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

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CHAPTER FIVE
Legislative Regulation of the right to Strike in Zimbabwe

ABSTRACT

This dissertation explores the legal regulation of the right to strike in Zimbabwe. The Zimbabwean workers, like other workers the world over have struggled and continue to suffer to express their interests and views in the workplace.

The study looks critically at the legislation which has regulated the right to strike in Zimbabwe, with particular emphasis on the period after 1990. The study also focuses on other legislation which though not being labour related, has had a lot of influence in the employment relations in the country, in particular as regards to strike action.

The method of research has largely been literature review and to a great extent on a comparative perspective. Not much has been written by way of text books on the subject of the right to strike in Zimbabwe. Some scholars have however put together various writings which have been a great reference point for this study. Among them are Professor Lovermore Madhuku and Munyaradzi Gwisai, who are part of the leading authors in the study of Labour Law in Zimbabwe. Zimbabwean case law is also rich in matters pertaining to strike law in Zimbabwe and it forms part of the research material for this study.

The aim of the study is to make an assessment of whether the legal regulation of the right to strike in Zimbabwe assists or act as an impediment to the Zimbabwean workers to exercise the right to strike. A relative result is obtained by undertaking a comparative analysis.

The study reveals that the right to strike is provided for under legislation in Zimbabwe. In practice however the study reveals that it is almost impossible for the Zimbabwean workers to embark on a lawful strike. The procedural requirements to engage in a lawful strike are so cumbersome that what the legislation gives with one hand it takes away with the other. Coupled with this is the criminalisation of strike action which fails to meet the procedural requirements.

The study observes that the failure of the Zimbabwean legislature to provide for a worker friendly regulatory framework on the right to strike is three fold. Firstly, this is a result of a failure to acknowledge that strike action plays an important role in collective bargaining. The regulation of the right to strike thus is not in sync with objectives of promoting collective bargaining. Secondly, there is absence of an effective social dialogue policy in Zimbabwe. Theoretically there appears to be efforts towards this, but the government, employers and labour, as a combined entity, hardly have any influence in labour law reform. The result has been a failure to meet each party's expected aspirations and relationships tainted by suspicion. Thirdly, and flowing from the second, the political climate in Zimbabwe is such that the government and the workers view each other as two parties in different political divides. This has been attributed to the formation of an opposition political party whose birth is associated with the biggest labour centre in the country. The result has been that the government takes labour not as a vital social and economic partner, but as a political foe to compete with for political survival.

CHAPTER ONE

Introduction

It is generally accepted that the purpose of modern labour law is to regulate industrial conflict by setting up institutions and means through which employers and employees engage to, "regulate conflictual relations in the engine rooms of national economies within a jointly recognised interdependence and commitment to the national economy".[1] It is also generally accepted that the employment relationship is made up of two collective interests, which is capital and labour. The interests of capital represented by management in the relationship include industrial peace which guarantees increased production and profits. On the other hand workers, representing labour expect to participate in decisions that affect their working lives, in particular the determination of wages and working conditions.

These somewhat conflicting interests need to converge for the benefit of both parties. Both management and workers have shared concerns over the productivity of the enterprise. Employers can only make profit were there is industrial peace which guarantees quality efficiency of production. On the other hand, workers can only get wages and employment security on the survival of the enterprise. Cooperative problem solving can bring gains to both in terms of increased profits, increased wages and job security.[2] However, when the parties fail to agree, which occasionally happens, on the benefits that must accrue to each party out of the operation of the enterprise, economic power is resorted to. Employers as the owners of the business can achieve this by either locking out the employees or completely shutting down the enterprise if such action is viewed to be better than continued operation. For workers, the most valuable contribution they bring to the employment relationship is their labour, and when they need to use economic power the only tool they can use is the withdrawal of that labour, generally termed strike action.

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[1] M Anstey *Worker Participation South African Options and Experiences* (1990) available at http://wwwics.si.edu/subsites/ccpdc/pubs/2art/ch13.htm accessed on 6 May 2008

[2] C Summers *Workplace forums from a Comparative Perspective* 1995 (6) *ILJ* SA 806

A strike has been described as "the deliberate and concerted withdrawal of labour and it represents workers' ultimate weapon against the employer".[3] The defining elements from this definition are that it is deliberate, it is the cessation of work, it is done by a number of employees, it represents a final weapon and that it is done against an employer. Strike action can therefore not be forced upon employees; they decide themselves and following the required procedures with an open conscience decide to withdraw their labour. A forced withdrawal of labour can therefore not be regarded as a strike.

Cessation of work can either be partial or complete. What this entails is that workers might refuse to work contractual overtime, or refuse to undertake certain duties whilst doing others, or they might do the work at considerably reduced speed.[4] Thus, actions such as work to rule, sit-ins, and go slows can all fall under the definition of strike. Generally an individual employee cannot go on strike. As a concerted effort, strike action implies that two or more persons are involved in the action thus in most instances it is called by a trade union on behalf of all its members.

Strike action is an ultimate action. This implies that efforts should have been made to resolve the dispute which is the cause of the strike action. Other dispute resolution efforts such as conciliation and mediation should have failed for workers to resort to the final decision of going on strike.[5] It is also pertinent to observe that strike action is action by persons who are in an employment relationship and that it is aimed at the employer. Actions against the government for social, economic or political reasons can therefore not be regarded as strikes. It is only when the government is the employer that actions against it arising out of the employment relationship can qualify as a strike.

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[3] A Rycroft and B Jordaan *A guide to South African Labour Law* 2nd edition (Juta and Co Ltd 1992) at 271
[4] See D du Toit; D Bosch; D Woolfrey; S Godfrey; C Cooper; GS Giles; C Bosch and J Rossouw *Labour Relations Law: A Comprehensive Guide* 5th edn (2006) LexisNexis Butterworths at 293
[5] Ibid

The right to strike is a controversial and contested industrial relations and labour law issue. It has been submitted that historically the right to strike was justified by the desire for freedom from serfdom or from forced labour or involuntary servitude.[6] Servants wanted freedom from being tied to their masters. It is suggested therefore that the right to withdraw labour is the one thing that distinguishes a free worker from the slave and is thus a fundamental freedom.

The issue of a right to strike also attracts very strong and sometimes deeply emotive and ideological views. One such ideological viewpoint is that:

> If the workers could not, in the last resort, collectively refuse to work, they could not bargain collectively. The power of management to shut down the plant (which is inherent in the right of property) would not be matched by a corresponding power on the side of labour. There can be no equilibrium in industrial relations without a freedom to strike. In protecting that freedom, the law protects the legitimate expectations of workers that they can make use of their collective power: it corresponds to the protection of the legitimate expectations of management that it can use the right of property for the same purpose on its side...[7]

Strikes have also historically been viewed as a precursor to revolutionary political struggles of the working class against the ruling or bourgeois class. One of the greatest socialist to live, Vladimir Lenin observed that,

> A strike opens the eyes of the workers to the nature not only of the capitalist but of government and the law as well. Just as factory owners try to pose as the benefactors of the workers, the government officials and their lackeys try to assure the workers that the government is equally solicitous of both the factory owners and the workers as justice requires. Then comes a strike. The public prosecutor, the factory inspector, the police and frequently the troops appear at the factory. The workers learn that they have violated that law.[8]

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[6] C. White *What Limits the Right to a strike?* Available at http://larvatuspredo.net/2007/05/21 accessed on 13 January 2008

[7] Kahn Freund quoted in P Davies and M Freedland, *Kahn Freund's Labour and the Law*,3rd edition,1983(Stevens and Sons, London) at 292

[8] V.I. Lenin *Selected Works* Vol. XXI(Progress Publishers) 372 cited in M Gwisai *Labour and Employment Law in Zimbabwe: Relations of Law under Neo-colonial Capitalism* Zimbabwe Labour Centre and Institute of Commercial Law University of Zimbabwe (2006) at 343

One prominent Zimbabwean professor commenting on the provisions of collective industrial action in Zimbabwe observed, "Labour can only argue its case by threatening to withdraw its labour and unless that right is guaranteed, it means labour is completely powerless."[9] A Canadian judge, commenting on the right to strike in relation to collective bargaining stated that:

> ...the freedom to bargain collectively, of which the right to withdraw services is integral, lies at the very centre of the existence of an association of workers. To remove their freedom to withhold their labour is to sterilise their association.[10]

This dissertation seeks to examine the legal regulation of the right to strike in Zimbabwe to establish whether it conforms to international law. The examination will try to establish whether the right to collective job action as provided in the regulations that govern employment relations in Zimbabwe avails the opportunity to workers to embark on a lawful or protected strike action. In this endeavour the study will commence by examining the justifications for the right to strike. This is followed by an analysis of international labour law provisions on the regulation of the right to strike. The study will then undertake an analysis of the legal provisions that regulate the right to strike in Zimbabwe, establishing whether they conform to international law. A comparative perspective with Zimbabwe's regional partners and in particular its biggest regional trading partner, South Africa will be done. The study concludes by summarising the essence of the right to strike and the shortcomings of the Zimbabwean legislation.

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[9] Professor W Ncube quoted in the *Daily News of Zimbabwe* 15 June 1999

[10] Cameron J A , *Re Retail Wholesale Union and Government of Saskatchewan* (1985)19 DLR(4^{th}) 609 at 639

CHAPTER TWO

Justifications for the Right to Strike

2.1 Introduction

This chapter examines the justifications for workers to have the right to resort to strike action. The examination is under the premise that strike action can rarely be an individual action. In most instances if not all, strike action is embarked upon by organised labour as trade unions. Thus the right to strike is a right which should be afforded to workers through their organisations. Indeed, when the International Labour Organisation (ILO) defines a worker organisation, it states that it is any organisation formed, "for the furthering and defending the interests of workers".[11] The Labour Act of Zimbabwe equally defines a trade union as, "any association or organisation formed to represent or advance the interests of any employees or class thereof in respect of their employment".[12] It follows therefore that the trade union will justify the right to strike in order to further, defend and advance the interests of its members.

2.2 Right to Strike as a Fundamental human right

There has been interesting commentary from scholars as to whether labour rights should be given the same status as general human rights. One scholar has stated that, "the two are akin to distant cousins who share a common heritage but rarely explore the extent to which they share similar values and aspirations".[13] In 1998, the International Labour Organisation commissioned an investigation of wide spread use of forced labour by the military junta in Myanmar. In its findings, the commission did not state that the use of forced labour was a crime against the workers of Myanmar, rather it sated that it, "amounted to a crime against humanity".[14]

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[11] Article 10 of the Freedom of Association and the Protection of the Right to Organise Convention 87
[12] Labour Act of Zimbabwe Chapter 28 Vol 1 of 1996 s2
[13] P Macklem *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?* in P Alston *Labour Rights as Human Rights* Oxford University Press (2006) at 61
[14] P Alston *Labour Rights as Human Rights* Oxford University Press (2006) at 15

The ILO objectives are well stated in the Preamble to its Constitution. The adoption of the Declaration at Philadelphia after the Second World War widened the purpose and aims of the ILO. The declaration stated that, "all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well being and their spiritual development in conditions of freedom of dignity, of economic security and equal opportunity...the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy...the principal set forth in this declaration are fully applicable to all peoples everywhere".[15] Given the above comments, statements and declarations, it is submitted that labour rights are indeed human rights and thus arises the justification to strike action to defend these fundamental human rights.

Workers are human beings and the right to strike is justified as a defence of human beings in general, which accrue by virtue of one being a human being. Note withstanding this, the United Nations' Declaration of Human Rights provides under Article 23 that:

> (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment
> (2) Everyone, without any discrimination, has the right to equal pay for equal work
> (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary by other means of social protection.
> (4) Everyone has the right to form and to join trade unions for the protection of his interests.

Under this background, workers can be justified to claim their rights to terms and conditions of work which are humane, to wages which are equitable and sustainable and to the freedom to join and participate in the activities of trade unions of ones' choice. If any of these fundamental principles are threatened or violated it is submitted, workers should have the right to strike in order to defend them. A right to strike, therefore, viewed

[15] The Declaration of Philadelphia as cited in note 13 at 70

as a means of defending fundamental human rights, ought to be part of any civilised community in the same way as the right to life, liberty and other common human rights.

As mentioned earlier, there was an extension of ILO work to cover not only labour legislation, but also economic and social policies after the Second World War. In what became known as the *Declaration of Philadelphia*, through an annexure to the ILO Constitution it is stated that:

> The conference reaffirms the fundamental principles on which the Organisation is based and , in particular, that (a) labour is not a commodity; (b) freedom of expression and association are essential to sustained progress; (c) poverty everywhere constitutes a danger to prosperity everywhere; (d) the war against want, while it requires to be carried on with unrelenting vigour within each nation, and requires continuous and concerted international effort in which representatives of employers and workers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare[16]

As the ILO affirms that labour is not a commodity, it follows it is suggested, that when workers embark on strike action to demand that they be awarded wages which give them adequate sustenance, they are demanding that labour not be treated like commodities which do not require living but existing. Workers can also resort to strike action to prevent business transfers which leave them insecure or with inferior terms than those they enjoyed previously. Thus if decisions are taken, which worsen the conditions of the workers without them having been consulted, they can justify the strike action as such decisions would have been taken without their inputs as if they form part of industrial equipment.

