizens in Swaziland or Botswana.

Labour and industrial relations could be better studied through examination and evaluation of the form and function and purpose of a given set of rules. As techniques for regulating social power, they are however not enough to explain the phenomena associated with labour; its psychological, political, economic, spiritual and cultural permutations. An understanding of the law would also enjoin its inter-disciplinary linkages with human resources management, trade union history, labour economics and the sociology of labour (6).

In defining labour law therefore, one is mindful of other usages. The concept may encompass industrial safety, employment law and industrial relations law (7). Labour law should therefore be seen holistically as involving discipline, statutes (both regulatory and auxiliary) standards and collective bargaining. Its sources are the common law, social legislation, codes of practice, public law, administrative practices and government institutions, the state, constitutional provisions and the courts.

Labour law may still be overshadowed by the common law particularly in the courts of Botswana and Swaziland where it enjoys an understandably pervasive continuity. As such, work related judicial decisions still follow precedent and procedure while the employer prerogative and archetypal models of the master-servant relationship also prevail. Collective bargaining

within certain structural prescriptions such as work forums and bargaining councils is not seen as "illegal" and a restraint of trade. Immunities granted are viewed as exceptions to the common law which must be narrowly interpreted.

It is postulated further that statutory provisions on employment contract also negate the contract at will (8). The thrust of this argument is that the inherent prices and cost of non-compliance and a resort to private litigation ought to be adequate checks on both the employer and employee. For example, both parties are supposedly opportunistic and know that private gain equals private cost. Moreover, while the employer suffers in terms of replacement cost, reputational loss and so appreciates the cost of applying the right to terminate the contract, the worker would equally suffer a re-employment cost. This argument is indicative of the current debates on the sanctity of the contract and the purposive assault on collective agreements and unionization.

Benedictus and Bercusson suggest that labour law might have begun in an academic sense with Wedderburn's survey of the terrain in 1946. Kahn-Freund had by then asserted that labour law was the contract of employment and a bit of protective legislation (9, 10). By 1950, there was still no satisfactory literature on individual labour law or collective employment relations until Kahn-Freund's breakthrough. This then provided both an analytical and historical framework for thinking about all aspects of labour law, particularly British.

Kahn-Freund's work resulted in a move away from legal categorization into contract, tort and statutory prescriptions as the basis for labour law. In its place was introduced the concept of labour law through the analysis of collective bargaining, trade unions and disputes within a regulatory framework. Labour law thus became affiliated to workplace relations, industrial relations and collective bargaining .

Our contention is that labour law has to be about labour and labourers, irrespective of the connotation or it ceases to be of relevance. Work, as we know, is the application of labour power emanating from the worker. It was not intended to be the process engineered to extract surplus value through greater productive effort. Problems exist at work which have no defining legal concept. This does not sublimate them. There is the notion of a floor of rights defining workplace relationships. Given the discrepancies between municipal laws and ILO Conventions, labour law should demonstrate a concern for how these basic rights are translated into statutory provisions.

Mitchell asserts that functionally, labour law would mean the law of the individual worker, the job seeker, the unemployed and the marginalized (11). Should labour law be considered in terms of purpose, it would mean a social framework within which workers negotiated their rights and interest with employers through collective organizations (12). This would entail collective bargaining structures, collective representative organizations, and implicitly the right to industrial action as a countervailing force to the employers' power and unilateral right of termination. This accepts a necessary socialization of the actors in the production process.

Where labour law denotes normative principles , then it should be such law as helps to shape the labour market and the relationship of work with regard to the worker in particular. That being so, it would include issues of location of industry, industrial organization, training, placement, mobility and worker welfare. It would thus be positioned to deal with the manner of work organization for the future (13). Additionally, certain basic normative social objectives must characterize its purpose and function. These would include shared employment, freedom at work and the right to equitable wages, participation and the legal forms thereof, the internal and the external labour market and accompanying regulation.

Labour law has therefore, until the current debate, concentrated on state juridification, judicial interpretation, aspects of common law, codes of practice, trade unions, industrial conflict, conflict resolution and auxiliary rules regulating procedural aspects of collective bargaining. Entry into and exit from the labour market was regulated by both the state externally and by employers as per their own calculations. The state at times played an arbitrary leadership role and set minimum wages. Where tripartism was practiced, the social partners were represented according to the dictates of the state as in Botswana and Swaziland.

Historically, labour and work relations were guided by different strategic approaches. These included abstention, collective laissez-faire, state corporatism, politics of exchange and intense intervention. Underpinning this was the socio-economic structure or property relations and how these were perceived and protected through juridification and juridical interpretations. While the impact of labour law has been selective and varied, what stood out was that there was no indigenous labour law but attempts at indigenisation of the various assembled legal precepts and influences received, imported and adapted into various codes.

In evolutionary terms, this ex cathedra origin of labour law laid the basis for comparativism and the internationalisation of labour law. Because labour law was initially perceived as industrial law, the socialization of production and the factory ideology meant that societies without any industrial base and bureaucratic forms of production organization could not and did not require the elaborate mechanism of labour law. *Ipso facto*, the regime of labour laws in the SADC region and Botswana and Swaziland in particular initially reflected only the pre-occupation of those anxious to regulate the extraction of raw materials and the creation of labour reservoirs.

Comparativism and Internationalisation of Labour Law

Internationalisation of labour law has become a relevant debate not because it is new but because of globalisation. Comparing laws of countries is comparativism while conformity to the norms of the international community would amount to internationalization. These distinctions are critical to our study.

Globalisation entails high levels of integration and interdependence of capital, labour and the markets. Fluid and constant migration of labour also entails that rights and protection may be won and shed as migration occurs both temporarily and permanently. National borders are also being rendered increasingly meaningless as goods, services and information criss-cross boundaries. Production is being moved to areas of cheaper labour cost by exceedingly rich and powerful multinationals as examples of trade liberalization. Regional blocs are emerging for purposes of integrating and collaborating economic relations in the hope of achieving social and political union in the long term.

While countries may not be able to resist these changes, they will inevitably experience the negative impacts of labour influx, capital outflows, excess liquidity and inflation, high levels of risk for both host and originating countries from the socialization in the work environment. The power of the industrialists could see the emasculation of trade unions and the creation of insulated export processing zones where minimum standards may not obtain. Depression of wages and use of child labour may also be seen as ways of achieving comparative advantage. Just as regionalism becomes a compelling starting point for the developing countries, so does internationalization of labour law for the worker and their aspirations in the less industrialized countries. It is as a bulwark of protection against abuse and exploitation.

Comparativism – Some Examples

The Hungarian example is illustrative for both Botswana and Swaziland albeit for future purposes. It is characterized by the ratification and integration of International Labour Organisation Conventions into a uniform code. There is no duality of the labour law system. The principal provisions of labour law regulate all spheres of work and workers under a Uniform Labour Code. The Code however acknowledges deviations originating from diversity of working conditions, training and location. The underlying theme is one of Equality of Citizens before the law.

From 1968 onwards, Hungarian labour law was characterized by national application of the Code with local regulations at plant or industry level agreed between Employers and Employees which may be enforceable at law. The Constitution guarantees participation in public administration of workers through collaborative management of the workplace and decision-making input as to the allocation of social and cultural resources of an enterprise.

The creation of unions is automatically guaranteed without registration or prior consent in line with ILO Convention 87. Trade Unions are constitutionally mandated social partners in labour legislation and regulation with extensive powers of control. For example, where rules and actions are perceived as intended to breach the moral and legislative content, their implementation may be vetoed. Unions may then initiate an investigation or a dispute to be resolved by the Courts. With the advent of the 1985 Labour Code, freedom of work from the age of fifteen years after primary school was ensured. Termination of the labour relationship could only be by writing and for a good reason. The termination of employment of those in need of social assistance was prohibited.

The Labour Code also provided for a forty hour, five day week with a minimum of fifteen days annual leave. Reward is performance based with the state in charge of labour safety supervision. The dominant features are therefore a uniform, constitutionally guaranteed social partnership buttressed by juridical support. The elements of prescription and exclusion are absent with no division into public and private sector labour laws.

These changes were prompted by a philosophy which sees labour regulation as integral to economic policy and increased privatization so that rewards could increasingly be determined by market forces rather than prescriptive wage levels. It sees a

functional relationship between effort, skill and recognition. It also sees democracy developing in social dimensions at work with Industrial Councils actualizing worker participation. The social ideology sees a legal framework whose function is to ensure that both within and outside co-operative enterprises, recognition should be the same.

Finally, the Hungarian system sees labour law as excluding social security, health services and social politics to be catered for separately within the macro-legal system. (14)

The Netherlands' example is of particular interest given the influence of Roman/Dutch law on the nascent labour law terrain and in fact its evolution up to 1990 in South Africa. As a result of its annexation and domination by France and Germany, the formation of Dutch law was through the Roman law *Oudvaderlandse Recht.* This was superceded later by the Dutch Civil Code (1838) Commercial Code (1886) and the Penal Code (1974).

The earliest phenomena of modern labour law are of French origin. An example is the ban on Combinations under the French Penal Code (Art. 414-416). Two principles of the French Civil Code on employment contracts were retained after re-codification in 1838 though supplemented by provisions from the ancient Dutch Master and Servant laws.

The slow pace of industrialization also slowed the pace of labour law development. As such, the first indigenous laws came between 1872 and 1874 as part of national development and thus openly reminiscent and reflective of changes in Europe. The repeal of the Coalition Ban of 1872 followed antecedents in England, (1824-25) France (1864), Belgium (1866) and Germany (1869). The General Labour Act (1919) and others were comparable to the Factories Act of England much as the Health and Safety Act imitated western European developments. Other influences came from Sweden.

In effect, the Netherlands relied heavily on the lead from the more developed countries, selected, imitated and adapted laws such as were in keeping with its own pace and philosophy of national development. Given our earlier references to the new South Africa, it would seem that such a comprehensive application of pragmatism has its advantages (17).

2.2 Reconceptualisation of The Contract Of Employment

Introduction

Work has been defined as activity undertaken with our hands that give objectivity to the world, or as effort aimed at redefining man in his relationship to Nature (18). Labour is bodily activity designed to ensure human survival through the satisfaction of individual or social wants such as goods and services. Labour is the source of wealth and the prime basic condition for all human existence.

Most sociology of work deal with paid employment and thus with the sociology of the industry or occupations. But work, as full-time activity is new in relation to work as a necessary social function. Paid work or occupational work locates the person within one form of market or the other but also carries with it certain social perceptions of status. This is why an ex-officer or functionary would opt to be referred to as a retired general or permanent secretary as a claim to status and social recognition. According to Grint, "the language and discourse of work are symbolic representations through which meanings and social interests are constructed, mediated and deployed" (19).

Thus, when the state imposes the definitive term 'contract' on the employment relationship and confers the status of 'economically active' on those it perceives as contributing to fiscal and economic revenue, in a given context therefore, work assumes both political and economic connotations.

Employment has therefore become the institution within which the social process of work occurs. As a result, it shapes identity as much as it produces goods and services. (20) The *Proletarius* in Roman times was the servant of the state, a person without property, coming from the lowest class of the community, without capital, a serf or wage-earner (21).

Radicalisation of labour theory reached anarchic heights with Kropotkin and Lafargue. (22) The position of Marx and Bentham (1977) was not that work was an anathema but that the proletarianization of work and the ruthless exploitation of workers was an inversion of the philosophy of work as a vehicle for human development. In effect, while work was the central arena for social and individual development, paid employment or the employment relation as erected by the market and buttressed through legislation was seen as inimical to the self-actualisation of man as it was anti-humanistic, engenders alienation and legitimizes exploitation.

Marx defines labour power as a combination of those mental and physical capabilities existing in a human being which he exercises whenever he produces a use-value of any description. In order to commodify labour power, the owner must have it at his disposal and also own the capacity for labour. He should be able to bargain with the owner of capital for its purchase for a specific purpose. The individual therefore reproduces himself or his sustenance when he applies his labour power.

Industry is a technical concentration of capital which has only been made possible by the separation of the worker from the means of production. It is this separation alone which made it possible to rationalize and economize labour, to make it produce surpluses in excess of the producers' needs and to use these growing surpluses to expand the means of production and increase their power (23).

Employment relations therefore create a scenario in which the employer affects the employee in a manner contrary to the employee's interests which may carry connotations of the political as well as economic power. [24] The Contract of Service becomes then the basis for the antithetical relationship between a group that appropriates and utilizes labour and that which offers the service under subordinative conditions. It implies therefore an unequal exchange with attendant unequal economic returns which may sometimes be imposed at the macro-level of economic and political authority. In this economic relations, labour is simply a commodity. The worker is expected to submit to the regulations and hierarchical command structure. In such a milieu, Employers may decide to insist on order or accommodate demands or countervailing efforts while ensuring their continuous dominance [25].

In referring to these strategies as Order and Indulgency, Crouch relates order to monism and indulgency to pluralism. Monism is a Unitarian approach to production relations where order confers rewards for compliance. On the other hand, pluralism as in prescriptive collective bargaining but which is not laissez-faire, may become so institutionalized as to become a predictable regime of order. A variant of this accommodationist approach may also be "benign paternalism" which in itself is a strategy of indulgence without any pressures from subordinates for greater access to control. [26]

Even at this point, a trend manifests itself in the form of a security consciousness or rather a constancy of insecurity on the part of the state and employers who form the dominant party in the production relations. According to Dahrendorf, there is an analytical similarity in conflict at societal and

organizational levels. There is a relativity between the character and intensity of Labour-Management and Social Class conflicts. This of course is due to the microcosmic nature of the organization. As such, growth in unionism may represent a similar stage in social conflict. In fact, increase in labour militancy has always been indicative of increasing social cleavages and accompanying stress. [27] Let us relate these generalizations to labour law.

The key question is the kind of labour law that can assuage the anxieties of the worker. Such a law should attempt to define a different subject matter and in so doing, identify new social problems and modalities for addressing them. In effect, labour law should address the daily concerns of workers and not those of lawyers. Therefore, policy initiation, formulation, implementation and evaluation intended to remedy these situations are critical. To some, the concerns of labour law should therefore be family responsibilities, accidents and compensation, migrant work and labour market rigidities, domestic and informal work, sexism among others.

The structural changes that came with industrialization dictated that work could no longer be understood from the point of or done in collective family groups but from a differentiated skill and process point that is, through the division of labour. Precise co-ordination of effort has resulted in management practices and the requirement that contracts be entered into at several levels simultaneously. These developments come with differing impacts on the worker. As men met total strangers in the workplace, it became increasingly clear that specific redefinition of relationships be arrived at. Wages and money became the focal point of this new relationship, not bonds of a socio-cultural nature.

This transformation did free property rights, goods services and workers from traditional bonds, aristocratic traditions, semi-feudal arrangements, paternatlistic and other forms of perceived retrograde restraints. (28) However, this mobility did not result in mutual benefits to both parties. First, the depersonalization of economic relations was the corollary of the specificity of contractual relations and this was supposed to lead to a reliance on the discretion and volition of the parties. Second, the decrease in consciousness for accountability and identity in the discharge of contractual obligations created the need for other, more organic and formal forms of control.

The dominant consequence is management practices by equally distant bureaucratic functionaries deriving legitimacy from the juridificatory framework of the state. Thus, laws, rules and

regulations became crucial in managing workplace tensions. As observed by Hill, the employment of industrious labourers, not the maintenance of loyal dependants became the way to prosper. (29) He observes further that the era of the legal contract became the era of a new normative ethos, derived from the realization that wealth is not created through the maintenance of a colony of menial, mendicant servants but through an astute investment in productive manufacturers (30).

Fox quotes Gouldner on the relationship between work relations and the need for law. We wish to quote this in detail:

"A technologically advanced civilization reduces and standardizes the skills required for wanted performances: it simplifies and mechanizes many tasks. It is therefore not as dependant on the rhetoric of morality or the mobilization of moral sentiment to ensure desired performances. Thus, within the technologically advanced sectors of society, individuals are less likely to be required to possess moral qualities and to be treated as moral actors ----. For men are becoming more interchangeable, more replaceable, and removable at lower costs ----. In other words, men are less likely to experience themselves as potent and in control of their own destinies as bureaucracy, technocracy, and science become increasingly autonomous and powerful forces by which men feel entrapped. Men's capacity and need to see themselves as moral actors are threatened. Many, therefore, will be disposed either to reassert their potency per se, aggressively or violently and without regard to the moral character of such affirmation, or to relinquish the entire assumption that they are moral actors and capable of moral action" (31).

In other words, classical bourgeois liberalism endorsed a "winner-takes-all" situation in which the only purpose for relationships is self-aggrandisement either of the person or the coalition of interests. (32) The state, as a coalition of interests cannot therefore claim moral legitimacy. Its only claim lies in the social contract which confers on it executive and to a large extent legislative power. Its job is to safeguard property rights for those who have and sanctions against those who do not have, using social institutions.

The relevance of the law to the market economy would appear to be to first acknowledge one's ability to bargain for advantage and secondly ensure that social structures exist to ensure objective, impartial but authoritative protection of the gains from the bargain via adjudication or other justiciable mechanisms. Law then formalises and prescribes already existing, useful habits and customs, hardening them into rigid,

crystallized forms. Thus in the concept of Master and Servant for example, we see a hidden concern for property and ownership which was refined into the employment relationship (33).

From the foregoing, if law in reality reflects the cleavages and polarization of society, labour law would be expected to follow suit. However, there cannot be a completely rational society based on the market without any moral sanctions. If indeed labour is not a commodity, labour law must protect this socially engineered principle.

Absence of disciplined interaction in the workplace is usually evidence of weak commitment, resistance and miscalculated exercise of power and authority. One cannot be transformed by the exchange economy into an alienated producer and be expected to demonstrate loyalty and commitment which derive from a different socio-economic system. Again, laws aimed at emphasizing managerial prerogative but not mediated by concerns for equity and justice or energized by a respect for human dignity would also prove futile and ineffective.

When the medieval craftsman lost control over his productive capacity, alienation became the rationale for larceny and acts of protest. The factory system came into existence because of the need for more effective supervision and co-ordination. The loss of control by the artisan however, led to despondency and dependency and a non-legitimisation of the already low-trust relations between employer and independent contractor-turned-employee. This trend resulted in greater interplay between the state and capital. More importantly for us, this trend grew into the coalescence of the close affinity between the legislature, judiciary and social institutions created to empower the centralized state. All these institutions, particularly the judiciary came to see the employment relationship as essentially economic rather than a social partnership built on reciprocity. (34) Because of its own calculating, impersonal nature, economic exchange as a process was flawed and could not be wholly legitimised even by capital without some form of internal and external props and modifications. Juridification and juridical interpretation willingly provided these. (35)

An observation that is often repeated is that law only serves to codify rights embedded in the existing state reflecting its own ruling class interests. In civil law therefore, existing property relations are declared to be the result of an amorphous but malleable general will.

This is not to say that law per se is a fraud but that the politics of class inequality demand the creation of objective forms which prevail over individual will. In a developed and mature social formation, law serves an objective purpose. But its capacity for wrongful use is equally evident in the repression of trade unions even in Poland, the USA, Hungary, Italy and Swaziland. This is also because the objective law only gives a determinate form to real social practice as evidenced in production relations. Developments in commerce, industry and globalisation are all new forms of intercourse which call for legal accommodation through new paradigms. Positive law that is anti-social, and amoral, may be treated as illegitimate in the broader context of human equality (36).

If social morality is law, then one could equate that to the externalisation of the society's religion or an amalgam of its religious beliefs. Thus a law which refuses to affirm this social morality is essentially grounded in only materialistic pursuits. It is not surprising therefore that there is so much new law in an already over-regulated arena of social interactions and relationships. Social life is governed by a labyrinth of laws administered by burgeoning bureaucratic institutions. In effect, personalism is replaced by obedience to bureaucratic rules and regulations with personal peace and affluence as the reward. De-regulation per se of work relations and the labour market is not enough unless it is informed by a quest for the necessary praxis for social justice (37).

The Marxist thesis on social development and regulation is legitimate. There is an immutable law of contradiction between the productive forces and production relations. The sharpening of the cleavages within this contradiction result in the transformation of socio-economic formations. A realistic appraisal of globalisation and the new world economic order would suggest that liberalisation without the liberation of workers would sharpen this contradiction further.

Inherent in this convergence of political and economic philosophy is the ideology of subordination. which says that without the power to command and a duty to obey, there can be no employment relationship. If indeed subordination is the prescribed hallmark of the employment contract, then it is a deliberately crafted relationship not founded on equality, consensus and freedom to contract *in stricto sensu*. The law then, as an instrument of public policy and state ideology, is used to impose implied terms and such other trappings in order to flesh out the employment relationship and dress it up as a contract. Implicit in this philosophy is a mentality trapped in the benefits of a Master-Servant relationship. For example, in

Harmer v Cornelius where an employee visited a dying mother against the orders of the employer, she was adjudged as having contravened the cardinal duty of obedience of reasonable orders. (38) In *Express Newspaper Ltd v MacShane* Lord Denning categorically stated that Parliament gave immunities to union leaders and not rights. Thus workers are offered restricted legal protection and not freedoms to do as they wished.

The law has also been used to support the managerial prerogative. For example in *Turner v Mason* the employer prerogative was used in ascertaining whether workers, on union instruction, have a right to refuse to work mandatory over time (39). It seems labour law conveniently overlooks the mutuality of interest and obligations that characterize any contractual relationship. It also, apparently enables the interpretation of workplace relations with a tilt towards the untenable unitarian management logic.

A floor of rights and the general persuasive character of ILO Conventions and Recommendations are considered pluralist as they are based on social partnership. The reality is that municipal laws that form the core of labour law ensure that these rights are truncated and often ignored. If the aim of pluralism is to combine social stability with adaptability and freedom, then labour law ought to play a more creative, harmonizing and transformational role *in tandem* with ILO minimum standards.

The courts have, under various political climates, demonstrated ambivalent inclinations towards upholding both common law principles and the work of these remedial interventions or Conventions which are universally ratified. For example in *Secretary of State v A.S.L.E.F.* an employer proposed cuts in overtime in order to save cost and this was resisted by workers. They were dismissed and denied redundancy payments and hearing for unlawful dismissal. The Court founded in the affirmative on grounds that the employer reserves the right to re-organise his business as he wished (40). In *Lesney Products v Nolan*, Lord Denning was quoted with approval as having indicated, four years earlier in *Chapman v Goodman China Clay* that changes in employment conditions were necessary so that the employer could cut excessive cost.

The Law's neutrality has always been of interest, given its instrumentality in maintaining the status quo. Not too long ago, Kahn-Freund's perception of the employment contract as the "cornerstone" of the edifice of labour law was accepted without question. Today, Rideout, among others, questions this

analytical judgement. (42, 43]

Davies and Freedland (44), Elias, Napier and Wallington (45), tend to also consider the employment contract as a contract in one form or another and as the central legal institution in labour law. However, Benedictus and Bercusson (46), Fox (47), Beatty (48), Meritt (49) and Pain (50) among others have expressed doubts about the advisability and desirability of anchoring labour law around the prescribed employment contract.

In conclusion, it is noted that even judicially determined tests are needed to ascertain what should have been clear as a statutory prescription. The statutory employment contract is deemed to exist when the various tests in a functional combination are satisfied. These may include dependence, control, wages, tax, social security and the equally vague "dominant impression". Therefore, though the imposition of this relationship is a manifestation of the power relations at work, its meaningfulness can only be a function of the cohesion between the social partners involved in the employment relationship.

2.2.1 The Concept Of Contract In Labour Law

Traditional labour law has always assumed the illegitimate contract of employment as its focus of intervention. The basic inherent contradiction is that while accepting contract (voluntarism, privacy and discretion) as the basis, the state then seeks to invade this private domain and impose its own regulatory and procedural mechanisms.

In the process, labour law inadvertently or perhaps inevitably invoked much of its legitimacy from the virtual reproduction and modification of common law doctrines regarding status, rights, terms and conditions which, in terms of contract, may be express or implied. In doing so, labour law, rather than extricate itself from the moral dilemma, encapsulated itself in the contradictory nuances of the common law. For those who follow British legal system, this has effected collateral damage on the social system as a whole.

Legislation in some jurisdictions do acknowledge the advisability of referring to 'worker' rather than 'employee' under certain conditions. The Trade Union and Labour Relations (Consolidation) Act 1992 of Britain defines a worker as an individual who works or normally works or seeks work under a contract of employment or any other contract where he undertakes to perform personally any work or services for

another party to the contract who is not a professional client of his. Effectively, this dresses the employment contract in the garb of a worker contract but appears incapable of moving away from the constraints of the artificiality of the employment contract.

The Workers' Compensation Act (No. 23 of 1998) of Botswana defines a worker as any person who either before or after commencement of the Act, works under a contract of employment or an apprenticeship with an employer. The categories of workers earlier mentioned are expressly excluded except that the Commissioner has the discretion to include anyone working at the time, after due consideration of the facts.

While the Labour Relations Act (26 of 1995) of South Africa does not define "employee", the Compensation For Occupational Diseases Act (COIDA) stipulates that a beneficiary must be an 'employee'. This definition however, covers one who has entered into a contract of service, apprenticeship or learnership, a casual employee, a director in an apprenticeship capacity, a person provided by a labour broker, the dependants of an employee who is deceased or the curator of one under a disability. It is certainly a wider basket of inclusivity for the purposes of compensation [COIDA Section 1].

The Lesotho Labour Code Order (1992) refers to an employee as any person who works in any capacity under a contract with an employer in either an urban or rural setting, including a government or public authority person. Worker is synonymous with employee.

The Swaziland Industrial Relations Bill (1998) defines an employee as one who is an employee at common law working for remuneration on a contract of service or under any other arrangement involving control by or sustained dependence for the provision of work excluding a casual employee.

In effect, it would appear that a broader umbrella is needed for the worker in these fast changing dynamics of work relationships, globalisation and the current incipient emasculation of proactive labour law. Labour should therefore not just cover employees under contract but also those who do work but under different contractual arrangements that are distinctly differentiated from the owner of the means of production and the vendor of labour power per se.

There are several features of work that need to be accommodated under a more benevolent and sensitive labour law. These include part-time work, fixed-term employment,

home-working and temporary or agency work. While these may pose problems for a traditional universal applicability principle of legislation, the recognition of the need to legislate with specification and comprehension could ensure that labour law is not declared obsolete in the face of these challenging developments in the contours of work and work relations.

In effect, employment has come to signify a central link to existence, a means of meeting personal needs and drives. It also becomes the source of self-actualisation and a spiritual corridor to the next world. The institution of employment through which society's production is generated becomes a critical component of determining individual identity. This institution has therefore come to signify how a person's life could be regulated through principles such as those of contract.

When people become dependent for their daily sustenance on continuous employment, they become preoccupied with not losing this source. Such pre-occupation is as basic and legitimate as the capitalist's quest to protect his property (51). But how this relation is translated and applied depends on the way the society regulates its institutions. This mode of regulation portrays the society's most basic economic and philosophical beliefs. As such, where work is no longer for survival, but also for development, the actualisation of this goal would indicate a different attitude to what the employment relationship must be.

The modern legal concept of work and worker is essentially neo-liberalist. Classical liberalism had professed that social relations should be determined by the logic of the market place where everything is a commodity. This logic flowed not so much out of the concept of equality of bargaining power but a perverted logic that elevated disparities in opportunities and bargaining power to entrenched norms of the market. This appeal to individuality found expression much earlier in the common law notion of Master & Servant. The Servant had prescribed functions and rights and in most cases could hardly challenge the Master.

The Master and Servant Acts in England, Australia and South Africa (1856) underscored these components of the relationship. This overriding social reality was emphasized by the fact that whereas a King could be held accountable by his subjects, the Master could not be questioned by the Servant. For that matter, he had neither the right to withhold service or take without permission, hunger notwithstanding.

The Statute of Labourers (1351) of England and the Master/Servant Act (1856) of South Africa share similarities in the definition of the Servant. He/she was any person employed for hire, wages or remuneration in handiwork, domestic service, bodily labour, agriculture, mining, manufacture, porter and boatman. Penalties for breaches such as failure to commence work were punishable by a fine of £1 or 1 month's imprisonment. This philosophy of 'subordination' followed post - industrial society into the statute books as one of the key elements of employment law. (52)

The sum-total of these debates is that man has moved from pre-contractual to contract modes of exchange. Work has therefore become wage-labour and its relations market-oriented where the worker must find a buyer for his power. To the employer, wages are now a cost. But while wages are specific, services derived are often inexact. Management apparently moulds and extracts the labour capacity in its own way, subject only to certain minimum standards which may exist at the discretion of the state. The distinction of labour from labour power is therefore critical because the appropriation and utilization of this labour power involves a social process of management, control, subordination and conflict. The Employment Relationship is therefore, not a specific bargain between two equals but a distillation of profit by one from the de-personalization of the other.

Status and Contract

It would appear that there were two essential jurisprudential features of British 'civilisation'. These are the contractual foundation of the obligation to work and the obligation to pay wages. But in addition, one also identifies the imperative to formulate and enforce norms for worker protection using an agreed legal framework. The contract of employment was perceived as "the cornerstone of the edifice" of labour law (53). However, the celebration of the centrality of contract in employment law then would appear to have been premature. Sir Henry Maine observed that;

> 'the acceptance of agreement as the basis for the relationship signifies an end to the conferment of status in terms of socio-economic gradation as was implied in Master and Servant relations.'

The era of equal bargaining for advantage had arrived but without consent in real terms. As indicated, the Master and Servant relations were based on arbitrary but time-honoured common law principles. This status meant the sum total of the

powers and disabilities, the rights and obligations, which society confers or imposes upon individuals irrespective of their volition (54).

Legal status would appear to be the functional persona prescribed by law for specific purposes, not socially determined. This, we hasten to add, is in contradistinction from the persona with which one transacts a commercial business such as the buying of a tool. Status, as traditionally understood refers to what Weber calls status contracts. Such a contract transforms a person into a child, father, minor, serf, worker or comrade (55). The reciprocal obligations it gives rise to are diffuse rather than explicit and fit the requirements and ethos of a status – based society (56). Fox referred to this as high-trust social exchange. But this would then not define the employment contract because its characteristic expectations of good faith and diligence are contrived and imposed rather than earned.

The purposive market transaction is the main characteristic of an exchange economy. It is crafted for a specific, close- ended transaction with a discrete objective. The relationship is tenuous and temporary, fused with the spirit of restraint and delimitation. It is impersonal and transient (57). This is based on low-trust economic exchange.

Thus, in describing pre-industrial society as pre-contractual, one is inferring in contrast to the philosophical context of the purposive contract, an era of diffuse arrangements which is not what is understood in common law practice as contract. And as such, contractual employment relations could not have existed as relations were largely based on trust, loyalty and reciprocity. A feudal contract was therefore more than the mere sale of labour power as it also meant mutual obligations (58) Production was driven by need, not excess profit accumulation. On the other hand, capitalism required, among other things, that the rule of the owner be seen as the undisguised rule over private property and the relationship. The modern contract of employment is thus a relationship between owner and worker, exploiter and the exploited (59).

Therefore whenever the modern, commercial contract is used, it connotes an agreement between two or more people to behave in a certain manner over a given period of time for a given gain. It involves only those engaged in it or at most, those empowered under it. There is no room for sentimentality or the brotherhood of man (60). The definition of the contract of employment is that it is "a legal relation based on agreement but regulated by law in the sense that its existence and its termination depend on the volition of the parties but its

substance is determined by legal norms withdrawn from the parties' volition" (61).

