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FACULTY OF LAW

DEPARTMENT OF COMMERCIAL LAW

FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING IN THE NAMIBIAN CORRECTIONAL SERVICE: RECOMMENDATIONS FOR LAW REFORM

By

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SUPERVISED BY: PROFESSOR DEBBIE WENDY COLLIER

DECLARATION

I hereby declare that this mini-thesis is my original work that all sources have been accurately quoted and acknowledged and that this thesis had not previously in its entirety or part, been submitted at any academic institution to obtain an academic qualification.

Signed by candidate

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ABSTRACT

The study explores the laws, policies and practices that prohibit the Namibian Correctional Service from organising and bargaining collectively on terms and conditions of their employment contracts. The study made recommendations based on the findings. The study was motivated by the fact that Namibia as a member state of the International Labour Organisation has ratified conventions concerning the Right to Organise and Collective Bargaining (Convention No. 98 of 1949), and the Right of Freedom of Association (Convention No. 87 of 1949). Namibia ratified the two above-mentioned conventions on the 3rd of January 1995. Convention 87 and Convention 98 provide prison staff the right of freedom of association and the right to organise, and the right to bargain collectively. These rights are also enshrined in the Namibian Constitution that "all persons shall have the right to freedom of association". However, the Namibian Correctional Service does not exercise these rights due to legislative exclusion. The Labour Act No. 11 of 2007 which provides for employers and employees to organise and bargain collectively does not apply to the Namibian Correctional Service.

Despite many inquiries and advice from the Committee of Experts on the Application of Conventions and Recommendations that Namibia must take steps to ensure that the Correctional Staff enjoy the guarantees under the two above mentioned Conventions, the Correctional Service is still not enjoying the right of freedom of association and the right to organise and to bargain collectively.

The research study employed a qualitative approach. The qualitative design enabled the researcher to gather secondary data from legislation, case laws, magazines, reports, and other relevant documents. Data were analysed using the desktop data analysis technique.

The study revealed that stringent national laws; lack of National Supervisory Body oversight of the implementation of ratified Conventions; budget constraints; shortage of Human Resources; lack of commitment by stakeholders such as trade unions, Office of the Prime Minister; and the Ministry of Home Affairs, Immigration, Safety and Security; and the failure of the Ministry of Labour, Industrial Relations and Employment Creation to review and amend the Labour Act No. 11 of 2007 that prohibits the Namibian Correctional Service to enjoy the guarantees under

Convention 98 and Convention 87, are all factors that obstruct the members of the Namibian Correctional Service to form and join a union.

As a result, the Namibian Correctional Service members are vulnerable and prone to abuse in terms of unfair discrimination relating to promotion and remuneration; unfair dismissals, poor disciplinary and grievance procedures; poor employment conditions; poor working environment/conditions, and exploitation by the employer due to lack of collective agreements. It is recommended that the Namibian Legislature amend the Labour Act No.11 of 2007 and that the Commissioner-General revoke the Commissioner of Prisons' Directive 03/2008 to ensure the application of the two Conventions to the Namibian Correctional Service by promoting collective bargaining and effective protection against anti-union discrimination in the Namibian Correctional Service. Secondly, the Correctional Officers may pursue the matter in the competent Court of law to seek a declaratory order on the constitutionality of the provisions of the Labour Act No. 11 of 2007 and the Commissioner of Prison's Directive.

ACRONYMS

CAS	Committee on the Application of Standards
CEACR	Committee of Experts on Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
CG	Commissioner-General
IG	Inspector-General
ILC	International Labour Conference
ILO	International Labour Organisation
ILS	International Labour Standards
ITUC	International Trade Union Confederation
LA	Labour Act No. 11 of 2007
LAC	Labour Advisory Council
LRA	Labour Relations Act No. 66 of 1966
MAB	Military Arbitration Board
MBC	Military Bargaining Council
MTU	Military Trade Union
Nampol	Namibian Police
NAPWU	Namibia Public Workers Union
NCS	Namibia Correctional Service
NUNW	National Union of Namibian Workers
POPCRU	Police and Prisons Civil Rights Union
PSCBC	Public Service Collective Bargaining Council