Following from the ILO declaration above, it is submitted that strike action is justified to protect the right to freedom of expression and thus is a fundamental human right. The right to free speech or freedom of expression is protected in virtually all international and domestic human rights documents. Workers can express themselves

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[16] See Constitution of the International Labour Organisation, ILO Geneva at 22

either verbally or by action. It can thus be argued that strike action can be used as a form of expressing dissatisfaction by workers of either the conduct of the employer or the general terms and conditions of employment. In this regard, the right to strike therefore needs to be protected.

Freedom of association is the other principle recognised in the International Labour Organisation declaration above. It has been submitted that freedom, "is reflected in the absence of restraint rather than the removal of restraint".[17] Freedom of association protects the collective aims of that association as workers associate not for the sake of associating, but, as acknowledged by the International Labour Organisation, they associate to protect, promote and further their interests. Freedom of association gives workers the voice with which to express their aspirations, it strengthens their position in collective bargaining and enables them to participate in the framing and implementing of economic and social policy. If this freedom is threatened, that is if workers are denied their right to form, join or participate in trade union activities, they will be justified to embark on strike action to defend this fundamental labour and human right. One researcher has aptly observed that the right of workers to strike is itself a test of freedom. Where this right is suppressed like in the dictatorships of Hitler and Stalin, there was also the suppression of freedom.[18]

Thus, if workers embark on strike action to defend their fundamental rights as human beings they are justified and should be protected like any other struggle to defend fundamental rights.

This justification seems to have been resisted by some authors. It has been said that "there has been reluctance to describe the freedom to strike as a right because of a strike's coercive nature and delictual consequences; no human right exists for the explicit purpose

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[17] F Von Prondzynski *Freedom of Association and Industrial Relations: A comprehensive Study* (1987) at 13

[18] Chris White *What limits the right to strike* available at http://larvatusprodeo.net/2007/05/21 accessed on 13 January 2008

of forcing others to do what they do not want to do".[19] This is an important observation and equally important is the fact that the right to strike as a human right does not mean that there are not or ought not be reasonable limitations and respect for the rights of others. Be that as it may, the characterisation of a right to strike as a human right continues to be one of the justifications given for insisting on its universal recognition.

2.3 Right to strike to promote collective bargaining

The term collective bargaining has been defined to mean "a voluntary process for reconciling the conflicting interests and aspirations of management and labour through the joint regulation of terms and conditions of employment".[20] Except in limited circumstances, bargaining cannot be compelled by law. It implies therefore that the exercise of power can be resorted to either to force a party to the bargaining table or to resolve the issues if bargaining fail. Collective bargaining should therefore strive to achieve certain objectives. These have been identified as, employment justice, a fair deal for employees, the successful regulation of industrial disputes and it should enhance the dignity and worth of workers as industrial citizens.[21]

The International Labour Organisation defines collective bargaining as;

> Collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the on hand, and one or more workers' organisations on the other for:
> (a) Determining working conditions and terms of employment, and or
> (b) Regulating relations between employers and workers, and or
> (c)Regulating relations between employers or their organisations and a worker's organisation[22]

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[19] A Rycroft and B Jordaan *A guide to South African Labour Law* 2nd edition (Juta and Co 1992) at 271-272
[20] Note 19 at 116
[21] See Reagan Jacobus *The Ancillaries to the Right to strike* in P Benjamin, R Jacobus and C Albertyn *Strikes, Lockouts and Arbitration in South African Labour Law* (Juta and Co Ltd 1989) at 53
[22] ILO Convention 154

From the ILO context above, it can be deduced that collective bargaining plays economic, social and political roles in the employment relationship. Economic role, by creating certain standards for workers such as wages and employment security, and for employers guaranteeing production. Social because it establishes a system of industrial justice which protects workers from arbitrary action by employers making the workers realise their fundamental right to human dignity, and political because it brings some measure of democracy to the working world, allowing employees to have a say in matters which affect their working life.

The need for both parties in the employment relationship to engage in collective bargaining was adequately summarised as follows;

> By bargaining collectively with organized labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc , should not be frustrated through interruptions of work. By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure...the principal interest of management in collective bargaining has always been the maintenance of industrial peace ...and...the principal interest of labour has always been the creation and maintenance of certain standards ...standards of distribution of work, of rewards, and of stability of employment.[23]

The employment relationship has however been observed as a relationship where the economic, social and political powers of the parties is not equal. It is in this context that the purpose of labour of labour law has been given as to be a countervailing force to counteract the inequality of the bargaining power which is inherent between workers and employers.[24]

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[23] P Davies and M Freedland *Kahn-Freund's Labour and Law* (note 7) at 69
[24] See (Note 7) at 18

As a result of the power imbalances, workers have the right to strike in order to try to level the bargaining playground. The threat of strike action is probably the only weapon that can influence management to accede to worker demands and;

> If the law were to ban strikes by employees, that would effectively end collective bargaining. It would deprive the union of the ultimate lever it has to extract concessions from a recalcitrant employer. In the eyes of trade unionists, it would leave the employers with no more than the right to collective begging.[25]

Employers, because of their inherent power need no corresponding right to that of workers to strike. This was the position held in the Constitutional Court in South Africa in the case *Ex parte Chairperson of the Constitutional Assembly.*[26] The Court, dealing on the issue of whether it was constitutional to provide for the right to strike to workers in the constitution of South Africa without a corresponding right to employers stated that, "collective bargaining is based on the need for individual workers to act in combination to provide them collectively with sufficient power to bargain collectively with employers",[27] because "of the fact that employers enjoy greater economic power than individual workers",[28] and therefore "the effect of including the right to strike does not diminish the right of employers to engage in bargaining, nor does it weaken their right to exercise economic power against workers".[29]

Thus, the right to strike strives to create equilibrium in collective bargaining which is generally taken as the cornerstone of modern labour law. This justification of the right to strike appears to be the most widely accepted and shapes most of the strike laws in the developed world.[30]

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[25] Weiler *Reconcilable Differences-New Directions in Canadian Labour Law* (Carswell,1980) at 67 cited in Cameron, Cheadle and Thompson *The New Labour Relations Act* (Juta and Co Ltd 1989) at 69
[26] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 17 *ILJ* 821 (CC)
[27] At para 69F
[28] At para 66A
[29] At para 65F
[30] See Lord Wedderburn, *Employment Rights in Britain and Europe* (1991) at 276-353

CHAPTER THREE

The Right to Strike under International Labour Law

3.1 Introduction

International labour law refers to the rules and regulations which have been established by international law. The International Labour Organisation (ILO) is the main source of international labour law. The ILO is a specialised agency of the United Nations, formed in 1919 by the treaty of Versailles and according to the ILO constitution, "to establish everywhere humane conditions of labour and to institute and apply a system of International Labour Legislation". The ILO is tripartite in its structure, representing the government, the employers and the workers. The regulations and rules of ILO are derived from the adoption of conventions by member states. The adoption of a convention by a member state is an indication of an intention to implement the provisions of that convention in the national laws of the member state. There are however a set of ILO conventions, termed the 'four core conventions" which require no ratification from member states but become binding by virtue of membership to the ILO. These include freedom of association, freedom from forced labour, freedom from child labour and freedom from discrimination. The ILO also adopts Recommendations which need not be ratified by member states but act as persuasive authority in their application.

There is no ILO convention or recommendation that deals specifically with the right to strike. However the absence of such an explicit convention does not mean that the right to strike does not exist in international law. The supervisory role of the ILO Conventions is carried out mainly by the Committee of Experts on the Application of Conventions and Recommendations. This body has further developed procedures for effective monitoring and protection of trade union rights which procedures have been entrusted to the Fact Finding and Conciliation Commission on Freedom of Association and The Committee on Freedom of Association. These latter two bodies have developed ILO case law and have derived the right to strike from the concept of Freedom of Association as provided in

Conventions 87 and 98.[31] It was held that the right to strike is "an intrinsic corollary to the right to organise protected by Convention 87" and that the right to strike is a "legitimate means ...through which workers may promote and defend their economic and social interests."[32]

3.2 Definition of Strike under ILO

The Convention on Freedom of Association provides that the rights that it provides to worker and employer organisations shall be exercised within the limits of national law and that the national law shall not be as to impair or applied to impair the guarantees provided by the Convention. [33] The Committee on Freedom of Association has taken a similar approach in its definition of a strike. The Committee has stated that;

> When the right to strike is guaranteed by national legislation, a question that frequently arises is whether the action undertaken by workers constitutes a strike under the law. Any work stoppage, however brief and limited, may generally be considered a strike. This is more difficult to determine when there is no work stoppage as such but a slowdown in work (go-slow strike) or when work rules are applied to the letter (work to rule); these forms of strike action are often just as paralysing as a total stoppage. Noting that national law and practise vary widely in this respect, the Committee is of the opinion that restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful.[34]

From the above definition, it can be deduced that the Committee on Freedom of Association has recognised that strike action is a right which workers and their organisations are entitled to enjoy. What is of concern is that the actions of the workers should remain peaceful otherwise there should not be any restrictions placed on exercising the right. As the right to strike is derived from Convention 87 and 98 it is important to discuss these conventions.

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[31] Freedom of Association and Protection of the Right to Organise Convention 87 OF 1948 AND Freedom of the Right to Organise and Collective Bargaining Convention 97 of 1949

[32] Freedom of Association Digest para 362 and 363

[33] See Article 8 of the Convention

[34] *Freedom of association and collective bargaining.* General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No 98). Report III (Part 4B), paras. 173-174 International Labour Conference, 81st Session, 1994. Geneva

3.3 ILO Convention on Freedom of Association and Protection of the Right to Organise Convention 1948 (C87)

As mentioned earlier, this convention need not be ratified by member states for it to become binding for it is part of the "core conventions". The main purpose of the Convention is to guarantee the freedom of workers and employers to form and join organisations of their choice for purposes of advancing their interests. It has been stated in this regard that;

> Worker organisations cannot exist if workers are not free to join them, to work for them, and to remain in them. This is a fundamental human right, a civil liberty...and as such it ranks with freedom of speech, freedom of religion, and freedom of arbitrary arrest and seizure. It is, however, also complementary to collective bargaining; that is a condition sine qua non of industrial relations.[35]

The above statement crystallises the context of the provisions of the Convention on Freedom of Association. The Convention provides that "workers and employers, without distinction whatsoever", have the right to establish and join organisations of their own choosing, "without prior authorisation".[36] The worker and employer organisations so formed have a right "to elect their representatives in full freedom, to organise their administration and activities and to formulate their activities" without interference from public authorities.[37] The convention further provides that the organisations are "organisations of workers or of employers for furthering and defending the interests of workers or of employers".[38]

3.4 ILO Convention on the Right to Organise and Collective Bargaining Convention 1949 (C98)

The Convention on the Right to Organise AND Collective Bargaining confers upon employers' and workers' organisations the right to engage in collective bargaining

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[35] Davies and Freedland (note 7) at 200-1
[36] Article 2 of the Convention
[37] Article 3 of the Convention
[38] Article 10 of the Convention

without interference from organs of the state. The Convention requires that the state provides the framework for the regulation of voluntary collective bargaining to determine wages and conditions of service. The Convention recognises that worker and employer organisations are autonomous bodies and discourage any acts of anti-union discrimination by the state or the employers including discrimination of prospective workers by reason of perceived trade union membership.

Though the Convention on Freedom of Association and that on the Right to Organise and Collective Bargaining do not expressly provide that the worker organisations have the right to strike, the right has been derived from them. The Committee on Freedom of Association has interpreted that the Conventions' mention of the freedom to organise and to formulate activities which further and defend the interests of the workers impliedly mean that the Conventions provide for a right to strike if that strike is to further or defend the interests of the workers. Strike action thus forms part of the activities in terms of the right to organise and formulation of programmes for workers' organisations as recognised under article 3 of the Convention on Freedom of Association.

This interpretation has been observed to find favour with the Worker Group at the ILO Conference Committee on the Application of Standards. The Employers' Group though acceding that the right to strike should not be totally banned, has maintained that since the Convention does not provide in express terms the right to strike, a precise and detailed, absolute and unlimited right should not be deduced from the Convention.[39] The interpretation of the Committee on Freedom of Association is however found to be reasonable. Workers do not form organisations just for the sake of it but for a purpose. The right to strike should therefore be provided to protect the purposes for which the organisations are formed in order to give effect to the freedom of association that the convention entails.

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[39] B Gernigon, A Odero and H Guido *ILO Principles Concerning the Right to Strike* International Labour Office Geneva (1998) at 9

3.5 Exclusion of other categories of workers

The Convention on Freedom of Association excludes other categories of employees from the express application of its provisions. As a result, if the right to strike is derived from the Convention on Freedom of Association, it follows that those workers who are excluded from its application shall not enjoy the right. In this regard, the Committee on Freedom of Association has refused to find an objection to legislations which deny the right to strike to such group of employees.[40]

3.5.1 Armed forces and police

The Convention on Freedom of Association provides that, "the extent to which the guarantees provided in this Convention shall apply to the armed forces and the police shall be determined by the national laws or regulations".[41]

This might mean the total exclusion of these workers from the application of the convention or the recognition of some limited rights of freedom of association. Justifications for this exclusion have been led with one being, "on the basis of their responsibility for the external and internal security of the state".[42] Others have justified this exclusion on the basis that once a union sells itself "as the only one that can truly represent the interests of members", this will be in conflict with the military tradition that, "an officer's first duty is to take care of his men".[43]

What can be concluded however is that the national laws which regulate freedom of association within the armed forces and the police should not be as to render the right impossible to exercise as provided under Article 8 of the Convention as this is a fundamental human right.