Thus the fact that traditional status gives way to status conferred so as to functionally enrich a relationship or mediate its rigours is not a return to status but an amalgam informed by political, social and economic realities. This is why the employment contract is a hybrid between the status contract and the purposive contract with arbitrary juridical emphasis on certain elements which obviously negate equality of bargaining advantage.

The Legal Theory of Contract of Service

In legal terms, the contract of employment exhibits the following traits; it may be unilaterally determined per notice or payment in lieu of notice. There is no obligation to renew and performance is only obligatory as per terms so stipulated. It creates limited voluntary obligations and is a legal expression of market place values.

Assuming these reflect reality, then the following observations become pertinent. The employment contract is not underpinned by any social policy consideration, for example, a policy on fixed term contracts which expose workers to severe risks in the short-term without protection. The power of unilateral termination serves to commodify labour as the emphasis is on the produce rather than the producer. In laying out plans and methods for optimum output, the producer is not factored into the equation.

This commodification is hostile to the theory of man as a social being. The social control inherent in the unilateral prerogative creates an atmosphere for manipulation and exploitation. The participatory ethos of communal effort is ignored and an atmosphere conducive to alienation may be created. Employment is no longer viewed as a partnership but a subordination to the employer, breeding a sense of insecurity and anxiety. All interpersonal relations are approximated to commodity exchange transactions and societal cum associational rights are subsumed under the transactional exchange. The law of employment, as a social, relational process should mirror these mutually reinforcing attributes, not commodity exchanges. The law of contract as is known cannot reconcile and co-ordinate the tension between individual interests and society's expectations to their mutual benefit (62).

The relationship between employer and employee does not conjure even a notional equality. Given the undercurrents that

inform work, the social compulsion of work cannot translate into a meaningful freedom of contract in the market place. Social policy, in the form of intervention may become more appropriate as a framework for social distributive justice than the impersonal dictates of the market. This is where labour law needs to demonstrate a sensitivity to social justice and dynamics.

It is clear that there are functional limits to consent as a legitimizing element in the employment contract. Freedom to contract is not necessarily consensual nor is it intended to be. When all your property is your labour power and survival is paramount, the motive force of bargain is subsistence, not equality of opportunity. In the arena of coercion, constraints and commands, the threat of destitution, redundancy and termination operate to neutralize any notion of equality. (63)

Where parties to a contract are equally matched, there is no need to invoke the law except for illegalities. When the law becomes a buffer, then there is no basis for a notional voluntary contract. Consent presumes selective access but reality dictates that the unskilled, migrant, involuntarily unemployed and the refugee all need access to the labour market in one form or another. Social justice expects equality in the right to social participation. Freedom of contract rejects the examination of the socio-economic circumstances of the individual. One's ability to actualize real, meaningful market equality is impossible precisely because social structures and participation in them are in and of themselves unequal. In addition, the more specific the bargaining relationship, the less diffuse the social obligations.

2.3 Regional Integration and Labour Law

Introduction

Given that the study has a long-term future focus on regional integration in Southern African through the SADC, the following discussions are important. This is more so as Botswana and Swaziland are a microcosm of the social, legal and economic realities of Southern Africa. The discussion provides the theoretical tool for examining the possibilities of successful regional integration and the modus operandi thereof.

The re-emergence of the African Union is not surprising, given that several regional blocs have, at one time or other emerged and survived their initial negative reception. The European Union is influencing the redefining of the role of states in the creation of a common framework for labour law. More importantly, it is also showing the way forward as to how worker rights would be re-assessed in the light of certain ideological considerations regarding fundamental norms of equality and human dignity.

Within this armbit of conceptual exploration, the issues of whether regional social and labour policies should be harmonized are also brought to the fore. For Southern African national economies to participate in combating the negative effects of globalisation, their own institutions and policies must be transformed. For, with the eventual buckling down of national economies under the relentless onslaught of globalisation, its disruptive and negative impact would be harsher unless social safety nets are put in place by allowing all stakeholders in the work relationship to influence the relationship through meaningful participatory rights.

First however, the enabling institutions and policies have to be identified, created, reassessed, integrated and modalities for their interpretation and implementation arrived at. There have, so far, been forms of engagement between the social partners at various levels, all aimed at seeking consensus for this exercise. For example, the adoption of the Southern African Trade Union Co-ordination Council's (SATUCC) proposal to the Southern African Development Community (SADC) of a draft Social Charter is very significant.

Essentially, harmonisation of social and labour policies would create equal conditions for easy access while diluting the corrosive effects of divisive competition. That harmonisation is a useful tool is not in contention but how to achieve and sustain it. Transplantation by consensus, imitation and adaptation are

but some of the approaches to achieving the same objective, buttressed by a healthy respect for human integrity and a floor of minimum rights.

Theoretical Issues

The forms of the state constitute a critical determinant of the degree of accessibility to the modes of regionalism that might obtain in Southern Africa. A key indicator is whether the state operates as a liberal democracy, constitutional republicanism or real socialism and the nature of the political and juridical structures used to entrench that state.

The political philosophy of the state then becomes equally important as a signal to the accommodation of pluralistic aspirations. For example, whether democracy or constitutionalism hold sway or a clearly articulate, precise system of governance or a repressive and predatory system obtains are critical factors.

In such an environment, the forms of articulation of power, mainly juridical and judicial and how it is enabled to shape jurisprudential and civic libertarian acculturation would also impact on how such a socio-political system interpretes and actualises functional collaboration with neighbours.

Within such milieu also, we need to be able to locate the organs of constitutional jurisdiction and how they decree constitutional validity of laws in relation to the Bill of Rights such as freedom of expression and the right to associate and collectively organise. Civic groups or social partners would, normally, then be in a better position to function both as pressure and interest groups advocating their contribution to the social and national agenda.

Where civil society is assertive and acculturated to self-expression and civic responsibility, transplantation of individual labour law would be easier. Factually, it is often the unions who advocate for universal standards. Because unions signify representativity, the importation of laws regarding levels of negotiation, modes of conflict resolution and the legal capacity to impose parameters through minimum wages and cooling of periods prior to strikes could be contested by employers. They, in their turn would advocate for mechanisms ensuring that their prerogative is not unduly diluted. Globalisation suggests but does not necessarily advocate the internationalisation of normative standards and legal practices to conform to the theory of borderless commerce. This is logical. For these standards to take root successfully, Hepple outlines certain pre-

conditions. These we shall briefly examine.

Social Consensus derives from the freedom of expression. The social dialogue between the partners is an important cornerstone as it presupposes a desire to achieve common ground. Thus, any model deriving from comparativism must be vigorously debated so as to be able to locate it within the most appropriate context, constitutional or otherwise. It is precisely because of this that the Social Charter of the EU (1997 Treaty of Amsterdam) provides for a mandatory consultation between management and labour at community level over social policy and also provides for the negotiation of collective agreements on them. Such agreements may then be legislated upon or accepted as implementable collective agreements. In this case, the European Council may then issue directives. A similar approach to negotiations was adopted at the National Economic Development & Labour Council (NEDLAC) which led to the Labour Relations Act of 1995 of South Africa. (64)

Social Need determination is a deductive process from the socialisation of the partnership. The law should be seen as attempting to address a specific social problem commonly agreed to as requiring such deliberate, purposive intervention. Industrial pluralism must enable a concise identification of the variables eg. vibrant unionisation, organisational freedom and capacity must exist if collective bargaining is to be a central cog in the industrial relations wheel. In other words, the model and method must be seen to be curative and consensual rather than prescriptive and unilateral. An insularist legal culture cannot be receptive to international influences. Thus, while the jurists ought to be internationalist in outlook rather than obscurantist, legal philosophy and social ideology must undergo changes that equip it with the desire to experiment, explore and adapt, guided by the changing spirit in the area of proactive, liberalising legislation.

Bearing in mind that the law is a tool, it has to facilitate the unleashing of the creative potential of business and enterprise and for that matter, the economic emancipation of all the partners. How the law can energise the process of participatory economic empowerment is by its acceptance as an instrument for beneficent social engineering, an embodiment of the objective direction of social development and an internalised, legitimated provider of security for comprehensive and constructive social interaction.

The characteristics of regionalism would include a sustainable interdependence among countries particularly where some have become increasingly marginalized. This is in recognition of

transnationalism in trade and economic power. At the least, nationalistic and internally structured economic relationships would need to give way to a broader coalition of interests regionally. The New Partnership For Africa's Development (NEPAD) is the latest example of Africa attempting to forge a functional relationship with the Group of Seven Industrialised Countries(G.7) and the Bretton-Woods financial institutions being the International Monetary Fund (IMF) and the World Bank (65).

Regional integration as a pragmatic response to the vulnerability of individual African countries is on the ascendancy. This therefore is an effort directed at innovations that look at a wider regional socio-economic theatre with accompanying political structures and processes that can facilitate the formulation, implementation, review and sustenance of viable policies within that regional context (66).

Models of integration

Regional integration is the commencement of a mechanism whose ultimate goal is different from regional co-operation where one-off or uni-dimensional forms of collaborative activity may be initiated and undertaken such as the defunct Air Afrique or Tanzam Rail in East Africa (67).

On the other hand, integration foresees a merger economically, politically or as may be decided. This may proceed in phases from Free Trade, a Customs Union, a Common Market and an Economic Community levels. A Free Trade Area removes barriers among trading partners only, for example the North American Free Trade Area (NAFTA). A Customs Union enlarges on the free trade concept among members by providing a common external barrier to trade, for example the Southern African Customs Union (SACU). A Common Market then may emerge characterised by the free mobility of both capital and labour. The Economic Union is the ultimate goal where common fiscal and monetary policies are pursued. As the purpose of this exercise is not to debate the dynamics of economic unification, we shall look critically at some structural innovations only in terms of how they provide a comparative framework for labour law harmonisation both historically and factually.

Regional Integration In Africa

Over the years, there have been different forms of regional integration in Africa. These included the Preferential Trade Area for Eastern and Southern Africa (PTA) (1981), The East African

High Commission (1947-61), the East African Community (1966), the Afro-Malagasy Organisation for Economic Co-operation (1961), the African-Malagasy Union (1961), the African Development Bank (1963), the Economic Community of West African States (1975), the Southern African Development Community (1992), the Organisation of African Unity (1963) which has now metamorphosed into the African Union (2000). There have also been bi-lateral agreements and others such as the African-Pacific and Carribean Protocol. (68)

The SADC and Labour Law

The SADC was formed in 1992 with the signing of the Declaration and Treaty in Windhoek, Namibia. The Treaty commits its members to the fundamental principles of sovereign equality of Member States, Solidarity, Peace and Security, Human Rights, Democracy and Rule of Law, Equity, Balance and Mutual Benefit. Its institutions are The Heads of State, Council of Ministers, Sectoral Committees/Commissions, Secretariat, Tribunal.

The supreme policy making organ is the Heads of State which has not yet moved to propose any arrangements beyond what currently pertains as a fledgling economic community of co-operation. The Council of Ministers oversees the sectoral activities within the defined areas of co-operation. The vision is towards a common future and to this extent a Protocol on Trade within the SADC was signed in January 2000. The general purpose is to provide for a free trade area and protective barrier for goods originating from Member States (70).

A Protocol on Tribunal and Rules of Procedure was also signed whose purpose is to exercise jurisdiction over all disputes and all applications referred to it regarding the interpretation and application of the Treaty, between States and States or natural or legal persons (Articles 14, 15). Its decisions shall be final and binding. Though only there to monitor the Treaty, it could evolve into a supranational judicial institution to enforce future legal developments.

Overall, the Trade Protocol would appear to be producer friendly and not the result of the implementation of the ILO Convention (144) on Tripartite Consultation which has been ratified by Botswana, Lesotho and Swaziland, excluding South Africa. Because of the SACU, it would also appear to undermine the "borderlessness" envisaged in SADC. It also does not reflect any compliance with ILO Convention No. 122 on Employment Policy (Minimum Standards). It however grants concessions to producers through rules of origin, poor work conditions, child

labour and exclusive export processing zones where normal labour laws may not be observed. There is also the severe restrictions on migrant labour which have characterised work in the member Countries.

At its conference in 2001, the SADC adopted the Social Charter of Fundamental Rights In SADC which was then recommended to the Council of Ministries for approval and subsequent signature by the Heads of State.

The Charter covers the following essentials;

- Freedom of Association and Collective Bargaining consistent with ILO Conventions and covering all areas of work (Art. 1)

- Autonomous dispute resolution machinery, tripartite consultation, right of recourse to appeal procedures.

- ILO Conventions as benchmark and minimum standards to include abolition of forced labour (29, 105) Freedom Of Association (87, 98) Employment Discrimination (100, 111) and Minimum Age Of Entry Into Employment (138) among others.

- Equal Treatment For Men and Women (Art. 3).

- Social Protection (Art. 7)

- Improvement of Working and Living Conditions (Art. 8).

- Information, Consultation and Participation of Workers (Art. 10)

- Employment and Remuneration (Art. 11).

- Education and Training (Art. 12).

Its preamble refers inter alia, to the promotion of the formulation and harmonisation of legal, economic and social policies, labour policies and practices and measures that facilitate labour mobility and remove distortions in the labour markets.

In comparative terms, the Charter, when signed ought to, like the EU's Social Action Programme of 1973 form the basis for approximation of the laws of Member States regarding the relevant areas of social interaction in need of regulation (71).

Harmonisation of Labour Law Regimes

Introduction

Woolfrey provides what one might call an all-embracing definition of harmonization. Used interchangeably with approximation and co-ordination, it refers to the "endeavour to give more equal content to provisions laid down by law, regulation or administrative action". These all suggest a process that may culminate in the creation of a uniform rule but generally stops short of such a result. (72). It connotes conscious attempts at fashioning similarities and commonalities from hitherto diverse and diffuse sources so as to give same or similar interpretation and effect.

There is the academic argument that countries with different history, ideology, socio-political and economic levels should not be expected to harmonize their social policies as there can be no 'fit'. Approximation of laws implies relinquishing the hold on sovereignty over certain areas at the domestic level as a trade-off for other benefits. It is not a derogation from national sovereignty but a strategic partnership which, granting that migrant workers come from anywhere, could be just as protective of one's nationals elsewhere as others within. The economic cost of progressive social policy is also not sufficient argument.

In a situation where harmonisation is unsuccessful, the most immediate socio-economic consequence would be 'social dumping'; a situation where the sharks of globalisation would relocate to areas of lower production cost while workers migrate to areas of higher returns. This in turn would accelerate supply and result in the devaluation of labour.

The inability to adopt relative common social measures could thus wreck the social balance. It is in this regard that a harmonization of those legal measures away from conflictual disparities in the area of work, relations and the labour market become important. A march towards economic integration presumes a corresponding evolution of social policy and the implementation structures.

There is a timely caution against the ground effects of structural and legislative differentiation at various levels.

'Disparities between national labour law systems create an uneven playing field for employers; progressive labour laws or prescribing certain minimum health and safety standards raise production costs for employers and place them at a

disadvantage in relation to their competitors operating under more permissive labour law regimes. In a region where capital is highly mobile, this may have the consequence that business is attracted to those areas where labour standards are low or non-existent' (73).

The question of whether harmonisation should be restricted to only economic and financial policies has been, one might say, convincingly tackled by the European Union. It is quite beyond the pale of debate that social measures must go hand in hand with other forms of regulation or transformation. In the EU, the approximation of laws has been seen as essential for the full realisation of the economic potential of EU Member States. For example, the EU Directive on Worker Protection presumes that safety and security in the workplace is paramount for effective production. Thus, selective protection and disparities in protection would again be leading to disparities in socio-economic opportunity and growth as envisaged under the Treaty (74). Competitive neutrality can only be ensured if common sets of labour standards prevail (75).

It is arguable that disparities in labour laws, income, wages and conditions of service exist in a more pronounced form in Southern Africa. This is exacerbated by the thrust of anti-union sentiments at both state and business levels and the threat of closure and relocation. Given a common standard however, business may be unable to threaten, pick and choose investment locations. The state would also have to reassess its relationship with the productive elements of the society

Above all, the discernible direction of the privacy of contract debate can be reversed to safeguard trade unions whose importance can be located within the scheme of social partnering and dialogue. In this regard, we are reminded that;

> "If it be accepted that economic development has social objectives, trade unions will always have a proper role to play in it. There is no substitute for trade unions as the workers' own instrument for obtaining a more equitable share of the fruits of economic progress. Social discontent is perhaps inevitable in any society and there may be no possibility of entirely eliminating it. The real problem is to prevent it from leading to serious social unrest and grave labour troubles, which can threaten the political order or the stability of government and cause enormous economic losses. So long as workers can believe that their trade unions are doing a creditable job of defending and promoting their interests, they will depend on the unions for airing their desires, aspirations

and grievances and for obtaining satisfaction, justice or redress through normal trade union methods. In this way, trade unions can be said to perform a vital role in preventing the danger of serious social unrest and in contributing to stable development and sustained progress" (76).

Possible Forms of Harmonisation

These, in acknowledgement of Woolfrey's pioneering work and the subsequent contributions of Clarke et al would include;

- harmonisation by directive
- the adoption of a Regional Social Charter
- international and regional Codes of Practice
- adoption, ratification and integration of core ILO standards
- regional collective bargaining

Harmonization by Directive

With the European Union as a viable example, Directives are determined by the Parliament and Council and Member States are obligated through the same medium to approximate their domestic laws to the principles enunciated in the Directives. It is a result oriented approach that leaves the Member States the room to decide modalities and form for incorporating the principles as long as this is done. Thus, overtime, these standards would become both qualitatively and quantitatively an integral part of domestic laws. Already, the European Court of Justice had provided a juridical framework for determining the antecedence of Directives.

In relation to Southern Africa, the successful application of this model would require supranational legislating institutions and an enforcement structure. Neither of these exist under the SADC Treaty at the moment.

A Regional Social Charter

The adoption of a Social Charter to underpin bilateral and multilateral trade agreements could provide a framework of basic human and worker rights. This, as we have seen from the SADC Social Charter recently adopted, would cater for freedom of movement, residence, employment, migration and citizen

rights for all workers in the region. The basic referent point is the ILO Constitution, Principles and Conventions. While isolated references have been made to the concept of a punitive social clause, in fact, a normative social charter capable of integration into domestic laws is preferable.

In 1980, an international consensus was agreed on regarding what constituted fair labour standards. While the debate continues, developing countries wish to domesticate the issue. The SADC Social Charter, though lacking in certain essential, once approved, would have settled the debate within the Southern African region. The core problems however would be interpretation, implementation and enforcement as its real import begins to permeate the social fabric and the current sociology of work and occupations. It is however expected that the Southern African Labour Commission established in 1980 and the Employment and Labour Sector (ELS) of SADC would continue their pioneering roles in seeking comparative models and home-grown solutions to these problems (77).

International and Regional Codes of Practice

Clarke et al identify the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy as the basic referent point because it operates at an international level. Also, the principles in the Declaration are intended as guides to governments, employers' and employee organisations and the multi-national enterprises. This is to enable them adopt social policies and measures whose legitimising constituency should include the approximation of principles from the ILO Constitution, Conventions and Recommendations which are considered relevant.

Though this approximation is voluntary, there is the normative authority because as the areas for attention are the core areas in work relations. These include employment promotion, equality of opportunity and treatment, security of employment, safety and health, training and conditions of work and industrial relations. Triennial compliance inspections are undertaken and the actors encouraged to constantly seek clarifications. They link the binding and non-binding elements of the ILO Conventions. As usual implementation does have its problems as some States seek to circumvent these principles.

In Southern Africa, a draft Code on HIV/AIDS and Employment has been negotiated and adopted with the SADC ELS. Other Codes are due to be drafted in future. Codes of Practice exist in individual states. Botswana and South Africa have on Industrial Relations. What is needed is as above, their

negotiation and adoption as standards for the region in the respective operational areas and there should derive closely from ILO Conventions. The SADC Social Charter has several key operational areas that could be codified eventually.

Adoption, Ratification and Integration of ILO Core Standards (ILS)

As Rubin said, there is a self-imposed modesty about the ILO which belies its importance, influence and its significance in Southern Africa. The tenacity and global influence of the ILO attest to its position as a valid bastion of normative labour standards. Since 1919, the ILO had never been dissolved but only grows in relevance and authority (78). As a bureaucratic organisation, it has its own shortcomings

Most African countries have accepted that ratified ILS become applicable when enacted by national law. As such, though the courts may not make direct reference to them, its constitutional provisions have proved persuasive in some judicial interpretations.

Article 213 (4) of the 1995 Constitution of South Africa accords it recognition and some Senior Courts have relied on them. The Lesotho Labour Code provides in Section 4 (c) that provisions should be interpreted so as to give effective to ILS (79).ILS have also functioned as sources of equity. The Industrial Court of Botswana articulates the benchmarking role of ILS in the determination of lawfulness and fairness (78).The ratified Convention; Termination of Employment (158/1982) has been instrumental as a basis for determining rules of fairness in cases of dismissal and retrenchment.

For Tajgman, the position of ILS in Southern Africa is unique. He laments however that;

> 'more than in any other sub-region of the continent, international labour standards in Southern Africa are relevant and stand a chance of implementation, yet practice indicates a certain reticence in the use made of the international systems of labour standards'. (80).

Kalula echoes the same sentiment by pointing out that:

> 'in the regional context, although the countries of the region are members of the ILO and formally committed to its ideals, most governments lack the will to ratify, and more important, implement international standards' (81)

In addition, the supervisory mechanism available for the implementation of ILS is hardly ever used to seek clarification and assistance from the Committees of Experts (82).

2.4 Energising Labour Law – The Inter-disciplinary Debate

For some labour law scholars, it seems that labour law must work within the traditional boundaries of other disciplines. This is considered as a necessity and an inevitability both from a methodological and empirical view point (83).

Creighton and Stewart go a step further to point out that;

> 'it is still relatively unusual for lawyers or legal academic to draw on the wealth of material and perspectives to be found in the broader field of industrial relations and human resource management, as well as the more specialised disciplines such as labour economics, industrial sociology, labour history and organisational behaviour' (84).

Gahan and Mitchell are of the opinion that there is now emerging a new focus as labour lawyers become increasingly aware of the inadequacies of operating within their self imposed traditional confines. But even then, while acknowledging that other areas of law impinge naturally on labour law, such as taxation and social security, Wedderburn, Davies and Freedland only marginally broach these topics while acclaiming them to be of central concern. This is in spite of the fact that they see a key role for labour market regulation and micro-economic management in labour law (85).

The isolation of labour law from other elements of the labour market brings into question the arbitrariness of the terrain of labour law as its connectivity with the structural relationships of organisations, industrial relations and corporate strategy become clearer. In addition, the fact that modern human resource management sees labour as a resource rather than a cost element suggests that labour law must come to terms with how these disciplines affect the arena of work and its regulation (86).

Whether labour law is a tool of labour market regulation or a device for the social protection of labour also determines how far it has to go to realise its purpose. In Britain, labour law has always been seen as protective because of Kahn-Freund's persuasive perception of it as such. For him, the main object of labour law has always been, and we venture to say always will be a countervailing force to counteract the inequality of

bargaining power which is inherent and must be inherent in the employment relationship (87).

Labour law has therefore, for too long, been focused on "paid labour" rather than the myriad issues related to work as a human function; skills, migration, rewards, awards, safety and health, equity, work security, social security and the dynamics of the labour market. Industrial relations or the relations in industry, the socialisation of production and employment relations ought to have been central to labour law much sooner. Now the concept of labour market regulation would, given its dimensions and dynamics, appear to be assuming a more dominant role as a more incisive analytical tool than the protective function of labour law within a subsisting employment relationship.

In the light of this, labour law may can no longer be seen as dealing only with law; the imposition of rules through statutes and judicial decisions but as encompassing other rules and regulations flowing from both public and private policy. These would include government policy, internal organisational arrangements between unions and employers, public administrative schemes, bureaucratic systems in organisations and accords between social partners.

Thus the issue should be one of assessing the necessity of regulation, its form, the efficiency or otherwise and the desired output rather than rigid juridification. These and other considerations inform a more holistic appreciation of the market of labour than labour law and renders labour lawyers inadequate to preside over the direction of labour issues and even the relevance of labour law itself. The dynamics and change potential inherent in industrial relations and human resource management indicate the need for constant change in modes of regulation which could render legislation nugatory unless it deals with broad policy frameworks rather than the minutiae of work. (88)

Industrial relations and Human Resource Management transcend the concept of economic exchange and value flowing from economic analysis of the contractual relationship of employment. This is because they deal with the form and content of the structure of workplace relations from a social and behavioural point.

Industrial relations revolves around workers and employers. The substance of these relations are determined by the microcosmic nature of the industrial environment in relation to society at large. Industrial relations may be considered as the

result a reactive analytical process of the industrial system. This process is evident more in the way rules and procedures pertinent to the quid pro quo of the relations are formulated (89). Industrial relations therefore deals with how best to accommodate the interests of the parties in the industrial process (90). At another level, such relations do reflect the sociology, politics of power, the activities of the actors and the interests at play in the work situation (91).

This would explain why an activist state could engage in aggressive juridification as a way of steering labour relations in a particular direction. The law, or labour law in this instance then becomes an instrument of regulating the parameters of workplace relations (92). But this is possible and operationally meaningful only if the organised groups allow the state to restrain them in some form in return for other concessions such as minimum conditions and quality time. While this may appear prescriptive, in reality, it is what Crouch refers to as "bargained corporation". Thus labour laws can only succeed where they reflect the realities of labour relations and the exchanges that characterise them (93).

The intensely competitive elements in globalisation have introduced into the terrain of industrial relations an aggravated form of adversarialism where the issues have become centralised around workers security, rights, abuses and distribution of production returns. As such, labour law may not be capable of mediating without a deeper understanding. For example, labour law may not be able to regulate the relational undercurrents described below:

'We [workers] work under pressure. Workers are dismissed for no good reasons. We are afraid even to talk anything because workers are being dismissed at a rate of six per day. We are very afraid. We are not happy.'

'1 [the manager] have adopted a more authoritarian style of management at this stage of the fight, because the shop stewards oppose everything we suggest. Although we sit around and talk once a month, it still seems as though they are anti-management. They must keep face with the workers, but if we allow them to be popular, we will close down '(94).

Embedded in this apparently antagonistic relation is a natural inclination to resolve it to mutual satisfaction. Thus, given the right impetus, such conflicts could equally quickly dissipate. In reality therefore, the focus of attention here is not law but the various strategies that management adopts in dealing with labour resources and labour problems. Law, despite its coercive

capacity, is not clothed with sufficient *savoir faire* to meaningfully mediate because of its remoteness and superficiality.

Human resource management sees labour, in addition to the financial and material, as a resource which can be used as part of the general business strategy. Management's driving force is how to induce employee loyalty and commitment for profit maximisation. Where need be, skills may be developed, honed and adapted, informed by an authoritarian and monist philosophy mixed with a pragmatic appreciation of workplace harmony. Increasingly, modern human resource management has apparently reconciled itself to a perceived perpetual antagonistic relationship between workers and employers. This rationalises the need for greater emphasis on the individualised employment relationship and an emasculation of unions.

Industrial relations on the other hand, sees this relationship as frictional but inherent in the employment relation. It is therefore manageable. To do this, the conflict should be institutionalised and procedures formulated. The resultant problems of inequity and inefficiency could then be resolved through pluralistic devices such as collective bargaining and or uniform extra – organisational regulation through juridification. The structure of industrial relations is seen therefore as receptive to prevailing dynamics and a function of changes in the power relations between workers and employers, the strategic role of the state.

In response, labour law, particularly in the developed economies has hitherto provided convenient superstructures which are superimposed on these socio-economic and relational bases. These institutional frameworks then provided for the recognition of unions (and their demise) and uniform, collective standards applicable to the workforces either wholly or as segregated.

Globalisation has however evolved a new management ethos that seeks to give primacy to the privacy of the individual contract. What this implies in relation to labour law then is that there would practically, be a bureaucratic construction of 'fairness' in employment practices and procedures centred around – recruitment of competencies and skills, job design, flexible obligations and duties, performance targets, appraisal and outcomes – based reward, efficiency, grievance procedures, disciplinary codes and the power of termination so reminiscent of the days of the Master and Servant Acts.

One approach to the resolution of the problem has already been mentioned. This is employee participation in decision-making. Worker participation is a philosophy or style of organisational

management which recognised both the need and the right of employees, individually or collectively to be involved with management in areas of organisational decision-making beyond that normally covered by collective bargaining. This would imply a participation in control as already in practice in some EU and Eastern European industries. Participation may include financial or share ownership, worker-co-operatives, democratic participation, co-management, co-determination and tripartite decision-making, directly or through representation (95).

This is however expected to signal the prophetic demise of industrial relations in its current form and structure. It is apparent that the workplace or the labour market is throwing up several challenges requiring change in structures, attitudes and methods of regulation, accommodation and containment. These rolling forces of change, largely economic and social, tend to render labour law in its current form obsolete and otiose. To avert this, a functional relationship between the legal framework and the preferred models of employment relations would need to be nurtured.

To do this, the following have to be understood and appreciated; the on-going conflict between industrial relations and human resource management, the evolving techniques of human resource management, the effect of globalisation and economic competition, the decline of trade unionism, the identification of best practice models of employee relations in American, Japanese and European industry and the rebirth of the neo-liberal private contract with undertones of employee subordination and employer prerogative (96).

The questionable claims of the neo-liberal school concerning the adequacy of the contract of employment as a self-regulating mechanism also seem to apply to occupational safety and health. In sum, greater risk and hazard would invite higher wage levels and greater cost to the employer. Evidence shows that accident and disease levels have increased, despite insurance and civil claims. For example, it is estimated that about 5000 people die every day from work-related accidents or diseases in the developing world while over 160 million become injured or ill every year (97).

The lack of adequate information about the danger at work and the reluctance to expend money on safety measures, training and improvement imperil the lives of workers and indicate the inability of the market to auto-regulate. In effect, the social or public good from regulation, inspection and penalisation suggest a continuing need for some forms of regulatory

intervention. The preferred option is the ownership of the policies, their method of implementation, structures and policing by the social partners.

The key question now is whether regulations have been effective enough to justify a role for regulation in a new labour law paradigm. To address this, one needs to know the policy agenda and objective outcomes expected. Also to be accounted for would be the formal and actual methods or purpose involved in satisfying perceived demands and interests of the true social partners.

It is also important to remember the unintended consequences of policy which regulation may bring about. For example, workplace forums in South Africa were initially seen by Unions as a way of fragmenting them. Workplace Forums have a threshold of 100 employees and are intended to promote the interests of all employees whether or not they are trade union members. Section 78 of the then Labour Relations Act (No. 66) of 1995 entitled them to be consulted by the employer and to participate in joint decision-making. Similarly, Bargaining Councils as provided for under Section 27 of the same Labour Relations Act are seen by some as an unnecessary aggregation of workers into amorphous bureaucratic structures hampered by conflicting interests. The Joint Industrial Councils provided for by Section 30A of the amended Trade Disputes Act (Cap 48:02) in Botswana are seen as divisive and emphasising industry or plant level arrangements that undermine the unitary aspirations of the Federation of Trade Unions.