PSUN	Public Service Union of Namibia
SADC	Southern Africa Development Countries
SANDF	South African National Defence Force
SANDU	South African National Defence Union
SAPS	South African Police Service
SAPU	South African Police Union
SSBC	Safety and Security Sectors Bargaining Council

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CHAPTER 1: INTRODUCTION

An integral foundation to effective labour relations and any democratic society is the right of freedom of association and the right to organise and collective bargaining.[1] A modern industrial society that seeks to become democratic must secure the right of freedom of association and the right to organise and collective bargaining.[2] Several fundamental Conventions and recommendations of the International Labour Organisation (ILO) promote the freedom of association within the employment environments.[3] These include the Convention on the Right to Organise and Collective Bargaining (hereinafter referred to as Convention No. 98 of 1949), and the Convention on the Freedom of Association and Protection of the Right to Organise (hereinafter referred to as Convention No. 87 of 1948).

Convention No. 87 on Freedom of Association and Protection of the Right to Organise guarantees all employers and workers the right to establish and join organisations of their preference.[4] Convention No. 98 regulates the protection of workers against anti-union discrimination at the workplace and permits that consultations take place under circumstances in which employees and employers representative organisations are accorded an opportunity to express their views freely without any intimidation.[5]

Convention No. 98 has also guaranteed workers and employers representative organisations the right of protection from acts of interference by each other, and the right that such representative organisations manage their interior affairs without interference and disruption by the public authorities.[6] These two Conventions amongst others are the most ratified by the member states of the ILO. Member states that have ratified these Conventions agree to extend the rights and freedoms guaranteed by the Conventions to their respective countries.

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1 H M Seady & P S Benjamin 'The Right to strike and Freedom of Association: An integral Perspective' (1990) 11 *ILJ* 439.

2 Freedom of Association and Protection of the Right to Organise (87 of 1948); Right to Organise and Collective Bargaining (98 of 1949).

3 No. 87 of 1948

4 Article 2 of Convention No. 87 of 1948

5 No. 87 of 1948

6 Article 3 of Convention No. 87 of 1948

Although some countries' legislation recognise the right of public servants to organise, many also deny this right to certain categories of public servants or subject them to particular restrictions or limitations on account of their level of responsibility (management cadres/senior officers) or the nature of their functions (for instance prison staff and fire service personnel).[7] These restrictions, with limited exceptions, are perceived as being contrary with the provision of Convention No. 87.[8]

Convention No. 87 has only explicitly authorised the exceptions of the members of the police and armed forces in terms of Article 9, and such exceptions being justified on the basis of their obligation and responsibility for the internal and external security of the state.[9] Most Countries deny the police and armed forces the right to organise. Sometimes members of the police and armed forces are restricted to the right to organise as other categories of public servants or are entitled to organise under separate legislation.[10]

The exclusion of the armed forces and the police from the right to organise does not conflict with the provisions of Convention 87, however the same cannot be said for fire personnel and prison staff, to whom many countries nevertheless deny the right to organise.[11] The Committee of Experts is of the opinion that the functions exercised by the two categories of public servants (fire service personnel and prison staff) should not justify their exclusion from the right to organise on the basis of Article 9 of Convention No. 87.[12]

South Africa is one of the ILO member states, and ratified Convention 87 and 98 in 1995 and notably the armed forces, police, and correctional services are members of trade unions and provisions are made for their members to engage in collective bargaining with their employers.[13]

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7 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), International Labour Conference, 81st Session (1994), Geneva.

8 Ibid.

9 Article 9 of Convention No. 87 of 1948.

10 Freedom of association and Collective Bargaining: General Survey by the Committee of Experts on the Applications of Conventions and Recommendations, Report III (4B), International Labour Conference 69 session, Geneva 1983.

11 Ibid.

12 Ibid.

13 E Z Mnisi 'National security and the constitutional right to join military trade unions: is constitutional amendment an imperative?'(2017) 2 *South Africa Journal of Military Studies* 45.