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[40] See ILO Principles (note 39) at 17

[41] Article 9 of the Convention

[42] N Rubin, B Hepple and E Kalula *Code of International Labour Law, Practise and Jurisprudence* Vol 1 (2005) at 126

[43] L Heineken and M Nel *Military Unions and the Right to Collective Bargaining: Insights from the South African Experience,* Journal of Comparative Labour Law and Industrial Relations Vol 23 Issue 3 (2007) at 467

3.5.2 Public Service

The provisions governing the employment of public servants under ILO are provided under the Labour Relations (Public Service) Convention 151 of 1978. In order to maintain a restrictive definition of public servants for the purposes of exercising rights in other conventions, the convention on Public Service employees provide that it applies "to high level employees whose functions are normally considered as policy making or managerial, or to employees whose duties are of a highly confidential nature".[44]
The Convention however protects public employees against any acts of anti-unionism and provides that they shall have the right to membership of public employees' organisations and that they shall not suffer any discrimination by such membership or participation in the activities of that organisation. Organisations of public service employees are guaranteed autonomy and their activities shall not be interfered with by public authorities.[45]

The Convention recognises the need for public employees' organisations to participate in the negotiations for terms and conditions of employment of public service employees, subject to national laws. The dispute settlement machinery to be instituted in the public service must be done through negotiations, be impartial and must "ensure the confidence of the parties involved".[46]

The concept of public service employees however differs from one country to another. The Committee on Freedom of Association has interpreted the definition of public servants in the Convention restrictively to mean employees who exercise authority in the name of the State.[47] The Committee on Freedom of Association and the Committee of Experts agree that when public servants are not granted the right to strike, they should enjoy sufficient guarantees to protect their interests, including appropriate, impartial and prompt dispute resolution procedures. Such procedures should ensure the

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[44] Article 1.2 of the Convention
[45] Article 4 and 5 of the Convention
[46] See Article 8 of the Convention
[47] *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO.* Fourth edition (1996) para 534. Geneva

participation of all parties at all stages and where arbitration is done, the arbitration decisions should bind all parties and should be fully and promptly applied.

By restricting the definition of public service employees to those who exercise authority in the name of the State, the Committee on Freedom of Association was applying the concept that it should be the nature of the function of the person that should exclude him from the right to strike rather than the general term of being a public servant. Public servants such as those employed in state owned commercial and industrial enterprises do not have similar functions with those in the administration of justice as an example. The former should have the right to negotiate collective agreements and should enjoy the right to strike provided the interruption of services does not endanger the life, personal safety or health of the whole or part of the population.[48]

The Committee on Freedom of Association has observed in this regard that "a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers".[49] It also would be contrary to the principles of freedom of association that the right to declare a strike in the public service illegal lies with the heads of public institutions. It has been observed that this will result in these persons acting as judges as well as parties to the dispute.[50] As a result of the different legal systems that govern public service employees it has been difficult for the Committee to draw up a list of the non essential public servants. For this reason the Committee has recommended that member states should not impose a total ban on the right to strike in the public service but to provide for the maintaining, by a defined and limited category of staff, of a negotiated minimum service when a total and prolonged work stoppage might result in serious consequences.

3.5.3 Essential Services

The right to strike in essential service under ILO jurisprudence is to be restrictively read. This is so because the Committee on Freedom of Association recognises that the

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[48] Rubin (note 42) at 210
[49] ILO Principles (note 39) at 19
[50] Note 47 at para 524

demarcation of services as essential differs from country to country as well as on the prevailing circumstances in a country. The Committee has recommended that all endeavours should be taken by member states to limit as much as possible the range of employees defined as operating in essential services. A too broad a definition the Committee recommended, would make the essential service concept lose meaning.[51]

The Committee on Freedom of Association defines essential services as "only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population".[52] The Committee, recognising the diversity of legislation is of the opinion that it would not be desirable or possible to draw up an exhaustive list of services which can be regarded as essential. However it came up with a list of services which it considers being strictly essential and to which the right to strike should be subject to major restrictions or even prohibited. These include the hospital sector, electricity services, water supply services, the telephone services and the air traffic services.[53] National conditions also apply as what might be an essential service in one country might not be an essential service in another and that a non-essential service may become essential if a strike lasts beyond a certain time that it endangers the life, personal safety or health of the whole or part of the population.[54]

It has been submitted that the criterion that must be applied to determine essential services must include "a clear and imminent threat...an objective test involving actual or potential damage...direct and demonstrable link between the work stoppage and the harm foreseen and also as to the proximity of the injury to be sustained"[55]

The Committee of Experts has observed that as a result of diversity of terms in national legislation, there has been confusion between the concepts of essential services and minimum services. The Committee clarified the confusion stating that minimum service is "situations in which a substantial restriction or total prohibition of strike action

[51] ILO Principles (note 39) at 20
[52] Note 34 paras. 159-60
[53] Digest 1996 note 47 para 544
[54] Digest 1996 note 47 para 541
[55] Rubin (note 42) at 212

would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met and that facilities operate safely or without interruption".[56] Thus the right to strike in minimum service occupations should not be as restrictive as the one in essential services. As in the public service, the restrictions on the right to strike of workers in essential services must be off-set by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards are should be binding on all parties.

3.5.4 Acute national emergency

The Committee on Freedom of Association recognises situations in which the exercise of the right to strike can be prohibited to all workers as a result of emergency national crises. The Committee stresses however that "this means genuine crisis situations, such as those arising as a result of a serious conflict, insurrection or natural disaster in which the normal conditions for the function of society are absent".[57]

Obviously, such situations will be a threat to the whole or part of the population and to prohibit strike action is reasonable and to the benefit not only of the general populace but the intending strikers as well.

3.5.5 Political Strikes/protest strikes

The Committee on Freedom of Association considers that strikes which are purely of a political nature do not fall within the scope of freedom of association.[58] The Committee however recognises the difficulty in distinguishing between the political and occupational aspects of a strike, since a policy adopted by government frequently has immediate repercussions for workers and employers, such as a general price or wage freeze. The Committee has provided that workers' organisations should be able to use strike action to support their position in the search for solutions to problems posed by major social and

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[56] Note 34 paras 162
[57] Note 34 para 1
[58] Digest 1996 (note 47) para 481

economic policy trends which have a direct impact on their members such as employment, social protection and the standard of living.[59]

3.6 Conditions for exercising the Right to Strike

A right to strike, being derived from the Freedom of Association Convention must be exercised within the confines of national law. The Committee on Freedom of Association though recognising the right to strike as a fundamental right of workers and their organisations regards it as such only as far as it is utilised as a means of defending their economic rights. National law lays down the conditions and requirements that must be met for a strike to be lawful or protected. The Committee on Freedom of Association has specified that such conditions should not be as to result in limitations which render the right to strike ineffective. The Committee accepts the following as legitimate and reasonable requirements.

3.6.1 Strike action to be ultimate recourse

The Committee on Freedom of Association recognises the need for parties to try to resolve disputes before the exercise of the right to strike. In this regard, opportunity should be given to other dispute resolution mechanisms such as conciliation, mediation and arbitration. The Committee recommends that these processes should be adequate, impartial, and speedy and that they involve all the parties in the dispute. The processes "should not be so complex or slow that a lawful strike becomes impossible in practise or loses its effectiveness".[60]

The Committee further stipulates that compulsory arbitration will only be acceptable if it is at the request of both parties involved in the dispute. This should normally be in cases of strikes in essential services in the strict sense of the term, whose interruption would endanger the life, personal safety or health of the whole or part of the population, in cases of genuine acute national crisis or in the public service involving

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[59] Rubin (note 42) at 224
[60] ILO Principles (note 39) at 26

public servants exercising authority in the name of the State.[61] The Committee specifies this as it regards that compulsory arbitration through the labour authorities can result in curtailment of trade unions to organise their activities and may involve an absolute prohibition of strikes, contrary to the principles of freedom of association.[62] Otherwise, arbitration should be voluntary and parties should accept the arbitration outcomes.

3.6.2 Quorum for decision to strike

For strike action to be representative of the wishes of the workers, the Committee on Freedom of Association has accepted that certain representative thresholds of the trade union membership should be met before a trade union embarks on strike action. The Committee has however expressed reservations on requirements where more than two thirds majority of the union membership is a requisite before calling a strike. The Committee views this as an infringement of the freedom of trade unions to organise their activities without interference from public authorities.[63]

The Committee recommends that if a strike is of a local nature, only the local leadership of the trade union should vote for the decision and if it is for a higher level then the executive of the trade union should be able to take that decision. The reasoning of the Committee is premised on the fact that some unions might be geographically scattered to an extent where requiring that each and every member votes will render exercise of the right to strike impossible to execute. National legislation differs in this aspect but the Committee recommends that the final decision of the union should be taken as that of the members who would have voted only.

3.6.3 Minimum services

The Committee on Freedom of Association holds that in all strike actions, certain services may be required to ensure safety of persons, the prevention of accidents and the safety of machinery and equipment. In this regard the Committee specifies that:

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[61] Ibid
[62] Rubin (note 42) at 206
[63] See Article 3 of the Convention on Freedom of Association

> The establishment of minimum services in the case of strike should only be possible in: (i)services the interruption of which would endanger the life, personal safety or health of the whole or part of the population; (ii) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crises endangering the normal living conditions of the population ; and (iii) public services of fundamental importance.[64]

The determination of the minimum services to be maintained and the minimum number of workers to maintain them should be a subject of negotiations between the public regulatory authority, the employers' and workers' organisations concerned. The Committee stresses however that the scope of the minimum service should not result in the strike becoming ineffective in practice because of its limited capacity.

3.6.4 Other requirements

The Committee on Freedom of Association identifies other requirements which might not be as prioritised as the above but which must also be considered. These include that the trade union should give prior notice of its intention to strike. This assists the other party to prepare for that eventuality and make necessary arrangements. The notice may also compel the employer party to agree to the terms of the union, thereby averting the strike action. Consideration should also be given to the guarantee of freedom to work for non strikers. The strike action should also be peaceful and should not lead to acts of violence against other persons.

The Committee provides that if there are allegations that the above requirements were not met by the trade union, the responsibility of declaring a strike illegal should not lie with the government. The Committee has emphasised that such responsibility should lie with an independent body which has the confidence of the parties involved and that the government should not be the one to have the final word on the illegality of a strike, especially in cases where the government is the employer.[65]

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[64] ILO Principles (note 39) at 30
[65] See Rubin (note 42) at 206

3.7 Protection Against acts of anti-union discrimination in connection with strikes

There are no specific provisions that exist to protect against acts of discrimination in connection with strikes. This might be as a result of the fact that there is no specific provision which provides for the right to strike. There is however protection against acts of discrimination which undermine freedom of association upon which the right to strike is derived. The Committee on Freedom of Association has received complaints regarding allegations of reprisals against strikers. The reprisals are mainly in the form of dismissals of trade union officials, members or workers for organising or participating in strikes. The Committee has stated that any acts of anti-union discrimination constitute a denial of the workers to exercise freedom of association as provided by the Convention on Freedom of Association. Protection against acts of discrimination is guaranteed under the following conventions.

3.7.1 Right to Organise and Collective Bargaining Convention 1949 (C98)

The Convention on the Right to Collective Bargaining provides that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment".[66] If workers are therefore dismissed, harassed or suffer any punishments as a result of their participation in union activities, this constitutes a violation of their rights as provided by the Convention on Freedom of Association which provides that workers shall have the right to participate in the activities of trade unions.

3.7.2 Workers Representatives Convention, 1971 (C135)

This Convention provides that workers' representatives shall be afforded protection against any acts prejudicial to them based on their status as workers' representatives. This includes dismissal of workers on the basis of their activities as workers' representatives or participation in the activities of trade unions. It would thus be in contravention of this Convention to dismiss a worker for participating in a strike action which was in conformity with existing laws or collective agreements.[67]

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[66] Article 1.1 of Convention No 98
[67] Article 1 of the Convention

3.7.3 Labour Relations (Public Service) Convention, 1978 (C151)

The Convention provides that public service employees shall be protected against acts of anti-union discrimination. The acts include any condition that public service employees shall not join or shall relinquish membership of a public service employees' organisation; or the dismissal of a public service employee by reason of his membership of a public service employees' organisation or participation in its lawful activities.[68]

The Committee on Freedom of Association has laid down the acts which constitute anti-union discrimination. These include that;

- No one should be penalised for carrying out or attempting to carry out a legitimate strike
- The dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No 98
- When trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against
- Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically it should also be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or penalise the exercise of the right to strike.
- The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association.
- No one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organising or participating in a peaceful strike.[69]

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[68] Article 4 of the Convention
[69] ILO Principles (note 39)at 38

These principles of the Committee on Freedom of Association above have been embraced by the Committee of Expects which has stated that such protection is an essential part of the protection of the freedom of association. The Committee of Experts further emphasised that trade union representatives need the guarantee that they will not be persecuted for their trade union activities in order for them to effectively perform their trade union duties.

From the above analysis of international law regulating the right to strike, it is submitted that such a right exists in international law and subject to the stated limitations, all workers should exercise the right. It would also be important to make an analysis of regional guidelines on the right to strike.