Where regulatory mechanisms appear to compete, we need to assess their relative efficiencies. For example, collective laissez-faire or abstention might have been more effective than direct legislative intervention. Similarly, collective bargaining could produce a more resilient, satisfactory labour relations systems particularly where it is legally binding than the direct intrusion of the law. To be able to ascertain whether penalties or incentives or a blend is relatively more salutary in effect on workplace safety and health requires study, observation and analysis and not mere assumptions that have formed the basis for regulations in key areas of work relations.

It would appear that it is no longer desirable that labour law should preoccupy itself with traditional issues such as contract of employment, conciliation and arbitration, collective bargaining, regulation of trade unions, industrial conflict and occupational safety and health. Rather a labour market regulation paradigm is more relevant to current socio-economic developments. Thus, labour law must begin with the

understanding of the rationales for labour market regulation, the advantages and disadvantages of regulation, different forms of regulation and the impact on demand and supply of labour (98). This should be complementary to the functions of industrial relations and other related disciplines.

While traditional industrial relations is under assault by corporate managers and big business, labour law has not reportedly experienced that because both employers and employees still seek its regulatory effect for their own ends. However, its traditional foundations, such as trade unions, industrial conflict, conciliation and arbitration and collective bargaining are perceived to be crumbling (99).

In some countries within the SADC region, law is apparently utilised as a modus operandi ; a class serving device that perpetuates a certain perception of both social reality and history. It locates its authority and legitimacy in the state and as such, its instrumentality is circumscribed and defined by the interests of the more dominant interests in the society. Precisely because of this, even industrial relations and human resource management have been subordinated to the organic law.

This subordination of institutions to the juridificatory apparatus of the state normalises the subordination of the employee to the employer. Since all other forms of work or human endeavour are perceived as peripheral to the factorisation or socialization of work, labour law has, not surprisingly, misunderstood the dynamics of work. It is suggested therefore that labour law, in contradistinction from contract, property and other variants, must redefine its constituency, purpose and relevance. This however can only make sense if social justice assumes the status of both a definitive focal point and an achievable goal.

Chapter 2 has been instrumental to our understanding of the philosophy of work, law, politics, power and the various disciplines that weave the tapestry of the world of work. There is a mosaic of factors that help shape the environment of work which need to be grasped if labour law is to be properly understood within a functional context that can sustain its validity.

In the process, it also became clear that at least conceptually, collaboration, co-operation or integration is possible only if the countries concerned can objectively appraise their intentions towards labour and labour law and come to terms with certain inevitable conclusions such as the permanence of labour and the immanence of change. The cost of political power and

legislative authority is the social dialogue that labour law must be allowed to mediate.

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Chapter 3

3.0 The Evolution Of Labour Law In Botswana

Introduction

This Chapter is intended to assist in examining the genesis of labour legislation in Botswana by providing a link between the past and the present in the hope of identifying a pattern or logic to labour legislation in Botswana. The function of legal history is to focus attention on how the law has been developed in a given context up to what it is today. The intention is to provide a better understanding of the law as it is at present so that society can be beneficially organised for now as well as for the future. (1) This is particularly so where the organic laws trace their origins to *ab extra* impositions by a foreign ruling power. Our main concern however is with the organic laws and the common law jurisprudence. The Legal systems of Botswana and Swaziland distinguish the applicable common law from statute law and customary laws relative to particular tribes. In common with the non-codified laws of Britain and South Africa, common law jurisprudence in particular is distinguished as judge-made law which attempts to re-state and give contemporary meaning to accepted practices inherent in concepts such as law of contract or law of obligations.

It can be said therefore that the development of common law jurisprudence presupposes a society steeped in legal principles and norms that defined its social formations and relationships, a society that is not only literate but also properly organised. It is precisely because of the foregoing that the development of labour law as we understand it in Bechuanaland and Swaziland among others could have been a non-starter. These were disparate, peasant communities engaged largely in subsistence economic activities. They could thus be described as virginal territory awaiting "discovery" and "civilisation" in this regard.

So, a study such as this should imply a study of how the law has been fashioned and used to mould and buttress the forms of social interaction. Law and law-making are reducible to policy choices, objectives and modalities for implementation. Since the law often provides the coercive mechanism, it necessarily facilitates the interaction between the lawmakers, the courts and the state. At the other end is the allocative constituency. Realistically therefore, the law provides the nexus between these institutions. The colonial state as personified by Resident and District Commissioners and *soi-disant* Justices of the Peace performed arguably legal and judicial functions whose effects were often arbitrary, prescriptive and deleterious.

Since the law is intimately connected to the state and expresses its dominant will, juridification then becomes a process of legitimizing existing and desired material conditions. One of these was the creation of labour pools and a system of economic dependency in contiguous territories. The law thus manifests instrumental, political and socio-economic objectives.

The actual role of the law at any given time is therefore premised on a realistic and objective understanding of legislation, rules, regulation and policy often put in place in the name of governance and development administration. According to Saul, one key function of imperial penetration was to force the proletarianization of adequate numbers of the indigenous pre-capitalist population to provide labour of all types and subsequently at times to staff the lower echelons of the colonial state apparatus. More importantly, such native labour was used to work the extractive and later semi-industrial sector developed by such colonising penetration. Such forms of labour were extracted through laws that actually legalised forced labour and poor wages. (2)

A corollary was endorsement by the colonial power of forced labour as practised by Chiefs and the legitimization of the externalization of indigenous labour in the farms and mines of South Africa through proclamations. Such laws, it was averred, were beneficial for both natives and the said colonial power. (3) This is one level at which the influence and impact of legislation could be analysed.

We contend that both South Africa and Britain had a significant influence on the development of employment law in Botswana and Swaziland. Influence is the perceptible effects of a person's actions on another, either positively or negatively or both. According to Schapera, there were laws such as that of obligations before the Protectorate system. (4) These were fragmented, tribe – specific, non-organic normative interpretations without form or ceremony and not conscious organic creations intended to effect certain compulsory changes in conduct. Pre-capitalist African society had no structures or mechanisms that institutionalised contractual relations of employment and service. It is the colonial master that came to identify some of the traditional practices as "less primitive" which it then recognised incrementally per proclamation. There were no economic activities that could have warranted the introduction of statutes such as the law of Master and Servant even in the area of farming except the application of penal and regulatory mechanisms intended to frighten the herdmen and their families into absolute subservience. Thus, from 1885 onwards, the regime of laws that applied in the Bechuanaland

Protectorate and later Swaziland were foisted on simple, pastoral and agrarian societies with a wide range of results.

The Evolution of Botswana and the Legal Framework

Botswana is a landlocked country. It shares borders with Zimbabwe, South Africa, Zambia and Namibia. In the North – East, the Limpopo river descends into a confluence with the Shashe river which effectively bifurcates the country. To the British and South Africans, this geographical phenomenon created two Bechuanalands. One was conducive to occupation for farming purposes and coterminous with South Africa. The other was seen as a historical corridor to the north from South Africa, unattractive and at best, a repository of native labour for future exploitation.

This is why in 1885, while agreeing to offer protection to Bechuanaland, the colonial authorities indicated that they had no interest in the country north of the Molopo except as the road to the interior. They saw their responsibility as preventing that part of the protectorate from being occupied by either filibusters or foreign powers.

However, the Foreign Jurisdiction Act (1890), necessitated a formal rudimentary administration which was established from Mafikeng in South Africa. Under the Bechuanaland Protectorate Order in Council (1891), the High Commissioner (HC) of the Cape Colony was given representative jurisdiction over the territory. Thus began the legal evolution that would essentially reflect the political, ideological and class differentiations that had started to unfold in South Africa. Ultimately, the tribal sovereignties were remoulded into dependent tribal labour reserves created by law.

With protection came incorporation into the Cape Colony to be followed by eight decades of legal and socio-economic dependence. The Governor of the Cape Colony became the HC for Bechuanaland, charged with inter alia, the settling and adjudication of the affairs of territories in Southern Africa which were adjacent or contiguous to the eastern and north-eastern frontiers of the colony (5).

By 1878, the HC had assumed responsibility for Basutoland,to be followed by Bechuanaland and later Swaziland. Between 1935 and 1959 therefore, the HC wielded absolute power over the High Commission Territories (HCTs). The seat of the Governor, being that of the HC also, became the political and administrative centre of Bechuanaland.

Legislation for the HCTs was thus externally done and mainly through either the adaptation or adoption in toto of Cape Colony laws . Such laws were translocated as Proclamations which in most cases were not even gazetted as required to validate them and would appear, in the main, to have been spatio-temporarily irrelevant.

Legislating the Botswana State

In essence, the General Law Proclamation (1909) (6) enabled the realisation formally and legally of the socio-political calculations of both the British colonial administration and the burgeoning South African capitalist interests. This proclamation incorporated and accepted as legal all received laws in force in Bechuanaland on 22 December 1909. This was in addition to the provisions of any Order in Council or any Proclamations or regulations in force as the laws of the Cape Colony on 10 June 1891. Such laws were, *mutatis mutandis*, to apply in the Protectorate. These legislative developments resulted in certain cosequences outcomes. The Roman – Dutch law then in use in South Africa became the common law of Bechuanaland. This amalgam, which was neither Roman nor Dutch law but a hybrid was imposed in its then primitive forms on a British administered territory.

These imported laws included the Master and Servant Act (1856), the Works and Machinery Proclamation (1934), the Workmen's Compensation Proclamation (1936), the Women and Boys Underground Work Proclamation (1936), the Employment of Women and Children Proclamation (1936), the Native Labour Proclamation (1941),the Trade Union & Trade Disputes Proclamation(1942),Wages Board Proclamation (1942)

On September 14 1959, an Order in Council (S.1 No 1620) conferred sole administrative powers on the Resident Commissioner (RC) who was appointed by the HC in Pretoria. In 1960, the Bechuanaland Protectorate (Constitution) Order in Council established the Legislative and Executive Councils.

On January 20 1965, an Order in Council established the office of Prime Minister and Cabinet portfolios as a prelude to the promulgation of the Constitution of 1965. On 30 September 1966, eight decades later, the Bechuanaland Protectorate finally became the Republic of Botswana. (7)

The Legal Framework of Socio-Economic Dependency In The Protectorate

In the closing decade of the 19th Century, Bechuanaland had been coveted by Cecil John Rhodes, the British South Africa Company and the Boers. The Kimberley mines were opened in 1867. By 1909, there was a growing demand for cheap but healthy black labour. Expectations had been high that the Union of South Africa Act (1909) would facilitate the incorporation of Bechuanaland as this would have facilitated the domestic legalisation of the abuse of such labour. (8)

The dual system in South Africa which was creating a segregated social class system was reflected in such Bechuanaland laws like Native Affairs Proclamation, African Education Proclamation and Credit Sales To Natives Proclamation (1932). These and others were only repealed in 1964 under the General Law (Removal of Discrimination) Revision Law.

The functional interdependence between Bechuanaland and South Africa was driven primarily by economics but buttressed by legislation and the import of expatriates to run the administrative and regulatory affairs of the territory. By 1949, 495 of 600 civil servants in the HCTs were South African whites. (9) On the other hand, the Hut Tax Proclamation (1899) in Bechuanaland became the catalyst for externalising black labour to augment the local workforce. It induced labour to migrate into the farms and mines of South Africa in order to pay the tax levied on males for the purpose of financing the protection of Bechuanaland.

The Proclamation of 1909 (No. 7) subsequently raised the hut tax, deepening the reliance on externalised sale of labour power. It also compelled the collaboration between the Chiefs as commission earners or salaried supervisors, the colonial government and the mining industry. (10). Drought, pestilence, taxation and collaboration therefore became instrumental in the structural transformation of the Protectorate into a labour pool. However, it was legislation that sustained the momentum, providing the coercive engine for the implementation of the process. The physical delimitation of tribal reserves resulted in the curtailing of traditional Chiefly authority. The tribal reserves were reduced to 40% of the most unproductive parts of the territory. The 1893 Concessions Commission demarcated the rest into Freeholds and Crownland. (11)

Through these laws, by 1960, 50,000 Batswana became migrant contract workers in South African mines out of a population of 526,000, 44% of whom were aged below 16 years of age. (12) The relaxation of Proclamation No. 6 of 1899 through Proclamation No.45 of 1907 enabled aggressive and open recruitment of labour in the territory and the monopoly over wages and labour conditions by the mines of South Africa.

The colonial government ensured a high volume of migrant labour with dire socio-economic consequences. For example, in 1936, out of 4000 fit men, in the Kweneng Reserve, 37% left for the mines annually, often returning having aged prematurely and prone to sickness. Meanwhile, wives, the aged and young were left behind to eke out a living from semi-uncultivated, arid patches of land. (13) Given this cyclical turnover, it was therefore more practical and logical to see Bechuanaland as an adjunct functioning within a common socio-economic and legal entity underpinned by a vibrant client – satellite ideology. It is therefore not accidental that the original intention was not to administer efficiently and effectively. As it is, the ultimate effect was the failure to stimulate any local economic activity beneficial to the natives.

Labour Legislation In Botswana

The General Law (Cape Statutes) Revision 2 (1959) set out to provide that certain laws of the Cape Colony of Good Hope in force in Bechuanaland but "obsolete or otherwise unnecessary in the circumstances of the territory" should no longer be in force. However, Section 3(d) also provided that nothing implied the discontinuation of the application of Roman-Dutch common law in the Territory.

Ipso jure, by 1959, Roman/Dutch law had been firmly entrenched in the Territory for seventy-three years and permeated all facets of civic life. With regard to employment law, it can be stated that the most important was the Master and Servants Act (1856) (14) of the Colony of the Cape. Its main object was to provide for the regulation of the rights and duties of Masters and Servants. Though its definition of the "employment contract" has not changed to date, the implicit assumption of subordination was, at that time, implied in the concept of "Master" and "Servant".

A Master was any person, male or female employing for hire, wages or remuneration. A Servant was any person employed for the same but engaged in handiwork, domestic service, bodily labour in mining, agriculture, manufacture, boatman, porter or other occupation of like nature. Clearly this scope indicated the

levels of activity in South Africa with some fringe activities such as being a Porter or domestic servant which were by then occurring in the Bechuanaland Protectorate.

A contract of service was not to be less than 1 month save as specified and approved by a magistrate (administration officer). Sections 3 and 4 provided that both oral and written contracts could not be more than 12 months in the first instance but not more than 5 years where the contract was written (migrant contract labour).

Section 12 excluded those below 18 years from criminal liability outside agricultural activity unless the offence fell within the scope of misconduct. It defined a breach of contract as any of the following; refusal to commence to perform services, neglect or lack of diligence, absence without valid reason and desertion. A penalty of £1 or 1 month's imprisonment was provided rather than the option of a Master using his discretion. [Note the value of £1 in 1856 and wage levels then. Section 13 defined misconduct as failure to commence work without just cause, use of Master's property without leave, brawling or disturbance and abusive, insulting language. These in themselves are not very different from the current provisions under serious misconduct warranting summary dismissal [S.26, Employment Act, Cap 47:01].

Section 15 provided a further scope for punishable offences as follows; refusal to report loss or death of any animal by a herdsman, failure to preserve part of any animal reportedly dead for the master's inspection, loss of any property of the master in the servant's care. However, Section 17 provided that no penalty shall constitute grounds for termination of a subsisting contract of service. Therefore those considerations that modern law accepted as sufficient grounds such as intolerable differences or breach of trust did not apply to free the servant in particular from the potential tyranny of the master. The prescription period was restricted to 1 month after cognisance of the offence (Section 20). On the whole, the provisions for alternate verdicts resulted in the legal right to punish any so-called servant above 16 years of age.

On the balance however, the Act did provide that a Master withholding wages could be penalised and also for refusing to supply necessary materials for the performance of contracted service. However, only a magistrate could terminate contracts particularly on grounds of non-performance by the Master. The question then is why such elaborate law was introduced to regulate domestics and farmhands on isolated farms. The Catchpole Report of 1960 described the Master and Servant Act

as containing "harsh penal clauses" that were not "in harmony with modern conceptions and contrary to ILO Conventions" (15)

The Employment of Women And Children Proclamation (Cap. 55) specifically excluded the employment of a 'child' below 12 and a 'young person' below 18. While these could not work in industrial undertakings such as mines, construction and installation, the same young person could be employed in night work, glass works, paper works, raw sugar extraction, gold mining and other reduction work. In this instance, only the HC regulated such selective employment while any DC or Police Officer could constitute himself into an inspector of premises to ensure compliance. (3) In effect, employment of 'young persons' below 18 years was not actually proscribed and they could thus be utilised in areas potentially more harmful than those actually restricted.

The African Labour Proclamation [56 OF 1941] was meant to regulate and control the recruitment of African labour and the execution of contracts for Africans as manual workers. It defined 'recruitment' as operations undertaken with the object to obtain or supply african labour not spontaneously offered at place of employment. It empowered licensed Labour Agents to enter into contracts of 6 months or more duration which could only terminate either through the death of the worker or lapse of time. It also restricted wage advances to Africans to £4 and penalised desertion with a fine of £10 or 2 months imprisonment. With regard to African Contract Labour, the Catchpole Report observed that its penal clauses (Section 40) conflicted with ILO Convention No. 65. In effect, given the rigours of the hut tax and the burdens of immiserisation, the African worker became literally an indentured article rather than the independent owner of labour power with the freedom to sell or to withhold this labour potential.

The Works And Machinery Proclamation [40 of 1934] (16) dealt mainly with processes connected with manufacturing, production, mining and related issues of safety, health and inspection.

The Women And Boys Underground Work Proclamation [74 of 1936] (17) prohibited the employment of <u>any</u> Females or any boy below 16 years underground in mines. A 'mine' was defined as any working made for prospecting for or winning minerals. However, there were exemptions on the grounds of health work, management, training and non-manual work. Given the exclusions in other laws, women were effectively restricted to the spheres of shop and domestic activities in what would amount to discriminatory practices today.

The Workmen's Compensation Proclamation [28 of 1936] (18) defined the workman as a worker under contract of service or apprenticeship. [Apprenticeship was deleted only after amendments to the Employment Act of Botswana in 1992]. The provisions excluded any worker earning more than £500 per annum, casual workers, outworkers or those so excluded by the HC such as farmhands and domestics. It is submitted that this exclusion from social insurance of some sectors of workers persists today. While the definition of 'dependant' is still basically the same, at that time, for the African, 'member of family, was defined as "wife or reputed wife" or others as may be determined "after consultation with the Chief". Section 16 provided that no agreement between the worker and employer shall operate to prejudice the employee which, we submit concurs with the current provision proscribing the waiver of right of claim by an injured worker.

Given the fact that provision was made for whites in the Act and their families and or dependants and given that there were actually very few, if any African workmen as defined, the Act would seem to have been incorporated to cater for the expatriates in charge of the governance and economic exploitation of the territory. (19) However, it did make provision for putative contracts of service as may be so realised to be deemed actual contracts having regard to all factors to enable recovery of claims by the injured. Section 13 also enabled an injured workman to receive half of his earnings in any pay period subject to other determinations.

Reacting to this Act, the Catchpole Report (1960) recommended a new Act which to a large extent, is still operational. At its enactment, the new Act effectively repealed the following, Proclamation 28 of 1936, Proclamation 51 of 1948, Proclamation 38 of 1949, High Commissioner's Notice HCN 170 of 1952.

The Wages Act [20 of 1936] (20) provides for the establishment of Wages Boards (Cap 161) and prescribed minimum wages for certain sectors. The Catchpole Report observed that wages were determined only by employers and were inhumanly low but added strangely that workers owned cattle which "often counterbalanced " the below-subsistence level wages. He did observe that, in view of the growth of the Public Works Department and the Lobatse Abattoir, worker participation in wage determination in some form was strategically advisable.
The Shop Hours Proclamation [72 of 1941] (21) prescribed strict business hours for shops which by definition included booths, barber salons, tents, buildings and such structures. It provided that all shops should not open beyond 5.30 p.m. on weekdays

or 1 p.m. on Saturdays. In addition, no shops could open on Sundays or holidays and no worker should work more than 47.5 hours a week. This statutory rest period is remarkable considering current provisions both in Botswana and Swaziland.

The Employment Law 15 of 1963] (22) had as its main purpose the amendment, consolidation and regulation of conditions of work by the nascent Legislative Council of the Bechuanaland Protectorate. It amended the African Administration Proclamation [Cap. 67] and repealed the following: Law of Masters and Servants, Employment of Women and Children Proclamation (Cap 55), Protection of African Labour Proclamation (Cap 72), African Labour Proclamation (Cap. 73), Women and Boys Underground Employment Proclamation (Cap. 127), Mining Health Proclamation (Cap 126).

Unlike the current Employment Act (Cap. 47:01), the Employment Law did not define the employee. Rather its definition of "employ" was "to use as employer, the services of an employee". "Employer" was defined as any person or body who or which entered into a contract of service to hire and includes agent, foreman, manager, or factor of such person placed in authority over such person employed or with any officer on behalf of the government. Excluded were the Police and Armed Forces. Currently, the Public Service Act [Cap 26:01], and the various enactments establishing Parastatals have now restricted 'employee' for the purposes of the Act to the realm of Private Sector activity.

It further provided that no one was to be employed under any contract of service except in accordance with the above. As said, the common law jurisprudence was conditioned by the structure of the judicial system. Given the dominant role of administrators in this respect, the situation prior to independence could be described as chaotic and bereft of any systematic jurisprudential approach.

With regard to trade unions, the Catchpole Report observed that since there was very limited industry with very limited likelihood of material expansion, there was no need for Labour Officers in the foreseeable future. It added that since there was very little trade union activity, trade disputes were also at their very minimal and the Report did not foresee "any reason to expect that trade disputes are likely to occur under present circumstances in the territory". (Catchpole, 1960: Section 49, P.10).

Needless to say, since 1942, there had been a Trade Unions And Trade Disputes Proclamation [16 of 1942] (23) which, we submit, was in reaction to the Passville Memorandum of 1930 which threatened a funding freeze if colonial administrations did not begin to toe the ILO line. It is no surprise therefore that only three Trade Unions were formed before 1960, two in 1949 and one in 1959.

With the exception of the above – mentioned Act of 1963 which was a patchwork from Jamaica, Trinidad (1927) and Tanganyika (Employment Ordinance Cap. 366 of 1955), the main body of laws had a distinct South African origin and flavour. The generality of these employment related laws were meant to facilitate regulation, control and exploitation. Nevertheless, their pervasive influence in several spheres cannot be ignored. Acts such as the Shop Hours Proclamation were not however draconian in effect.

The Current Labour Law Regime

There are two main instruments affecting trade union formations in Botswana. These are the Trade Union and Employers Organisation Act [Cap 48:01] and the Trade Disputes Act [Cap 48:02]. The Industrial Court, established in 1992 through the Amendment of the Trade Disputes Act is charged with settling Trade Disputes, the furtherance and ensuring of good industrial relations.

1. The Trade Unions and Employers Organisation Act (TUEOA)

In 1992, Bill No. 17 was enacted into law to amend the TUEOA as it stood in order to replace the whole of Part XII relating to the investigation of trade unions and federation of trade unions in order to revert to the system that obtained under the 1983 Act (No. 23).

Formation and Registration

A trade union may be formed by thirty or more employees belonging to a trade or industry. The registration of such an organisation consisting wholly or in part by thirty or more employees shall be effected as soon as it is formed or it shall not be accorded legal status for the acquisition of a *locus standi in judicio.*

For this purpose, employee excludes

a. public officers

b. persons employed by a local authority above the rank of "industrial class but shall include employees of parastatals established by Acts of Parliament" [Sections 5,6]

For purposes of registration, the following particulars are to be furnished to the Registrar who shall be a Public Officer below the Commissioner of Labour;

a. Titles, Names, Ages, Postal and Residential addresses of the founders
b. Their occupations
c. Particulars of the Employers and Industry with which they intend to negotiate.

Effects of Non-Registration

The union shall be liable to a fine and not eligible for legal status.

Where any of its officers is a non-citizen, such a union shall not be registered (Section 10(3)).

However, officers of such unions may be deemed as legally conducting business if the object is to defend an action or to undertake the dissolution and disposal of the assets of the putative union.

Cancellation of Registration

In the event of exercise of such power as conferred on the Minister, the union so affected a) shall cease to enjoy any rights, immunities and privileges accorded officers and members of a registered trade union, and b) any liabilities may be forced upon it (Section 12).

Immunities Arising From Registration

a. There shall be no suit or legal proceedings lying in any civil court against the registered union or its officers in respect of any act done or contemplated in furtherance of a trade dispute on the grounds of;

   i) inducing others to break a contract
   ii) interfere with trade, business or the right of a person to dispose of his capital or labour at will
   iii) delictual acts alleged to have been committed in an individual or collective capacity for the trade union.

b. The objects of the union shall not attract legal sanction because they are in restraint of trade so as to render a member liable to criminal prosecution or void or make voidable any agreement or trust (Section 17).

However, the trade union shall be liable for all obligations arising from contracts operative in law entered into by or on its behalf. (Section 19)

Membership and Elective Office

Membership shall be open to only employees in the industry with which the union is directly concerned. The Minister may investigate the composition of this membership (Section 53). A member who becomes an employee of the union shall cease to be a member which status thereby terminates with the loss of employee status as defined for union registration.

An employee of the union cannot contest an elective position neither can non-members of a particular union or federation.

An employee for less than one year in an industry shall not be eligible for election as well as a young person below eighteen years whose statutory incapacity is limited to elective office (Sections 21, 22).

Restriction On Membership

No member of management in any undertaking or enterprise shall be represented by a negotiating body whether a registered trade union or not in matters of relations between employer and employee unless such representation is of members of management only. Member of management is defined as an employee who

a. has authority, on behalf of his employer, to employ, transfer, suspend, lay off, recall, promote, terminate the employment of, reward, discipline or deal with the grievances relating to the employment of any fellow employees or effectively to recommend any such action or the manner in which such grievances ought to be dealt, with, if the exercise by him of that authority is not merely of a routine or clerical nature but requires the use of his discretion;

b. participates in the making of a general policy regarding relations between his employer and his fellow employees or any of them; or

c. is employed in a capacity that requires him to have full knowledge of the financial position of the undertaking or enterprise in which he is employed or gives him free personal access to other confidential information relating to the conduct of his employer's business (Section 61).

Section 61 appears to be rather contentious precisely because the Section is seen as a strategic collusion between the state and employers in the tripartite structure to restrict the unionisation of the workforce. This is further supported by the decision of the Appeal Court in *Botswana Power Corporation Workers Union (BPCWU) v Botswana Power Corporation (BPC)* (Civil Appeal No. 42 of 1998 [IC 136 of 1996).

At issue was whether certain categories of employees of BPC qualified as 'management' as defined by Section 61 of the TUEOA [Cap 48:01]. If they did, then by the same section, they could not be unionised and represented by the appellant union in matters bearing upon relations between the industry and employees. They can therefore only join a union organised solely for management staff.

The BPCWU therefore was seeking a relief by way of certain declarations.

a. that Section 61 of Cap 48:01 was contrary to Sections 3(b) and 13(1) of the Botswana Constitution regarding freedom of association and membership of a union of one's choice.

b. that Section 61 of Cap 48:01 be restrictively construed in respect of only those job positions absolutely expressive of the core interests of the employer.

c. that all job positions within grades 8-17 inclusive except the 9 listed elsewhere be declared as within the scope of union representation.

In its ruling, the Appeal Court, rather than examine management from a functional perspective to ascertain which ranks actually were managerial, held as follows:

a. that the individuals described in these positions as 'management' did not appear to be complaining about the restriction on their rights, and would appear to be satisfied and have therefore not been joined in the application.

b. that the Constitution itself has consciously excluded certain categories of workers from union membership such as public officers and teachers and enabled other statutes to make such exclusions.

c. that there should be an operational distinction between employees in management and those in the unions so as not to deprive the employer of confidential advice.

d. that it is not the BPC Act but rather the Constitution and the TUEOA that have provided for a range of categories and job positions to be excluded and therefore it is Section 61 that confers "management" status and not the employer. This is in conformity with the intentions of both Parliament and the Constitution.

In contrast, in the case of the *NALCGPMWU v BTC (Unreported)* the Industrial Court relied on the same constitution in support of the union.

In this instance, the Union had sought a declaratory order that it was entitled to represent its members employed by the Corporation. Further, it wanted the court to direct the Corporation to hear its representation on the exit packages being proposed as part of the organisation's restructuring process.

BTC contended that the Union members who were its employees did not add up to twenty-five percent of its total workforce as required.

In it's ruling, the court said the Constitution of Botswana preserves the right to freedom of assembly and of association. Further this implied the freedom to form or join an association of one's choice. It further ruled that the Constitution places no restriction on the recognition of a union where it is sufficiently representative.

In conclusion, the court held that though there are no specific statutory organisational and bargaining rights, there is implied a duty to consult and a right to be consulted. These are protected by the jurisprudence of the labour law in Botswana.

Inspection of Records in Custody of Registrar

All registers, books and other documents in the custody of the Registrar by virtue of this Act shall be open for inspection by members of the public during such hours, on payment of

such fees and subject to such conditions as may be prescribed (Section 62).

Restriction on Affiliation

No registered trade union, federation of trade unions or employers' organization shall, without the consent in writing of the Minister, be a member of or otherwise affiliated to any body outside Botswana (Section 63).

Restriction On Receipt of Funds

(1) No registered trade union, federation of trade unions or employers' organization shall, without the consent in writing of the Minister, accept any funds originating from outside Botswana. (2) In this section, "funds" includes all donations, loans or other assistance (including assistance in kind, air or sea passages, vouchers or scholarships) having pecuniary value (Section 64).

Service of Legal Process

Every summons, notice or other document required to be served on a registered trade union, federation of trade unions or employers' organization in any civil or criminal proceedings shall be deemed, for the purposes or those proceedings, to be duly served if it is delivered at its registered office or posted to its registered postal address or served personally on its president, principal secretary or treasurer or any other of its officer (Section 65).

Trustees and Union Property

Only members of the union may be elected as Trustees. In all actions and prosecutions before court pertaining to property, the same shall be stated as the property of the persons who are trustees for the time being in their names. Disposal of assets is subject to the discretion of the Executive Committee (Section 26).

Disbursement of Funds and Oversight Authority

Union funds may be used for a host of things including compensation of members for loss of income from trade disputes and lawful industrial action. Excluded are political party contributions and personal litigation costs.

Five or more members may apply to the Industrial Court or the Minister for an interdict to prevent further misuse of

union funds.

The Minister may, by notice in the Gazette, demand inspection of union books or documents at the behest of members or on his own initiative. He may appoint an Investigator subject to Fourteen days prior notification. The Investigator may become a witness in courts (Section 51).

The Minister may proscribe a union if for whatever reason, he is unable to obtain access to information required and a penalty of P100 fine may be imposed for refusal to furnish data.

Meetings

The order of union business shall be by the Annual General Meeting (AGM) which shall take place at no longer than 15 months intervals. It shall be the forum for the election of officers and shall normally be called within every year ending 31st December.

Where there is a default, the Registrar may call such a meeting.

Extraordinary General Meetings may be requested by one-tenth of the union membership in a written requisition.

Twenty-one days after notification of the requisition and not more than forty days after such deposition, the Executive Committee shall convene a meeting. In default, any two members may convene such a meeting but no later than three months after such a deposition (Section 29).

Constitution

Every registered union shall draw up a constitution in terms of the schedule which is subject to amendment by the Minister and shall lodge such and any subsequent amendments with the Registrar.

The union shall provide members with copies at a cost of fifty thebe per copy.

Picketing

One or more members of a union may lawfully assemble at or near premises, house or place of business to obtain information or to peacefully persuade or induce any person to work or abstain from work.