South African Police (SAPS), and South African Correctional Services are covered by the provisions of the Labour Relations Act No. 66 of 1995 (LRA), whereby they are allowed to form and join trade unions and to bargain collectively.[14] This makes South Africa an interesting case. The South African National Defence Force is excluded from the provisions of the Labour Relations Act.[15]

In South Africa, a highly controversial issue of whether or not to grant labour rights to military personnel was heard in the Constitutional Court. The South African Constitutional Court granted armed forces certain labour rights, such as the right to form and join trade unions and the right to collective bargaining.[16] The Constitutional Court Judgement stood short of extending these rights to include the right to strike, but the right to strike was not requested, hence, it was not granted.[17] This unique experience of South Africa might be of interest to other countries dealing with similar issues, including Namibia.

It is provided in the Constitution of the Republic of Namibia (hereinafter referred to the Namibian Constitution) that all persons shall have the fundamental right to freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties.[18] The Namibian Constitution guarantees the exercise of freedom of association, subject to the Law of Namibia, in so far as such law imposes reasonable restrictions.[19]

Namibia as a member state of the ILO has also ratified Convention No. 98 and 87 on 13 January 1995. The Namibian Government has no exemption but to ensure effective implementation of the two Conventions, and that the guarantees provided by the Conventions are extended to the Prison Service (the Namibian Correctional Service).[20]

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14 Labour Relations Act 66 of 1995.
15 Section 2 of LRA 66 of 1995.
16 Lindy Heinecken and Michelle Nel 'Military unions and the right to collective bargaining: Insights from South African experience' (2007) 3 *The International Journal of Comparative Labour Law and Industrial Relations* 23.
17 See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC).
18 Constitution of the Republic of Namibia, 1990.
19 Article 21(2) of the Constitution of the Republic of Namibia. The Namibian Constitution is divided into 'Articles' and not 'Sections', unlike the South African Constitution which is divided into 'Sections'.
20 SADC-ILO workshop on ILO Conventions No. 87 on Freedom of Association; No. 98 on Collective Bargaining; No. 144 on Tripartite Consultations (ILS) and No. 151 on Labour Relations (Public Service), Johannesburg (2017).

The Namibian Correctional Service (NCS) previously known the Prisons Services, was established in 1994 in terms of article 121 of the Namibian Constitution and is administered in terms of the Correctional Service Act No. 9 of 2002.[21] It contributes to the safety of the public, by administering and managing thirteen Correctional facilities across the country. The facilities have different sizes, functions, and different types of offender populations.[22] The NCS also monitors offenders who have been sentenced to Community Service Orders. Its workforce is approximately 2700 uniform and non-uniform staff members.[23]

The Namibia Correctional Service has adopted the military rule style of management which was inherited from the previous government before independence. Its members are required to salute and wear ranks as military personnel. They are remunerated under the unified pay structure for all public servants, with the same salary grades and notches, common allowances such as housing, transport, and rent.[24]

In terms of section 2(2)(d) of the Labour Act No. 11 of 2007, the Namibian Correctional Service is excluded from the provision of the Act.[25] Previously, from 1994, the correctional officers were organising and were members of the Public Service Union of Namibia (PSUN) and Namibia Public Workers Union (NAPWU) until 2007 after the Labour Act No.6 of 1992 was repealed.[26] It is evident from the speech of the then Minister of Prisons Services, Dr. Nick Iiyambo during the workshop in 2008 that the decision to exclude the police force and prison services members from joining trade unions is in the interest of national security.[27] The workshop was held to allow police and correctional officers to be covered by the Labour Act No. 11 of 2007, and join labour unions.[28]

[21] See Article 121 of the Namibian Constitution.
[22] Namibian Correctional Service Strategic Plan 2017-2022.
[23] Ibid
[24] Public Service Act 13 of 1995.
[25] Labour Act 11 of 2007.
[26] Labour Act 6 of 1992.
[27] P M Teek, Workshop report on Police Labour Relations in Namibia: Time for a new beginning, Windhoek (2008).
[28] Ibid.