3.8 The Charter of Fundamental Social Rights in SADC

The Charter was adopted by member states of the Southern African Development Committee in 2003. The Charter embraces the tripartite nature of ILO in recognition of the need of the government, worker and employer organisations to be involved in the implementation of the Charter.[70] The objective of the Charter "shall be to facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations, the accomplishment of..." retaining tripartite structures in member states, harmonisation of legal and economic policies among member states, facilitate labour mobility within the region, cooperation in dissemination of labour market information and others.

The SADC Charter acknowledges the universality and indivisibility of the fundamental rights as provided under the United Nations instruments and ILO Conventions and recommendations. Member states undertake to give effect to the ILO Convention on Freedom of Association and the Charter spells out principles which are almost similar to those in the Convention.

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[70] See Article 16.1 of the Charter

Among others, the countries undertake to create a friendly environment for the formation of worker and employer organisations by workers and employers, the freedom of workers to join organisations of their choice and the right for employer and worker organisations to engage in collective bargaining. The Charter goes further than the ILO Convention on freedom of association by providing that member states shall afford workers the right to strike in the event of unresolved disputes.[71] Without clearly stating it, the Charter, it is suggested provides the right to lock out for employers by stating that, "for employers...traditional collective bargaining and remedies consistent with ILO instruments and other international laws",[72] shall be provided.

The Charter draws up a list of organisational rights to be enjoyed by trade unions in their operation. These include the right of access to employer premises, the right for trade union deductions by the employer, the right to appoint full time trade union officials, and the right of trade unions to disclosure of information. On the issue of workers deemed to be working in essential services, the Charter provides that the definition of this category of employees shall be by agreement of the government, employers associations and trade unions.[73]

The SADC Charter draws a priority list of ILO Conventions which member sates are enjoined to ratify and implement. This priority lists includes all the ILO four core conventions mentioned earlier.[74] To assist in enforcement and monitoring of the principles of the Charter, member states undertake to establish regional mechanisms to assist member states in complying with the ILO systems.

It is suggested that under such voluntary system of regulating the freedom of association, through the ILO Conventions and through the SADC Charter, governments in the SADC region should find it easier to draw up national legislation which give effect to these international and regional obligations. As shall be found however, Zimbabwe has not fully given effect to these principles, especially as regards the right to strike

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[71] Article 4 (e) (i)
[72] Article 4 (e) (ii)
[73] Article 4 (f)
[74] Article 5

CHAPTER FOUR

Freedom of Association and Collective Bargaining in Zimbabwe

4.1 Introduction

The previous chapter has revealed that the right to strike under the International Labour Organisation jurisprudence is derived from the Convention on Freedom of Association and the Protection of the Right to Organise as well as the Convention on the Right to Organise and Collective Bargaining. In order to understand the regulation of the right to strike in Zimbabwe, it is pertinent to initially analyse how freedom of association and collective bargaining is regulated in the country. This analysis shall be done on a comparative perspective with some of Zimbabwe's regional partners but in particular the country's biggest regional trading partner, South Africa.

4.2 Constitutional provisions on Freedom of Association.

The Constitution of Zimbabwe is the supreme law of the country and any law inconsistent with it is void.[75] Thus, if the Constitution provides for the freedom of association, any purported prohibition or limitation of the right in labour law would be void. The Constitution of Zimbabwe guarantees the freedom of association under the "Declaration of Rights" where it provides that:

> Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.[76]

The exercise of the above right can be limited in the interests of defence, public safety, public order and public safety. Such limitations shall not however go beyond what is reasonable in a free and democratic society. It has been observed however that at times such limitations placed on workers who want to embark on strike action have been

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[75] Constitution of the Republic of Zimbabwe s3
[76] S 21 (1) of the Constitution

undemocratic. The Supreme Court has observed that this might be so because reasonableness is a subjective matter. In the *In re Munhumeso* case, the Court stated that,

> what is reasonably justifiable in a democratic society is an elusive concept-one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provisions under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right. [77]

In the same manner as the Committee on Freedom of Association has derived the right to strike from the Convention on freedom of association, one can raise the issue of the content of a freedom to "form and belong to trade unions...for the protection of his interests" that the Constitution of Zimbabwe provides. Can the Constitution provide for the right to form trade unions and for persons to belong to the trade unions "for the protection of his interests" when the trade unions cannot enjoy the right to strike to protect the interests of its members?

The Supreme Court of Zimbabwe has given guidance in the interpretation of this constitutional provision. In the matter of *Ngulube v ZESA*, the court interpreted this provision to mean that, "it guarantees every individual the right of freedom of assembly and association, not simply for the sake of it, but for the sake of protecting his interests".[78] The essence of this decision is that freedom of association is meaningless if the activities of the association are not thereby protected. Such activities should entail the right to strike and to remove the right to strike from an association of workers is to "sterilise their association"[79] and in the process denying them the right to freedom of association.

It is submitted therefore that a right to strike can competently be derived from the freedom of association provisions of the Constitution of Zimbabwe. Workers have a constitutional right to peaceful assembly and movement without interference from the

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[77] *In re Munhumeso and others* 1994 (1) ZLR 49 (S) at 64B
[78] *Ngulube v Zimbabwe Electricity Supply Authority and another* 2002 (2) ZLR 335 (S) at 345F
[79] The Canadian case of *Re Retail Wholesale Union and Govt. of Saskatchewan* (1985) 19 DLR (4th) at 639

state. The Supreme Court, in a matter in which it was dealing with the constitutionality of provisions of the now repealed Law and Order (Maintenance) Act (Chapter 65) further held that no prior permission from the state is necessary for workers to demonstrate or assemble in public as such a demonstration is a facet of the freedom of expression and assembly enshrined in the Constitution.[80]

Besides the provisions on the freedom of association, the Constitution of Zimbabwe does not provide for any other employment rights. This lack of a well enunciated employment rights provision has led to other writers accusing the Constitution of being "a critical source of labour dis-empowerment".[81] Be that as it may, the courts have held that those rights that the Constitution provides should be interpreted in an expansive way and that regulations that tend to take away worker rights should be restrictively interpreted. In the *Smyth v Ushewekunze* case, the Supreme Court had this to say regarding this:

> Arriving at the proper meaning of a constitutional provision the court should endeavour to expand the reach of the right rather than attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as the letter of the provision, one that takes full account of changing conditions, social norms and values. The aim must be to move away from formalisation and make human rights a practical reality.[82]

The Constitution of South Africa on the other hand provides for a "Bill of Rights" which it declares forms the "cornerstone of democracy in South Africa".[83] Under the Bill of Rights, the Constitution provides that everyone shall have the freedom of association.[84] Unlike the Constitution of Zimbabwe, the Constitution of South Africa specifically provides for employment rights.[85] The Constitution provides under these provisions that:

> (1)Everyone has the right to fair labour practices.

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[80] *In Re Munhumeso and others* 1994 (1) ZLR 49 (S)
[81] T Neil *Labour and Union issues in the Zimbabwean Agricultural Sector in 2004* available at http://www.sarpn.org.za/documents accessed on 14 March 2008
[82] *Smyth v Ushewekunze and* another 1997 (2) ZLR 544 (S)
[83] Constitution of the Republic of South Africa s7(1)
[84] S18 of the Constitution
[85] S 23 of the Constitution

(2) Every worker has the right –

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike

The Constitution of South Africa thus leaves no room for doubt as far as the right to freedom of association and the right to strike is concerned. Workers associate to promote and defend their interests, thus the explicit right provided for workers to strike. During the certification of the Constitution of South Africa, the Constitutional Court explained the reasons for such provisions. The Court stated that "collective bargaining is based on need for individual workers to act in combination to provide them collectively with sufficient power to bargain collectively with employers".[86] The Court held further that the Constitution provides the right to strike to workers without corresponding right to employers because "of the fact that employers enjoy greater economic power than individual workers" and thus "the effect of including the right to strike does not diminish the right of employers to engage in bargaining, nor does it weaken their right to exercise economic power against workers".[87] The South African courts have also embraced the attitude of the Zimbabwean courts in interpreting worker rights expansively and they have stated that "a construction of the Act which has the effect of taking employees' rights should not be lightly adopted. Indeed if there is another construction of the statute which does not take away rights, such construction is the one that should be adopted".[88]

In Mozambique the Constitution provides for the right to the freedom of association to all citizens.[89] The Constitution further provides that "all employees shall have the freedom to organise professional associations or trade unions".[90] Such associations have the right to pursue their aims to achieve their objectives. Without the elaborate provisions of the South African Constitution, but with more clarity than the Zimbabwean Constitution, the Constitution of Mozambique provides for an explicit right for workers

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[86] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,1996* (1996) 17 ILJ 821 (CC) at para 69 F

[87] At para 65F

[88] *United National Breweries (SA) Ltd v Khanyeza and others* (2006) 27 *ILJ* 150 (LAC) at para 24

[89] Constitution of the Republic of Mozambique Article 76 (1)

[90] Article 90 of the Constitution

to strike.[91] Thus, Mozambican workers have an express constitutional provision to the right to strike which right as expected is regulated by law. The Constitution of Mozambique goes further than the South African Constitution by prohibiting lockouts,[92] which are normally used by employers as a counter to the right of workers to strike.

The Constitution of Malawi provides for the freedom of association but does not expressly mention the formation and joining of trade unions. The Constitution provides that "everyone shall have the right to freedom of association which shall include freedom to form associations"[93] and goes further to mention political parties but not trade unions in express terms. The Constitution of Malawi however, in a move more progressive way than Zimbabwe it is suggested, provides for employment rights. The Malawi Constitution provides that "every person shall have the right to fair and safe labour practises and to fair remuneration".[94] It can be argued therefore that the Malawian workers can claim the right to strike in order to defend fair labour practises, safety and fair remuneration as these are constitutionally guaranteed rights.

The Zambian Constitution guarantees the freedom of association and the formation of trade unions in a wording almost similar to the Zimbabwean Constitution. The Constitution states, "except with his own consent no person shall be hindered in the enjoyment of his freedom of assembly and association...in particular to form or belong to any political party, trade union or other association for the protection of his interests".[95] Thus, Zambian workers can derive the right to strike from the content of the Constitution as regards the protection of their interests.

From the above, it is submitted that freedom of association under the Constitution of Zimbabwe entails the right to strike. Though the Constitution does not expressly provide for this right as in the South African Constitution, one can apply the reasoning of the ILO Committee on Freedom of Association to derive the right to strike from the

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[91] Article 91 (1) of the Constitution
[92] Article 91 (3)
[93] Constitution of the Republic of Malawi s32(1)
[94] S 40 of the Constitution of Malawi
[95] Constitution of the Republic of Zambia s21(1) (2) (d)

constitutional provisions that guarantee the right to freedom of association. It is pertinent to observe that it is only Zimbabwe that does not expressly provide for the right to strike as provided under the SADC Charter on Social Rights.

4.3 Legislative Protection of the Right to Freedom of Association

The freedom of association as provided in the ILO Convention as well as the Constitution is regulated through legislation. The Constitutional Court in South Africa held that no litigant may bypass legislation which regulates any fundamental right and rely directly on the Constitution. The court stated that, "... a litigant who seeks to assert his or her right...should in the first place base his or her case on any legislation enacted to regulate the right..."[96]

Labour law reform and development in Zimbabwe is not progressive it is suggested, because it is a preserve of the legislature. Employer and worker representative bodies may be consulted for their inputs into any intended enactment but it remains just that, consultation. The legislature is not under any legal obligation to implement any of the organisations' proposals. Of late, there has been formed the Tripartite Negotiation Forum (TNF) where business, labour and government meet to deliberate on economic, social and employment issues. This body however does not have statutory recognition. The result has been that it becomes a talk show and can be undermined by the legislature or the executive. An example of this occurred in 2007 when through the Presidential Powers (Temporary Measures) Act, business was forced to freeze prices and wage negotiations were also frozen, though these issues had been agreed to be agenda items for the Tripartite Negotiating Forum.[97]

The Labour Act of Zimbabwe, unlike the Labour Relations Act of South Africa, does not have any clause that stipulates that it undertakes to give effect to ILO Conventions that the state would have ratified. What is of interest is that an amendment of the Labour Act in 2002 had a provision for this under the purpose of the Act.[98] This

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[96] *South Africa National Defense Union v Minister of Defense and others* (2007) 28 *ILJ* 1909 (CC)
[97] This was done through Statutory Instrument 159A of 2007
[98] S2A(1) (b) Labour Relations Amendment Act No 17 of 2002

provision was repealed by another amendment of the Labour Act in 2005 and placed under the long Title of the Act.[99] The net effect of this position is that the provision becomes of no effect when interpreting other provisions in the Act. This legal position is as given by the courts that the courts will only consider the title and preamble of an Act where the provisions of the Act which are the operative sections of the law are not clear.[100] The motivation for such changes in Zimbabwe is not clear except that in their report to parliament, the Portfolio Committee on Public Service, Labour and Social Welfare indicated that the amendments had taken into consideration the existing political and social climate. It is suggested however that this was a retaliatory reaction to several citations of the country at the ILO conferences as a result of reports by the Zimbabwe Congress of Trade Unions. It is also reported that the government in 2002 had turned down an ILO proposal to send a mission to assist with the development of amendments to the Labour Act to ensure conformity with ILO standards.[101]

Under the Labour Act, employees have fundamental rights to join, form and participate in the lawful activities of trade unions.[102] The Act further provides for unfair labour practise jurisdiction against employers who might hinder employees in their exercise of the fundamental rights.[103] Unions are required to register with the Registrar of trade unions and the process is not as rigorous as to render registration impossible.[104] Accreditation proceedings are held before the registration of a union to ensure that the interests so required to be registered are not already catered for and thus to reduce the proliferation of trade unions.[105] This, it is submitted is in conformity with the ILO Convention on freedom of association and the SADC Charter.