Such picketing shall be unlawful where it operates to intimidate occupants or obstruct exit or access or leads to a breach of the peace.

Amalgamation

Where a union amalgamates with others in a federation, it shall nevertheless retain its *locus standi in judicio* and retain liability for its actions independent of the federation.

Freedom Of Association

Shall be construed as freedom to join or not to join any union or organisation. This shall not be a condition sine qua non for employment enjoyment of employee benefit. It shall also not occasion subjection to any form of penalty or disadvantage arising from the exercise of the freedom.

2. The Trade Dispute Act [Cap 48:02]

This Act was equally amended in 1992 (Bill No. 24) to establish the Industrial Court and to reduce the interventionist role of the Commissioner of Labour and the Minister in the settlement of trade disputes. The Commissioner retains the mediatory role prior to referral of cases to the Court and the Minister has a quasi-adjudicatory role in the matter of Essential Services. It also introduced the concept of Joint Industrial Councils (industry based) and the registration of Collective Agreements arising therefrom.

The new definition of "trade dispute" includes a dispute between unions, a grievance and any dispute over –

a. the application or the interpretation of any law relating to employment;

b. the terms and conditions of employment of any employee or class of employees, or the physical conditions under which such employee or class of employees may be required to work;

c. the entitlement of any person or group of persons to any benefit under an existing collective agreement;

d. the existence or non-existence of any collective agreement;

e. the dismissal, employment, suspension from employment, retrenchment, reemployment or reinstatement of any person or group of persons; or

f. the recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment".

Powers Of The Commissioner Of Labour (COL)

As the organ of first resort in the resolution of trade disputes, the Commissioner may delegate any of his powers of investigation and settlement to specified labour officers to whom the parties may report and who shall compile a report for the Commissioner as to failure or success to secure settlement (Section 5).

Where there is a failure, the COL, taking into account the delay (forty-two days or twenty one days as the case may be) and the inability to utilize other means, issue a certificate referring the case to the Industrial Court copied to the parties.

Given the key role of the COL, it is necessary to make a few observations. Since the enactment of the amendment in 1992 providing for the Industrial Court, the very court has found it necessary to question the COL's understanding and application of the provisions of the Trade Disputes Act.

Specifically, Section 6 (2) mandates the COL to personally undertake certain functions after his delegated officials have reported to him including enquiring into the matter at hand, acting as conciliator *inter se* or requesting the parties to do certain things. Section 6 (3) stipulates that the above mentioned functions shall be without prejudice to the power to delegate or authorize someone else to mediate.

The confusion between administrative discretion and statutory duty was illustrated in the case of *Jameson Limbo v Cresta Mowana Safari Lodge*, [IC 50/96] (24). Limbo's contract of employment was terminated and he reported the matter to the Labour Office as required. The point raised *in limine* was that, while the complainant had done what the law required, the Commissioner of Labour had failed in his pre-emptive pro-active functions as required per Section 6(2) of the Trade Disputes Act [Cap 48:02]. The Industrial Court ruled that the COL must perform the functions outlined in Section 6(1) and (2)(a) personally and only then could a conciliator be appointed under Section 6(2)(a). The court therefore held that the COL could not have validly dealt with the said dispute and could therefore not have validly issued a Section 7 Referral Certificate. In effect, the Court itself had no jurisdiction to determine the dispute. These findings were confirmed in nine other cases leading the court to observe that;

"The Applicant is not the only unfortunate one whose case has fallen by the way because of technical hitches due to the imperative wording of the aforesaid sections of the Trade Disputes Act" (P.21) (25)

The import of this is that, much as the COL has a lot of responsibilities, his accountability must be matched by an adequate level of technical competence. A thorough grounding in introduction to law, interpretation of statutes and the legal environment of public administration is called for. This could then form the basis for a specialisation in Labour Law. Having said that, if indeed delegation defines much of the scope of the COL's work, then where personal effort and integrity are required, this should be made *ex abundante cautella.*

The Industrial Court

Is vested with all the powers and rights set out in the Act as a court of law and equity.

The Court

In the existence of the jurisdiction of the Court under Section 18, a Judge shall sit with two nominated members, one of whom shall be selected by him from among six persons nominated by the organization representing employees or trade unions in Botswana, and the other selected by him from among six persons nominated by the organization representing employers in Botswana, that is, one from the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM) and one from the Botswana Federation of Trade Unions (BFTU) (Section 17 of Part III).

Provided that, where, for any reason such nominated members are, or either of them is, absent for any part of a hearing of any trade dispute, the jurisdiction of the Court may be exercised by the judge along or with the remaining member of the Court, as the case may be, unless the Judge, for good reason, decides that the hearing should be postponed.

Jurisdiction of Court

(1) The Court, or any division of the Court, shall have exclusive jurisdiction in every matter properly before it under this Act, and without prejudice to the generality of the foregoing, such jurisdiction shall include power –

a. to hear and determine all trade disputes;

b. to enjoin any employee or employer, or any trade union or employers' organization, from taking or continuing any industrial action;

c. to refer any matter to an expert and, at its discretion, to accept his report as evidence in the proceedings;

d. generally to give all such directions and do all such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it.

(2) Any matter of law arising for decision at a sitting of the Court, and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the Judge presiding.

(3) Upon all issues other than those referred to in subsection (2), the decision of the majority of the persons representing the Court shall be the decision of the Court: Provided that where there is no majority decision, the decision of the judge shall prevail.

(4) There shall be an appeal to the Court of Appeal against decisions of the Industrial Court.

(5) In the exercise of its powers under this Act, the Court may take into consideration any existing code of industrial practice agreed between the Government, employers' organizations and trade unions, and any guidelines or directives relating to wage and salary levels, and any other terms and conditions of employment that may, from time to time, be issued by the Government.

(6) The Court shall regulate its own procedure and proceedings as it considers fit (Section 18).

Powers to hear evidence

(1) The Court shall not be bound by the rules of evidence or procedure in civil or criminal proceedings and may disregard any technical irregularity which does not and is not likely to result in a miscarriage of justice.

(2) For the purpose of dealing with any matter before it, the Court may order any person to –

a. furnish, in writing or otherwise, such particulars in relation to the matter as it may require;
b. attend before it;

c. give evidence on oath or otherwise;
d. produce any relevant document.

(3) Any order given under subsection (2) may include a requirement as to the date on which or the time within which the order is to be complied with.

(4) Any person who without reasonable cause, the proof of which shall be upon him, fails to comply with any order given under this section shall be guilty of an offence and liable to a fine of five hundred Pula and to imprisonment for three months.

(5) Any person being required by an order made under this section to furnish information or particular, produce any document or give evidence before the Court, who makes any statement, or furnishes information or particulars, or produces any document which he knows or has reasonable cause to believe is false or misleading in any material particular, shall be guilty of an offence and liable to a fine of One Thousand Pula and to imprisonment for six months (Section 19).

Collective Bargaining and Registration of Agreements

A union and an employers' organization may, where sufficiently representative of employees' and employers' interest in an industry apply to the Commissioner jointly in writing to establish a Joint Industrial Council (JIC) for that industry.

The Commissioner shall, after due consultation and examination of its constitution and objects cause a notification to be gazetted and thereafter establish such a Council. (Section 30 A Part V) Collective agreements arising from such JIC negotiations shall be registered by lodging a certified true copy from both sides with the COL within 28 days after such agreement (Section 33).

Repudiation

Either party may repudiate a collective agreement after one month by giving notice in writing save that such notice shall not be effective unless approved by the Minister who may not do so before the expiry of six months after the execution and enforcement of the agreement.

Ministers Powers Regarding Industrial Action

An industrial action may be declared unlawful where the Minister is satisfied that all practicable means for resolution of the trade dispute have not been exhausted (Section 34).

The Minister may declare a sympathy strike unlawful if though occurring in a trade or industry, is planned or apprehended or intended in furtherance of a trade dispute in an other trade or industry.

However, employees shall be considered of the same trade or industry if they are members of or their interests are represented by the same union or branch or are subject to same collective agreement either wholly or in part regarding terms and conditions.

The other provisions of the Act are not of immediate relevance given that one is dealing with a specific union.

Conclusion

This was a brief survey of the continuum of labour legislation in Botswana. The examination of the Botswana situation will enable us to draw some parallels and similarities with Swaziland. This investigation has been necessary to demonstrate a continuing pattern of juristic philosophy mediated only by the determination of the International Labour Organisation to implant benchmarks.

The regime of laws would also appear to indicate the strategic utilization of juridification as the enforcement organ of the political economy apparatus in place at different times. Overall however, the learning experience has been meaningful and rewarding. To that extent, though brief, this Chapter has been very informative.

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Chapter 4

4.0 The Evolution of Labour Law In Swaziland

Introduction

In keeping with the structure of this study, an investigation of the history of labour legislation in Swaziland is required. This would provide not only a historical setting but a longitudinal perspective on the legislative and socio-political issues and policy reactions that had shaped the present situation in Swaziland.

This aspect of the research would not only assist in informing the researcher, but also provide a contextual dimension to the investigation of how labour legislation has impacted on social policy formulation and implementation in Swaziland. In essence, history shapes the present for the future.

Swaziland, in many ways, mirrors the origins of modern Botswana as their political and legal histories became intertwined after the Anglo-Boer War of 1899 and the inclusion of Swaziland within the High Commission Territories (HCT's) as per the Swaziland Order In Council of June 1903. Swaziland had earlier been annexed in 1868 by the South African Republic. A mission of 350 men was sent to affirm its authority seven years later in 1875 (1).

Without any substantive administration either from the British or the Boers, the King used 'concessionairing' as a trade-off for stability and security. The key corollary of this was that the most viable areas of land were handed over to expatriates who, while achieving freehold rights, created the impression of being usufructuaries in conformity with the cultural norms of the Swazis in relation to communal property. The rule of King Mbandzeni therefore became synonymous with expropriation through concessions, of large tracts of Swaziland culminating in the annexation of parts to the Transvaal Republic by 1876 (2). The helplessness of the territory in the face of the marauding and predatory Boers or 'Free-Booters' resulted in the Conventions of 1881 and 1884 wherein both Britain and South Africa sought to reach common ground for guaranteeing the safety of Swaziland.

In retrospect, the High Commissioner (HC) of the Cape Colony, Hercules Robinson, tended to exhibit the reluctance initially demonstrated in the Bechuanaland. He went on to abdicate responsibility for Swaziland while South Africa considered itself inherently entitled to Swaziland. This entitlement was

motivated not by any proven justification but by among others, rail, survey, telegraph and postal services, mineral and sugarcane concessions, access to the sea and a supervisory paternalism deriving from alleged assistance given to the King.

Thus, the fate and future of Swaziland came to depend on the changing fortunes of both South Africa and Britain as epitomised in the outcome of the Anglo-Boer war.

The Legal Framework Of The Evolution Of Swaziland

In 1889, the Swaziland Standing Commission was created solely for the governance of the Whites who had become a dominant force as private landowners in a culture of communal land rights. In 1893, the Organic Proclamation conferred administrative and suzerain authority on South Africa with the consent of the Queen Regent. Annexation was strongly opposed as the Queen Regent wished for the protection of the British Queen (4). A six-man delegation was sent to London to seek this protection which was declined.

In 1894 therefore, South Africa took over complete control until her defeat in 1899. By 1903, the jurisdiction of the Crown over Swaziland had become established as a result of the defeat and annexation of the Transvaal Republic which had hitherto enjoyed full power over Swaziland. The creation of a self-governing Transvaal State resulted in the transfer of power to a High Commissioner (HC) rather than a Governor which made the appointment of a Resident Commissioner (RC) necessary. This also resulted in a system of control by imperial government essentially to protect British economic investments from "uncivilised" conditions (5). The Cape of Good Hope laws promulgated up to 10th June 1891 remained in force except where repealed by proclamation. The Swaziland Administration Proclamation of 1907 declared Roman-Dutch law to be in force as had been the case in the then Bechuanaland.

To a large extent, all the High Commission Territories were administered externally from the HC's seat of government in the Cape Colony under similar administrative procedures. The difference was essentially the dual nature of internal governance in Swaziland occasioned by the large expatriate, white economic class. This social group was beginning to see conservation of the *status quo* as achievable only through a coalition with the traditional elite in a culturally differentiated and hierarchically structured society.

The genesis of Swaziland's labour laws thus lay in the perceived need to contain and accommodate socio-economic changes

likely to flow from the economic disparities which expropriation was likely to produce.

In political terms, annexation was deemed to imply absolute jurisdiction and sovereignty. Swaziland however remained essentially a protectorate, a labour reserve to be utilized by both South Africa and Britain at minimal cost. Like in Bechuanaland, the Foreign Jurisdiction Act (1890) was invoked in Swaziland. This was also deemed to have conferred full internal sovereignty on England with unfettered and uninhibited power to legislate for the administration of government and justice among the natives. This power was not to be limited by treaty or agreement (6).

Thus, even though South Africa could claim a historical lien over the three HCTs, its legal rights could not supercede those of Britain, not after its military defeat and subjugation. British developmental policy, if any, did not adversely affect South African interests. This was because it was characterised more by policies aimed at labour externalisation as in Bechuanaland and Basutoland.

The Concessions Partition Proclamation (1907) gave indications as to the intent of administrative policy. It provided that land and grazing concessions should deduct one-third of their land possessions and reserve these for native use because of the acute levels of expropriation. Secondly, from 1909 to 1914, a moratorium was placed on the expulsion of natives from the concessions. Thirdly, after this period, the terms of tenancy were privately negotiated between landless peasants and their new economic masters (7). This was the colonial administration's way of solving the land problem by transferring responsibility to a settler community who would require the coercive presence of the state to sustain their hold on the land. The loss of their birth right, link with the ancestors and sense of identity through land expropriation had a traumatic effect on the natives. It also rocked the economic, political and social foundations of Swaziland leaving long-term repercussions. Ultimately, in 1913, Proclamation No. 24 resulted in the removal of Natives who had negotiated no forms of tenure with the owners from the concessions altogether.

In 1921 King Sobhuza was installed but not recognised as a King with sovereign power by Britain. He commenced the futile campaign to retain traditional power and authority. The 1941 protest delegation to London was snubbed. In reaction in the same year, the Traditional authorities rejected the Draft Native Administration Proclamation. Regardless of this, the Proclamation came into force in 1944.

The Swaziland Native Administration (Consolidation) Proclamation (No. 79) was passed in 1950 to curb the powers of Chiefs and to create agencies of local government through a "Libandhla" system through which the King was also the Paramount Chief of Chiefs effecting indirect rule.

In 1959, an Economic Survey Mission under Prof. Chandler Morse was sent to the territory. However, the Swazi National Council proposed in 1959 to de-accelerate the pace of change implied in the mission's recommendations. The King cautioned against the unleashing of "too forceful winds of change". He then proposed a race-federation amounting to a coalition of the aristocratic elite, white settlers and South African support which would effectively entrench a dual legal and socio-political system close to but without the privations of an all-out apartheid system. (8) In 1962, in reaction to the simmering racial tensions, the Race Relations Proclamation was passed. Affairs took a dramatic turn at this point with the formation in 1962 of the Mbandzeni National Convention (MNC) whose platform was a single national territorial organised labour centre under the King to pre-empt the formation of unions.

A Constitutional Committee had earlier been set-up in 1960 even though the Swazis had no experience to speak of in relation to local government. This is because though District Councils were created in 1944 in the other two territories of Basutoland and Bechuanaland, Swaziland was left to the designs of the clannish "inner council" of the King. (9)

The first open elections for the Legislative Council were held in 1964 and the LegCo was formally initiated in September of the same year. In 1966, Sobhuza was finally recognised as King with full rights of internal self-rule (10).

The Legal Framework Of The Political Economy Of Swaziland

The Removal of Natives From The Concessions Proclamation (1913) indicated without any doubt, the kind of protectorate envisaged for Swaziland. Five hundred concessionaires had been identified as forming the core of the landed aristocracy. Of these, 60% resided in Swaziland as the white capitalist segment of the society (11). In essence, by 1960, Swaziland had become a territory of 40% absentee landlords and 'weekenders' who were chronically averse to change and who described both politicians and unions as "communists", "demagogic" and "power-grasping" (12).

The payment of special levies such as the Special Levy Proclamation (No. 7 of 1947) which charged native males twenty shillings contributed to externalisation of labour, immiserisation of the male labour force and the further pauperisation of the natives after being herded off the arable areas. (13)

It needs to be remembered that the regime of laws were for the most part the same for the three HCTs which had identical judicial systems. These were later headed by a HCT Court of Appeal established by Order in Council in1955 . It is equally important to remember that though Judges, in theory, do not make law, they, by merely expounding on the unknown, turn it into law and thus impact on its shape and form. They are therefore equally instrumental in the evolution and impact of the legal framework on the community (14).

The Swaziland ~~was the Swaziland~~ African Labour Proclamation (No. 45 of 1954) was intended to consolidate and amend the law relating to the recruitment and the contracts of employment of African Workers in Swaziland. While defining contract contextually as service by a manual worker (Paragraph 2) it also provided for Labour agents and Runners. It further defined 'worker' as specifically an African and by implication excluded Natives from the purview of the common law notions of contract. It constructed a special contract status for natives subject only to changes by the Resident Commissioner.

Included in this regime were also the following: Aliens Act, Employment of Women & Children Act General Law – Proclamation, Incitement of Natives To Rebellion Proclamation (1899), Maintenance of Peace (1907) Master and Servants Act (1925), Native Administration (Consolidation) (1941, 1950) Native Labour Contracts of Employment (1942), Trade Unions and Trade Disputes (1942) Workmen's Compensation (1949) and Works and Machinery (1934), among others.

Through these legislative mechanisms, the HCT's became literally labour reserves for the sugar plantations and mines in South Africa and Swaziland. This state of affairs produced the first indigenous labour agitation in the form of a strike in the Havelock Asbestos Mine in 1948. By 1962, the Swaziland Mining Workers Union became established and operational with the next two years witnessing a spate of labour unrests, arrests, trials and imprisonment.

Along the continuum of this evolution, the ILO Committee on Application of Conventions had been pushing for recognition of trade unions. In 1959 it was informed by the HC's office that out of 102 Conventions, only 6 were remotely relevant and

applicable, with modification, to the HCTs. Given this situation, a Trade Unions Act was at best theoretical and academic. What was needed was training for artisans and semi-skilled workers for the future via the ILO African Field Services office. Some incipient steps however had been taken such as the repeal of penal provisions for breach of contract by minors below 18 years.

The strategy of the colonial government was to impose a dragnet of specific legislation designed to emasculate all spheres of native political and economic effort. Superimposed on this was the ineffectual, all-embracing benchmarks for dependent territories by the ILO which were neither contested nor actively implemented. The reasons were both operational and strategic. This would explain why, for example, the Catchpole Report of 1960 did not have any critical, substantive issues to address apart from general safety and health standards that reflected, arguably, the realities of the times (15).

The Swazi State and Labour Legislation

Swaziland is a kingdom purportedly governed as a sort of modernised traditional monarchy. In reality, the King embodies legislative, judicial and executive powers. The legal system is a dualist mixture of unwritten law and custom with enacted laws and administrative agencies created through a partially elected Parliament. Given that the 1968 Constitution was abolished in 1973, the constitutional source and guarantee of freedom of association had also ceased to exist. The King has the power to issue decrees that have the effect of overriding both Parliament and the Judiciary. The only means of political expression of opinion is via the semi-elected Parliament and the "Tinkhundla" system of village level meetings of a non-partisan nature (16).

To a large extent, Swaziland is still what it had been carved out to be; a dependent economy and a haven for entrepreneurs from mainly South Africa. The generality of the population engage in subsistence agriculture. As such, it operates a free market economy with little or no central intervention. The King, with his coalitional elite operate a quasi-parastatal organisation by Royal Charter which maintains large investments in the major sectors of the economy such as industry, agriculture and services that need partnership with foreign investors (17).

The history and political economy of Swaziland shows early settler penetration and subsequent calculated and carefully planned strategy of land deprivation and surplus extraction. The result has been the almost total reliance on any form of wage labour both internally and externally. The pre-war era

witnessed the consolidation of the colonial conquest through the subjugation of the labour force and its internalisation by all means save attractive working conditions.

By 1960, the capitalist expansion and the externalisation of labour through repressive taxation and domestic immiserisation resulted in shortage of labour for the domestic market. In consequence there arose the need for some form of improvement in labour conditions for inducement and retention purposes. These included marginal increases in wages and provision of food and transport to workers. Between 1960 and 1980, events had created a situation that called for a different outlook to labour issues. First, the incipient agitation and gradual unionisation of workers in reaction to conditions and suppression exploded into the strikes of 1963. The state reacted in fear and called for external assistance to quell the strike.

For the state, trade unions then became synonymous with a dangerous and virulent foreign ideology. This perceived threat culminated in the abolition of the constitution in 1973. Unfortunately, this was not enough to contain what had been festering since the expropriation. In addition, the labour situation in the sub-region had been creating its own dynamics and momentum. Because Swaziland was a satellite economy of South Africa, certain reforms became inevitable as the changes in work and labour philosophy were transported into Swaziland from the South African labour law environment.

In 1976, Swaziland ratified 16 ILO conventions including those on freedom of association (Co. 87) and the right to organise and bargain collectively (Co. 98). In 1980, the first Industrial Relations Act (IRA) was passed together with the Employment Act and immediately received a storm of protest for its embodiment of the very repressive powers that formed the arsenal of restrictions on individual freedoms in the Kingdom. In 1989, the Government resolved to seek the assistance of the ILO in the revision of the IRA (1980). A draft statute was submitted by the expert in 1991 and was promptly rejected by both the Swaziland Federation of Employers (SFE) and the Government (18).

The Wiehahn Commission was appointed in 1992 to enquire into industrial relations in Swaziland assisted by two assessors representing the Federations of Employers (SFE) and Trade Unions (SFTU). The report indicated that the IRA (1980) was not in itself unacceptable and inadequate but needed certain amendments for further approximation to ILO standards. The Commission report submitted in November 1993 was not

endorsed by the SFTU representative as it did not reflect the core concerns of the Unions. These concerns effectively became the 26 demands that subsequently formed the platform for further agitation after they were submitted to the Government in October 1993.

In 1994, the Government expressed its intention to amend relevant legislation including the 1980 Act. As a follow-up, a draft Bill was tabled in 1995 which, to some extent, addressed some of the 26 concerns. However, the Bill introduced a number of restrictions on trade union rights, particularly those of federations to engage in legitimate trade union activities. Prior to its enactment, a Tripartite Forum was convened to provide a protocol on the Bill.

This forum produced 65 proposed amendments in its protocol of which 62 were generally and unanimously approved. However, the Bill was introduced without the Protocol's contents. It was rushed through and assented to on January 20 1996 in anticipation of a national strike called for 22 January 1996. In keeping with the provisions of the new Act, mass stay-aways and strikes called by Unions while hearings were pending were prohibited. In consequence, the protagonists in the strike action became offenders under the new Act.

A Joint Negotiating Forum was established in February 1996 to itemize and segregate the concerns of the SFTU into three categories; constitutional, legislative and industrial relations (19). The Legislative aspects of the 26 concerns and the tripartite protocol were submitted to the Labour Advisory Board (LAB) which subsequently submitted them to the Minister responsible in March 1996.

The Current Collective Labour Law Regime in Swaziland

A new IRA was enacted in 1998. It also provided for the Industrial Court, the Labour Advisory Board and the Conciliation Board. In June 2000 this Act was amended and replaced by the Industrial Relations Act (IRA 2000). This under - went further amendments in November and was then approved by the ILO's Committee of Experts (COE). It is important to add also that the Employment Act of 1980 was repealed and replaced by that of 2001 in order to harmonize employment law and the IRA [2000]. We shall therefore need to examine it outside the purview of individual labour law.

The IRA provides for employees other than those in essential services to participate in peaceful protest action to promote their socio-economic interests. It also retains the provisions

regarding the Industrial Court and the Labour Advisory Board (LAB). Under the Act, Unions are free to draw up their own constitutions within the framework laid down regarding the core issues that must be covered such as the election of officers by secret ballot. Where a Union loses its legal status, this may be reinstated once the Commissioner of Labour (COL) is satisfied that all legal requirements have been met. The IRA stipulates procedures for dispute resolution by providing definitions for legal and illegal strikes and shortens the notice period from 21 to 14 days prior to a protest action.

Though these provisions would appear to be the outcome of tripartite discussion, the Government seems desirous of testing how far their practical and jurisprudential limitations could be stretched. *The Swaziland Government v The Swaziland Federation of Trade Unions (SFTU) and The Swaziland Federation of Labour (SFL) (Case No. IC 349/02)* is a case in point.

The Government had filed an application seeking an order to;

1. declare the protest action called in Notices of 2/12/002 as unlawful.

2. interdict and restrain Respondents from embarking on supporting or participating in the aforesaid action on 23 and 24 January 2003.

3. interdict and restrain the Respondents from any conduct in furtherance of the said protest action.

4. interdict and restrain the Respondents from calling their affiliates and members to participate or otherwise be involved in the said protest action.

5. declare that any person or organization or Federation which took part in the protest action of 19th and 20th December 2002 and intended to take part in the protest action scheduled for 23rd and 24th January 2003 will not enjoy the protection conferred by the IRA (No. 1) of 2000.

In their answering affidavit, the Respondents raised the following points *in limine;*

1. that Applicant was abusing the judicial process as the matter was substantially the same as the case No. 347/02 which was dismissed with costs. The matter was therefore *ipso jure, res judicata.*

2. the Applicant's attorneys had no legal rights as they were not duly registered as per Section 30 of the Legal Practitioners Act (No. 5 of 1954).

3. that the grounds for interdiction were not justified as contemplated by Section 40 of IRA (2000) which has been fully complied with.

4. that he who comes to equity must do so with clean hands which was not the case in the instance.

In its ruling of 1st January 2003, the court held that:

1. the Applicant was not in contempt of the court by issuing a statement read by the Prime Minister. In any case, the Respondents had not filed any affidavit nor attested to the contempt so the court could advise itself.

2. the social and economic relevance of the two matters in contention fall within the armbit of Section 40 (of IRA 2000). These concerned the conscious assault on the Rule of Law by the state and the misuse of tax payers money to purchase an extravagant jet in these lean times. There was thus no merit in an application for an interdict.

3. the issue of legal right of attorneys was dismissed as the State's legal representative is the Attorney-General.

The IRA provides for compulsory resolution of trade disputes via the medium of the LAB. As such, no protest action may be legal until all prescribed avenues have been exhausted and a secret ballot conducted regarding the contemplated action. For this purpose, a strike is understood to mean a complete or partial stoppage of work or slow down of work carried out in concert by two or more employees or any other concerted action designed to restrict output and thus to induce the employer to accede to a demand or abandon the modification of the said demand. Strikes are expressly prohibited within "essential" services including police, security forces, correctional services, fire fighting bodies, health and other key civil service sectors.

The IRA recognises the right to organise and collectively bargain and prohibits closed shops. An employer may therefore recognise a union in terms of associational and other rights only if it is representative of 50% of its employees. Once accorded the recognition, the union acquires the right to conduct its activities on company time. Collective agreements flowing from such union and employer interaction must be registered with the Industrial Court (IC) as per requirements. The Act permits

Workers Councils in enterprises having 25 or more employees but not representative unions.

The following South African cases are illustrative.

In *SACCAWU v The Hub ((1999) 20 ILJ 479 (CCMA))* the Union had claimed organisational rights under the Labour Relations Act (LRA) of South Africa because it represented 41% of the employees in all the 12 outlets taken together and more than 30% of the employees in 7 out of the 12 outlets. In the other 5, it represented less than 30%. The employer had conceded at arbitration that it gave the union rights and access to check-off subscriptions from all outlets.

In demanding access to the workplace, the Union argued that 'premises and workplace' referred to the company in its totality. The Commissioner concurred that the union was then the only one and had been given rights by the employer. It therefore qualified as a representative union and 30% was a fair representativity threshold.

However, in *OCGAWU v Total SA (Pty) Ltd (1999 4 LCD 525 (CCMA))*, the analytical approach was similar, but the Commissioner took a different view when the union attempted to fragment the workplace in order to claim access, stop-order and leave rights. The Commissioner found that when integrated into the 38 centrally co-ordinated depots, the union had only 2.5% representation of the national workforce and this was too low to render meaningful the right to join a union.

Such progressive changes are occurring and ought to be very persuasive argument for a change in the intention and interpretation of labour legislation in Swaziland. The social partners of the Government, specifically the SFTU are of the opinion that the 26 concerns still stand. In reality, the issue goes beyond the recognition, redress and containment of shopfloor issues. What one sees is a claim to a multidimensional role that trade unions such as those in Botswana and Swaziland feel they ought to assume. These would appear to include a social voice and social policy role given the socio-economic and political contexts in which they function.

The relationship between social protest, concerted stoppage of work and the employment contract appears endemic and embedded and replays itself at the level of legislation and policy formulation. It is evident the state camouflages its proprietorial interests through the mechanism of legislation, using political and administrative agencies.

This is amply demonstrated in the *Swaziland Government v SFTU, SFL ((Case No IC 347/02) of 08/01/03)* which we discuss below *in extenso.*

On the 18/12/02, the Government brought an urgent application in the night for an order regarding a protest action planned for 19/12/02. The order was intended to

A1. set aside court rules and deal with the matter as of urgency.

2. that pending the outcome of the application NO MATTER HOW LONG, (emphasis mine) the Respondents and their affiliates and members be interdicted and restrained from embarking on, promoting, encouraging, supporting or participating in the protects action called for 19/12/02.

3. that the said action be re-scheduled and members notified accordingly.

The said application as per the Founding Affidavit of the Minister for Enterprises and Employment should operate:

B1. to finalize the order in A above:

2. that an order be granted declaring the strike contrary to Section 40 (10) of IRA (2000) and Section 29(1) (w) of IRA (2000|) regarding Union constitutions.

3. that such persons and organizations be rendered liable to prosecution.

Further, a time limit of 9.00 a.m. on 19/12/2002 was given for opposing the application and service of answering affidavit set for 12:00 on 19/12/2002.

Hearing commenced at 9.00 p.m. on 18/12/2002 with only the court President in attendance. Though Section 6(6) read with 6(7) of the Act required prior agreement of parties for the judge to sit alone, the objections were overruled in accordance with Rule 9(1)(e) of the Industrial Court Rules of 1984 regarding extraordinary circumstances.

The Respondents also objected to the application as a matter of urgency as no certificate of urgency was annexed explaining the averment of urgency. In dismissing the application with costs, the court made very resounding pronouncement that have wide implications for labour law in Swaziland. We summarise these below;

1. Regarding the issue of urgency, the court found that precedents of both the High and Appeal Court of Swaziland have lent the practice of annexing certificates of urgency notoriety and the force of law, rendering their annexure mandatory. This is regardless of the fact that an Industrial Court, as a court of equity, may dispense with the rules of procedure and evidence if such would not result in injustice.

2. The Applicant, though having rushed to court in the night under such extremely inconveniencing circumstances, has nevertheless failed to show cause why it was justifiable to deprive Respondents of the opportunity to reply and state their case in the face of such serious allegations.

3. The affidavits of the Applicant confirm that they had been given notices via the Labour Advisory Board on 2/12/2002 advising of the intended action as per Section 40 of IRA (No. 8 of 2000). A mediation had actually been attempted leaving two unresolved issues – the purchase of the jet and the violations of the Rule of Law.