1.1 The problem informing the research

As it was mentioned above, Namibia as a member state of the International Labour Organisation has ratified the ILO Convention on Freedom of Association and the Right to Organise Convention, No. 87 (hereinafter referred to as Convention No. 87 of 1948) and Convention on the Right to Organise and Collective Bargaining No. 98 (hereinafter referred to as Convention No. 98 of 1948) in 1995.[29] Both Conventions on the Freedom of Association No. 87 the Convention on Collective Bargaining No. 98 provides for the rights of prison staff.[30]

However, the Namibian Correctional Officers (Prison Staff) are not enjoying the right of freedom of association and the right to organise, and the right for collective bargaining because they are excluded by the provisions of s 2(2)(d) of the Labour Act No. 11 of 2007.

Section 2(2) reads as follows;

2. subjects to subsections (3) and (5), all other sections of this Act apply to all employers and employees except to members of the –

> (d) Prison Service, unless the Prison Service Act, 1998 (Act No. 17 of 1998) provides otherwise.[31]

The Prison Service Act, No. 17 of 1998 is no longer in force, it was repealed in 2002. The Act provided for prison staff to form unions and organise, however it was replaced by the Correctional Service Act, No. 9 2002 (hereinafter referred to as the Correctional Service Act, 2002). At the same time, the new Labour Act, No. 15 of 2004 (herein referred to as the Labour Act, 2004) was in the process of being promulgated and was enacted on the 22 November 2004. The Labour Act, 2004 excludes the prisons services from its provisions, and to form trade unions.[32] The Labour Act of 2004 was subsequently repealed by the Labour Act No. 11 of 2007. It was only in operation for two (2) years before it was repealed.

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[29] Application of International Labour Standards: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (A), International Labour Conference 109th session, 2020.
[30] Convention No. 98 and No. 87.
[31] Section 2(2) of Act 11 of 2007.
[32] Labour Act 15 of 2004
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According to the Regional SADC-ILO workshop, the ILO Committee of Experts on Application of Conventions and Recommendations (CEACR) expressed the hope that Namibia would extend the guarantees under the conventions No. 87 and No. 98 to the Prisons Service staff through the introduction of a new Labour Act within a short period.[33] According to the Observation of the CEACR adopted in (2008),[34] the Committee of Experts noted the comments submitted by the Public Service Union of Namibia (PSUN) in a communication of 26 October 2007, and by the International Trade Union Confederation (ITUC) communicated on the 29 August 2008, regarding the application of the Conventions 98 and 87 and, in particular, the exclusion of prison service staff from the provisions of the new Labour Act No.11 of 2007, and from the guarantees afforded by the Conventions.[35] The Committee of Experts noted that section 2(2)(d) of the Labour Act, 2007 excludes the members of the Namibian Correctional Service from the Labour Act's provisions, unless the Prisons Service Act provides otherwise. The Committee further notes in this regard that, the Prisons Service Act does not provide for the extension of the new Labour Act's guarantees to the Namibian Correctional Service members, nor does it contain any provisions establishing freedom of association rights for the Correctional Service members.[36] The Committee opined that all public service workers, with the sole possible exception of the armed forces, the police, and public servants directly engaged in the administration of the State, should enjoy the rights enshrined in the Convention 87, including the right to collective bargaining guaranteed by Convention 98.[37]

In the Observation of the CEACR adopted in (2010), the Committee notes that the Namibian Government indicated in its report that it is in the process of consulting the Cabinet with the hope that permission will be granted to proceed with the legislative amendments that are required.[38]

Again the CEACR's Observation adopted in (2014), the Committee of Experts (CEACR) took note of the Namibian Government's submission that the amendment of the Labour Act has not

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33 SADC-ILO workshop on ILO Conventions No. 87 on Freedom of Association; No. 98 on Collective Bargaining; No. 144 on Tripartite Consultations (ILS) and No. 151 on Labour Relations (Public Service), Johannesburg (2017).
34 In the Observation Report of 2008, International Labour Conference, 98th Session.
35 Act 11 of 2007.
36 In the Observation Report of 2008, International Labour Conference, 98th Session.
37 Ibid.
38 Observation Report 2010, International Labour Conference 100th.

yet been tabled to Cabinet. The Committee (CEACR) further notes that in 2014, a suggestion was made for a tripartite meeting to include the Minister of Prisons Service, The Minister of Labour and Social Welfare, a union representative supported by ILO technical staff to discuss the way forward to resolve this matter.[39] The Committee further requested the Government to provide information on developments in relation to the adoption of new legislation regarding the guarantees to the Namibian Correctional Service members.