It would appear the trade unions are thus given democratic space to operate as autonomous bodies under the Act. It is sad however, that other pieces of legislation have

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[99] S3(a) Labour Relations Amendment Act No 7 of 2005
[100] *R v Magamo and Madumo* 1924 TPD 129
[101] Amnesty International, *Zimbabwe: Rights under Siege* available at http://amnesty.org/en/library/info/afr46/012/2003 accessed on 13 March 2008
[102] S4 of the Labour Act
[103] S 8 of the Act
[104] S28 of the Act
[105] S41 of the Act

been enacted to frustrate the effectiveness of the rights so guaranteed. One such legislation is the Public Order and Security Act (POSA) which was passed in 2002.[106] The irony of this enactment is that when it was passed, the then Minister of Justice, Legal and Parliamentary affairs was quoted saying that the law would ensure that Zimbabweans "move about peacefully, enjoy their freedoms, without any fear that those freedoms may be threatened".[107] The Zimbabwe Congress of Trade Unions had to seek the intervention of the High Court to stop the police from demanding that they attend meetings of its General Council on the pretext of the POSA.[108] Regardless of the court ruling, police continue to frustrate the trade union federation's activities and its exercise of the freedom of association. The federation has stated that, "even on May Day, a declared public holiday in this country and around the rest of the world, we have to get police permission to hold our May Day rallies".[109]

Though the ILO Convention on Freedom of Association provides that the state or its agents shall not interfere in the internal activities of trade unions, the 2005 Labour Amendment Act gives the Registrar of trade unions the power to supervise the election of office bearers of workers' and employers' organisations, set aside elections, and postpone or change the venue of an election.[110] This it is suggested is an infringement of the freedom to exercise autonomy on the part of the organisations as it undermines their independence. In a similar way, the Act requires that collective bargaining agreements be submitted to the Registrar of labour for registration before they become binding on the parties.[111] The Act then allows the Minister to refuse registration of collective agreements if they "appear" to him to be "unreasonable or unfair, having regard to the respective rights of the parties".[112] How the Minister can become the defender of the rights of parties who have voluntarily concluded a collective agreement is questionable. The fact that is clear is however that this is interference in the operations of worker and

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[106] Public Order and Security Act (Chapter 11:17)
[107] Minister Patrick Chinamasa on Zimbabwe television cited in (note 98)
[108] *ZCTU v Officer Commanding ZRP, Harare* 2002(1)ZLR323 (H)
[109] Lucia Matibenga, ZCTU first vice president quoted in *The Sunday Times* of 13 April 2008
[110] S26 and s51 of the Act
[111] S79-82 of the Act
[112] S79-82 of the Act

employer organisations in contravention of the ILO Convention on Freedom of Association and the SADC Charter.

The ILO Convention on Freedom of Association under Article 5 provides for worker and employer organisations to affiliate with regional or international organisations with which they share interests. In Zimbabwe this has been made almost impractical. Instances in which the state has frustrated the freedom of the workers' federation to associate with international organisations have been given. Some of these are that, on 1 March 2006, Pat Horn a South African labour activist was expelled from Zimbabwe where she had been invited by the ZCTU to facilitate educational activity in the informal sector, Zwelithima Vavi, the General Secretary of the Congress of South Africa Trade Unions,(COSATU) was labelled a security threat and denied entry into Zimbabwe to attend the Congress of the Zimbabwe Congress of Trade Unions in May 2006, so was Nina Mjorberg the LO Norway's Programme Officer for Africa who wanted to attend the same congress.[113] This it is suggested is a deliberate abrogation of the provisions of the Convention on freedom of association by the Zimbabwean government.

One of the progressive aspects of Labour Law development in South Africa which differs from Zimbabwe is that from the time just before the demise of Apartheid it has been a product of tripartite negotiations. Under the auspices of the National Manpower Commission (NMC) and later the National Economic Development and Labour Council (NEDLAC), the government, business and labour have managed to undertake labour law reform through negotiations.[114]

The objectives of the Labour Relations Act of South Africa (LRA) include giving effect to the constitutional rights conferred by section 23 of the Constitution. Another of the Act's objects is giving effect to ILO Conventions that the country would have ratified

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[113] These and others available on ITUC 2007 *Annual Survey of violations of Trade Union Rights* available at http://survey07.ituc-csi.org/getcountry.php accessed on 29/02/08

[114] D do Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, GS Giles, C Bosch and J Rossouw *Labour Relations Law A Comprehensive Guide* 5th ed (2006) 15-23

which the Zimbabwean Act does not provided for.[115] The LRA further provides that it must be interpreted in compliance with the Constitution and "the public international law obligations of the Republic".[116] The courts have also stated that in interpreting the LRA, "a construction of the Act which has the effect of taking away employees' rights should not be lightly adopted".[117]

The LRA devotes a whole chapter to codify the rights of workers and trade unions and the obligations of employers and the state to give effect to the objects of freedom of association.[118] The chapter protects employees and prospective employees from discrimination by participating in trade union activities. Employers are also protected against any action against them by reason of their membership to an employment association. The LRA does not compel trade unions to be registered but it affords registered unions with better legal and organisational benefits. These include eligibility for bargaining council membership, possibility of applying for establishment of statutory council, eligibility to enter into agency shop and closed shop agreements and they may obtain advice or training from the Commission for Conciliation, Mediation and Arbitration (CCMA).[119]

The regulation of the freedom to association by the requirement that trade unions register does not curtail the freedom to associate it is suggested. This is so given that firstly, the definition of a trade union under the Labour Relations Act does not include registration.[120] Secondly, the process of registration is not accompanied by or made subject to onerous conditions.[121] This, it is suggested is in conformity with Article 8 (2) of the Convention on Freedom of Association. Thirdly, unregistered unions can operate though they may not enjoy the same rights with registered unions. The requirement for registration it is suggested is to allow orderliness in the employment relations, given that by registering, the union does not forfeit any of its guaranteed rights. This position was

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[115] S1(a) and (b) of the Act
[116] S3 (b) and (c) of the Act
[117] *United National Breweries (SA) Ltd v Khanyeza and Others* (2006) 27 1LJ 150 (LAC) at para 24
[118] Chapter 2 of the LRA
[119] D du Toit and Others (note 114) at 197
[120] S213 of the LRA
[121] See s95 of the LRA

confirmed by a Fact Finding Commission of the ILO which was sent to investigate complaints of infringement on the freedom of association by COSATU. The Commission came to a conclusion that, "registration is not compulsory under the LRA. An unregistered union, provided it complies with certain requirements, is able to carry on a wide range of trade union activities..."[122]

The closed shop and agency shop arrangements which the LRA provides for have raised debate as to their conformity with the tenets of freedom of association.[123] In particular, the question that has been raised is whether freedom of association includes or implies a related freedom not to associate. In dealing with this matter, The European Court of Human Rights stated that, "to construe Article II as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee".[124]

The agency shop arrangement has been advanced as a union security arrangement for the promotion of stable, orderly collective bargaining. This is achieved by, limiting the proliferation of trade unions, in line with section 21(8) (a) of the Labour Relations Act, stabilising union membership in the workplace, removing tensions between members and non-members, dealing with employees who enjoy the benefits of collective bargaining without paying for them (free riders), and allowing the recognised union to be responsible for all employees in the workplace.[125] If non-union members are allowed to enjoy the benefits of collective bargaining without paying union dues this will be a serious threat to trade unions as this would discourage workers from joining unions.

In furtherance of this position, it has been submitted that since union security arrangements are recognised by the Constitution under section 23(6), the limitation of the right to freedom of association by virtue of union security arrangements is

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[122] Para 585 of the report as cited in AA Landman *The registration of Trade Unions-The Divide Narrows* (1997)18 *ILJ* 1183

[123] See s25 for agency shop and s26 for closed shop

[124] *Young, James and Webster v The United Kingdom* (1981) JLR 408(ECHR) (1995) 4LCD 208 at para 52

[125] H Cheadle, *Labour Relations* in Cheadle H, Davis D and Hayson N (eds) *South African Constitutional Law: The Bill of Rights* (2005) 2nd ed at 18-17

constitutionally valid if the other requirements of section 36 of the Constitution are met.[126] The Labour Relations Act it is suggested has laid down extensive checks and balances to pass this test.[127] These include that employees who refuse to join the union on grounds of conscientious objections may not be dismissed, prior union membership cannot be required for work seekers and that strict controls are placed upon expenditure of union subscriptions paid under the closed shop agreements.

4.4 Collective Bargaining

One of the justifications for the right to strike is that strike action promotes collective bargaining by giving workers leverage against employer inherent power. The ILO jurisprudence on the right to strike is also derived from the Convention on the Right to Organise and Collective Bargaining. The Convention provides that member states should put in place "measures appropriate to national conditions...to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and worker organisations..."

There is no specific constitutional right to engage in collective bargaining in Zimbabwe. It is sometimes argued that because the Constitution confers the right to form trade unions for the protection of workers' rights, collective bargaining is inferred in that provision. The Labour Act grants every registered trade union the right to engage in collective bargaining with the employer irrespective of membership levels. However, unregistered trade unions can not be part to National Employment Councils were industry wide negotiations are held.[128] Workers committees can also undertake collective bargaining with the employer though their agreements are subject to ratification by the trade union.[129]

The Labour Act of Zimbabwe has two apparently conflicting provisions governing the duty to bargain. In one provision the Act provides that its purpose is to provide a legal

[126] H Cheadle (note 125) at 18-19
[127] See generally s26 of the Act
[128] S56 of the Act
[129] S25 of the Act

framework for employers and workers to bargain collectively for determination and improvement of conditions of service.[130] In pursuit of this objective, and in a manner to demonstrate the desire for voluntary bargaining, the Act states that trade unions and employers or employers' organisations "may" negotiate collective bargaining agreements relating to conditions of employment which are of mutual interest to the parties.[131] In another provision however, the Act provides for the concept of unfair labour practice which creates a judicially enforceable duty to bargain on the part of the employer. The Act states that "an employer commits an act of unfair labour practice, if by act or omission he refuses to negotiate..."[132]

The provision on voluntary collective bargaining would entail that parties can use economic power either to force one to the bargaining table or to force one to agree to the terms of the other. Judicial enforcement as provided under the unfair labour practise concept would not allow workers to go on strike as they have recourse to adjudication by the courts. This provision however has its own problems because the courts would now be required to deal with issues like the determination of the parties to the negotiations, the bargaining levels, the bargaining subjects and the manner which bargaining should be held. These it is suggested are domestic issues which the courts would not want to be involved in. It is submitted therefore that collective bargaining should be voluntary as the ILO Convention and the SADC Charter provide.

A disturbing feature of collective bargaining in Zimbabwe is the involvement of the government in the process. The Act requires that collective bargaining agreements be registered with the registrar of labour before they become binding on the parties and the Minister of Labour has discretionary powers to refuse registration of an agreement.[133] The Minister is also given powers to order parties to renegotiate an agreement if it appears to him that the agreement is "unreasonable, or unfair, having regard to the respective rights of the parties". It is submitted that this is interference in the operation of

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[130] S 2A (1) (c) of the Act
[131] S 74 (2) of the Act
[132] S 8(c) of the Act
[133] S79 of the Act as read with s81

employer and worker organisations in contravention of the provisions of the ILO Convention on freedom of association.

Collective bargaining in South Africa on the other hand is a constitutional guarantee. The Constitution provides that "every trade union, employers' organisation and employers has the right to engage in collective bargaining".[134] Several judgments have been made by the courts in South Africa to interpret this provision and in the end "the dominant view is that a right to engage as opposed to a right to bargain collectively denotes a freedom rather than a positive right".[135] In this regard, the limitations placed by the Labour Relations Act on the duty to bargain have been held not to offend the Constitution.