4. The prerequisites for a lawful protest action, though complicated are set out in the IRA No. 8 of 2000 and have been met.

5. The Respondents are lawful organisations in terms of the IRA (No. 1) of 2000 and as bona fide entities as per Section 40 (5) of IRA (No. 8) of 2000 have complied with all necessary provisions.

6. The Founding Affidavit was riddled with speculation by both the state and the Police Commissioner regarding potential violence arising from the protest action.

7. The Applicant failed to act timeously after the notice to ascertain all the facts and fears and could have given Respondents adequate time to file opposing papers if it had wanted to. It has failed to establish the grounds for urgency and a *prima facie* right to the relief sought.

8. The issues of the purchase of an extravagant jet and the State violations of Rule of Law fall within the armbit of Section 40 as these touch on the very foundations of the Swazi nation and are therefore indeed social and economic in nature.

Given the state of affairs in Swaziland, this is indeed a landmark ruling that seems to polarise the society even further by forcing the courts to make pronouncements of a socio-political and economic rather than purely jurisprudential nature.

The Employment Bill (2001) also attempts to provide for the harmonization of the law governing employment and the IRA (2000). It also wishes to enact a law that conforms to ILO Conventions and takes cognisance of minimum ILO standards. Finally, it aims at repealing the Employment Act of 1980.

To these extents therefore, while more exhaustive, it is nevertheless identical to the Employment Act [Cap 47:01] of Botswana. It defines the employment contract as a contract of service, apprenticeship or traineeship whether expressly or impliedly, written or oral.

It goes further to cater for domestic employees where employee means a person who works for pay or remuneration under a contract of service or under any other arrangement involving control by or sustained dependence for the provision of work upon another person.

"Employer" is expanded to include any agent, representative, foreman or manager of the person entering into a contract of employment with an employee (Part I S.2). The place of employment shall be any place at or in which the employee works.

The Act applies to all sectors of work except the Royal Swaziland Police Force, the Umbuto Swaziland Defence Force and Correctional Services and no exceptions shall be made contrary to incompatible with ILO Conventions in force in Swaziland. Characteristically, Section 6(3) provides that the Minister may so exempt, subject to publication of a notice in the Gazette and the consideration of objectives, any one, group or class of workers from the coverage of the Act. The Commissioner of Labour has sole responsibility for the administration of the Act which is intended to effectuate labour management and sound industrial relations.

The Employment Bill (2001) becomes important because there is no specific provision excluding membership in unions. What obtains is the exclusion from the class of employees and by extension from membership of unions.

The case of *Swaziland Hotel and Catering Workers Union v Swaziland SPA Holdings Ltd (Case No. IC 1/90)* is important

precisely because it offers an attempt by the courts to examine statutory provisions that provide blanket authorization for employers to exclude their more informed and articulate employees from union membership in the name of "management".

In this case, the issue was whether all posts described as such by management were beyond unionisation. Judge Hassanali J.A. presiding said, quoting Julius Stone from his book *Social Dimension of Law and Justice.*

> "The modern claim to freedom of association presents itself as essentially a claim of the individual to be permitted to establish relations with others of his own choosing, for the purpose of obtaining for the whole group, some special strength or advantage in the pursuit of a common end" (Page 386 at Page 2 of judgement).

The Union had been negotiating to a deadlock with the employer over whether all managerial, supervising and confidential staff should be excluded from union membership. In his ruling, the presiding judge opined that a person in a managerial or supervisory position performs vital roles in carrying out management policy including disciplinary matters and is accountable to management. Were he a union member, his acts may bring him into conflict with fellow union members who may wish to hold him to account. It is therefore necessary to draw a line between the management and the managed. However, this has to reflect the realities of each industry (page 3).

In arriving at an informed decision therefore, exclusions must be justifiable looking at the job descriptions, the level, scope of supervision and responsibilities in terms of implementation of management policy. Thus, those whose posts could be unionisable must be seen as not involving access to confidential, financial and organisational documents, records of employee's financial affairs, recruitment, dismissal, transfer, promotion or powers or recommendation. In effect, formidable and ostensibly powerful posts with no real authority or actual powers and lacking in managerial and supervisory content cannot constitute management positions.

In the light of the foregoing and in relation to the instant case, the following posts were unionisable.

Unit Maintenance Manager
Assistant Estate Manager
Restaurant Manager
Assistant Convention and Banquet Manager

Assistant Accountant
Bookkeeper
Internal Auditor
Excluded are Assistant Food and Beverages Manager
Front Office Manager and Executive Housekeeper

This case projects an approach to suturing the incision that the provisions in this regard have effected both in Botswana and Swaziland.

Under offences, Section 15(1) provides that no person shall disclose, publish, communicate or otherwise make use of any information supplied by the employer. How this is interpreted in relation to access to and use of information for bargaining purposes remains to be seen.

Section 18 makes the prescribed written particulars and the form mandatory for an agreement to constitute a written contract and this shall be issued not later than 60 days after the date of appointment.

The Commissioner of Labour (COL) sees his position consolidated. He assumes responsibility for the administration of the Act as before. He has the powers of an Inspector. An Inspector is anyone appointed as Deputy Commissioner of Labour, Assistant Commissioner, Principal Labour Officer, Factories Inspector, those in similar or lower ranks within the public service or anyone so designed in writing.

He receives, investigates, conciliates any issues arising out of an employer-employee relationship and advises both parties and Government as need be. Inspectors have the powers of entry into any workplace and may, with the help of others such as police officers, apprehend, impound or detain and issue a compliance order.

In effect, these quasi-judicial administrative functions intended to produce functional industrial relations could prove problematic unless and until a proper work ethic is forged within an en-skilling atmosphere and framework that can produce positive results. This problem is common to Botswana also. For example as earlier discussed, the question of Section 7 Certificates as a pre-condition for the Industrial Court to hear cases has at times enabled Plaintiffs to outwit the COL at court. (*(D. Magogodi v Grunwald Construction (Pty) Ltd (Case No. 1 C 148/86))* (20). *James Limbo v Cresta Mowana Safari Lodge (Case No. 1 C 50/96))*.

Significantly, the Employment Bill provides for the security of employees in the event of the transfer of on-going businesses or prior to take over. This conforms to ILO Convention No. 173 which has recently been incorporated in the proposed Employment (Amendment) Bill 2002 in Botswana. Sections 33 and 34 of the Swaziland Act deal *in extenso* with automatically fair and unfair termination of service in similar fashion as Sections 17-26 of the Employment Act of Botswana.

These are pointers to the direction of developments in relation to labour legislation. In the main, we have seen that the colonial era with its own calculations laid the basis for a fractured society in which law became an instrument of further polarisation and coercive imposition of artificial stability. This Chapter also attempted to examine the historical motive force behind the reluctance of the traditional elite to democratise as this might create conditions for the resurrection of the land issue.

In essence therefore, the evolution of Swaziland labour legislation has also been the evolution of the political economy and its dynamics over the years. A poignant lesson would appear to be that perceived compliance with ILO benchmarks in tandem with restrictive domestic legislation in certain spheres serves a dual purpose; it keeps international pressure at bay while entrenching disparities that characterise the socio-economic system in Swaziland.

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17. Ibid

18. See Case No. 1884 ILO Governing Body Interim Report Page 22

19. Ibid

20. These are some of the cases dismissed for lack of jurisdiction of the Industrial Court and absence of *locus standi in judicio* of the employee arising from the Commissioner of Labour not having complied with the strict provisions of Section 6 of the Trade Disputes Act [Cap 48:02] of Botswana.

Chapter 5

5.0 The Ground Realities Of Implementing Freedom Of Association And The Protection Of The Right To Organise In Botswana and Swaziland.

Introduction

The International Labour Organisation (ILO) Declaration of Philadelphia in 1944 identified freedom of association and expression as one of the essential building blocks for industrial peace and sustained progress. In 1998, the International Labour Conference (ILC) adopted a solemn Declaration on Fundamental Principles and Rights at Work which reaffirmed the commitment of the international community "to respect, to promote and to realize in good faith" the rights of workers and employers to freedom of association, effective right to collective bargaining and to promote the elimination of discrimination in respect of employment and occupation.

Convention Number 87 (C.87) deals with the freedom of association and the protection of the right to organise (1948). This basic right enjoins all stakeholders to enable all workers and employers to form and join organisations of their own choosing without prior authorisation and provides guarantees for the free functioning of organisations without interference by the public authorities. Convention Number 98 (C.98) (1949) deals with the right to organise and bargain collectively. It provides against anti-union discrimination, for the protection of workers' and employers' organisations against acts of interference in each other's affairs and the promotion of collective bargaining. These core Conventions have been ratified by Botswana (1997) and Swaziland (1978).

In principle therefore, these signatories, Botswana and Swaziland, have undertaken to provide unfettered freedom to workers and employers in their quest to organise and join organisations who shall have the right to draw up their own programmes, constitutions and rules and elect representatives in full freedom. (Art. 1) Such organisations shall not be dissolved or suspended by any administrative authority (Art. 4) and shall be free to establish and join federations or confederations and have the right to affiliate with international organisations of workers and employers (Art. 5). These countries shall also undertake to put in place all measures necessary and appropriate for the full exercise of the right to organise (Art. 11).

The legal person of these organisations shall not be saddled with such conditions as shall restrict the realisation of the aforementioned provisions. Though employees and workers are expected to comply with the laws of their respective countries, such laws shall not operate to impair, erode or undermine the guarantees provided by both the Convention and the ILO Constitution (Art. 8).

The provisions of the Convention shall however be subject to municipal laws of these countries with respect to the armed forces and the police (Art. 9). The ratification of the Convention may be denounced by any member state after 10 years or shall, ipso jure, be superceded by a subsequent revising convention as ratified by the member (Art. 20).

To discuss C.87 in the context of comparative labour law and regional integration, some emerging issues need to be captured. The first is that, while no one appears to question the raison d'etre of the ILO, its over-bureaucratisation and overproduction of standards is beginning to erode both its credibility and legitimacy . The second is whether C.87 as initially conceived is not in need of critical review in the light of globalisation and labour market changes. It is not the intention here to discuss these issues but to record that measuring the performance of member countries does not absolve the ILO of the obligation to constantly justify its moral and legal authority.

Overview of Sources of Law Relating To Freedom of Association

1. The International Labour Organisation

The freedom to form and to join trade unions can be traced to several international instruments. The Treaty of Versailles (Part xiii) mentioned "recognition of the principle of freedom of association" as one of the ILO promotional objects.

The general principles in Article 427 included "the right of association for all lawful purposes by the employed as well as the employers". In 1944, the Declaration of Philadelphia reaffirmed the fundamentality of the principle by saying that freedom of association was essential for sustained progress. (1) The ILO was also mandated to achieve "the effective recognition of collective bargaining". These principles, needless to say, are binding on all member states by virtue of their membership per se irrespective of whether the specific Conventions and Recommendations have been ratified or not.

In 1952, the International Labour Conference resolved that there should be intra-organisational co-operation where participation meant negotiation and collaboration. In 1967, in-house communication was recommended (Recommendation 129) followed by a recommendation that complaints should be investigated by the ILO (Recommendation 130). In 1971, ILO Convention 135 put in place worker representatives in management and in the same year, the International Labour Code 1919-1981 through Recommendation 143, endorsed this position. The United Nation's Covenant on Economic, Social and Cultural Rights espoused the freedom to form trade unions (Article 8).

ILO Convention No. 87-Freedom of Association And The Right To Organise

This became the basic instrument for the international protection of Trade Union Rights. It deals with the right of workers and employers to establish trade unions and organisations with accompanying rights and guarantees. This Convention is generally coupled with the Right To Organise and Collective Bargaining Convention 1949 (No. 98). This deals, *inter alia*, with the protection of union workers and leaders against victimisation by employers at any time, protection of unions against interference and the promotion and sustenance of collective bargaining. The Collective Bargaining Convention 1981 (No. 154) and Recommendation (No. 163) define measures for promoting these and their scope. The Workers Representatives Convention 1971 (No. 135) and Recommendation (No. 143) deal with the protection of workers representatives and the facilities to be granted them. Labour Relations (Public Service) Convention 1978 (No. 151) and Recommendation (No. 159) deal with the right to organise in the public service. These provisions expand on Convention No. 98 which, unlike No. 87, does not cover public servants engaged in the administration of the state. The Rural Worker's Organisations Convention (No. 141 and Recommendation (No. 149) reaffirm the provisions of Convention No. 87 with regard to workers in the rural areas, whether self-employed or not.

The general supervising procedures in relation to all ILO conventions apply to freedom of association. The Committee of Experts publishes periodic surveys. Complaints over freedom of association issues from any quarter are referred to the tripartite Committee on Freedom of Association and the Fact Finding and Conciliation Commission. A Digest of Decisions is also released periodically.

2.0 United Nations

The United Nation's Universal Declaration of Human Rights (1948) avers that "everyone has the right to form and join trade unions for the protection of his interests" (Art. 23 (4)). It also recognises that "no one may be compelled to belong to any association" (Article 20 (2)).

The International Covenant on Economic, Social and Cultural Rights in Article 8 (1) requires that ratifying States must ensure the right of everyone to form trade unions of his choice and for unions to function freely. This Article acknowledges the right to strike subject to compliance with domestic laws.

The International Covenant on Civil and Political Rights (Article 22), though similar to the ECHR Article 1, provides for the inclusion of those in the administration of state in the beneficiaries of the freedom to form and join trade unions (2).

Unravelling The Freedom of Association

In ancient times, the Roman *Leges xii Tabularum* (8,27) provided for the free establishment of associations within the existing law. A clear feature however was what they could not do in terms of negative rights There was even then concern over how much freedom they could claim as a group which the group might then be able to transform into a potential challenge to the state (3). State apprehension of group rights is therefore not new.

Both the French *Declaration des droits de l'homme et* du citoyen (1789) and the American Constitution did not at first give prominence to the fundamental right of association. This later occurred through judicial interpretation and the formation of the Council of Europe. Freedom of association initially implied citizenship or individual rights. Section 13(1) of the Botswana Constitution makes specific provision for the inalienable right to associate through membership of trade unions.

Alkema thinks that freedom of association should be extended to include in principle, the right to establish any corporate body irrespective of its denotation in domestic civil law. It could thus become a species of the freedom to contract which is a basic social and therefore fundamental freedom. He further points out that this notion corresponds to what obtains in the European Union member states. In the Swedish Instrument of Government [Chapter 2 Article 1 (5)] the freedom of association covers even compulsory co-operatives founded for the public good. (4) For the maintenance of law and public order, certain

associations may be excluded such as secret societies and terrorists groups. It understood that the law may set limitations but generally, conditions for membership imply autonomy of and in membership.

An essential feature of the freedom of association is its incorporation and capacitation in terms of judicial matters. The capacity to function with a *locus standi in judicio* is often largely dependent on domestic procedural law but where the law requires administrative consent, this may be seen as restrictive. Freedom of association is a pivotal freedom which involves collective action. Though individual to each person, it belongs to everyone and can only be exercised collectively. The collective enables the individual to actualise this freedom. However, it also creates a conflictual situation where group rights may suffocate individual rights.

Freedom of association is linked to other collective freedoms and transcends mere membership of a group.

> "The protection of personal opinion afforded by Article 9 and 10 [EU] in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11" (6)

Freedom of association provides the nexus between civil, political, economic, social and cultural aspects of human rights such as the right to join trade unions (7).

In the United States, the Supreme Court has, through its rulings, confirmed the importance of freedom of association to political democracy. In the absence of specific constitutional provisions, the Supreme Court has ruled that the right to organise into groups for political purposes emanates from the constitutional provisions regarding freedom of speech and assembly. As such, a political association may not be suppressed simply because the state disapproves of its purposes. In fact, controversial organisations serve to test democracy and therefore tend to attract pressure such as unions with articulated political affiliations.

The U.S. Supreme Court in *Cramp v Board of Public Instruction* reviewed a Florida statute which required state employees to declare their non-affiliation or sympathy for the Communist Party. The Court invalidated the statute because it considered that its terms were not capable of objective measurement (8). In this particular instance the statutory restriction was both broad and vague. In determining associational rights, the Court was not endorsing communism. Rather it was seeking to safeguard

rights as enshrined in the Federal Constitution. In effect, the Courts could play a leading role in diluting the restrictive impact of juridification. In Britain, the passage of the Human Rights Act (1999) which came into effect in 2000 gave statutory effect to the European Convention on Human Rights. It also provided that the most direct method of upholding the Convention rights is by allowing the courts to enforce them directly against public authorities.

With regard to freedom of peaceful assembly and association, Article 11 of the Convention above has, as indicated earlier, resulted in an extension of employment rights through other Articles. However, in the *GCHQ* case the ECHR rejected a complaint by members of the General Communications Headquarters that restrictions on their union membership had breached Article 11. It said the measures were not arbitrary and thus violated no rights as restrictions for state security or public safety were permissible. Article 8 raises the issue of respect for private life and whether an official could expect privacy of telephone conversation in the office (9). Article 9 dealing with the right to freedom of thought, conscience and religion has also been invoked by those who have objected to being asked to work on Sunday on religious grounds (10). Similarly, Article 10 on the right to freedom of expression was successfully relied on when a German school teacher was dismissed for membership of the Communist Party. (11)

The Human Rights Act (1998) of Britain therefore has ensured direct redress against public authorities in the courts who are enjoined to interprete the Act to give effect to Convention rights. 'Public authorities' have been given a narrow definition but include government departments, local authorities, police, prison and immigration officers. The Act however does not intend to allow employees to circumvent their contractual obligations and neither does it prevent derogation from the rights of others regarding business and commercial transactions.

It has to be noted also that the European Court of Human Rights does not appear to be willing to give carte blanche superiority to the collective rights of Unions over those of non-members as evidenced in the GCHQ case. (12) Also, it is not willing to endorse 'closed shops' either. (13)

Most worrisome, with regard to trade unions, is the fact that the European Court sees a discretion under domestic law as to whether, when and how unions could be consulted. In effect, the European Convention on Human Rights does not endorse categorically statutory tripartism or social partnership (14).

Also, the Convention would appear not to provide for Collective Bargaining in any particular form or manner. Thus, consultation of unions is not an issue, neither is any right to industrial action supposed to be inferred from its provisions (15). These observations are, if correct, precursors of a legitimising constituency for anti-union neo-liberalist ideology and a potent threat to the essence of freedom of association within the realm of labour law and relations.

Of critical importance is the ruling that a UK Act of Parliament requiring the names of trade union members to be disclosed to an employer prior to strike action was seen as not significantly limiting the right to strike. (16) What is clear therefore is that the European Court of Human Rights has been reluctant to uphold the rights of workers and trade unions. In the case of the UK the adoption of the Council of Europe's Social Charter appears to be the only serious mechanism for a more benevolent impact on labour law and one believes that this would apply in most cases to Africa also (17). It is critical to appreciate how the developed world provides for and actualises the freedom of association because these comparative models are instructive while some are mandatory in the labour law schema of Southern Africa.

Freedom of Association and Trade Unions

Trade Unions are autonomous voluntary associations and should therefore not be so meticulously shepherded. In the absence of the closed shop, the freedom to join, leave or stay trade unions is no longer a debatable issue.

Trade unions enjoy autonomy in membership only when they are free to determine the constituent provisions of their rules and regulations. Secondly, there is autonomy over membership when workers are free to choose who to associate with and the conditions therein.

Given the role of trade unions, detailed internal regulation could stifle growth as energies and resources go into meeting administrative requirements rather than worker aspirations. Moreover, if internal democracy is to exist, the union must be able to utilise its structures proactively and not as required by administrative authority for the maintenance of stability and the status quo.

Earlier discussions point to a collection of instruments that form part of the pattern of international protection of trade union rights. To this extent, Southern African collective labour legislation is expected to approximate or provide direct

compliance with some, if not all. For example, the provisions of Article 11 (1) and (2) of the ECHR are parallel to Articles 21 and 22 of the International Covenant on Civil and Political rights. Both derive from the Universal Declaration of Human Rights and are largely worded in terms of individual rights. The ILO however, elaborates on collective rights. The implication is that, the ILO sees freedom of association in the context of industrial relations, a right to organise and collectively bargain, to strike if need be and to lock-out strikers. This sees a key role for trade unions in the realization of the Conventions 87 and 98 in particular.

On the other hand, the ECJ interpretes the provisions of the ECHR more narrowly as individuated interests. This, however tangentially, leads to a preferred avowal of the contract and a discretion of the Contracting State in choosing how such interests of trade union members could be protected. (18) The ECJ also recognises that the ECHR (Article 11 (1)) does not secure any particular mode of treatment of trade unions by the State. (19) As said earlier, it also does not place any duty on the State to conclude any given collective agreement (20), nor condone the right to strike (21)

At another level, the dichotomy between the individual and the collective with regard to freedom of association is played out in the Webster case regarding whether it also implies freedom to dissociate. (22) In *Young, James and Webster v UK* the dissenting judges considered the right to associate as concerning "the individual as an active participant in social activities" while at the same time it is "a collective right in so far as it can only be exercised by a plurality of individuals". The right to dissociate "aims at protecting the individual against being grouped together with other individuals with who he does not agree or for purposes which he does not approve" (23). However, such protection of the individual is not the implication of the positive freedom of association. Hepple concurs with Leader that this argument is fallacious because it seeks to remove the possessors of the freedom of association from the point at which the freedom is decidedly actualised (24).

The freedom of association is possessed by the individual but achieves realisation only in the collective. Thus, even the right to strike is individuated but can only be exercised meaningfully in a collective manner. It follows therefore that the right to join a union of one's choice is also a right to union activity. Similarly, while the exercise may be collective, victimisations, abuses and derogations are often contested from the perspective of individuated rights under siege.

What needs to be asserted is that, while collective rights could circumscribe individual rights, society and the rights emanating thereof for the collective good should not be unduly subordinated to individuated rights elevated to the sanctity of the individual contract and freedom of choice.

The Role of Trade Unions

Most references to trade unions connote the ILO intention of association. However, Article 11 of the ECHR also categorically refers to trade unions as the central object of 'association' within the context of the freedom of association. In the Webster case, the Commission indicated that an association must of necessity be a voluntary one, for a common purpose, and not an association by accident of common employment. As such, Civil Servants Associations and other Statutory Bodies intended to rationalise professional activity and to protect public interest are not trade unions.

Apart from being voluntary associations, trade unions are also set apart by the socio-political functions they perform in a democratic society. They are therefore engines of democratic and industrial pluralism. This presumption derives paradoxically from the basis of the neo-liberal ideology that is currently savaging trade unionism. In a market economy, buyers and sellers of labour power ought to be free to bargain to mutual advantage. Within this setting however, there are disparities in the bargaining power between the parties which results in unacceptable subordination of workers. This situation also leads to social disruption and economic problems. As such, collective bargaining by trade unions becomes a necessary mechanism for establishing a countervailing power in the labour market without adverse effects on market forces per se.

Essentially, industrial pluralism sees modern business as a coalition of social interests represented by groups of shareholders, workers, consumers and society who have delegated authority to a management team tasked with securing a stable balance between these groups. Ipso facto, managerial authoritarianism and coercion run counter to the desirability and logic of consent and participation through such means as trade unions (25).

In the light of the foregoing, while the interest of the state in trade unions becomes understandable, its overt intervention in the internal operations of the unions renders it interventionist and emasculatory. There is a perceived need for a framework law providing parameters and operational guidelines rather

than heavy and pervasive administrative authority interlaced with quasi-judicial roles. [26] If indeed the state aspires to ensuring a commitment to freedom of association and a commitment to trade union autonomy, it could do these through agreed oversight mechanisms that ensure core principles are stringently adhered to by unions in their relationship with their members. There is thus no need to over-regulate the operational life of the trade union.

Implementing Industrial Democracy

The following are some indiciae of a viable workplace democracy. These issues will be tested against the reality in the countries of our study in the subsequent parts of the Chapter.

a. **Openness:** This would suggest that trade unions should not exclude applicants for membership without good reason. This implies that those who wish or volunteer to join a union as permitted for the protection of their interests, should be free to do so.

   Most countries have expunged closed shops from the statutory "liberties" hitherto enjoyed by some trade unions. However, the question of industry, profession and trade specificity is still a significant determinant for example in South Africa, Botswana and in the E.U. This is not a trade union decision but rather an indicator of the unwillingness of the state to let go. Most unions would rather have more members because at the end of the day, as per Lord Diplock, 'freedom of association can only be mutual, there can be no right of an individual to associate with other individuals who are not willing to associate with him' (27).

   In terms of membership therefore, it could be said that restrictions imposed by the state in respect of professions, trade, industry or even nationality would appear to be an unprincipled invasion of the rights expectedly ascribed to unions and their memberships. If trade unions are indeed worthwhile, that can only be seen in their untramelled viability rather than their compliance with prescriptive criteria.

b. **Transparency:** This would suggest that members of trade unions should be able to acquire information related to how their affairs are being handled by the leadership. This would include access to financial information by any member and inspection of books by their own accountants if need be. This is to satisfy members in doubt as to the probity of union management. (28)

c. **Participation:** As opposed to other forms, this would suggest that actual, meaningful involvement of a member in all aspects of union activity including elective office. In some countries, non-citizen members may not stand for elective office regardless of how their skills serve other socio-economic purposes.

Participation could be interpreted to mean that no member should be disadvantaged or discriminated against on grounds of nationality, party or religious confession, for being a shop-steward, on ground of unproven financial impropriety or to be unreasonably excluded from standing as a candidate. In effect, where a person can be a union member, no other circumstances should, under normal situations, operate to disqualify him from holding an elective position as a true expression of his full associational and participatory rights (29).

d. **Accountability:** In essence, industrial democracy presupposes that those who exercise power in the sociology of the workplace or accept responsibility for those they have socialised into a group must, naturally, be answerable for their custodianship and should not, at the very least, be frugal with the truth, no matter how it is perceived. In this instance, one is dealing with the accountability of the elected executive as a committee and also the individual accountability of its members.

While, in the normal rhetoric one could say they could be voted out, it is equally quite pertinent not to overlook the unfashionable phenomenon of a labour aristocracy and the penchant for self-perpetuation. To this extent, the regularity of elections, statutorization of them or the internal constitutional arrangements can be examined. In the main, a mandatory elective term would appear rather desirable.

At another level, accountability could imply the level of demand members make on the leadership and the degree to which the same leadership sees its legitimacy as conditional on the volume and clarity of union voice at consultational level prior to major decisions. Political affiliation, negotiations over terms and conditions, wages, redundancies and welfare arrangements are key areas that expose the degree of consultation, cohesion, unanimity and collectivity in union affairs. In addition, the burgeoning issues of binding bargaining council agreements, joint industrial councils, work place forums, enterprise level agreements and sectoral issues are such that, ideally, unions should have a framework within which these should be designed and

tailored.

In a situation of dysfunctional multiplicity, unions could become a hydra-headed phenomenon that can only play itself out to the advantage of an increasingly cohesive coalition of employers.

e. **Fairness** This refers to the need for members to be treated fairly in the exercise of disciplinary or other powers including expulsion from membership so as to avert litigation. Such litigation suggests the need for external supervision. Labour law jurisprudence has done much to provide guidelines as to what is substantively and procedurally fair in disciplinary cases. The rule book should encompass these. However, the state may feel inclined to protect those who did not identify with an industrial action as decided upon by ballot. This should be discouraged because balloting implies a majority decision that ought to be binding on all if ILO Convention 87 is to be holistically actualised.

At the most extreme, a Code of Practice for disciplinary matters could be developed to augment the rule-book. At this juncture therefore, labour law could be utilised to secure the importance of unions by providing a floor of minimum standards within which union activity must fall and against which it should be evaluated. By so doing, an interventionist framework law could be avoided while ensuring that there exists a functional combination of trade union autonomy with a union governance that adheres to the basic principles.

An administrative oversight machinery such as the Registrar or Certification Officer could then list only those meeting the generally agreed prescribed standards. Such unions could then become the only ones to be accorded recognition, rights, protection and assistance by the state.

Freedom of Association and The Right to Strike

If law is indeed a technique for regulating social power, the forms and methods of expression of this social power would have to be known to the law. Immutably, the power to command and the duty to obey cannot only be mediated by legislation but by countervailing methods of power exhibited by the subordinate in the relationship. It is because of this that Industrial Relations, rather than Human Resources Management theory sees a functional importance in the realisation of collective industrial action as a key instrument of social and economic power (30).

The strike has come to be embodied in the definition by Lord Denning M.R in *Tramp Shipping Corporation v Greenwich Marine Inc.* He, at that time, defined a strike as:

> "a concerted stoppage of work by men done with a view to improving their wages or conditions of employment or giving vent to a grievance or making a protest about something or other or supporting or sympathising with other workmen in such endeavour. It is distinct from a stoppage which is brought about by an external event such as a bomb scare or by apprehension of danger.(31)

The strike is not however generally perceived as a right inherent in the employment relationship. One could say correctly though that the strike is the equivalent of the managerial prerogative to unilaterally change work conditions. In social ethics, a system which compels people not to withdraw their labour is patently totalitarian in intention. Sometimes, strikes are called psychological vents for tension. Unitarians refer to it as a recipe for productivity loss and an abuse of the collective sanction. It is also seen as a stress reliever.

In reality any legal system that seeks to suppress the strike is increasing the vulnerability of the worker vis-à-vis the labour contract (32). Strikes are in the nature of other social protests. Therefore, to think of industrial relations in terms of strikes or of labour law in terms of strikes is absurd. Lawyers and journalists are prone to see society in terms of pathological situations (33)

It has been observed that workers will go on strike, whatever the law may have to say about it. The common law of conspiracy was as impotent to suppress strikes as was the French legislation against coalitions, and as were the Pitt's Combination Acts to suppress trade unions. Freedom to strike is legal, not a sociological concept, and, where strikes are forbidden, there is no such freedom, however frequently they may occur (34)

In the celebrated case of *Vegelahn v Guntner* (35) Oliver Wendell Holmes said:

> Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counter part, if the battle is to be carried

on in a fair and equal way.
[SIC] They have the same liberty
that combined capital has to
support their interests"

Sometime later, in 1942, Lord Wright, in the case of *Crofter Harris Tweed Co. Ltd v Veitch* ruled that it is far more important that the substance of many of the norms of collective bargaining should defy the use of legal sanctions. As such, the right of workmen to strike must be seen as an essential element in the principle of collective bargaining. (36)

It is not a fact that workers resort to strikes because they are "ill-informed or "ill-advised". It is also not a fact that "strikes may be last resort for the workers". Therefore governments should not "be more concerned about the harm that strikes can cause to the economy of the nation" particularly a nation "which relies mainly on foreign investment" (37).

But, it is a fact that, when social conditions deteriorate; when avenues for democratic participation in resource allocation and not in their production are non-existent, then a strike becomes like a "cancer and cancer when it is not cured at an early stage, kills the whole body". (38) It is submitted that the cure for such a 'cancer' is not legislation per se but legislation that is holistic in its intention and effect. It is equally a fact that strikes, like litigation, are a waste of social resources. As social services grow in response to demand, the definitive turf of the "essential" continues to change contours. This in itself imposes enough restrictions on the strike without any aggressive reactions to the agitations of an emasculated collective of workers.