The most recent Observation on the rights of prison staff of the CEACR was adopted in 2017. It is noted that the Committee requested the Namibian Government to provide information on developments in relation to the adoption of the new legislation in this matter.[40] The Committee notes the Government's statement in its report on the application of 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), for the year 2017, in which it indicates that a Tripartite Working Committee has been established and is currently reviewing the Labour Act, including the prisons service issue.[41]

Subsequently, the Committee indicated its hope and expectation that the Namibian Government will take into consideration the comments it has been making in this matter for a number of years during legal review to make necessary legislative amendments, in order to ensure that prisons staff enjoy the rights enshrined in the Conventions No. 87 and 98. It further requested the Government to provide information on any progress made with regard to legislative amendments.[42]

After the Enactment of the Labour Act No. 11 of 2007 that excludes the Correctional Officers from its operation, the officers found it difficult to negotiate terms and conditions of employment with the government because they do not belong to any union that has the bargaining power to represent them during collective bargaining proceedings.[43] Correctional members only benefit from salary adjustments when there is a general salary negotiation between the Namibia Public Workers Union, Namibia National Teachers Union, and the Government. But, only if the general

[39] Observation Report 2014, International Labour Conference 104th.
[40] Observation Report 2017, International Labour Conference 107th.
[41] Observation Report 2017, International Labour Conference 107th.
[42] Observation Report 2017, International Labour Conference 107th.
[43] Workshop report on Police Labour Relations in Namibia: Time for a new beginning, Windhoek (2008).

salary adjustment applies to the entire public service staff members.[44] In the Namibian public service, only two unions have the bargaining power to enter into collective agreements with the government. NAPWU represents all other public servants, while NANTU only represents teachers.[45]

1.2 The objective of the study

The objective of the study is to identify barriers that prevent the Namibian Correctional Service from organising and collective bargaining; and to propose recommendations that will enable the Namibian Correctional Service to organise and bargain collectively.

1.3 Research questions

- Does the Namibian Correctional Service enjoy the right of freedom of association, the right to organise, and the right to collective bargaining?
- What are the barriers that prohibit the Namibian Correctional Service to organise and bargain collectively?
- What are the possible measures to be employed to enable the Namibian Correctional Service to organise and bargain collectively?

1.4 Significance of the study

The recommendations will provide a pathway for members of the Namibian Correctional Service to enjoy the right of freedom of association, the right to organise, and the right to bargain collectively like all other public servants. This study will be useful to the Government of the Republic of Namibia specifically the Ministry of Labour, Industrial Relations and Employment Creation to implement the International Labour Organisation's Convention 1948 (No. 87) and Convention 1949 (No. 98) which was ratified by Namibia in 1995. The findings of the study justify the amendment and alignment of the labour legislation to comply with the provisions of the Namibian Constitution.

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[44] Ibid.
[45] Ibid.

1.5 Research Methodology

To answer the research questions and explore the research problem of this study, attention is given to the legislation on the right to organise and collective bargaining as well as on freedom of association in the workplace of the Namibian Correctional Service. In addition, the two rights cannot be studied in isolation without considering the provisions under the Namibian Constitution and the relevant enacted laws passed by the Parliament of the Republic of Namibia. Furthermore, Conventions that form part of the international labour law, instrumental in the enactment of the Namibian labour law, and are ratified and binding on the Republic of Namibia, are also considered. Relevant case laws and reports on the rights under discussions are also reviewed and referenced. Moreover, the nature of the study requires the historical background of the implementation of the two Conventions on the Namibian Correctional Service to be traced from 1995, the year Namibia ratified the two Conventions. As a result, the methodological approach of this study is qualitative. The study employed the qualitative approach to lead to the acceptance of assured truth in the outcome of the study and to allow exploration of possible good practices that will enable the Namibian Correctional Service to exercise its right of freedom of association, the right to organise, and to bargain collectively on the terms and conditions of employment.