The Labour Relations Act (LRA) of South Africa does not provide for a "judicially enforceable duty to bargain".[136] The Act provides the framework within which parties in the employment relationship should engage for orderly collective bargaining and that it promotes voluntary bargaining at sectoral level.[137] This approach was a deliberate shift from the unfair labour practice jurisdiction of the erstwhile Industrial Court which held that refusal by an employer to bargain with a representative union amounted to an unfair labour practice and the employer could be compelled to negotiate. This was observed to have resulted in a "confused jurisprudence in which neither party is certain of its rights, and in which economic outcomes are imposed on parties which often bear little, if any, relation to the needs of the parties or the power they are capable of exercising".[138]

The LRA of South Africa, in promotion of voluntary collective bargaining fully protects the right to strike including the right to strike on issues concerning a refusal to bargain or levels of bargaining.[139] It has been submitted that this approach of the Act

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[134] Constitution of South Africa s23 (5)
[135] D du Toit and Others *Labour Relations Law* (note 114) at 244
[136] Andre van Niekerk: *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA, A response to Halton Cheadle's Concept Paper*, Development Policy Research Unit (March 2007)
[137] S 1 (d) of the Act
[138] *Explanatory Memorandum to the Draft Labour Bill* (GN 97 of 10 February 1995) at 122
[139] S 64(2) of the Act see also *General Food Industries Ltd v Food and Allied Workers Union* (2004) 25 *ILJ* 1260 (LAC) at 64G

assists trade unions in gaining sufficient bargaining power, not only to persuade employers to bargain with them, but to treat them as serious bargaining partners.[140] The courts have further held that the absence of an express duty to bargain does not mean that employers can refuse to participate in the negotiation process unreasonably.[141]

Voluntary collective bargaining rather than judicial cohesion is likely to produce mutual benefits to the bargaining parties it is suggested. When a party is enjoined to the negotiating table by the threat of economic power play there is more flexibility for the parties to compromise on bargaining stakes than when it's a court order. By enforcing the duty to bargain like in the Zimbabwean situation, there is bound to be a curtailment of the right to strike as workers will be required to go through the court processes which do not guarantee mutually benefiting outcomes. The LRA of South Africa tends to be more compliant with the ILO and SADC Charter provisions in this regard than the Labour Act of Zimbabwe.

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[140] D do Toit (note 114) at 245

[141] See *SANDU and another v Minister of Defence and others* (2003) 24 ILJ 210 (T)

CHAPTER FIVE

Legislative Regulation of the Right to Strike in Zimbabwe

5.1 Introduction

The history of strike law in Zimbabwe shows a consistent trend to suppress the right to strike for workers. From as early regulations as the Master and Servants Ordinance of 1901 strikes were banned. The Industrial Conciliation Act of 1934 recognised the right to strike but this was subject to "severe restrictions consistent with colonial state corporatism".[142] Black workers were however not covered by this legislation and black trade unions were illegal. A trend of unrest by black workers led to the massive general strike of 1948. The strike had far reaching effects that the then prime minister, Sir Godfrey Huggins, in an address to the Legislative Assembly observed that "we are witnessing the emergence of a proletariat and in this country it happens to be black. They are demanding a place under the sun and we have to face up to it". The strike was followed by the establishment of the National Native Labour Board which recommended the introduction of minimum wages. The restrictions on the right to strike continued and new requirements such as ballots, processing of disputes through arbitrators before going on strikes were introduced. There was the creation of essential services in which strike action was prohibited and strikes for political reasons were also banned and so were strikes called by unregistered trade unions.[143]

The post-colonial government which came into power in 1980 started on a pluralist approach which tended to give the workers the right to strike. The Prime Minister in the early days promoted the cause of workers through encouraging the formation of workers committees and is quoted as saying, "we are interested in the role of the worker in his being organised so that he becomes more effective as a producer".[144] However, five years later, as the new workers committees created were thrust in the role of spearheading a wave of strikes, tensions started to emerge between the post-colonial government and

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[142] M Gwisai (note 8) at 344

[143] ibid

[144] Prime Minister R Mugabe (as he was then) quoted in Rashid Ranchod, *The artifice of independence: Reconsidering the labour movement in Zimbabwe to 2001* available at http://www.african studies.uct.ac.za.postamble/vol2/Zimbabwe.pdf

organised labour. The strained relations were demonstrated in the speech of the Prime Minister when he was now quoted saying, "there are some people in the union movement who go out looking for difficulties and try to be difficult. We will watch them closely and discourage striking as much as we can".[145] This was followed by the declaration of much more occupations as essential services.[146] Lengthy and cumbersome procedures were introduced which had to be exhausted before embarking on strike action. Strikes could only be done in response to a threat to the existence of a workers committee or registered trade union or as a reaction to immediate occupational hazards. This is the background upon which the right to strike has been built in Zimbabwe.

This chapter seeks to analyse the statutory regulation of the right to strike in Zimbabwe. As alluded to earlier, there is no express constitutional right for workers to strike. However, one can argue that the constitutional provisions which guarantee the formation of trade unions for the protection of worker interests impliedly provide for the right to strike to protect those interests. The analysis will also include a comparative perspective with South Africa.

5.2 The Labour Act

5.2.1 Definition of Strike

The Labour Act defines strike action under the broad term of collective job action as:

> an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment, and includes a strike, boycott, lockout, sit-in or sit-out, or other such concerted action." [147]

It appears therefore that every form of industrial action is covered by the definition and in line with the ILO Committee on Freedom of Association; all such action should be protected unless it ceases to be peaceful. By being an industrial action, the Act entails that there must be an element of work stoppage; otherwise if the action is done outside

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[145] ibid

[146] See the Emergency Powers (Maintanance of Essential Services) Regulations, SI 160A of 1989 and the Public Services (Maintanance of Services) Regulations SI 258 of 1990

[147] Labour Act Chapter 28 Volume 1 of 1996 s2

working hours it cannot constitute collective job action. The period of work stoppage is immaterial and in a case where a determining authority had held that there was no strike because of the short period it had taken, the Labour Court overruled this stating that "there was collective action...its briefness cannot be taken to mean that there was no collective action".[148] The industrial action must actually take place; otherwise incitement of workers to go on strike which does not actually take place is not unlawful. This was held by the Labour Court in reversing the dismissal of a workers committee chairman who had addressed members and threatened to go on strike if a member of the workers committee was to be unilaterally transferred. The court stated that:

> It is important to realise that the legislature deemed it necessary to give the worker the right to strike in order to send his message to the employer...in *casu* there is nothing to show that in calling for a sit-in, the Appellant was suggesting that the sit-in would be carried out in an illegal manner.[149]

The strike action should be undertaken by persons who are under an employment relationship and such action shall be undertaken for the purpose of "persuading" the other party to agree to a demand which is related to the employment relationship. Strike action cannot therefore be directed against the government if the government is not an employment party to the dispute.

Strike action is collective meaning that a single employee can not embark on that action but that it shall be a collective withdrawal of labour. As a sit-in, workers may collectively agree to continue to work as a form of protest outside normal working hours. Employers can also embark on collective job action by locking the employees out of the employment premises. Lock-out is defined in the Labour Act to mean any exclusion of employees from the work premises, total or partial discontinuance of the business or the provision of work, breach or termination by the employer of contracts of employment, or

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[148] *Securitas (Pvt) Ltd v Dangirwa and Matara* LC/H/184/05
[149] *Makanyisa v Securitas (Pvt)Ltd* LC/H/180/05

the refusal or failure by the employer to re-employ any persons who have been in his employ.[150]

The Act, however having listed the various forms which collective job action can take further states that it can take the form of "other such concerted effort." Exactly what these other actions entail is subject for the courts to determine. One may think of issues like "work to rule," where workers resort to strict compliance with their contracts of employment in the execution of duties, working according to the letter and not the spirit of the employment contract. The central issue will be the collective withdrawal of cooperation as workers refuse to work "beyond the rule." Employees can also resort to a go-slow, which is a collective, deliberate and calculated reduction in the speed or rate at which work is undertaken.

Another aspect might be whether this "other concerted effort" encompasses a stay-away organised by national labour centres. The stay-away might be directed at the government in its capacity as the government to make a serious consideration of a given issue or to both government and employers to accede to some tripartite negotiation considerations. It has been found however, that the machinery provided in the Labour Act for dealing with strikes does not apply to a stay-away.[151] The Zimbabwean government, faced with these massive stay-away actions in 1998 enacted the Presidential Powers Act to specifically deal with them.[152] This approach it is suggested was taken on the grounds that stay- aways were being viewed as political strikes and not labour related actions. Such views are however misplaced as the economic and social interests of workers encompass a wide range of legitimate issues that are interrelated to government as well as employer policies and usually enmeshed in politics.[153] It remains an issue for the courts therefore to interpret on a case to case basis what categories of actions qualify under "other such concerted action."

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[150] S102 of the Act.
[151] See L Maduku, *The Right to Strike in Zimbabwe* (1995) Zimbabwe Law Review 113 at 121
[152] The Presidential Powers (Temporary Measures) (Labour Relations) Regulations,1998(SI 368A of 1998)
[153] See Chris White *The Right to Political Strike: The case for re-evaluation* Evatt Foundation Publication April 2005 available at http://evatt.org.au/publications/papers/139.html accessed on 13 Jaunuary 2008

Under the background of this definition of collective job action the Labour Act provides for a right to strike as follows:

> "subject to this Act, all employees, workers committees and trade unions have the right to resort to collective job action to resolve disputes of interest."[154]

Thus, the right to collective action is a collective right and is not only available to trade unions but also workers committees and unorganised group of workers, as long as they are "employees".

On a comparative basis, The South African Labour Relations Act (LRA) defines strike as:

> Means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a disputer in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory.[155]

The definition also contemplates situations were workers may engage in actions short of complete withdrawal of labour such as were the workers may refuse to do other aspects of their duties whilst doing others. The definition is similar with the Zimbabwean Act in that the action must be collective and that it must be aimed at an employer. The South African Act however provides the right to former employees. This has been explained to mean that employees whose contracts of employment have lawfully terminated can engage in strike action.[156] The LRA also agree that the issue for strike action must be employment related, meaning that political strikes are not covered under the provisions of strike in both legislations.

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[154] s104(1)
[155] Labour Relations Act of South Africa s213
[156] See D du Toit (note 114) at 293

5.2.2 Procedural requirements

The ILO Committee on Freedom of Association has accepted that certain requirements must be fulfilled before workers can embark on a strike. The Committee however states that the requirements should be "reasonable and ...not such as to place a substantial limitation on the means of action open to trade unions".

5.2.2.1 Immediate collective job action

Under the Labour Act of Zimbabwe two situations can arise were workers can engage in collective industrial action without following any procedures. One of these is given as "in order to avoid any occupational hazard which is reasonably feared to pose an immediate threat to the health or safety of the persons concerned".[157] Conditions which apply to this action are that the persons resorting to the collective job action should not have deliberately caused the occupational hazard, the industrial action shall be proportional in scope and locality to the hazard in question and that the industrial action shall diminish as the occupational hazard diminishes. The other situation when workers can go on strike without procedures is when "in defence of an immediate threat to the existence of a workers committee or a registered trade union".[158]

The latter provision has been said to be open for imaginative unions to use in any instances to call for a strike.[159] If an employer refuses to engage in collective bargaining or if, in the eyes of the union the employer unreasonably refuses to accede to the union's demands, the union can call a strike on the grounds that the refusal of the employer is a "threat to the existence of the union" because the union members might threaten to resign en-masse if the union fails to get those demands. The right was also demonstrated in the case of *First Mutual Life Assurance v Muzivi* by the Supreme Court.[160] In this case managerial employees formed a workers committee which was opposed by the employer and the matter was referred to the Labour Tribunal. Pending the determination by the

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[157] S104 (4) (a)
[158] S 104 (4) (b)
[159] L Madhuku (note 150) at 122
[160] *First Mutual Life Assuarance v Muzivi*-S-62-03

Tribunal the employer regraded the managers into non-managerial employees effectively dissolving the workers committee. The workers went on strike and the Supreme Court held that the regrading of the employees was a direct attack on the existence of the workers committee and that the workers were entitled to go on strike without following any procedures.

Besides these two exceptions, workers or trade unions that need to embark on a legal collective job action must satisfy certain requirements before embarking on the action.

5.2.2.2 Notice

The Labour Act provides that if a workers committee, trade union, employees, employer, employers organisation or federation decides to embark on strike action shall give:

> Fourteen days' written notice of intent to resort to such action, specifying the grounds for the intended action,
>
> (i) to the party against whom the action is to be taken; and
>
> (ii) to the appropriate employment council; and
>
> (iii) to the appropriate trade union or employers organisation or federation in the case of members of a trade union or employers organisation or federation partaking in a collective job action where the trade union or employers organisation or federation is not itself resorting to such action

The written notice is mandatory and failure to give it even when the employer is aware of the intended action will be fatal. Such was the determination of the Supreme Court in a matter in which the employer had been made aware of the intended action in a works council but the union had failed to issue a written notice before embarking on the strike.[161] The Act does not specify whether the fourteen days are consecutive or working days but the courts have held that Saturdays and Sundays form part of the fourteen days.[162] Once a notice has been given and the party does not proceed on the action as intended as a result of interventions such as further negotiations, a further notice will be required if the party still intends to go ahead with the action. The courts originally held that if the action is based on the same issues for which notice was previously given, no

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[161] *Moyo and others v Central African Batteries (Pvt) Ltd* 2002 (1) ZLR 615 (S)
[162] *Mukundwi and others v Chikomba Rural District Council* LC/H/01/05

fresh notice is required.[163] However in a later case, in which workers served a notice in August 1997 which was followed by vain interventions of a labour officer and the workers subsequently resorted to the action in December 1997 relying on the previous notice, the Supreme Court held that such notice was invalid and the workers should have issued a fresh notice.[164] The same approach was followed in the case of *Net One v CASWUZ* in which the court stated that the original notice could not be carried forward forever.[165] What this means is that once a labour officer has tried to conciliate a matter, notice of intention to proceed on strike action can only be issued after the officer has issued a certificate of no settlement. This has been found to create rigidity and discourage the parties to further pursue negotiations once notice has been given as this may lead to requirements of a fresh notice.[166]

Under the South African Labour Relations Act, 48 hours written notice of intention to resort to a strike must be given to the employer or to a council if the dispute relates to a collective agreement of a council, or to an employers' organisation if the employers' organisation is party to the dispute.[167] The South African courts have held that the purpose of the strike notice is to give the employer advance warning of the proposed action so that it may prepare for the power play and thus the notice must state exactly when the strike will be commencing.[168] This approach was however not followed in a subsequent case in which the Labour Court held that the uncertainty about the duration of a strike adds to its effectiveness.[169] It is submitted that this is the approach that the ILO Committee on Freedom of Association will find favour with. In this case the court held further that even the inclusion of the demand in the notice is mere formality as the employer would have been apprised of it during negotiations preceding the strike.