In essence, one fully concurs with the following observation that epitomises the inherently dichotomous nature of industrial relations: "It is difficult to see how, in a case of a conflict of interests, it is possible to separate the objects of benefiting yourself and injuring your antagonist. Every strike is in the nature of an act of war. Gain on one side implies loss on the other, and to say that it is lawful to combine to protect your interests, but unlawful to combine to injure your antagonist, is taking away with one hand a right given with the other". (39)

The core issue is that one should not be compelled to work if he has a grievance against anyone connected to the work and employment relationships. More importantly, it is an attribute inherent in the collective bargaining process as a countervailing weapon against managerial imposition of terms and conditions. The protection of such a right would therefore carry an expectation of legal intervention against liability, discrimination

and retribution in all its forms for the exercise of the freedom by union officials, representative organisers and the participants in the actions.

The ILO Perspective

The above-mentioned restrictions all run counter to both the ILO Conventions and international law. Convention 87 provides that nothing may be done to impair, minimise or emasculate the guarantees afforded workers' organisations to defend their interests. As such, if their socio-economic interests are to be realised and sustained, workers must retain the right to strike. The ILO Committee of Experts notes certain outgrowths to these tendentious restrictions. This, as earlier stated, does not render untenable, some forms of procedural restrictions, which do not in any way reflect those rigidified interventions earlier mentioned.

The narrow definition of 'trade dispute' overlooks the inherently political and social nature of industrial activity which the strike seeks to influence. Furthermore, there is the question of who the employer actually is, given these conglomerates and subsidiaries with headquarters and decision-making authority located far away. Also, the question of whether extra-territorial branches of a company can engage in secondary strike over a common economic issue is not answered.

The lawfulness of secondary and sympathy strikes itself receives different interpretation in different jurisprudential domains even though the ILO sees them as only conditional and pursuant to a lawful strike relating directly to the socio-economic interests of the workers involved in both the original strike and secondary action (40).

With regard to dismissals for participation in a strike, the ILO Experts translate the power of the employer to refuse to reinstate some or all employees, without the employees having a right to contest the fairness of such action as inconsistent with the right to strike. The Freedom of Association Committee therefore considers such selective and arbitrary dismissal or conditional reinstatement as unacceptable.

In effect, both the ILO Committee of Experts and the Freedom of Association Committee agree that the right to strike can be limited but the scope for permissible strikes must neither be too narrow nor all forms of supporting activity prohibited.

The freedom to strike has been inured to immunities from common law actions because both the state and the courts have been reluctant to put the strike firmly within the armbit of labour law. Thus, immunities succeeded in only offering protection from known liabilities at the time of legislation. This situation, because of the dynamics of social relations, quickly changes creating newer liabilities. For example, conspiracy and restraint of trade were overtaken by intimidation and inducement and breach of statutory duty as in essential services. Thus, from an immunity-based protection, one sees the need for properly crafted and prescribed rights as complementary to the range of protection; a proactive role for the law rather than the usual reactive inclinations and narrow interpretations of immunities the courts are wont to adopt.

Even though Lord Denning, in *Tramp Shipping* clearly understood the import of a strike, he nevertheless opted to distinguish parliamentary immunity for union leaders from rights that were never intended nor given. (41) Generally a clear, unambiguous diction from Parliament regarding rights would be less malleable than immunities in the hands of the courts if Parliament were so inclined. With regard to labour law and trade unions in particular, delicts ought to be abolished and a new conceptual framework for the protection of the right to strike be adopted that removes industrial action from the oversight of common law jurisprudence. Thus, the strike would mean more than just "a concerted stoppage of work" where such activities are protected and free from penalties such as dismissals.

It is apparent that the circumstances that could warrant an industrial action of any sort need to be identified, whether in contemplation or furtherance of a trade dispute as the case may be. This would exclude political protests by employees of the state or against policies of the state regarding labour issues. Outside these, workers ought to be able to, in a democracy and as citizens, stop work in protest at the activities of government which have a negative impact on their lives. Without advocating irresponsibility or rampant explosions of worker agitation through strikes, workers should be able to utilise the strike as a method of seeking a redress of issues affecting the work and employment relationships.

Given the attitude towards secondary strikes, international solidarity strikes would appear impossible. Yet, the internationalisation of economic activities, and the quest for common corporate practices, make it untenable for multinational enterprises to seek to fragment their global work force when it comes to trade disputes in subsidiary outfits. As

pointed out by the ILO Committee of Experts, cannot be a concerted denial of protection for industrial action which was intended to protect or to improve the terms and conditions of employment of workers outside a particular country or to register disapproval of the social or racial policies of a government with whom theirs has trading or economic links (42).

Emerging Trends In Labour Law Conceptualisation And Implications for Trade Unions.

The apparent shift in thinking about the role of labour law in general and collective labour law in particular is not a signal towards absolute deregulation. It would appear to be rather a change in locus and focus of regulation; either away from a state interventionist approach or a reaffirmation of neo-liberalist tendencies that decry the protection of workers as a collective.

The state still plays a strong ideological and even coercive role in the on-going re-marketization of labour issues by opting for an increasingly minimal floor of rights. It is also evident that governments are withdrawing state-sponsored support for unions through recognition and representational rights, including the right to intervene and the legal capacity of unions. In addition, workers are being given the option of selective membership or non-membership of unions and a growing consensus that consultation of unions is not inherent in the employment relationship.

On the other side of the employment relationship, employers are collectivising behind the protective wall of the bureaucratic corporate entity, multi-national conglomerates and government sponsored cartels. The increasing externalisation of the labour market has exposed the worker, who, hitherto, had been inured to protective regulatory interventions.

Further to this is the fact that flexibility of the production process when further enhanced by lesser regulation affords the entrepreneur a free reign with only competition as his boundary. Within this framework, international competition sees the need to denude domestic legislation of its social and political content which normally provides for the incorporation of unions and the protection of workers. Competition therefore perceives labour standards as an impediment. It is postulated that such competition also benefits poorer economies because it offers an opportunity for them to compete upwards as they are impelled to improved quality, skills and capital intensive strategies that are utilised to differentiate trade and goods and to attract foreign investment (43).

Granted that investment in human capital may result in vertical disintegration when core workers move to the periphery to become self-employed in the process referred to as casualisation. However, it could also create a situation where big companies move into hitherto individualised, independent contractor operations, mopping them up as subsidiaries. These conglomerates then partition the global market among themselves. Organisational flexibility would imply legislative flexibility, a bargained corporatist strategy that sees the state and key coalitional groups in closer co-operation to the detriment of organised labour. Thus one sees a greater tendency towards de-regulation and the optimisation of contractual discretion.

Even then, the new radical right sees flexibility in its current form as inadequate and enshrining centralised collective and legal regulation which obstructs the efficient allocation of labour resources that the market could make. These include standard wages policy, restrictions on hiring and firing, dismissals and the role of unions.

The Anti-Union Debate

The philosophy of the radical neo-liberal right derives from economic rationality which makes no room for an intervening legislation in the natural arena of the labour market. A foremost proponent is Friedrich von Hayek who claims that trade unions enjoy "unique privileges" which would "before long destroy the whole market order" by causing inflation and unemployment (44).

For him, those who actually exploit society are not the capitalists and entrepreneurs, not even individuals but organisations which derive their power from the moral support of collective action and group loyalty (45). As such, the concept of freedom of association needs reinterpretation if group organisation and the "coercion" of workers to join unions is to cease being a threat to the rule of law on which free society is based.

Economic analysis misses the role of norms and values such as trust and fairness in long-term business. This would explain why human resource management underscores investment in labour and recognition for work done. In doing so however, human resource management also opposes supra-firm unionisation and standardised legal regulation. This explains its quarrel with industrial relations which it sees as interfering with corporate personnel policies and internal management practice. Should the law absolve itself from a say in the internal

dynamics, human resource management could assume extra-legal roles that will see the complete marginalisation of labour law.

A poignant corollary of the dominance of the radical new right is that an attack on levels of flexibility also results in fragmentation of social classes as hitherto known (46). While modernism is supposed to stress the subjectivity and diversity of the perspective people utilise, in reality, its effects are more invidious. For example, far from homogenising, globalisation brings into counter point all sorts of civilisational, ethnic, racial and religious differences (47).

Unionism, the collective of socialised workers is vilified as masculinist, searching for full work for those males employed formally while restricting the capacities of those outside the formal and unionised corporate culture. Neo-liberalist ideology sees unions as the patriarchal archetype even though it is often the state and entrepreneurs that collude in the exploitation of disadvantaged workers. They are also therefore those who best understand the role and the need of industrial struggle to redress this.

To them, the labour process does not empower choice while unionism entrenches gender disparities. The institutionalisation of conflict and the current methods of collective bargaining along with compulsory arbitration are all too combative and adversarial (48). These processes are also too categorical and insensitive to females (49).

The labour process according to them, should be reorganised through selective flexible intervention to secure individuation, differences and subjectivity (50). Labour law's vocation must then be to secure flexible and well-remunerated jobs for everyone (51). To do this, workplace relations and those of the external labour market social structures, policies conditioning choice, the inequalities inherent in child bearing and domestic work must be reflected or accounted for by the law. Radical economic rationalism aspires to an organisational structure that seeks presumably, to respect the full humanity of all, providing opportunity for self-expression and development (52).

Containing The Threat From Unionism

Contract is viewed as the best legal form for maximum autonomization of market transactions. Centralised regulation, it would appear, has a customised and complex relation with the regulation of the individual contract. In practice, it has always swayed in favour of the common law contract.

The question then is whether contract law can be reflexive enough to provide a framework for flexibility and social justice. In effect, the particularities of contract can only be mediated by an aggressive labour law prepared to structure and guide the power play with the parties bring to the exchange transaction. Yet an aggressive vocational commitment to the protection of the worker could see a dichotomization with the individuated contract (53).

This is because this contract comes pre-designed, packaged and differentiated in terms of authority, subordinated and returns. Contractualisation signifies the unwillingness to identify with and support others (54). As such, individuation sets the well-endowed against the less, the young, old, disabled, young parents, the ugly and fringe elements of society and the labour market.

Globalisation then contributes its quota to these local and national discontinuities by encouraging the formation of transactional elites with loyalty to no particular location when deciding on investment, recruitment, consumption or tax evasion (55). The preoccupation is with subjectivity and actualisation of the privileges of the elite. There is thus engendered, a widening gap in equalities of income, unemployment and the development of an underclass. Contractualisation is therefore patently market individualism that translates into coldly national economic self-maximisation by two self-centred parties bargaining for short-term advantage regardless of the wider social implications (56).

In exchanging health and security for cash or low training for profit, the contract exhibits a sterling incapacity to see the changing dynamics of social relations at work (57). The contract per se is not at fault however. It has never been adequately integrated into labour law so as to grow, which explains the stagnation of the employment contract. Its servile and authoritarian attributes are thus historical (58).

As Collins observed, the classical ideals of equality, liberty and reciprocity have been reconstituted and modified by reference to communitarian values of paternalism, fairness and co-operation. At the same time, the form of law itself has shifted from technical rules to open-ended standards and conflicting principles which invite the courts to examine the texture of market relations with an eye to the distributive consequences of their decisions (59).

To contain contractualisation, the strategy may not be that of removing certain transactions such as casual, atypical and

domestic work from the purview of legislation. This would only differentiate them further and remove the protective obligations imposed on the employer as forms of work.

Whereas it would have been easy to classify all workers as independent contractors, the capacity to assume the risks and obligations cannot be evenly assumed and managed. Constructing an employment relationship out of these myriad transactions in order to impose protective measures is daunting. The courts are happy with seeing a contractual relationship they comprehend than the assortment of factor on which an employment relationship is contingent. In addition, general standards embodied in contract jurisprudence are not so universal as to be uniformly applicable. Ipso facto, even the proponents of a contract at will, free of regulation do accept a need for some form of proceduralisation in the areas of equity, transparency, intention and consent among others. These realities justify and make unionism all the more important and relevant.

Governments at all levels are engaged in providing measures of assistance and adjustment to industry. Tariffs are being reduced and grants, procurement contracts, tax concessions, even selective regulation are being used to further the promotion of innovation and restructuring. These developments are bringing the private sector into closer working relationship with the state which is inclined to adopt more cost-efficient bureaucratic management practices. Sometimes, state assistance comes with labour guarantees and export processing zone liberalisations. To entice investors, industrial activities are allowed agglomeration of strong companies in weak economies. Attendant to these are often weak conditionalities such as employment of local, unskilled labour, pollution and use of local raw materials. For these, such companies acquire in-roads into policy making and political patronage utilized to dilute industrial regulations or rigidity labours laws that emasculate unions.

It would appear however that, the indispensability of unions is a reality that seems to be defying the sophistry of the proponents of anti-unionism. In a report entitled "Unions and Collective Bargaining", the World Bank acknowledges the impact of organised labour on "sound industrial relations", women, lower inequality of earnings, improved economic performance and highly co-ordinated collective bargaining. The report also credits unions with bringing labour standards on to the international agenda.

Precisely because of the foregoing, globalisation and contractualisation pose one of the greatest challenges to a positive engagement of labour law with the labour market and organisations (60).

5.5 Statism, Levels of Compliance and Implications For Botswana and Swaziland

This section attempts to examine the socio-political dynamics of the state in both Swaziland and Botswana. The purpose is not an apologia for their perceived reluctance to effect the approximation to internationalisation labour laws but to appreciate the fears and the realities that inform the conduct of the state as it attempts to mediate labour relations and other socio-economic issues. This examination also enables us to see the difficulties inherent in subordinating nationalistic goals to and subsuming these under a regional integrative framework.

One is guided by the fact that Swaziland is a purported modern form of absolute monarchy while Botswana is, to all intents and purposes, a de facto one – party State. Constitutional provisions regarding fundamental human rights exist in Botswana but not in Swaziland since the Constitution was abrogated in 1973. In addition however, membership of and affiliation to international organizations presumes a subscription to their principles. It is noted also that a veneer of democracy may overlay a crafted system of paternalism, and social polarisation. Recourse to strategies of containment and control are then critical to the sustenance of a hierarchically structured system characterised by patronage and culturally legitimised conformity. The legislative ethos may thus be oriented towards erecting a superstructure that facilitates regulation for the extraction and exploitation of both human and material resources.

The Botswana Situation

The Botswana state presides over a free market economy whose key social impact is the greater rural dependency on wage labour from the urban centres. As such, wage labour is a critical element in the socio-economic life of the majority and this serves to enhance the power of the state as the largest employer. This has also precipitated the interventionist role of the state in labour relations and a sensitivity to agitation particularly in the diamond mining sector which is the principal economic activity. But this sensitivity is also heightened by the fact that labour agitation is wage-driven.

In reality, the state has come to epitomise the cleavages in the society. It consists of the coalition of peak groups who own vast tracts of commercial ranches, farms, retail and service outlets in a tightly knit web of partnership between local and expatriate political power and capital. Other forms of activity are undertaken through the 39 subsidiaries and associated

companies of the National Development Corporation (NDC) in partnership with expatriate companies (61). The tourist industry is also predominantly expatriate owned. Wages among the rural majority of the population fall outside the purview of wages policy precisely because this is the locale of capital generation by the state.

The Botswana state has also directly invested in industry with significant equities in partnership with De Beers, Amax, Roans Selection Trust and others. The state thus appears to subordinate the economy to itself for its own immediate needs which somehow fits into the schema of prioritised growth and development.

Given that state imposed wage restrictions have only exacerbated the unemployment situation, centers of economic activity have become the focal point of agitation. This has led to a heavy-handedness in dealing with the strikes of 1972, 1974, 1975 and 1991. In 1974, the mining workers went on strike over parity of pay with their De Beers South Africa counterparts. In keeping with its monopolistic ethos, the state initially prevented the company from adjusting wages but finally capitulated. Similarly, in 1991, the Central Government Workers were dismissed. It was only in 1995 that the Appeal Court nullified the dismissals.

Thus the Botswana state perceives the need to adopt a strategy of neo-corporatist, structured and organised neutralisation of organised interest groups such as labour through juridification and close administrative supervision. It perceives a need to maintain order and subordination of all other interests to its authority. Being an elite democracy, defined however by growing disparities in income and resource distribution, it manifests certain tendencies at times as a result of the constant need to co-ordinate the sub-ordination of all groups under its central authority. The state, as a result, is caught between the dichotomy of deregulation and intervention.

Calls to nationalistic allegiance imply submission to control and regulation which then translates contextually into docile acceptance by workers of departures by the state from conformity with ILO standards. As the dominant interest, it seeks to resolve conflicts through a prescribed system of established rights and an inclination towards Unitarian ideas of bureaucratic organisation and governance (62). The need for stability has often been used to justify a strong demand for law and order. The rationale has been that "companies who invest here must obtain a reasonable return on their investment and (SIC) skilled expatriates feel their lives and property are safe"

(63).

It is important therefore to understand that the logic of executive-driven legislation is policy formulation and implementation where the law reflects the will of the state which is the manifestation of the social coalition in power. The state therefore employs legislative emasculation as a strategy that recognises an inability or a reluctance to create viable social structures and partnerships that can sustain open debate. For example, the most critical tripartite structure is the National Employment, Manpower and Incomes Council (NEMIC). It is the national forum mandated to deal with "all matters which pertain to employment incomes, manpower and training" (64). Yet it is dominated by the public sector bureaucracy and private capital in the form of seven Permanent Secretaries, the Governor of the Bank of Botswana, the Vice Chancellor of the only university and three members of the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM). From labour, there is one Member of the Botswana Civil Servants Association (BCA) and three representatives of all the trade unions in the country. In fact BFTU admits that they attend such meetings physically without being able to participate meaningfully as they are incapable of fully grappling with issues or boldly contradicting their better informed superiors.

As far back as 1969, Sir Seretse Khama, the first President, declared that labour legislation was intended to "provide for the control and regulation of trade unions, lay down procedures for settling labour disputes and for enquiries into trade disputes and industrial conditions and permit the regulation of wages and conditions of employment in industry" (65). There was no reference to standards of justice and equity as implied in the ILO framework because Botswana only ratified most of the relevant Conventions in 1997 although she had been a member of the ILO since 1978.

In taking a motion on "Legal Action Against Unjustified Strikes", in 1969, the objective was declared to be "legislative action to prevent workers in both public and private sectors of the economy from the coming out on and remaining on sudden, ill considered and unjustified strikes" (66). This was in reaction to a spate of strikes between 1965 and 1966 over poor working conditions. These strikes were variously described as "irresponsible", "ill-advised by political fanatics", "a trial of power against government" and "organised by the opposition".

These perceptions of labour reaction to workplace situations and the lack of appropriate social interaction between the actors

in labour relations, play a dominant role in how legislation is perceived by the state as a weapon of control and not a framework of social discourse premised on constitutionally guaranteed and internationally accepted norms. The contention has been that the state owes nobody an apology and could legislate in a manner it thinks is in the best interest of Botswana and in the best interest of the trade unions (67).

As far back as 1960, the colonial report on labour legislation had observed "poor housing and bad surroundings" within the environment of work and had recommended a review along ILO lines. However, reticence exhibited then is still prevalent today despite the fact that there was an ILO team in 1968 to assist in drafting labour legislation (68). The issues regarding freedom of association as raised by the Committee of Experts (COE) currently therefore predate the 1992 amendments. These we shall now re-visit.

The ILO Committee of Experts (COE) on the application of Conventions and Recommendations in their Direct Request (2001) to the Government of Botswana identified virtually the same issues raised in Chapter Three.

With regard to Article 2 of Convention 87, it noted that the right of workers and employers, without distinction whatsoever to establish and join organisations appears compromised. To this extent, the COE observed that Article 13 of the Constitution of Botswana condones selective application of freedom of association as it excludes public officers and teachers. They are neither "industrial class" workers nor "employees" as defined under the Trade Unions and Employers Organisation Act (Cap 48:01) (TUEOA).

The right of workers and employers to establish organisations of their own choosing is equally endangered. The TUEOA empowers the Registrar of Unions not to register a union if it is felt that an existing union is sufficiently representative [S.10 (4)]. The COE considered such authority as inimical to the establishment and joining of a union of one's choice. The Right of workers to establish organisations without previous authorization is also affected. Section 6(10) of the TUEOA with Section 10 (2) (b) and (c) confer the power not to register a union if it does not satisfy the requirements included in the schedule. There are no remedial procedures provided save that as per Section 11(1) (a), the union may be dissolved or refused registration. The COE also noted that Section 10 (3) and 6(2) dealing with non-eligibility for elective office because of non-citizenship and the submission of full particulars of members is

discriminatory, emasculatory and amounted to prior authorisation or a pre-condition for membership. Similarly, under Section 10 (g), refusal to register a union because one of its officers was convicted of an offence under the Act is considered an all-embracing net that could include legitimate union activity. Since an unregistered union may not undertake any business, these other requirements become superfluous.

Regarding Article 3 of Convention 87, the COE notes that the TUEOA in its entirety over-regulates the affairs of unions which amounts to intrusion and interference. The power to cancel registration simply because of non-citizenship except with Ministerial approval is contrary to the Convention which seeks to ensure unfettered freedom to elect representatives in line with the union's constitution and sense of need.

Section 22 (1) of the TUEOA disqualifies any one from elective office if convicted of an offence under the Act within the previous five years. Furthermore, Section 22(1) prohibits non-members from becoming officers while Section 21(1) restricts membership to only those employed in the industry for not less than a year. Membership and its protection ceases with termination of employment. Not only does this restrict membership in terms of calibre available for union work, it also restricts the union in terms of whom it may employ or assist. Moreover, Section 61 through its broad definition of 'management' effectively removes the most articulate segments of the workforce from union membership.

Regarding sympathy strikes, the COE noted that Section 35 of the Trade Disputes Act (Cap 48:01) confers discretionary authority to declare them unlawful. Such authority is stifling as workers ought to be able to engage in industrial action not only in furtherance of a trade dispute but as a reaction to socio-economic and occupational interests. Furthermore, industrial action does not necessarily jeopardize the essentials of life or livelihood. (Section 9(1)). Essential services should therefore be restricted to its strict usage and not as a loose umbrella as provided for under Sections 9(1) (a) and 37. Criminalization of industrial action under Section 39 should obtain only if the intended prohibitions are in themselves not antithetical to the principles of freedom of association.

Articles 5 and 6 of the Convention (No. 87) refer to the right to establish federations and confederations and to affiliate with international organizations. However, Section 47 and 63 of the TUEOA require prior consent for external affiliation and sourcing of funding. The sections are therefore contrary to the provisions of the Convention and convey an atmosphere of

suspicion and intrusive oversight of union affairs. More importantly, the guiding spirit is not protection of the unions. It is the screening of who they relate to ideologically, politically and who may help to sustain an environment of protracted industrial agitation and action. It connotes the assumption that unions in particular are breeding grounds of political leftism, extremism and luddite inclinations.

Current Reactions to ILO Requests

As indicated earlier the Direct Request of 2001 to the Botswana Government by the COE on application of Conventions and Recommendations covered the Constitution, the TUEOA and the Trade Disputes Act. This request has elicited certain responses culminating in the drafting of amendment Bills of the Employment Act (Cap 47:01) together with those mentioned above.

The Employment (Amendment) Act 2002 carries a memorandum which identifies its aim as effecting the alignment of labour laws with the Conventions of the ILO by seeking to accord protection to employees in the event of subsequent insolvency of the employer and enabling priority payments out of assets of the insolvent estate. This is realized by enlarging the scope of Section 92 which dealt with the same but limits the sum to 3 months wages prior to insolvency. Section 92 A (1) and (2) therefore cover payment for holiday work over the preceding 24 months, paid absence of not less than 3 months prior to the insolvency or termination of employment and any accrued severance benefits before non-privileged creditors are attended to. This is in conformity with Convention 173 on the Protection of Workers' Claims (Employer's Insolvency) of 1992 which Botswana ratified in 1997. Further, the amendment Bill also stipulates specific duties of the Labour Advisory Board which has been in existence under Section 148 of the Act without a proper mandate.(69)

Hitherto, the Minister was to consult the Board before introducing Bills regarding employment, further contracts of employment, amendments to the Act and subsidiary legislation. The composition, duties and powers of such an important structure were never openly stated and it is debatable if such a Board ever impacted on employment legislation. The amendment per Sect. 148 Subsections (1), (2), (3), (4) and (5) provides a proper scope of its functions. *Inter alia*, it shall advise the Minister on any proposed legislation, guidelines, codes or model agreements in the arena of dispute resolution. It shall review dispute resolution mechanisms under the Trade Disputes Act and advise thereon. Most significantly, it shall

advise on membership of the Panel of mediators and arbitrators to be appointed under the new Section 4 of the Trade Disputes Act and advise on any other labour law.

Despite the significant and wide juridical role of this body, it is assumed that the discretion as to the membership is vested in the Government as no mention is made of its composition. The make-up of such a body is critical for a balanced view from all the social partners. This will engineer legal procedures and frameworks that do not only accord with constitutional and international expectations but derive legitimacy from their own integrity.

The draft of the Trade Unions and Employers' Organizations (Amendment) Bill 2002 avers that its object is to align the law to ILO Conventions through certain specific amendments.

These are *inter alia*,

i. The expansion of the definition of 'employee' to include public officers and persons employed by local authorities including teachers. By implication, these initially excluded groups as dictated under the Constitution may soon be able to form and join organizations of their choosing without prior authorization. (S.2)

ii. The minimum number required for formation of a union is also removed together with the provision barring so-called identical or similar unions (S.10).

iii. The removal of the Registrar's powers to refuse registration on the grounds that a union officer is not a citizen of Botswana and the subsequent cancellation of such registration where an officer is found not to be a citizen is most encouraging. This removes the Ministerial waiver hitherto required (S.11, 12).

iv. The amendments introduce the protection offered to a union member who is no longer employed in an industry with which the union is directly concerned. This protection is critical to the processing of severance benefits, out standing insolvency and compensation claims (S.21)

v. Any employee may become a member of a union of his choice and may be eligible for elective office (S.22).

vi. Deletion of the provisions relating to the investigation of the membership a union by the Minister has also been effected (S.53).

vii. Freedom to affiliate and to accept funding from outside Botswana without Ministerial consent in writing has now been incorporated within the genre of rights (S 63, 64).

viii. Employers are to bargain in good faith with unions.

ix. Provision is made for the establishment of Joint Industrial Councils (81).

It is observed that, while the thorny issue of restriction on membership of negotiating bodies by members of management (S.61) appears to be in line for repeal, Clause 34 (7) of the Trade Disputes (Amendment) Bill introduces restrictions again from a different, albeit plausible angle. It provides that an employer is not obliged to recognise a union in respect of employees who are members of senior management responsible for policy formulation and representation of the employer in negotiations. The freedoms of association and organization of this so-called senior management are threatened as employees. Or is this compensated for by their privileged positions and the threat of breach of confidentiality? Who represents them as employees? "Member of management" was a dragnet. It is hoped that "members of senior management" would not become another as workplaces differ in size, structure and allocation of functions.(70)

The Trade Disputes Act has been substantially amended. It makes provision for the following structures, some of which have been in existence: The Industrial Court System, Panel of Mediators and Arbitrators, Joint Industrial Councils and Collective Agreements, Compulsory Arbitration of Interest Disputes in Essential Services, Essential Services and Codes and guidelines (section 82)

Essentially, the thrust of these amendments is to re-visit, restructure and re-proceduralize dispute resolution, bringing in as many alternate and informal channels as functionally possible between the administrative role of the Commissioner of Labour and the judicial functions of the Industrial Court.(70) It would appear that the ILO is still unhappy with the scope of these efforts.

The ILO CEACR has requested the Botswana Government as of March 2003 to furnish certain reports by September 2003. The areas covered are still some of the Conventions we have been

discussing in relation to recent amendments to the labour laws. Among these are Convention 98 on Organising and collective bargaining, Convention 144 on Tripartite Consultation and Convention 87 on Freedom of Association and the right to organise.

The Swaziland Situation

The genesis of the dominance of the state in all spheres of socio-economic life in Swaziland has been traced to the Proclamation of 12th April 1973 which repealed the 1968 Constitution. A survey of the rationale, scope and ramifications of this singular act provides a window into the Swazi state.

According to the Proclamation, the Constitution had not only failed to provide the machinery for good government but had also become the cause of social unrest, insecurity and an impediment to free and progressive development (S.2 (a) (b)). Furthermore, the Constitution had facilitated the importation of alien and undesirable political practices designed to destroy hitherto democratic methods of political activity. The Constitution did not lend itself to amendment but compromised the desire for peaceful coexistence as a nation without outside pressure (S.2 (c) (d) (e)).

The direct result of the repeal in legislative terms was that the King assumed supreme power and that all legislative, executive and judicial power was vested in him (S.3). As such, though all laws except the Constitution may be re-enforced, such could only happen subject to modifications, adaptations, qualifications and exceptions as may be deemed necessary to bring them not into conformity with international standards but with ensuing decrees (S.3 (b)).

The King-in-Council may, whenever it deems it in the public interest, order the detention of any person subject to any condition it may impose for any period not exceeding sixty days in respect of any one order. Consecutive orders may be issued as necessary and no Court shall have the power to enquire into or make an order regarding such detention (Decree No. 2)

Freedom of association and the right to organise was dealt a mortal blow. No meetings of a political nature and no processions or demonstrations shall be held or take place in any public place unless written consent is sought from the Police. The grounds for refusal are a reason to believe or belief that such a meeting or demonstration may be directly or indirectly related to political movements or other assemblies that may disturb the peace. Added to this was the proscription of

political parties and similar bodies that cultivate disturbances and ill-feeling (Decree No. 11, 12).

In such an environment, any labour legislation, as long as it remains subordinated to those decrees and the supreme authority of the King could not be said to create an enabling environment for dialogue among the social partners. It can also not be seen as a vehicle for social justice. It is as if the labour law juridificatory effort is only aimed at placating the ILO and then quickly neutralised once that is done.

Current Reaction To ILO Requests

Because the Industrial Relations Act (2000) was drafted at the request of the ILO and also because it is supposedly indicative of the Government's desire to be seen as ensuring international standards, certain provisions are standard in themselves. These are contained in a single codified Act unlike the separate pieces in Botswana. Provision has therefore been made for the following among others:

The Industrial Court System, Labour Advisory Board and functions, Joint Negotiation Councils and Collective Agreements, Works Councils, Employee and Employer organizations and related issues, Freedom of Association, right to organize and strikes, Dispute Resolution Mechanisms, Tripartite Commission on Conciliation, Mediation and Arbitration, Compulsory Arbitration, Essential Services Commission and a Code of Practice (IRA 2000).

The Individual Observations of the Committee on Enforcement and Application of Conventions and Regulations concerning Convention No. 96, (Fee Charging Employment Agencies) which Swaziland ratified in 1981 indicated that the report requested from the Government had not been furnished by November 2002. The provision in question concerns recruiting of persons for employment on foreign contract of employment under Part IX of the 1980 Employment Act (67). Regarding Convention No. 87 on freedom of association, the Committee noted that the adoption of IRA No. 8 of 2000 modified Sections 29, 40 and 52 of the IRA (2000). The Swaziland Employers Federation reacted to the discrepancies between Decree No. 2 (Proclamation of 2001) and the provisions of Convention 87. As such, Decree No. 3 of 2001 was promulgated to repeal Decree No. 2 in its entirety (71).

The Committee noted the lengthy procedure and excessive balloting requirements to hold a peaceful protest action under Section 40 of IRA (2000) and the withdrawal of immunity for

civil liability for protesters. This was rectified, as the Committee acknowledged, by Act No. 8 (2000) which restricted civil liability to criminal, malicious and delictual acts by unions, federations and members.