The nature of this study is desktop-based research. Desktop research involves the collection of secondary data without conducting a field survey.[46] In short, the study employed textual analysis by gaining information or knowledge by perusing both primary and secondary sources. The methodology was chosen in consideration of the research problem, objectives, and the presented research questions. Therefore, the methodology is appropriate in the time and space constraints related to the study, as the primary sources and secondary data for the study are available and accessible. Saunders, Lewis, and Thornhill stress that with the inductive approach, the research questions guide the collection of secondary data which will be used to generate theory and hypothesis.[47] The techniques employed to collect data were an in-depth review of secondary data from the case laws, reports, academic research, ILO Observations, Recommendations and Conventions, Statutes such as the Public Service Act No. 13 of 1995, the Labour Act No. 11 of

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[46] John Cresswell *Educational Research, Planning, Conducting and Evaluating Qualitative and Quantitative research* 4 ed (2014).

[47] Mark Saunders, Lewis Phillip and Adrian Thornhill *Research Methods for Business Students* (2012).

2007, the Namibian Correctional Service Act No. 9 of 2002, The Constitution of the Republic of South Africa, The Constitution of the Republic of Namibia, and the Labour Relations Act No. 66 of 1995. Primary and secondary sources were reviewed to ensure that the required data has been considered and that it is objective and unprejudiced. The data was collated and summarised to ensure the accessibility and usefulness of the findings of this research. The print materials were reviewed to gather both historical and present information to conclude the findings of this study.

Data were analysed by employing two types of data analysis. The first is content analysis which is used to identify key factors and concepts related to the right of freedom of association, the right to organise, and collective bargaining in the Namibian Correctional Service. The second type is gap analysis, this study reviewed existing data to identify the areas that need to be researched further by future studies. The gap analysis focused on the results of the content analysis to identify potential pointers that may need to be further explored to eliminate barriers and enable the Namibian Correctional Service members to organise and bargain collectively as other public servants.

1.6 Ethics Statements

The processes and procedures that followed and adhered to, met ethics requirements. The research did not violate any rule or procedure of the public service. It adhered to ethical research standards set by the Faculty of law, University of Cape Town.

CHAPTER 2. INTERNATIONAL LABOUR STANDARDS

2.1 Convention No. 87: Freedom of Association and Protection of the Right to Organise

One of the cornerstones of liberal democracy and health labour relations is the right to freedom of association.[48] This right gives a guarantee to the formation of organisations such as employee representatives (trade unions) and employers' representative organisations, which enhance democracy in the workplace.[49]

Freedom of association enjoys a prestige status in the international agenda of human rights. It also serves as a principal pillar for policies on labour market governance and labour laws.[50] It is a foundational right for the International Labour Organisation (ILO), informing its tripartite structure and Conventions, Recommendations and Experts Advice.[51] It is part of the fundamental principles and rights at work and a constitutional right in many countries, including Namibia. It is an enabling right that makes the fulfilment of other rights possible.[52] The freedom of association is enshrined in International Conventions and State Constitutions, and it has triumphed in many statutes and judicial decisions around the world.[53]Association in the labour context can be viewed as yet another fulfilment of the general freedom to associate, as are the association of social clubs, shareholders, social movements, political party members, etc. Ultimately, it is also regarded as a unique right that constitutes a central pillar for governing the labour market, a right intended to achieve equality, fairness, emancipation, liberty, and dignity.[54]

One of the most important Conventions of the ILO on the freedom of association is Freedom of Association and the Right to Organise, No. 87 of 1948. This Convention guarantees that employees should not be denied rights to form or join organisations as members based on their