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[163] *Cole Chandler Agencies (Pvt) Ltd v Twenty Five Named Employees* S-168-98
[164] Note 160
[165] *Netone Cellular (Pvt) Ltd v Comminication and Allied Workers Union* SC/89/05
[166] See Gwisai (note 8) at 355
[167] LRA s 64 (b)
[168] *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU* (1997) 18 *ILJ* 671 (LAC)
[169] *Public Servants Association of South Africa v Minister of Justice and Constitutional Development* (2001) 11 *BLLR* 1250 (LC)

On the issue of the timing of the strike action in relation to the notice, the South African courts have held that it is not the intention of the legislature to deprive employees of the right to strike for failing to act on the strike notice. In the case of *Tiger Wheels v NUMSA*, where the employees commenced their action three days after the date specified in the notice, the court was of the opinion that non-commencement of the strike on the specified date does not defeat the purpose of the strike.[170] In the case of *PSA v Minister of Justice and Constitutional Development,* the Labour Court emphasised that mere delay, even unreasonable delay, will not on its own invalidate the right to strike.[171]

It is submitted that the requirements pertaining to notice before strike action are more flexible and allow for the exercise of the right to strike effectively in South Africa than in Zimbabwe. A fourteen day notice period compared to a 48 hour period is so long that the impetus to strike may be lost during that period. A shorter notice allows the union to exercise the right whilst its members are still geared up for the action. Requiring trade unions to continuously issue fresh notices as required in Zimbabwe not only curtails the opportunity for the parties to further negotiate after declaration of disputes but also puts cumbersome requirements which might lead to the union failing to exercise its right to strike action. This, it is submitted is against the spirit and intention of the ILO Committee on Freedom of Association.

5.2.2.3 Conciliation

As stated previously, the ILO Committee on freedom of Association accepts that provisions can be made for disputes to be conciliated upon before workers can go on strike. This is premised on the understanding that the procedures are adequate, impartial and speedy and that the parties involved can take part at every stage of the proceedings.

The Labour Act of Zimbabwe provides that strike action shall not be resorted to unless

An attempt has been made to conciliate the dispute and a certificate of no settlement

[170] *Tiger Wheels Babelegi (Pty) Ltd v NUMSA* (1999) 20 *ILJ* 677 (LC)
[171] Note 167

has been issued in terms of section ninety-three.[172]

Under section ninety-three of the Act, a labour officer to whom a dispute has been referred to must try to conciliate it within thirty days. If the dispute remains unsettled the officer shall issue a certificate of no settlement.[173] It is after the issuance of this certificate that the notice of intention to proceed on strike action can be issued. If however the parties in the dispute are identified as engaged in essential services, they have no recourse to strike action and their dispute shall be referred to compulsory arbitration.

What this translates to is that from the date that the parties declare a dispute, a period of at least 44 days must elapse before strike action can be lawfully embarked on. It is submitted that this is too long a time that by the expiry of that period the essence of the strike would have lost effect within the trade union membership.

The LRA of South Africa provides that the dispute must be referred to a council or the CCMA and a certificate stating that the dispute remains unresolved has been issued or 30 days have expired since the referral of the matter to either the council or the CCMA.[174] The 48 hours notice can then be issued. It has been submitted that the reference of the dispute to conciliation "serves to delineate the issue in dispute". [175] What this may entail is that parties are no longer negotiating for settlement but debating the actual issues that make up their dispute. Thus the notice period of 48 hours before strike action is adequate as parties would have been ceased with the dispute for a long enough period to understand why the strike has been called.

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[172] S104(2) (b)
[173] S 93 (3) of the Act
[174] S 64 (1) (a) of the LRA
[175] Du Toit (note 114) at 299

5.2.2.4 Secret Ballot

Under the Zimbabwe Labour Act, no collective job action can be resorted to by:

> Any workers committee, trade union or employers' organisation, except with the agreement of the majority of the employees or employers as the case may be, voting by secret ballot.[176]

The requirements of the secret ballot are provided under Statutory Instrument 217 of 2003. These are that:

- there must be a written letter by the chairperson and secretary of the workers committee or trade union informing the members of the reasons of the ballot and the intended strike.
- the ballot must be conducted within the notice period and the workplace.
- voting must be done in the presence of a labour officer in the case of enterprise level strike who shall record the results.
- in the case of industry-wide strike, the ballot shall be done at the different workplaces and the General Secretary of the union shall collect all the results from the chairpersons of the various workers committees.[177]

The above requirements almost make the right to strike impossible to exercise. For a trade union to carry out secret ballot for all its members who are scattered all over the country within fourteen days is indeed a tall order. This requirement is excessive and can seriously hinder the possibility of carrying out a strike, particularly in large enterprises. Where the labour officer refuses or fails to come to observe the ballot no recourse is provided. Such requirements it is suggested fall foul of the recommendations of the ILO Committee on Freedom of Association that the decision to call a strike should be taken by the national executive of the union.

The South African Labour Relations Act does not require that a ballot be held before a union can declare a strike. The Act however provides that the constitution of any union must provide for ballots of its members who will be involved in a proposed strike.[178] If

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[176] S 104 (3) (e)
[177] SI 217 of 2003 s8
[178] LRAs95 (5) (p)

the union fails to ballot its members or fails to get the requisite majority of its members supporting the proposed strike, it may not discipline those members who may refuse to take part in the strike action.[179] It is suggested that in this instance, the executive of the union may take the decision and inform all its membership of the decision for them to carry out the action. The executive of the union is elected by the membership to carry out the mandate of the union on behalf of the membership. It is for this sake that the executive will always make decisions which are in the best interest of the members. Failure to ballot its members does not render the strike action unprotected. To demand that each member votes for strike action may also lead to victimisation of the workers by the employer thereby limiting the exercise of the right to strike.

5.3 Situations where the right to collective job action is prohibited.

The Labour Act provides restrictions to and in other circumstances totally bans the exercise of the right to strike. As observed by other writers, "such conditions are designed to prevent the most militant forms of strikes that affect the most vital interests of the employers and the bourgeois state".[180]

5.3.1 Public Service

It is disturbing to note the deliberate tendency of the Zimbabwean legislature to move from pluralist to unitarist labour law policies. In 2002, a progressive amendment was made to the Labour Act, which brought public servants under the scope and application of the Act.[181] This positive move was reversed in 2005 by another amendment of the Act which placed the public service under the sole coverage of the Public Service Act, under which their rights to freedom of association and the right to strike are greatly limited.[182] The amendment states in clear terms that "for the avoidance of any doubt, the conditions of employment of members of the Public Service shall be governed by the Public Service Act Chapter 16:04".[183]

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[179] LRA s95(5) (q)
[180] Gwisai (note 8) at 352
[181] Labour Relations Amendment Act No 17 of 2002 s3(2)
[182] Labour Relations Amendment Act No 7 0f 2005.
[183] Ibid s3(2)

Under the Public Service Act, workers shall not engage in collective bargaining. The conditions of service "applicable to members of the public service including their remuneration, benefits, hours of work and discipline shall be determined by the Commissioner in consultation with the Minister".[184] Worker associations, which can only function after "recognition" by the Minister, "may" be "consulted" by the Commissioner as regards the conditions of service of public service employees. However, failure to be consulted on the part of the associations shall not render conditions of employment determined by the Commissioner to be invalid.[185]

The ILO Committee on Freedom of Association emphasises that the denial of the right to strike in the public service should be derived from the functions of the public servant. Only those employees who exercise authority in the name of the State should be prohibited from engaging in strike action. In Zimbabwe the regulations are so broad that even messengers and sweepers do not enjoy the right.

It appears the motivation for the Zimbabwean approach is that public servants are taken as representatives of sovereign power and therefore cannot be in conflict with themselves through a strike. It is submitted that this might be true of those workers who exercise authority in the name of the State but not the generality of the public service.

What is interesting is that the prohibition of the right to strike in the public service has not deterred the workers from going on strike. Teachers, doctors and nurses have embarked on crippling collective job action irrespective of the draconian legislation. In 2007, magistrates went on a three month general strike and the State did nothing, either by way of stopping the strike or resolving the dispute. The strike only came to an end after the wages of the workers had been reviewed, during the fourth month of the strike.

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[184] Public Service Act s19
[185] Ibid s20

Under the South African Labour Relations Act, public service employees enjoy the same rights as any other employees as regards the freedom of association and the right to strike. Public sector employees are not exempted from the application of the Labour Relations Act.[186]

What is apparent from the above is that in Zimbabwe, once a person joins the public service he looses some of his civil liberties such as the freedom of association. Workers have neither the right to strike to influence the content or nature of their conditions of service nor the entitlement to engage in meaningful collective bargaining to improve their conditions.

5.3.2 Defence forces and Police

The Labour Act provides that it shall not apply "in respect of members of a disciplined force of the State".[187] The right to form trade unions or to strike for soldiers and the police force is unthinkable. Their conditions of engagement are regulated under the Defence Act and the Police Act respectively and are prescribed by the Minister. They are seen as key state agents whose loyalty to government is of primary importance. The relationship that exists between these employees and unionised workers is generally antagonistic, evidenced in the repressive role that they play with regard to public union activities in the country. It can be submitted that this is permitted under the ILO Convention 87 which states that the army and police are not covered by its provisions. However, other progressive states such as South Africa have taken a different view.

The LRA of South Africa does not apply to members of the defence force and intelligence.[188] However, as regards their right to freedom of association, the courts have held that members of the defence force are employees who should also enjoy the constitutional rights of fair labour practise which includes the right to form and belong to trade unions. The Constitutional Court in a case in which it had to consider whether members of the armed forces, who are expressly excluded from the application of the

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[186] LRA S2
[187] S3(3)(a)
[188] See note 186

LRA were workers as contemplated by the Constitution held that "members of the defence force remain part of our society, with obligations and rights of citizenship".[189] It is however still to be seen how the government would react if either the defence forces or the police were to call for a strike. During the massive public service employees strike of 2007 the Police and Prisons Civil Rights Union (POPCRU) threatened to join the strike but in the end they did not.[190]

5.3.3 Essential services

The Labour Act defines essential services in a manner so wide that it can cover virtually every industry in the country. The Act initially adopts the definition of the ILO Committee of Experts but then proceeds to open up the definition to an extent where every worker can be declared to be engaged in essential service. The Act states that essential service means any service:

> (a) the interruption of which endangers immediately the life, personal safety or health of the whole or any part of the public; and
> (b) that is declared by notice in the Gazette made by the Minister, after consultation with the appropriate advisory council, if any, appointed in terms of section nineteen to be an essential service.[191]

The Minister is given so much wide powers to declare an occupation as an essential service making the term lose all meaning. Under section 19 of the Act, the Minister is given the powers to appoint an advisory council:

> Either on *his own or her own initiative* or on the recommendations of any employer or employees...consisting of *such persons as the Minister may deem fit*, to investigate and make recommendations to him or her ...[192]

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[189] *South Africa National Defence Union v Minister of Defence and another* (1999) 20 ILJ 2265 (CC) at 12G
available at www.fin24.com/articles/default/display_articles .as.px? accessed on 4 June 2008
[191] Labour Act s102
[192] S 19 (1) of the Act

Such powers it is submitted go beyond the normal need to regulate the right to strike action. These powers can even be exercised where a strike has already broken out, thus making even those strikes that might escape the net to be subsequently declared illegal. The list of designated essential services is provided under Regulations in the Statutory Instrument issued by the Minister.[193] It includes the fire brigade, the supply and distribution of water, veterinary services, health services, transport and communication services, electrical services and public broadcaster services during a state of disaster. The Minister may declare a non-essential service to be an essential service if according to him the persistence of a strike endangers the personal safety or health of part or the whole population. This it is suggested is not essential service "in the strict sense of the term" as the ILO Committee of Experts entails.