Regarding Article 2 of the Convention, the Committee was of the opinion that contrary to Government's argument that correctional services staff form part of the defence forces, the legislation should be amended to grant them the right to organise in defence of their socio-economic interests. It would appear that this was done but immediately reproduced in the Employment Act (2001) which exempts them from the definition of employees (Section 5).

Article 3 of the Convention (No. 72), according to the Committee did not envisage a protracted procedure before legal strike action. It therefore advised Government to reduce the length of the compulsory dispute resolution procedure to previous levels which do not render strike action impossible. The Committee therefore advised a revision of Section 70, 82, 85 and 86 of the IRA (2000). Furthermore, the Committee also indicated the need to adopt specific provisions accompanied by sufficiently effective and dissuasive sanctions for the protection of workers' organizations against acts of interference by employers or their organisations.

It also noted that the system of works councils provided for in Section 52 confer the power of establishment only on the employer. The modalities for their representation are not set out. Rather, they are empowered to negotiate terms and conditions for those who are not members of unions. The Committee considered this as inimical to the functions of trade unions and collective bargaining.

The Act also provides that the Employer shall recognise a Union if 50% of the employees of the unit are members. Below this, recognition becomes a matter of discretion. The Committee recommended that should no union have 50% membership in the unit, any union with members should be recognised for collective bargaining on behalf of its members (72).

To this extent therefore, one might describe the government as being cautiously responsive. The state is still authoritarian and reactionary however. As to whether these provisions have, can and ever will be permitted to translate into a framework within which freedom of association, expression and assembly in their various forms at the national level could be realizable remains to be seen. Given that the government is synonymous with the state, selective responsiveness accompanied by draconian,

centralised control of all the levers of power, renders compliance with ILO standards merely academic.

Given that there are reportedly no national minimum wages, constant violation of ratified conventions and abject working conditions, the decorous and superficial labour law legislative framework could only engender a conducive atmosphere for the antithesis of labour organization. This antithesis then manifests itself in the form of benign intervention in industrial relations and privatisation of work, joblessness and the creation of a hegemonic enclave for local capital in collusion with multi-national conglomerates.

It is recalled that the 1973 decree (No. 6 (a)) vested land and rights in and to land in the King rather than the government. It would appear that in Swaziland, the state, the traditional elite and the accompanying cultural and ideological paraphernalia are the greatest bulwarks against a functional, acceptable labour law regime. Government reactions to demands for greater flexibility and openness are at best marginal and often strategically evasive and laced with intimidation and extreme subordination.

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Chapter 6

6.1 Towards a Viable Common Framework

Introduction

This chapter is the culmination of the examination and analysis of theoretical debates on labour law, the evolution of labour law in Botswana and Swaziland and the concept of regional integration in the SADC sub-region. We intend to formulate certain theoretical premises deriving from the foregoing chapters. The main objective is to position ourselves to suggest an approach to forging a common labour law front in Botswana and Swaziland capable of adoption and practicable enough for future realisation. For this purpose, we shall examine certain elements of the labour law regimes and ascertain where points of convergence occur. These points of convergence need not be structural, institutional or procedural. The emphasis is more on the purpose and direction of the law and how the current content and context point to that direction.

The chapter also examines the very real problems, covert and overt, legal, managerial and otherwise which could or have militated against the realization of a replicable labour law regime. It then attempts to produce a hybridised model after a brief re-visit of the paradigms earlier discussed in chapter 2. This hybrid also indicates the future possibility of a synthesis that is capable of capturing the realities of the situation in these societies. The chapter closes with a postulation as to how local ownership of even ostensibly alien models could be achieved.

6.2 Functional and Legal Commonalities

In this section, we examine the common areas, functions and structures that operate in the labour law milieux of both Botswana and Swaziland. The overall aim is not to locate institutional similarities but functional and methodological commonalities. This is precisely because while Botswana has three distinct Acts in terms of our research, Swaziland only has a comprehensively codified Industrial Relations Act similar to that of Lesotho and moreover, structures may serve different ends in different socio-legal environments.

6.2.1 The Industrial Court

Both the IRA of Swaziland and the TDA of Botswana provide for an Industrial Court composed of judges appointable in same manner as those of the High Court.

The functions of the Court are essentially the same as both countries expect that it shall be a court of law and equity. They also have independent Registrars. The jurisdiction bears the same emphasis on matters arising from trade disputes and those needing resolution in furtherance of good industrial relations. Decisions are subject to appeal to the Court of Appeal. Swaziland provides for an Industrial Court of Appeal while Botswana does not. This provision should be replicated as it is the trend. South Africa has a Labour Appeal Court. It engenders specialisation away from the over-arching demands on the normal justice system. Essentially the courts may regulate their own procedures and proceedings.

The purpose of these courts is mainly to interprete and oversee the implementation of labour laws so as to ensure good, effective industrial relations. How this can be done in its totality would require a harnessing and harmonization of the roles of all the other actors who may be both centrally and marginally connected to labour law and relations.

Because the judicial framework, the philosophy and expectations are common, the Industrial Court system becomes an attractive instrument provided this instrumentality is utilizable to enhance social justice.

6.2.2 The Labour Advisory Board

Both the IRA and the Employment Act (EA) of Botswana provide for the Board. While the duties are essentially the same, Botswana is quiet on the composition, meetings, rules and procedures which are covered in detail under the Swaziland IRA. The IRA includes the approximation of ILO Conventions and the preparations of reports and memoranda submitted as per the requirements of Articles 19 and 22 of the ILO Constitution among the duties of the Board. However, the composition provided comprises 18 members, with 6 senior government officials, 6 representatives each of employers and employees or their alternates with the Commissioner or his Deputy as Chairperson. In effect this may translate into 12 against 6 leading to questions of legitimacy if and when worker representatives are outvoted.

6.2.3 Tripartite Commission on Conciliation, Mediation and Arbitration/Panel of Mediators and Arbitrators.

Though there is a nomenclature variation, these two organs as they are referred to in Swaziland and Botswana respectively, are charged with alternative dispute resolution prior to referral of disputes to the Industrial Court. Both are to be established

subject to the consultation of the Labour Advisory Board which shall make recommendations and membership shall consist of those so recommended to the Minister.

The Commission in Swaziland shall receive trade dispute reports directly as does the Commissioner of Labour and is standing rather than *ad hoc* for this purpose. In Botswana, the Commissioner of Labour receives the reports and determines who is suitable to mediate or arbitrate as the case may be from a pool of full-time and part-time appointees. The Commissioner may intervene where he apprehends a dispute and delegate the job of resolution to a Panel member. The two Acts provide detailed procedures for effecting alternative dispute resolution which, in their letter and intent, do not differ but also indicate a preference for compulsory, statutory dispute resolution.

6.2.4 Joint Negotiation Councils/Joint Industrial Councils

In Swaziland, the JNC may be formed by an employer, employers' organizations or more of them or one or more registered trade unions the purpose of which is to negotiate on behalf of employees and employers within an industry where it considers itself sufficiently representative. Upon satisfying the requirements, a notice is gazetted for the purpose of establishment of a JNC. The same applies to the JIC under the Botswana Trade Disputes Act. The difference however is that where the COL under the TDA refuses registration, the only recourse is to the Minister whereas any aggrieved person under the Swazi JNC, may refer the matter to the Industrial Court or the TCCMA. Being an important negotiating machinery from which collective agreements emanate and disputes or rights evolve, it is critical for the Court to determine objectively the grounds for non-establishment of a JIC rather than leave it to the political discretion of the Minister.

The provisions of the IRA and the TDA regarding disputes procedures, unlawful industrial action and enforcement of collective labour agreements are not substantially different. Thus, both content and format are identical and reconcileable.

Departures such as an Essential Services Commission in Swaziland and a detailed, crafted role for Mediators and Arbitrators in Botswana are aimed at the same things where these are provided for. The list of essential services is essentially the same by industry or service. In view of reasons adduced earlier in Chapter four, a body comprising of equal numbers of representatives from the government, employers and employees is ideal for overseeing the broad range of issues concerning Essential Services.

6.2.5 Freedom of Association and the Right to organise

There are minor variations with regard to the post-formation period allowed prior to registration and the number in terms of representativity required for recognition (that is 25% and 50%). The role of the Industrial Court is recognised in this regard under both Acts. Ex facie, there is ample room for effective unionisation and organization unless these Acts are subject to derogation under other superceding legislative arrangements. In addition, the oversight powers of the Minister such as his discretionary intervention, inspection and potential cancellation of registration cast a shadow of limitation on the full freedom to associate and organize which is realizable by creating internal, self-auditing rules and procedures that confer autonomy in membership and over membership of these bodies.

We identified substantive and procedural convergence and structural/institutional similarities which support the contention that in terms of juridification, the approximation of Conventions 87 and 98 and other related ones is on course in both Botswana and Swaziland. This does not absolve the legal regimes from a tendency to restrict, control and emasculate unions using the same technique of legislation.

6.3 Core Problems: Dimensions of the Reality

6.3.1 The Swazi Situation

We need to grapple with the multi-layered constraints in the path of even a hypothetical harmonization or unification of these two legal regimes which have so far attempted to only align to ILO conventions.

In Swaziland, the *raison d'etre* of rule by decree and monarchical supremacy is explicit enough. Moreover, it is said that it is the sovereign right of the state to govern and create a perceived enabling environment for the mutual respect for the rule of law. To this end, as per the official position, penalties, which have always been part of Swazi industrial relations legislation ought to be raised to prevent violation of national laws.

In reality, the Swaziland situation is best illustrated through an analysis of the Interim Report (Case No. 1884) on the complaint by the ICFTU against the Government of Swaziland. Within this analysis, we integrate the location of supreme authority and the function of law as an instrument for the coercive implementation of policy. We also recognise legislation as a contextual and logical desideratum of an ostensibly participatory process of social engineering.

Between 1993 and 1996, it would appear that some of the leadership of the Swaziland Federation of Trade Unions (SFTU) had been subjected to police surveillance arrest, detention and brutalisation in the course of performing legitimate union functions. These privations derive their legitimacy from laws such as the Public Order Act (1963) and instruments such as Legal Orders and Notices which all trace their authority to the Proclamation of 1973 that abolished the Constitution (1).

In 1996, the Swaziland Government indicated its conviction that a liberal industrial relations regime had spawned workers' organizations with a proclivity towards "harnessing their labour power to toe the lines of political transformations under the guise of labour issues" (2). Thus, government saw the SFTU as an instrument of anarchy bent on destabilizing it and undermining law enforcement. Moreover, police action has been endorsed as legally obligatory duties to perform in the interest of law and order (3). Furthermore, where social partners are consulted but consensus is not being reached, government has a responsibility to ensure that legal measures are put in place (4). Government also considers that a Commissioner of Labour must have the powers to enforce the provisions of the law (5).

It is recalled that the 1963 strikes were crushed by the Gordon Highlanders from Kenya. The state had been so rattled that it strategically ratified several ILO Conventions thereafter. In tandem, it also then predictably set out to impose an indigenous form of industrial relations structures rather than invite the ILO to assist. It established workers representatives or Ndunas and later Ndabazabantus. These were appointees of the Swazi National Council sent to major enterprises as liaison officers on the payroll of these enterprises. The structures and the philosophy energising them failed. They were suspected as spies for the state rather than advocates of good workplace relations. (6)

To a large extent therefore, the attitude of the state to labour and labour relations has been antagonistic and at best paternalistic. The mediating institution of the Department of Labour, being an agent of the state finds itself in the position of a dubious arbiter between the entrenched positions of the employer and employee and the often politically motivated machinations of the state.

In December 2002, the Swaziland Federation of Trade Unions (SFTU) called a 48-hour general strike in protest at the anti-union and undemocratic policies of the government. This course of action was prompted by the worsening ruthlessness of the government, the serious unemployment problem and the refusal by the King's palace to abide by two key Court of Appeal rulings. This had resulted in the resignation of six Appeal Court judges.

The ILO itself has criticized the regime for violating trade union rights including the incessant detentions of the SFTU General Secretary, Jan Sithole. It would appear that though the SFTU has over the years sought a platform for social dialogue, the government appears to prefer confrontation, selective austerity and a generally unstable economic environment (7).

It is observed however that the bureaucratic machinery, particularly the Department of Labour is attuned to the problems that militate against a salutary effect of labour legislation on the ground. While the state engages in its strategic emasculatory programme, the Department is aware that most employees are poorly informed while employers, given their background and affinity with the state are quite familiar and also cocooned in the knowledge of their partnership with the traditional political elite (8).

Moreover, the area of legislation most problematic to workers and unions is the comprehension and interpretation of the real

import of the law (9). However, while it seems workers generally feel that ILO standards are crucial for stability, the state appears not to think so. Similarly, the staff of the Department of Labour do not see separate pockets of legislative evolution in SADC as being in the long-term interest of the sub-region (10). To this extent, just like their counterparts in Botswana, approximation of domestic legislation to ILO Conventions is neither a difficult nor an expensive process (11).

There is strong agreement on the need to begin moving towards standardization of labour laws implied in regional integration though specific reasons have not been adduced (12). There is strong disagreement to the notion that domestic labour laws are tools for the state and employers to control and regulate employee's potential for demonstrating his collective countervailing power (13).

In view of recent developments in Swaziland, it is not surprising that there is agreement that the courts of law have hitherto been instrumental in creating the perception that collective employment law is a tool for the rigid control and regulation of workplace relations.

Amidst an atmosphere of poor communication, arrogance, indiscipline and mistrust, the Department of Labour has at least been able to observe objectively that "authorities in Swaziland still view trade unions as political organizations" (14). Thus, adversarialism and entrenched positioning and posturing rather than negotiation and consensus building have created a disempowering environment within which labour law as envisaged by the ILO cannot flourish and perhaps may not be intended to flourish.

Regarding harmonization of the legal framework for labour law, the internal political economy and socio-economic conditions in Swaziland do not create a situation where a logical corollary such as cross-border migration could be permitted, assuming that there was a common legal framework. Given the tight control over social formations in Swaziland, Botswana, with its open, liberal economy and stable political system could prove too strong an attraction for Swazi skilled labour. Social dumping could become the inevitable outcome playing into the hands of agents of globalization, expropriation and exploitation.

6.3.2 The Botswana Situation

The months of October and November 2002 have seen an upsurge in labour agitation driven largely by economistic demands over pay structures, unfulfilled promises and

protracted implementation of policies. The amalgam of teachers unions and associations are undertaking intermittent demonstrations and industrial action. The Botswana Unified Local Government Service Association (BULGASA) followed over similar issues and is now declaring an alliance with the opposition. The Academic and Senior Staff Union (UBASSU) of the University of Botswana was initially equally bent on utilising the strike to obtain a 6% inflationary adjustment payment. A compromise solution has since been negotiated. Though interdicted by an interim court order, they had earlier mounted a more co-ordinated, holistic assault on the management framework, least of all for its non-consultational and authoritarian disposition. The Nurses within the Public Health System are in a similar mood (15). Various members of Parliament and Cabinet have supported and criticised these actions. On the one hand, they are seen as scaring away investors and on the other are reflections of governmental ineptitude, indifference and complacency (16). The Permanent Secretary in the Ministry of Labour and Home Affairs provided selective interpretation of the right to strike by essential services whose effect is to individualise the grievance, locate it at the level of the personal employment contract and thus accentuate the vulnerability of the workers.

It is recognised that management plays a critical role in labour relations. However, the study could not afford a large quantitative survey to ascertain this fact. The opinion of a few in strategic organisations crucial to the economic interests of the state were polled. The purpose was not to present a dominant statistical derivative but to reflect perceptions that help elucidate the support the state expects and derives from key business interests. The twelve officers interviewed were Batswana with educational qualifications ranging from Ordinary School Leaving Certificate to undergraduate studies. Their lengths of service were as fresh as 9 months and as long as 22 years. Some have stagnated at the same rank for 4, 5 and 6 years for no apparent reason.

Among them, it is generally agreed that workers and their unions demonstrate low familiarity with collective labour legislation with the employer doing virtually nothing to facilitate the acquisition of such knowledge. In fact, it is felt that employers rely more on lawyers who emphasise statutory rights and litigation rather than negotiation and the protection of employee interests.

On occasions, the employer ignores industrial court rulings and exhibited incapacity to interprete rules and provisions, knowing, it seems, that its economic clout would result in government

protection. As a result, labour legislation is viewed as supportive of the employer who uses the "management" clause to exclude employees from union membership. Moreover, the questionable designation of "management" has been extended even to lowly placed support staff.

A former Secretary to a General Manager who had been excluded from Union membership because of her position was allegedly given an allowance and then instructed to attend union meetings so as to inform on them. In the event of disputes, she was usually instructed at night to type changes to policy so that when the union tendered its copy, there would be disparities. However more importantly, it is alleged that given the general ignorance about ILO Conventions, employers engage in victimization, often punishing employees with the "disclosure of information" clause (16).

If the goal is labour peace, stability and economic development, then the state could not be said to be achieving this goal. A research report by Partnership Research Institute of Canada says diamond revenue has been used to serve only the state coalition while most citizens live in poverty, illiteracy and are faced with a dwindling life expectancy (17).

The United Nations Development Programme (UNDP) in its annual Human Index report commented;

> "In pure economic terms, diamonds have resulted in Botswana having higher economic growth rates than any other country in the world over the past thirty years, however, in term of social indicators, Botswana has performed relatively poor. In 2000, Botswana's adult literacy rate was 72% compared to Zimbabwe's 89%, life expectancy at birth was lowly 40 compared to Sudan's 56" (18).

The Department of Labour and Social Security

This is the key organ of government where we have attempted to have a closer picture of the mindset of policy formulators and implementers.

The Department has only one Assistant Commissioner responsible for industrial relations. It provides the annual statistics on labour inspection, accidents, disputes and compensation. What is quite obvious is the shortage of competent manpower for inspection and dispute resolution prior to litigation or reference to the Industrial Court of disputes by

the Commissioner of Labour. Given its significance, this Department is misconceived, misunderstood and understaffed.

There is also the problem of jurisdictional grey areas between the Factories Inspectorate, the office of the Assistant Commissioner (Workers Compensation) and the Assistant Commissioner (Industrial Relations) (20). The Department of Labour and Social Security has no specific in-house training for its industrial relations staff. For that matter, specific orientation to ILO Conventions and how local laws compare to them have also not be considered important (21).

Regarding the Department's own perception of the labour law and relations terrain, it would appear that there is an awareness that both employers and employees demonstrate a low level of familiarity and sometimes contempt for the laws (22). As a result, the most problematic areas of legislation instrumental in workplace discord are employee rights and the resolution of workplace disputes, since rules and procedures are either ignored or not known (23). With respect to ILO standards, the industrial relations unit of the Department feels that workers and employers on their own feel that free membership of unions would ultimately promote industrial stability through fair treatment and negotiability of rewards (24).

However, and most remarkably, there seems to be a strong agreement that the present system of separate collective employment legislation in each SADC country is necessary for and because of their separate economic, manpower and historical development (25). By implication, the Government does not see regional integration in terms of harmonization of labour laws or by extension, free movement of labour (26). In fact, the President recently expressed deep reservations about the advisability of free movement at this stage.

The contention that approximation of domestic legislation to ILO conventions is a difficult and expensive process requiring external specialist input has been dismissed as untenable. (27). The question therefore is whether it is the absence of the political will rather than resources. It would appear that the issue is not one of competence but that of a collective will and how the technocrat/bureaucrats evaluate their advisory roles. This may justify the advisability of marginal incrementalism. The answer to this might include our observation that the necessary competence is located at the Attorney General's department and the externally funded ILO inputs that Government would rather use than originate its own approximations. Realistically however, the lower level officers

who interact on the street are inadequately trained and left to grapple with legal complexities. While they may possess on-the-job administrative experience, delegating of investigation and resolution of workplace disputes to them is a misplacement of trust. This also explains the perception of creeping corruption in their relations with employers (28).

The Government itself appears torn between acquisition of an international image of symbolic value and a rapprochement with investors and local capital which may translate into either lesser interventionist policies or the rigidification of labour laws to emasculate unions while liberalizing the labour market. We have also observed the tactical but covert penetration of union leaderships along party lines so as to deradicalize labour. There is also the policy of wage leadership and monopsomization (29). In effect, since Government is unwilling to relinquish its central hold on the levers of economic activity, the alternative is to placate capital through manipulative labour legislation.

Private capital, both local and external, have entrenched unitarian and monist values with an astute sensitivity to Government policy directions. It utilizes heavy-handedness, dismissals, demotions, transfers and retrenchments to intimidate and control the workforce. Unions only function after work hours. Officers use up their unpaid leave to attend to union business and operate under the constant threat of ever-changing rules for disciplinary action. (30)

Given this backdrop, it is doubtful whether one should be debating models of integration of legal regimes into a common framework. The reason is one of functionality rather than academic suitability. In another way, the question could be whether it is premature for a viable common framework to be mooted.

6.3 Modelling Paradigms – A One Best Way?

Introduction

This part of the study is premised on the intellectualisation of issues which, normally, should be experiencing actualisation. Certain fundamentals need to be in place as pre-condition for this intellectual discourse but precisely because they are not, this is mainly a theoretical and academic engagement.

The societies under examination need fundamental transformation. The key areas are political, social, economic and institutional structures that have been superimposed on the contradictions that characterise them.

The absence of consensual and concerted enthusiasm for holistic modernisation and internationalisation of labour laws detracts from the purposefulness of the attempt at pre-viewing the Botswana and Swaziland societies as proto-types of a sub-region that accepts and enshrines a common Social Charter into their various constitutional frameworks. This, alongside a Bill of Rights would have been the common subsets of legislation from which protective mechanisms may emanate. Unfortunately, the make-up and *raison d'etre* of governance do not lend credence to a desire to formulate policies and enact legislation whose nodal thrust is the democratisation of social debate and the concretisation of good, meaningful and mutually beneficial industrial relations.

The question to be answered now is how best one could effect the integration, rationalization and commonalization of the labour law regimes in these countries even as a hypothetical exercise. The objective of this study though has been to identify a preliminary role for labour law in the ultimate integration of the SADC Sub-region. A key corollary would then be the methodology for the attainment of this objective.

Formulating and imposing a common framework law such as the Loi Cadre that applied in Francophone West Africa prior to decolonisation presupposes a sub-region subject to the same or similar political, administrative and coercive apparatus of state or pseudo-states without access to sovereign jurisdiction and overriding nationalistic aspirations.

Given that the demonstrated trend is towards compliance with ILO provisions and given also the trajectory towards an ILO driven Social Charter, the concern should now be the detailed approximation of these legal frameworks to the principles so enshrined in the Charter. To this extent, harmonization

becomes compatible with the end-result of commonality which is achievable through not only the adoption but the internalisation, application and enforcement of the Charter. Harmonization implies approximation, co-ordination and equalisation of content. It is not essential however that all domestic or national labour laws become uniform in content or structure. It is critical and desirable however, that in their overall effect and enhancement of social justice, they be seen as more convergent than different (31). The argument of historical, ideological, political and economic dissimilarities do not in themselves justify the adoption of common principles that become more remarkable in their non-applicability than applicability. In fact, for us, approximation is more of regional strategic social partnering than a derogation from sovereignty or exposure to aggressive competitive and deleterious forces. Harmonisation implies the rationalisation of social policies to attain a functional balance across the sub-region. This could ensure stabilisation of social forces rather than imbalance and dislocation (32).

The adoption of a Social Charter of Fundamental Rights by the SADC in 2001 may not have been in recognition of an immediate need to harmonise divergent labour laws. Its functional importance as a tool for achieving closer affinity of the legal frameworks may therefore appear accidental to some, episodal to others and a threat to some other members of the SADC. It is however, a welcome development that could facilitate the engineering role of labour legislation.

This is because, it suggests a functional approach to re-positioning social policy at the centre of labour legislation and reprioritising it at the top of the growth and development policy ladder. By so doing, it also seeks to elevate social rights to the protective embrace of the Constitution within a Bill of Rights framework as part of the basket of entrenched rights. This presupposes the existence of an enabling socio-political environment where rights are guaranteed within a constitutional framework that defines the ultimate source of legitimate authority.

Thus, were the Social Charter to be ratified, the next hurdle should desirably be to agree collectively to elevate it to and integrate it into the constitutional framework either by incorporating it in the Bill of Rights or by recognising its pre-eminence as the singular embodiment of the people's aspirations.

Ideally, this should not be a domestic issue but seen as the benchmark for good governance and peer review within SADC,

once its primacy is established within the collegiality of nations at the conclave of the Heads of State, having passed through the Ministerial level of the SADC structure. One could say that local referenda should be held but the conclusions are obvious unless coerced from the society at large.

The next step would then be to determine how its various elements could be addressed either as domestic incorporation into the legal framework or as multi-sectoral and supranational Codes of Practice that are enforceable within the basket of rights available to citizens under the Constitution. This would then obviate the issue of oversight structures such as a SADC Court of Justice as the Charter becomes subsumed within the domestic legal system. In sum, super-structures are in themselves indicative of mutual distrust and do not carry either the emotive force of national consensus or the semblance of inter-State amity.

In this regard, it should be noted that the Charter as currently structured is a compendium and embodiment of the ILO Constitution, principles, ideals and conventions. This lends legitimacy, standardization and internationalisation to the Charter and any institutional derivatives therefrom. In the absence of the Charter, the International Labour Standards (ILS) themselves could, as the current trend depicts, become sufficient as a tool of harmonization. In effect, since history has shown the unwillingness in SADC to ratify and apply ILS even in Botswana and Swaziland, the voluntary adoption of the Social Charter carries the hope that being a SADC creation, it might therefore be more acceptable.

Unlike the perception that ILS are foreign impositions, the Social Charter is an indigenous creation mooted largely by the Employment and Labour Sector of the SADC. It is expected therefore that in realising its principles, Protocols on HIV/AIDS, Free Movement and Marketization of Labour and others will capture the hues and the dynamic realities of the SADC environment.

There is therefore no one best way but an amalgam. Harmonization has different implications and carries varied connotations. Similarly, the tools for its attainment could be an admixture of approaches, blended to reflect the complexities of the SADC society and the interwoven tapestry that the Social Charter attempts to actualize.

6.4 Functional Synthesis

The form of harmonization proposed therefore is a functional synthesis of the following; the adoption of a Social Charter, a bundle of Regional Codes of Practice, the assimilation of International Labour Standards and ultimately a Regional Collective Bargaining Mechanism. These have been discussed at length in Chapter Two (33).

The import of this synthesis is to tap into the best qualities of these tools when it comes to acceptance of a minimum floor of rights that constitute fair labour standards. In addition, it provides a multi-pronged approach to confronting the challenges that will emanate from an objective implementation of the myriad elements of the Charter. It would also equip the SADC with a keen appreciation of the core problems of uniform, acceptable interpretation, implementation and modalities for enforcement domestically or supranationally as the case may be.

What is beyond debate is that the evolution of the SADC Social Charter mirrors the direction of current sociology of work and workplace relations. It also seeks to make a statement regarding the necessity for institutional transformation to drive the Social Charter. This implies a new ethos of governance, social partnership, political accountability and a more responsive and inclusive state.

Africanisation of Regional Integration In The Context of Labour Law

In the course of our discussions, reference has been made tangentially to the European Union and its Directives, Courts and the subordination of EU member domestic laws. To a large extent also, the debate has been about compliance with ILO Conventions. In essence, comparativism has tended to suggest models and an appreciation of their evolution, difficulties, successes and the accompanying labour law framework and jurisprudence. The conclusion is that Africa in general and the sub-region in particular has not produced any comparative models. In effect, Africa is simply open to the persuasive influences of external and foreign models.

This raises the question of whether there is the need for africanising or indigenising regional integration through local ownership of the labour law framework. Globalization has not removed americanisation or europeanisation of Protocols. However, internationalisation may suggest emphasis on functionality rather than symbolic ownership. This does not

imply an abdication of responsibility for local analysis, strategies and the production of methods that reflect a sensitivity to and an acculturation towards a consultative process as a result of which, if need be, foreign models may be accepted.

While local solutions to local problems may be desirable, the norms, precepts, institutions and ideology that energise the work place as a socialised, bureaucratically organised process are in themselves foreign. The socialisation of production, employment contracts and capitalisation are in themselves at once foreign and also descriptive of the institutional mechanisms that define even developing and underdeveloped economies such as found in the SADC sub-region. What is required then is not an abnegation of these models but an adaptation, perhaps a transformation of the philosophy, institutions, structures and the *raison d'etre* of labour law in SADC in general and Botswana and Swaziland in particular.

In asking for an africanised role for labour legislation, the concern is mainly one of identifying afresh, the objectives of juridification in relation to the particular environment. The preamble of the SADC Social Charter refers to the promotion of the formulation and harmonisation of legal, economic, social and labour policies, measures and practices whose end is to facilitate labour mobility and social justice. As such, blanket importation of Conventions and norms *per se* is not anticipated. Rather, a selective array of inputs that have relevance and meaning to the local situation is envisaged. For example, unlike the EU, even the concept of cross-border migration of labour is not of immediate concern to SADC and therefore labour legislation should not seek to cover that as a matter of urgency as opposed to freedom of association in all its ramifications. In this instance, the local labour law would seek to underscore the collective role of trade unions, given the low levels of education and market vulnerability of workers. It would therefore not adopt the individualist approach of the EU as a model but rather the collectivist model of the ILO.

In seeking to provide Guidelines, Protocols and Codes for example, the labour law framework would recognise the scourge of HIV/AIDS, poverty, the extended family system, economism and how these are affected by reward structures, levels and why wage-driven industrial action is prevalent. It would also recognise and deal with child labour, exploitation of women and premature ageing among other demanding areas of social welfare and development.

Instead of laws aimed at rigid control of unions, labour legislation would seek to enhance the training of union leaders in recognition of the key role of informed bargaining in the arena of good industrial relations. It would also remove prescriptive qualifications on workers' compensation for work related diseases and accidents and also on claims on the estates of insolvent employers. In providing Guidelines and Procedures, the labour law regime would deal more with alternate dispute resolution rather than neo-liberal concepts of private contract. To this extent, it would also advocate less adversarialism, less criminalisation of worker lapses and equally less quasi-judicial role for Politicians and Administrators in workplace affairs.

It is these sensitivities that would, while achieving international standards, characterise and define the africanness of the labour law regime in question. The key therefore lies in attitudinal transformation and a commitment to improving local living standards through the mechanism of the law rather than opening new frontiers for the more invidious forms of globalization as represented by international finance capital and its multi-national conglomerates.

Equally important for the indigenisation of the labour law framework is the conscious enactment of laws that are unique in terms of their simplicity and directness. These would be devoid of superfluous verbiage, with an emphasis on consultation, communality and good faith rather than legal obscurantism, obfuscation and obsession with control, authority and prescription.

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Chapter 7

7.1 General Observations

This dissertation did not set out to re-state labour law or provide profound conceptual paradigm shifts. Its purpose was to undertake an enquiry of an academic nature. The focus was the broad philosophical, juristic and socio-economic context within which labour law functions. This covers the organic instrumentality of the law in terms of social engineering on one hand. On the other, it also attempts to define, locate and relate labour law to the reflexive, reflective and collective aspirations of the society at large.

The study was therefore both an investigative exercise and a learning experience that was intended to further underscore and question the function of legislation in general and labour legislation in particular in the search for a concrete determination of social justice and quality of life.