On the other hand, though the Labour Relations Act of South Africa also prohibits strikes in essential services there are enough checks and balances to avoid abuse of the declaration of occupations as essential service. The Minister of Labour must consult NEDLAC and the Minister for the Public Service and Administration in order to establish an essential services committee which operates under the auspices of the CCMA.[194] The essential services committee then investigates whether a service is essential for the purposes of exercising the right to strike.[195] The committee calls for submissions from parties in the occupations it considers declaring essential services to accommodate their concerns. Parties who dispute the declaration of their occupations as essential services have the right to declare a dispute which must be arbitrated upon by either a bargaining council or the CCMA.[196]

It is apparent it is suggested that from the above, the regulation of essential services in South Africa is consistent with international law. The Zimbabwean situation is so open ended that it "makes the law of strikes in Zimbabwe ridiculous and misconceived".[197]

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[193] Labour (Declaration of Essential Services) Notice Statutory Instrument 137 of 2003
[194] LRA S 70 (1)
[195] LRA s70 (2)
[196] LRA s 74
[197] L Madhuku *The Right to Strike in Zimbabwe* (1995) Zimbabwe Law Review at123

5.3.4 Disputes of right

The Labour Act provides that no collective job action may be engaged in "if the issue in dispute is a dispute of right".[198] A dispute of right is defined as:

> Any dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of this Act or of any regulations made under this Act, or a breach or alleged breach of any of the terms of a collective bargaining agreement or contract of service.[199]

This differs from a dispute of interest which is defined as "any dispute which is not a dispute of right".[200] This over simplified definition reflects on the challenges the legislator faced when enacting this provision. Professor Ncube who was a member of parliament then is quoted stating that:

> "one may ask what is left to go on strike for. If the contract of employment cannot be subject to strike or if the breach of this Act by one of the parties cannot be subject to a strike; then what is left to strike for? There is virtually nothing. Therefore I suggest that you have a problem with the continuation of such a clause because it extinguishes the right to collective job action" [201]

Disputes of rights involve mainly the interpretation and application of existing rights thus it is proper that they be adjudicated upon either by arbitration or court determinations. The situation is different with disputes of interest as mainly they involve the creation of new rights and thus power play should be allowed.

Under the Labour Relations Act of South Africa, no person may take part in a strike if "the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the Act".[202] The disputes that a party has right to refer for arbitration are those disputes that involve the interpretation or application of existing rights. The LRA however has two instances in which disputes of rights may result in

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[198] S 104 (3) (a) (ii) of the Act
[199] S2 of the Act
[200] ibid
[201] The Hansard Parliamentary Debates 18 December 2002 at 2230
[202] LRA s 65(1) (c)

strike action. These involve disputes about unilateral changes to terms and conditions of employment if it amounts to an unfair labour practice and disputes that may be arbitrated under legislation other than the LRA such as the BCEA or the Employment Equity Act, as the LRA refers to disputes that can be arbitrated in terms of "this act".[203]

As regards the prohibition of strike action in disputes that are disputes of right, both Zimbabwe and South Africa provide similar legislation. The South African courts have stated however that in determining the nature of a dispute, the court must have regard to the substance of the dispute and not the form in which it has been characterised by a party.[204] This is to avoid the characterisation of disputes of interest as disputes of rights and thereby limiting the rights of workers to strike action.

5.3.5 Other circumstances

The Act provides other circumstances under which collective job action cannot be embarked on. Where a registered trade union representing the interests of the employees is in existence but has not approved or authorised the collective job action, no employees or workers committee can engage in the action.[205] An unregistered trade union cannot recommend or engage in collective job action.[206] Where a union collective agreement which governs the issue in dispute is in existence, no workers committee can recommend strike action on that issue.[207] It would appear the Act in all these circumstances is trying to protect the interests of registered unions. It is submitted that this is not against the spirit of freedom of association entailed by the ILO. If such regulation is not in place, there is bound to be chaos in the working world as any body of workers would call for industrial action which would adversely affect the regulation of the right.

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[203] See Du toit (note 114) at 307
[204] *Coin Security Group (Pty) Ltd v Adam and Others* (2004) 4 *BLLR* 371 (LAC)
[205] S 104(3) (b)
[206] S 104(3) (c)
[207] S 104 (3) (d)

5.4 Rights of persons on lawful collective action

Lawful collective action is defined as "any collective action that complies with this Part in respect of its notification and other matters provided for under this Part".[208] Such persons who follow the legal procedures are termed "protected persons" and they enjoy certain rights and protections. Both the Labour Act of Zimbabwe and the LRA of South Africa provide for almost similar protections.

5.4.1 Protection from dismissal and discipline

An employee, official or office bearer of a party that is protected shall not be dismissed on the ground that he has threatened, recommended or engaged in lawful collective job action.[209] In the case of *CASWUZ v Tel-One*, the High Court overturned the dismissal of employees by an employer under its code of conduct following the declaration by the Labour Court that a show cause order that had been issued against the workers was invalid.[210] Such protection shall however not cover wilful acts of threats or destruction of, or damage to, property other than the perishing of goods caused by employees' absence from work on account of the lawful job action. The LRA of South Africa provides that an employer may not dismiss an employee for participating in a protected strike. A striker can only be dismissed for improper conduct during the strike.[211]

5.4.2 Immunity from civil liability

The Act provides that it shall not be a delict or breach of contract for any protected person to threaten or engage in collective job action. Such persons shall not be liable to any civil liability but shall not extend to cover wilful acts of destruction of property.[212] The LRA of South Africa provides the same protection and prohibits any civil proceedings against any person for participating in a protected strike.[213]

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[208] S 108 (1)
[209] S 108 (3)
[210] *CASWUZ v Tel-One (Pvt) Ltd* HC898/05
[211] LRA S67(5)
[212] S 108 (2)
[213] LRA s67(6)

5.4.3 Right to remuneration

An employer is not obliged to remunerate an employee who is on lawful collective job action. However if the remuneration consist of payment in kind such as accommodation, food and other basic amenities of life, these shall not be stopped during the course of the action. The employer can recover the monetary value of these services at the conclusion of the collective action by way of action through the Labour Court.[214] As regards wage deductions, the courts have held that in line with the *audi alteram* rule, the employer must conduct inquiries before effecting the deductions.[215] The LRA also provides for similar conditions, with the Labour Court given jurisdiction to determine the monetary value of any remuneration in kind that the strikers might have enjoyed during the duration of the strike.[216]

5.4.4 Replacement labour

Where an employer has lawfully locked-out its employees, it shall not employ any other person for the purpose of performing the duties of the locked out employees.[217]

It is submitted that though the procedures for engaging in collective job action are rigorous and cumbersome, for those who might be able to fulfil them, the protection provided is adequate. The requirement to hold hearings before effecting wage deductions removes the unilateral actions by the employer in this regard. The continued provision of remuneration in kind such as accommodation and food also assists to avoid victimisation by the employers by threats of starving the strikers or making them homeless.

5.5 Effects of unlawful collective job action

The definition of unlawful collective job action is construed from that of lawful collective job action.[218] Once any person is alleged to be engaged in unlawful job action, the "Act

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[214] S 108 (4)
[215] See *CASWUZ v ZIMPOST and Another* LC/H/68/2004
[216] LRA s158 (1) (a) as read with s67(3)(b)
[217] S 108 (5)
[218] S 108 (1) of the Act

provides a variety of draconian measures to suppress" such action.[219] These measures can be divided into interlocutory, discipline and criminal measures.

5.5.1 Show cause and disposal orders

Where a strike is threatened, recommended, encouraged, incited, organised, or engaged in, which may be deemed unlawful, the Minister, "acting on his own initiative or upon the application of any person affected or likely to be affected by the unlawful action" may issue an order asking the workers involved to defend the continuity of the strike.[220] Pending that defence which shall be beard in the Labour Court, the strike is illegal and cannot be continued with. After the inquiry, the Labour Court may issue a disposal order directing that the collective action be terminated, postponed or suspended or that the issue giving rise to the action be arbitrated upon.

The disposal order may provide for the employer to suspend payment of wages to the employees who were engaged in the industrial action, to dismiss those employees, to discipline specified employees, the prohibition of the collection of union dues by any trade union during such period as may be specified and may provide for the suspension or rescission of the registration of the trade union involved in the action.[221]

5.5.2 Discipline and dismissal of strikers

Under the common law, participation in an illegal strike would automatically constitute a breach of contract which warrants dismissal. This was the approach which the Zimbabwean courts were taking until the enactment of Act no. 17 of 2002. This legislation brought to the fore the fact that dismissals, even of strikers need to be procedurally and substantially fair and thus the need for hearings before meting out any disciplinary action.[222] Substantial fairness entails considering the seriousness of the contraventions of the requirements of the Act and the efforts made to comply with those requirements. The conduct of the employer is also taken into consideration and if proved

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[219] Gwisai (note 8)
[220] S 106 of the Act
[221] S 107 (3)
[222] See s 12B

that the conduct of the employer was the direct cause of the collective job action dismissal will not be justified. The moral blameworthiness of the strikers should also be considered and employees found to have been forced into the action should not be disciplined.[223]

The dismissal of strikers should also be procedurally fair. The employer should give the strikers an ultimatum that if the strikers refuse top return to work then they will be dismissed.[224] The ultimatum should be clear and state in unambiguous terms the consequences of failure to heed it. Hearings must be held for each individual employee to determine whether indeed the employee was on strike as alleged. The Supreme Court set aside the dismissal of strikers who had not been given the opportunity to be heard in the case of *Design Incorporated (Pvt) Ltd v Chapangura and others.* [225] In the case of *Cargo Carriers (Pvt) Ltd v Zambezi and others* were the employers conducted a mass hearing, the Supreme Court in setting aside the dismissal of the employees held that "there was no realistic way in which the applicants could convene a mass trial of 322 employees and stay within the parameters of the code".[226]

5.5.3 Criminal sanctions

Although the Labour Act grants trade unions and workers committees' immunity from civil liability when they abide by the procedures of going on strike, it creates criminal sanctions for any breach of the provisions. Under the Act,

> If a workers committee, trade union, employers organisation or federation of trade unions...recommends, advises, encourages, threatens, incites, commands, aids, procures, organises or engages in any collective action which is prohibited...he shall be guilty of an offence and liable to a fine ...or imprisonment for a period not exceeding five years, or both such fine and such imprisonment.[227]

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[223] See Gwisai (note 8) at363 to 365
[224] *Jiah and others v PSC and another* 1999 (1) ZLR 17 (S)
[225] *Design Incoporated (Pvt) Ltd v Chapangura and others* S-23-03
[226] *Cargo Carriers (Pvt) Ltd v Zambezi and others* 1996 (1) ZLR 613
[227] S109 (1) of the Act

The pool of persons who might face the criminal sanctions is broadened to cover even persons not part to the employment relationship. The Act further provides that "any person" other than those already covered who is involved in bringing about unlawful strike action will also face the criminal sanctions as stipulated above. To compound it, the Public Order and Security Act,[228] which was held not to be applicable to trade unions by the High Court is brought into the fore to deal with the persons above.[229]

It is disturbing to note that the Act intends to punish even where a strike has only been "threatened" but not resorted to. The Act has also effectively destroyed any solidarity that the workers might get from civil society, social movements and progressive media by widening the provisions to cover "any person". The Minister is given powers to declare a strike illegal, which is against the principle of the ILO Committee on Freedom of Association, which emphasised that this should lie with an independent body which has the confidence of the parties involved. Bringing criminal sanctions into labour matters has been cited as outdated and draconian. One scholar has written that:

> The time has come to dispense with criminal regulation of industrial relations. The criminal law is a crude instrument of social control. Often it is more a matter of social retribution than an effective deterrent. However effective it might be in deterring other types of social behaviour, it has failed to inhibit strikes.[230]

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[228] Public Order and Security Act (Chapter 11:17) s3
[229] See *ZCTU v ZRP Officer Commanding Harare* 2002 (1) ZLR 323 (H)
[230] MSM Brassey et al, *The New Labour Law*, 1987 (Juta and Co) at 252

Conclusion

The right to strike is a critical feature of labour law. The regulation of the right to strike in Zimbabwe is apparently inconsistent with the values that the Labour Act purports to promote. The Act provides that its purpose is to advance social justice and democracy at the workplace by giving effect to the fundamental rights of employees. However, the Act tends to give effect to these rights by one hand and take them away by the other. Freedom of association entails that workers associate to defend and promote their interests. The effective tool that workers can use to achieve this is the withdrawal of labour. The rigorous procedures that the workers have to go through in order to exercise this right are such as to make the right non-existent.

The Act also provides that it provides a legal framework within which employers and employees can effectively bargain collectively. This has been identified as one of the justifications for the right to strike, as a recognition of the power imbalances that exists between workers and employers. There however appears to be no deliberate link between the regulation of the right to strike as a weapon of countervailing the employer power and collective bargaining. Public service employees and employees in essential service have no right to strike but are not provided with effective dispute resolution mechanisms to compensate for this. For those workers that the right is purportedly available, accessing the lawful right is like accessing the proverbial needle in the haystack.

Trade unionism cannot prosper without the effective right to strike. It is submitted that effective trade unionism has positive returns not only in the employment relationship but in society at large. Thus, stifling workers in the exercise of their rights has negative effects to the social fabric of society at large. Zimbabwe has experienced this as workers take their employment frustrations from the workplace to the general political field. If workers cannot have a say in issues that affect their working lives at the workplace, then it is submitted they have all the right to take it elsewhere.

The state of affairs in Zimbabwe as regards the right to strike might be a result of lack of an effective policy towards social dialogue. Suspicion and at times pure hostility

exists between the state, the employers and the workers. The state thus views that once workers freely enjoy the right to strike, they might use this to undermine or "overthrow a democratically elected" government. It is submitted that failure to realise that for the nation to prosper the three parties have an important role to play each will lead the country into more doom.

It is also unfortunate that regional countries, though committed to the SADC Social Charter tend to turn their eyes the other side when a colleague member state abrogates the provisions of the Charter. It is suggested that the regional body could create an independent body to monitor the effective implementation of its policies to avoid it becoming nothing but a talk show.

The right to strike serves a purpose in the employment relationship. It is hoped that the lawmakers of Zimbabwe realise this and establish a legal framework that is linked to the justifications of the right, which are, as a fundamental human right and as a means to achieve equilibrium in the employment relationship.

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