This study was premised on the philosophy that fundamental freedoms include those of association and organisation which are therefore inalienable. This premise was rebutted by the plethora of actual legislative evidence that appear to seriously derogate from and qualify the freedoms to the extent of rendering them discretionary privileges accorded by the state. Realistically therefore, the thrust of the enquiry became that, since legal positivism as evidenced in these societies is not necessarily socially sensitive, certain forms of intervention are required to attenuate the effects of this insensitivity and to mediate between the holders of power and the addressees of power.

The study also recognised that in the context of the new global social and economic world order, certain forms of collaboration such as regional integration carry with them both opportunities for enhancing the positive effects of labour legislation and significant threats to individual workers from the state in its quest for greater international interplay and domestic leverage.

Therefore, regarding Botswana and Swaziland, there may be the perception that their legal regimes reflect International Labour Standards. Reality however suggests that the state philosophy driving this perception, its actual depth, content and adequacy and thus the need for further effort become important and call for closer scrutiny. The results of this enquiry may then assist in indicating whether, given the domestic picture, regional integration using harmonization of labour legislation as one plank could result in greater emancipation of workers and

actualisation of their aspirations.

Implicit in this is the assumption that regional integration aims at improvement of social and economic standards of living. A necessary corollary is that freedom of association and protection of the right to organise are so basic and fundamental as to form the bedrock of any social framework and engineering intended to achieve the broad objectives of regional integration. Where these basic rights are not only differentiated but also selectively applied, using the mechanism of legislation to buttress policy and then induce compliance through coercion, this would militate against the fruits of cohesion and integrative development.

Within the SADC framework, labour legislation cannot play a conservative, reactionary role. Such orientation would steer it away from the essential harmonization and transformation of the basic floor of rights into a viable, sustainable pillar of social policy legislation as envisaged in the SADC Social Charter. In comparing the labour law regimes of Botswana and Swaziland, the study sought to examine, analyse, understand and appreciate the dynamics, differences and similarities engendered, nurtured or tolerated within these milieux. By so doing, while one ascertains the theoretical applicability of harmonization, one also becomes informed about the functions of labour law in these countries.

The exposure to labour law in its practical reality is easier to appreciate given the conceptual terrain in which it is derived. The etymology of the law and its organic structure thus define a nexus between labour legislation, forms of ownership of property, the socialisation or factorisation of production and its impact on the socio-economic relational structures and arrangements. It is to this extent that law primarily is seen as a technique for the regulation of social power which manifests itself also within work relations. Both individual and collective labour law therefore reflect these conditions created at work and how they are reflected in socio-economic relations within the wider society.

The study also demonstrated that the evolution from serfdom through a Master-Servant relationship to a legally defined Employer-Employee relations has not succeeded in removing the defining characteristics of domination and subordination. To inject some balance and stability therefore, labour law becomes a contrived arbiter and mediator. However, given its origin and historical role, it has only been able to reflect the status quo and prescribe procedures and parameters that have sought to induce stability through the formalisation of

workplace disputes and agreements while maintaining the imbalance in power relations between employer and employee. In effect, labour law has been mired in conservative structures, common law utilitarianism and the coercive authority of the state. Because of these, it is difficult to perceive it as an instrument of liberation even within the context of regional integration.

For labour law to influence regional integration meaningfully, it must understand industrial relations beyond collective agreements. It must reach beyond immediate, narrow and often economistic issues of the workplace into the socio-economic and political dimensions of work, its socialisation, attendant relations and how these impact on socio-cultural structures as far as the family unit. Then its inter-disciplinary connectivity would ensure that it is not only utilized to sustain collective labour rights within an industrial relations framework. A deeper, more radicalising and infinitely more socially sensitising and responsive connotation of labour legislation would evolve to drive regional integration in its quest for a more inclusive social justice.

Within the environment of re-defining labour law, legislation would then be able to answer the question of the desirability of free migration and marketization of labour within a common legal framework without the statist edicts and restrictions that currently define one's real freedom to bargain to advantage in the domestic and regional labour market.

The history of the evolution of labour law in Swaziland and Botswana indicates a colonial tendency of over legislation and extreme restrictions on the forms and modes of application and sale of labour power. To a large extent, legislation resulted in the inundation of these colonies with excessive regulation, much of which was irrelevant at any given time while the rest created conditions for expropriation, exploitation and the dehumanisation of the worker. At independence, while imported laws gave way to domestic legislation, the common law framework ensured the perpetration of patterns of social stratification that sustained the superiority of the traditional cum political elite in relation to the wider society. The wider society become increasingly identifiable with wage-labour and dependency on the capital and production modes of the elite.

In the absence of competitive capacity, society and wage labour have come to see this dependency in both political and economic terms. This is then summed up as the struggle against political oppression in the public arena and managerial authoritarianism in the workplace. Either way, legislation again

assumes the role of the mechanism of control, regulation, stability and restriction.

Thus, in discourses on regional integration the choice becomes one of either gravitating towards the integration of repressive forces and commonalization of poverty levels or a diplomatic cum political intervention to standardize and so force a liberalization of laws, rules and regulations. The liberation of productive energies through social participation, consultation and equalization can only occur if the juridification processes are consultative and reflective of cumulative partnership of social forces.

Realization of meaningful regional integration through harmonization of labour legislation is not idealistic and unattainable. The comparative study of some aspects of labour legislation as they affect freedom of association and protection of the right to organise indicates this possibility. The issue then is one of desirability and the political will to debate, structure and prioritise the modalities for approximation to International Labour Standards, incorporating these proximates in similar fashion and then rationalizing them into a harmonized framework. Because the SADC Social Charter incorporates all these methods, its ratification and full implementation could offer the needed framework.

Meanwhile, Botswana and Swaziland still have far to go in achieving full approximation to or the alignment of their regimes of labour legislation to the ILO Standards. This laudable process needs to be continued as it has, thanks largely to ILO funding and intervention, enabled the key parties to begin preparing for the inevitable journey. This journey commences with the recognition of the tri-partite nature of work and labour relations. It also posits an acceptance of the reality of the equality of roles and representation required. It thus also presumes the advisability of negotiations, consultation and partnering.

Above all, this journey locates the responsibility for failure at the level of these three social groupings They also equally stand to gain from its successes. While the state assuages its anxieties over instability and the perceived volatility of the industrial climate, the employer can now operate within a predictable environment. For the worker, the success of the journey would translate into employment and work security, a meaningful living wage and opportunities for self-actualization.

The key impact of a common referent point for labour legislation such as the ILS is that while dispute resolution mechanisms

may become institutionalised, anarchy and chaotic conflict would not be. Hitherto, unions have felt that it was their job to do more damage to the enemy than he does to them. If they can get a limited objective with very few casualties, then they are all the more ready to move to the next step (3).

Such attitude has been generated by the futility and powerlessness occasioned by perceived repressive and subjective legislation. The intransigence of the state in clinging to undemocratic practices without open debate also lends itself to combative confrontations, sometimes even to the chagrin of the very private sector employers they purport to be protecting. As Burawoy said, in a society that claims to operate on the principle of socially defined needs, class division can be preserved only by repressing public discourse and movements for the creation of an autonomous civil society – that is by a "dictatorship over needs" (4).

This study has also enabled us to see the conceptual relevance of harmonization, the practical efficacy inherent in such a policy decision and the profound impact it could have on transforming these societies. In Swaziland, we see a situation where the absence of free political debate has propelled the trade unions into agents for both political and economic change, using the clamour for internationalisation of labour laws as a leverage for freedom of association, expression and social justice.

In Botswana, the open democratic system has been left to play the role of an attractive veneer while labour legislation is utilised to ensure that management prerogatives and state control of the levers of socio-economic power are sustained. Again, strategically, agitation for greater internationalisation is seen as an avenue to the neutralisation of state and management controls and as a corridor to greater and more active participation in social debates on issues that are essentially political in nature.

For labour law to be utilized to buttress the Social Charter, its role as an engine of social justice would have to be established, transforming labour legislation from an obsidian threat into a fulcrum for social justice, equity, growth and development. To this extent, this study is incomplete in and as of itself until similar appraisal of the other SADC states has been undertaken and properly documented.This is because , in the course of the study, one came into contact with dynamic events occurring in Lesotho and Namibia with regard to their Labour Codes which are similar to those in Botswana and Swaziland. However, these could not be followed up. Developments in South Africa point to the significant application of comparativism in the shaping of

the much internationalized and acclaimed regime of laws, codes, rules, regulations and structures that define the employment and labour regime in that country.

Superficial as these observations may be, they, in their totality helped towards a better understanding of how public administrative systems and structures operate relative to the labour legislation process. In particular, one could see that contrary to general assumptions, technocrats and bureaucrats in certain respects, do not necessarily identify or collude with the political elite in erecting restrictive mechanisms against workers with whom they share an affinity as wage earners.

One also must take into cognizance the fact that SADC is made up of several countries with a multiplicity of cultures and political ideology that need to be properly examined, studied and accounted for. In effect, a holistic appraisal of the employment and labour legislation environment is important as this would inform the regional integration process. Moreover, it would doubtlessly provide a deeper appreciation of the dimensions of the regional challenge, the complexity of the political, cultural and economic undercurrents, the real and imaginary problems that confront such a comprehensive exercise. Within this process also, similarities of problems, perceptions and ideological inclinations having become self-evident, would, hopefully, lend themselves to common solutions.

7.2 Findings

It may be said that this study has yielded certain results which are mainly informative and suggestive of further exploratory study. In setting out on this undertaking, Chapter One was intended to provide an introductory background within which the scope of the investigations could be laid out. This was because the issues involved are not necessarily as simple as they might appear to be.

In examining labour legislation and policy as indicative of emerging trends in SADC Countries, one could have stepped right into a conceptual quicksand. In contextualizing it as reflective of the implementation of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, the problem becomes even more compounded.

The reason is quite simple. Legislation and policy are intergral elements of the state's programme of action. Recognition and implementation of Convention 87 is a critical and symbolic indicator of the levels of social partnership and democratic engagement. Therefore, the study tended, unintentionally, to

assume dimensions which are logical but because of that also threaten to unravel the seams of the study.

It became apparent that the study could not be a simple extrapolation but must proceed in-depth to examine the core dynamics of governance and how legislation is utilized to facilitate the realization of the contextual goals of governance. In stating the problem therefore, one came to the realization that the discussion could not be about differentiation between individual and collective labour law but rather about labour law as an instrument of realizing the ideals of both individual and collective labour aspirations. This study needed to be holistic, historical, comparative and socio-legal rather than a purely technical regurgitation of the organic prescriptions of statutes. This meant that in terms of methodology, the dynamics of the theatre of study was going to dictate the approach and the interplay of variables.

The importance of Chapter One therefore came to hinge on its ability to focus the searchlight on those areas that would ultimately lend meaning and credibility to the study. These included the theoretical issues in labour legislation. Also, the actual continuum of legislation, its perceived objectives and impact and whether these effects portray labour legislation as capable for the moment at least, of playing a constructive role in the context of the SADC as an instrument of mobilization. In this respect therefore, Chapter One cautioned against locating the debate in the notion of labour law as a mediator in a mere countervailing power game.

Chapter 2 performed the function of an intellectual probe into the conceptual aspects of legislation and, depending on one's perspective, why labour legislation could serve different purposes. Laws in general have been demonstrated to have a social value with such value dependent largely on the dominant social forces capable of utilizing the law.

Thus the fundamental legal notion of employment indicated a social acceptance of inequality presumed, erected and sustained through the instrumentality of legislation. In effect, labour law as law is fundamentally characterised by its ability to primarily sustain such regime of social inequality. Assuming this is correct, Chapter 2 then enables us to accept that labour legislation has hitherto played the role of perpetrating the contractual inequality between employer and employee which it cannot divorce itself from because of its historical and socio-economic origins.

It can however be transformed as a conscious effort if the social partners so wish. It is the political will to do so which has bedevilled labour legislation and renders it a tool of containment and restriction rather than emancipation and realisation of social expectations. It becomes apparent then that unless labour legislation is re-engineered and as long as it serves the parochial interests of the state, it cannot be harnessed into a means towards beneficent regional integration.

Of much relevance and importance is the fact that there are several ways in which the law could be transformed from serving selective needs to being socially relevant. This could be through comparative adaptation, harmonization or approximation to acceptable international standards.

Regarding Chapter 3, its evidential value cannot be overstated. In travelling through its terrain, we have found out the importance of the past for the future and the indispensability of historical notes to the permutations of labour law evolution and practice in dependent colonies that were essentially barren for purposes of juridification. An important lesson therefore is the blanket imposition of all forms of policy prescriptions in the hope that some would fit. The legislative blitzkrieg operated to induce in the natives an early subservient and instrumental compliance that subsequently facilitated uneventful pseudo-administration and stability. Thus those who shared some affinity with the colonial dispensation also imbibed a penchant for law and order and paternalistic prescriptions for the good of the general public.

Laws therefore, as early as 1965, denoted instruments of authority and rule by those anointed by the colonial authorities to continue that "onerous" task once they were gone. Thus the concept of master and servant and its inherent superordination became ingrained in the ethos of work relations and a defining attribute of work place legislation. Not surprisingly, the subsequent coalition between the political elite, traditional aristocracy and budding capital defined itself in terms of its capacity to regulate the social stratifications they were beginning to appreciate as natural corollary of post-colonial administration and power.

We find therefore that efforts at updating colonial era labour legislation in line with current levels of democratic awareness and worker consciousness have been seen as untoward agitation. This would explain why concepts or specific creatures such as statutory management functions have become dominant in the schema of labour law intended to deny as many levels of the workforce union representation as possible. It is

peculiar, though understandable, that a trade union statute or a trade disputes Act would seek to define management functions for organisations structured and differentiated for specific objectives.

We find, in Chapter 3 that in the absence of far reaching amendments, the current provisions of the labour law regime are conflicting with core Conventions of the ILO such as Convention No 87. In the process, the over-extended office of the Commissioner of Labour has been saddled with quasi-judicial functions for which it is neither equipped not adequately oriented. Chapter 3 therefore puts much stock on the capacity of the Industrial Court to mediate these structural, substantive and conflictual developments that may actually militate against the realisation of effective industrial relations.

Chapter 4 dealt with the evolution of labour law in Swaziland. This investigation brought to the fore certain elements critical to the overall appreciation of the role and impact of labour legislation in Swaziland. Of critical importance is the fact that the historical experiences of land expropriation and vulnerability resulted in a traditional elite that has become conservative and wary of liberal sentiments with regard to unionisation and open social discourse.

The labour law regime has been largely oriented towards stability and restriction rather than participation as a continuation of the historical experiences. The abrogation of the Constitution in 1973 has not been helpful either, having neutralised any frame of reference. The running battles between the state and the SFTU have become indicators of the intransigence of both partners, a situation that has increasingly drawn the judiciary into an alignment with labour. This has transformed labour relations issues into jurisprudential, socio-economic and political matters of national significance.

The various efforts by the state to comply with ILO recommendations for fear of becoming a pariah state are often quickly overcome by the unfortunate reaffirmation of absolute monarchical authority.

The findings indicate a willingness of the public bureaucracy to seek rapprochement with the union and employer formations, a move often frustrated by the traditional elite and its coalition partners. In such a situation, Swaziland cannot provide a model for regional integration as its labour law regime is still trapped in the past which is highly intolerant of social partnership and open discourse.

Given the pivotal role of Convention No. 87 in this study, Chapter 5 assumes a particularly important position in terms of the window of opportunity it affords. From the United Nations through all the nascent regional blocs, the bedrock of freedom of association has not been in doubt. The right of everyone to form and join trade unions for the protection of their socio-economic interests has therefore been recognised as paramount.

There is thus a presumption of the uniqueness of trade unions and their function as agents of industrial democracy. Embedded in this is the acceptance of the inherent right to strike in furtherance of disputes as a manifestation of the countervailing power of the employee against the unilateral prerogative of the employer. However, the perception of the ILO of worker interests as a collective does not sit well with the capitalist connotation of the employment contract as a private bargain or market transaction. Increasingly therefore, we see the state, at the instigation of both local and international finance capital, attempting to dilute the interventionist protection it has offered initially to workers and unions and opting for covert measures intended to reduce the relevance of unions in the workplace.

With regard to Botswana, this tendency has taken the form of less than enthusiastic reception to ILO recommendations, slow reactions, tactical amendments, jurisprudential interpretations effecting the supremacy of laws and condonation of employer lapses in the implementation of those aspects of the laws that appear protective and supportive of workers.

The ILO Committee of Experts on application, recommendation and compliance with Conventions has made several direct requests for adaptation and alignment of domestic legislation. The current efforts amount more to giving with the right and taking back with the left. The recent debates on the amendments to the three main pieces of labour legislation; Trade Disputes Act, Trade Unions and Employers Organisations Act and the Employment Act is a case in point. It has to be remembered that in a de facto single-party state such as Botswana, pronouncements of the legislature carry significant policy import and reflect the politics of the times.

Regarding the freedom to unionise except for the police and the armed forces, Members of Parliament were of the opinion that this could create unions that would become "too powerful and become bigger than the BDP" (the Botswana Democratic Party). Access to external funding was seen as leading to dealings with shady characters which could result in destabilising the country. The freedom to amalgamate was also viewed as "most

frightening" as the labour organisations could group themselves into "a huge trade union bigger than the BDP or the BNF" (the Botswana National Front – the main opposition party with four members of Parliament).

It was observed that the amendments were being tabled at the eleventh hour when most members had not been consulted and that "the timing was wrong and that the government was surrendering power easily and yet it has no fall back position" (1). We find therefore that the mentality of the state has not evolved significantly from the positions adopted in 1965 when the colonial labour laws were being updated with ILO assistance. The state still perceives labour legislation as a theatre of power play and vibrant unions as a potential threat to the *status quo*.

Of greater significance is the fact that neither the labour organisations nor the state appear satisfied with the proposed amendments, citing non-consultation and imposition of clauses by the state. While the unions appear to let the current amendments be effected as they stand, Parliamentarians appear opposed to the advantages perceived for the unions. In effect, the essence of social dialogue and partnering remains elusive (2). The ILO is also not completely satisfied with these efforts. Given this statist attitude, it is difficult to predict when commendable levels of compliance shall have been attained such as can provide models for experimental harmonization.

The same situation applies to Swaziland in all its aspects. On the surface, there is compliance characterized by active attendance at conferences. In reality, country reports are usually late and the enthusiasm for actual change appears weak at the level of the state particularly with regard to key areas that undermine the real meaning of union membership.

As indicated, the interest of the study is to examine if indeed, Botswana and Swaziland offer any insight into the realities of labour legislation which can assist in the formulation of a position vis-à-vis the capacity of these countries to serve as indices of how compliance with international labour standards works domestically and could therefore, hopefully work within the wider SADC arena. The purpose has not been to test a premise that yes, they are on track. Rather, one only wanted to explore the inner workings of these milieux so as to have a foretaste and perhaps capture better the prerequisites for such a study.

In the process, Chapter 6 has shown that certain common features do exist. There is the Industrial Court, the Labour

Advisory Board, the Tripartite Commission on Conciliation, Mediation and Arbitration (Swaziland) and the Panel of Mediators and Arbitrators (Botswana). There are also the Joint Negotiation Councils (Swaziland) and the Joint Industrial Councils (Botswana). Freedom of association and the right to organise, as a statutory provision also exists even if the structural framework is still problematic.

We find that the core problems are;

- the attitude of the state to labour and labour relations which is generally antagonistic and at best paternalistic.

- the state still perceives labour formations as instruments of anarchy and formentors of political instability.

- there is a tendency to fall back on authoritarianism and coercion.

- the departments of labour often find themselves as state agents, mediating between the state and the unions each of which tends to assume a trench mentality.

- while the public bureaucratic functionaries see a potential for regional integration through harmonization, the state appears more hegemonic and sovereignty-conscious, prone to seeing certain forms of interests as interference.

- there is a generally low level of familiarity with labour legislation and its intended purposes by both workers and employers.

- generally, both employers and the state exhibit a Unitarian mind-set where they would, normally, rather prescribe and dictate to the worker formations.

- the state, is yet to transform itself into social partners and until they do so, the apparatus of state and the legislative framework would be perceived by both the worker and other social formations as intended to sustain the disparities therein.

- the state also appears to be torn between the acquisition of an international image of symbolic value and a pragmatic rapprochement with its selected team of investors whose priorities in labour legislation may be opposed to the collective aspirations of labour.

- It appears therefore that labour legislation and implementation of Convention No. 87 are not convergent policy activities. The former is a necessary tool while the latter is an embarrassing assignment for now.

- nevertheless, intransigence is not ignorance of the values of International Labour Standards. Refusal to comply would seem a temporary issue which ultimately would give way to full compliance. To this extent, the essential ingredients are there for a long term rationalisation of the domestic labour law regimes.

7.3 Recommendations

Since 1968, the ILO has been attempting, with limited success, to intervene and assist in introducing comparative and internationalised labour standards in both Botswana and Swaziland. What is becoming increasingly clear is that there are plausible reasons for the limited success. With specific reference to Convention 87, the substance may not necessarily be incompatible with indigenous or local democratic espousals. However, the Convention in itself is a threat to flawed governance and statism.

As such, the inability to incorporate it into domestic legislation or failure to align local laws to reflect it should not be baffling, as this can be explained in terms of misplaced fears and perceptions. What one sees on the ground are therefore *ad hoc* and marginally incremental changes in response to periodic bursts of labour agitation.

The Labour Advisory Boards, in line with their new duties and powers should establish Committees tasked with evaluating all labour related Acts. They should attempt to initiate exploratory drafts intended as a basis for recommending the comprehensive incorporation of the ILO Conventions into domestic legislation.

Given that ILO expert advice has not been lacking, local personnel should be trained to discharge these important tasks while tapping into such external help. The Attorney General's Department has a supportive role to play in this regard.

To this extent therefore, we congratulate the ILO/SWISS programme and the Employment and Labour Sector of SADC for initiating training in areas such as dispute resolution.

However, a higher level, more focused and completely differently packaged programme is necessary to teach Comparative Labour Law with particular emphasis on the ILO, its Principles and

Conventions in the context of Africa in particular. Much of labour law has been taught from a non-industrial relations, non-human resources management but mostly adversarial, case-oriented perspectives. These seek to provide skills for mainly professional dispute resolution and litigation. The philosophy, content and future of ILO standards need to be accorded a more central focus. In particular, globalization, individuation and the neo-liberal market approaches to labour relations make such studies into labour issues critical.

The draft amendment Bills of Botswana and the ever-changing face of the Industrial Relations Act of Swaziland suggest that the traditional roles ascribed to labour legislation are falling away. As such, rather than have workers re-define labour legislation through radical social upheavals, the state should introspect and re-examine its philosophy and *raison d'etre*. The rationale is simple; laws that respond to social needs, acquire automatic legitimacy. On the other hand, even within a much-vaunted democracy and a free market system, laws that require the coercive apparatus of state for their compliance, become catalysts for cataclysmic social transformation.

The most significant development along the continuum of regional integration in SADC has not been the trade protocol but the adoption of the Social Charter. It is not only ambitious but comprehensive in the claims it attempts to make on behalf of the body politic of SADC States. Its ratification by the organ of Heads of State would open the floodgates of civic activity, economic rejuvenation and form the watershed for a more viable sub-region. The reason is that it aims to liberate and unleash the creative potential of people for example by recognising gender equality, equal pay for equal work and protection from abuse. Since the purpose of legislation would be to activate, actualise, sustain and protect the rights enshrined therein, labour legislation in the SADC would have a pre-determined scope and trajectory rather than the idiosyncratic use to which it has been put.

It is recommended therefore that the Social Charter should become part of robust social and academic debate, achieving notoriety and credence so that political inconsistency and trickery may not be adequate to derail it. This should be the crusade of the Employment and Labour Sector of the SADC.

Since industrial relations is embedded in the social relation of production, conflict becomes an inherent part of it. While labour legislation attempts to mediate, organized labour should undertake a systematic exposure of its membership to the law and its nuances. They need to accost the law in a demystified

way and come to grips with its tendency to cloud issues and its actual purpose in verbiage. If workers are to stake a claim to their place as equals at the social partnering table, then they must exhibit a comfortable familiarity with the law rather than hide behind representativity and sloganeering.

We conclude with the observation that within the context of regional integration in SADC, labour legislation has an important pioneering role to perform. To do this, it needs a harmonised body with a re-defined cutting-edge, sensitive, resilient but resolute enough to slice through the debilitating quagmire of conservatism, petty sovereign insecurities and external economic pressures. It is only then that it can shape a solid foundation for the upliftment of the lives of SADC's people.

Then its march towards a larger integrative challenge under the African Union could commence. For this purpose, a wider picture may be required. This wider picture is possible only if and when the comparative appraisal of countries has been undertaken. This could be done in pairs as in the present study or in clusters as dictated by logistics.

It is nevertheless important, desirable and also critical that these comparative studies be undertaken as they form the building blocks for the ultimate harmonization of labour legislation among other forms of social policy required for the delivery of an efficient, sustainable and meaningful integration of the SADC sub-region.

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31.	Swaziland African Labour Proclamation (No. 45)	1954
32.	Incitement of Natives to Rebellion Proclamation	1899
33.	Maintenance of Peace Proclamation	1907
34.	Native Labour Contracts of Employment Proclamation	1942
35.	General Law Proclamation	1909
36.	King's Proclamation – Constitutional Law	1973

c. **ORDERS IN COUNCIL/NOTICES – BOTSWANA/SWAZILAND**

1.	Foreign Jurisdiction	1890
2.	Bechuanaland Protectorate Order	1891
3.	General Administration Order	1959
4.	Bechuanaland Protectorate (Constitution) Order	1960
5.	Administration Order	1965
6.	Concessions Commission	1893
7.	African Labour (Contract)	1899, 1907
8.	Swaziland Order in Council	1903
9.	Swaziland Standing Commission	1889
10.	HCT Court of Appeal Order in Council	1955

D. **UN/ILO DOCUMENTS**

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b.	Freedom to Organise and Collectively Bargain Convention	98
c.	Declaration of Social Principles for Multinational Enterprises	1977
d.	ILO Declaration of Philadelphia	1944
e.	ILO Constitution	
f.	United Nations Covenant of Economic, Social and Cultural Rights	
g.	Collective Bargaining Convention	154
h.	Workers Representations Convention	135
i.	Labour Relations Convention	151
j.	Rural Workers Organisations Convention	141
k.	Committee of Experts Surveys (COE)	

l. Committee On Freedom of Association (CFA) Reports
m. Fact Finding and Conciliation Commission (FFCC) Reports
n. Digest of Decisions
o. Committee for the Enforcement and Application of Conventions and Recommendations (CEACR) Reports
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Trade Disputes (Amendment) Act	2002
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The Employment Act	2001
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Appendix I

CONFIDENTIAL

Questionnaire on Levels Of Compliance With ILO Convention No. 87 On The Freedom Of Association and Protection Of The Right To Organise In Botswana And Swaziland.

General Background Information:

The questions that follow are intended for use in assessing the levels of understanding of the implications of the Convention and the need to incorporate its provisions in one form or another into the framework of domestic labour legislation. They are also meant to solicit comments on the problems faced by workers, employers and the state in grappling with the desirability of compliance, non-compliance and the forms thereof. The overall aim is to see how far compliance has resulted in the enactment of similar legislation and whether these are a pointer to the long–term harmonization in one form or another of labour legislation in the SADC Sub-region.

Please feel free to comment briefly, to explain or illustrate your response. Your assistance in responding as objectively as possible, will be appreciated.

The confidentiality of this response will be maintained.

Appendix 2

CONFIDENTIAL

Questionnaire on the Impact of Collective Labour Law On The Development Of Workers Organisations In Botswana and Swaziland.

General Information:

The purpose of this exercise is to have a very diversified factual account of the role of the law in the world of work.

The questions that follow are intended for use in assessing the degree of familiarity with the collective labour laws in Botswana and Swaziland, the constraints on union activities and officers and the benefits therefrom. Please feel free to comment, explain or illustrate your response. Your assistance in responding as objectively as possible, will be appreciated.

A. **Personal Information**

1. Nationality ----------

2. Highest level of education (please tick or cross one)

   ------Junior Certificate
   -------Ordinary/Advanced level
   ------University degree(s)
   -------Others (specify)

3. Please state any pre-employment training received which included Personnel/Human Resources Management/Industrial Relations/Labour Law:----------
   ---

B. Job related information

4. How long have you worked in this organisation? ----------
   ---

5. Current position----------
   ---

6. How long have you been in the grade and why? (No of years or please approximate).----------
   ---
   ---

7. Are you involved in any worker/management/trade union activities?

   Yes/No (please delete the inappropriate).

8. Is there any specific training initiated and undertaken by management/unions in local labour laws by your organisation?

   Yes/No/Indicate or describe.----------

   ---

9. Are you satisfied with the current level and content of the training received ?

Yes/No/Explain----------

---

10. Briefly state what you feel about the level of employer/employee familiarity with labour laws, rules and regulations and how these are interpreted and applied in the work situation:

---

11 . In what ways has Management assisted the Union in correctly interpreting and applying the relevant labour laws?

C. Perceptions towards law and related issues in the workplace (please tick against the appropriate rating).

12. The employers/employees in your organisation understand the operation of various aspects of a collective employment system in the places of work such as dispute resolution and collective agreements.

_____ Strongly disagree; _____ Disagree; _____ Agree;

_____ Strongly agree; _____ Not sure.

13. Workers expect their shop steward to protect them from management, mediate and solve problems in the workplace.

_____ Strongly disagree; _____ Disagree; _____ Agree;

_____ Strongly agree; _____ Doubtful.

14. Have there been instances where disputes ended in court? Please provide references for the decided cases.

---

15. Which aspects of the constitution of the union do you consider as problematic ? Kindly give reasons.

---

16. Freedom of Association and the Right to collectively bargain form part of the ILO Conventions. How much of these do you actually see in practice in your company? (Please provide detailed answer., using extra paper if necessary.)

---

17. Labour laws ensure fairness and justice in the workplace and they should be enforced.

_____ Strongly disagree; _____ Disagree; _____ Agree;

_____ Neutral _____ Strongly agree.

18. The Trade Unions and Employers Organisations Act [Cap 48:01] (S.61) specifically excludes members of management as defined from membership of negotiating bodies dealing with management.

The restriction of **members of management** from membership of negotiating bodies discriminates and is against the freedom of association and expression more so

_____ Neutral _____ Strongly agree.

21. Increased participation by workers in decisions that affect their lives through collective bargaining and agreements is essential for building a dynamic work force.

_____ Strongly disagree; _____ Disagree; _____ Agree;

_____ Neutral _____ Strongly agree.

22. Domestic employment laws are just a means for the state and employers to control and regulate the employee's potential for demonstrating his collective countervailing power.(Kindly expand on your answer)

_____ Strongly disagree; _____ Disagree; _____ Agree;

_____ Neutral _____ Strongly agree.

23. The Courts of law have been instrumental in creating the perception that collective employment law is a tool for the rigid control and regulation of workplace relations.(You may wish to give examples)

_____ Strongly disagree; _____ Disagree; _____ Agree;

_____ Neutral _____ Strongly agree.

24. Kindly provide any further comments or ideas you consider relevant to the exercise.

25. Describe the structure of the Department of Labour in your country. (if you work there)

26. Identify the problems associated with the implementation of ILO Convention 87 by the Government (if you are in a position to know).

Thank you for your co-operation.

Sincerely,
Emmanuel K.B Ntumy