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48 M Salamon *Industrial Relations: Theory and Practice 4 ed* (2000).
49 H M Seady and P S Benjamin 'The Right to Strike and Freedom of Association: An International Perspective' (1990) 11 *ILJ* 435.
50 B Molatlhegi 'Workers; Freedom of Association in Botswana' (1998) 42 *Journal of African Law* 64.
51 Ibid.
52 Ibid.
53 M Budeli 'Freedom of Association for Public Sector Employees' (2003) 44 *Codicillus* 49.
54 Ibid.

occupation, origins, age, sex, etc.[55] In the same way, domestic laws or practices that impose such limitations contravene article 2 of Convention 87. Convention 87 protects the autonomy of the trade unions explicitly from the state's interference, under Articles 2, 3, 4, 5, and 6.[56]
Namibia ratified this major Convention of the ILO in 1995. Concerning freedom of association, article 2 of the Convention 87 of 1948, provides that:

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their choosing without previous authorisation".[57]

Article 9(1) of the same Convention provides:

> "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations".[58]

The terms 'employers' and 'workers' in Convention No. 87 underline the fact that the instrument guarantees the right of association in the world of work and for trade union purposes, which is within the competence of the International Labour Organisation, and not the right of association in general which falls within the competence of other international agencies.[59]

It was highlighted during the preparatory work on Convention No. 87 that freedom of association was to be guaranteed not only to employers and workers in private industries, but also to public employees.[60] In view of that, the law and practice report prepared by the ILO provided that public servants and officials should be covered by that instrument.[61] The guarantee of the right of association should apply to all employers and workers, private or public, and therefore, to public servants and officials and to workers in nationalised industries.[62] It is considered discriminatory to draw any difference regards freedom of association between wage-earners in private industry

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55 No. 87 of 1948.
56 Ibid.
57 Article 2 of the Convention 87.
58 Article 9(1) of the Convention 87.
59 Article 2 of the Convention 87.
60 M Budeli 'Freedom of Association for Public Sector Employees' (2003) 2 *Codicillus* 44.
61 Freedom of Association: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report VII, International Labour Conference 30th session, 1947.
62 M Budeli 'Freedom of Association for Public Sector Employees' (2003) 2 *Codicillus* 44.

and officials in the public services, since all persons in any category should be allowed to defend their interests by becoming organised.[63] The Committee of Experts has considered that the exclusion of the public servants from this fundamental right is contrary to the Convention.[64]

It is evident from the provisions of Convention 87 that armed forces, prisons service, and the police are covered within its scope, while the extent to which the provisions of the Convention shall be applied to armed forces and police should be according to the national law of the member state, in accordance with Article 9. Hence, ILO considers members of the defence force, prisons service and police to be workers for Convention 87.[65]

Consequently, the ILO explicitly contemplates that the position for the armed forces and police, is different, and it leaves it open to member states to determine the extent to which the provisions of the Conventions 87 and 98 should be applied to members of the armed forces and police.[66] However, the prisons services are not included in the Convention as exceptional, and members of the prisons services are therefore not to be treated on the same footing as the armed forces and police. The International Labour Organisation has advised member states to enact national laws or regulations that should regulate the application of Convention 87 to the armed forces and police.[67]

Article 15(1) of Convention 87 stipulates that-

> "This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General".[68]

This denotes that upon a member state's ratification being registered with the Director-General, the ratified Convention becomes part of the national law of that specific member state and the

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63 Freedom of Association: *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (Revised Ed) 2006.
64 International Labour Conference, 30th Session, 1947, Report VII, Freedom of association.
65 Article 9 of Convention 87.
66 Article 9 of Convention No. 87 and Article 5 of Convention No. 98.
67 Article 9 of Convention 87.
68 Article 15(1) of Convention 87.

Convention has to be honoured. The Convention comes into force for a member state that has ratified it, twelve months after the date which its ratification has been registered.[69]
Namibia has also ratified the Freedom of Association and Protection of the Right to Organise Convention No. 87, on 13 January 1995. Namibia was expected to put this Convention in force on 12 January 1996, twelve months after the date which its ratification has been registered with the Director-General. Noting that, under the provisions of the Labour Act, No. 6 of 1992,[70] the Namibian prison staff were members of trade unions. In 2007, Namibia repealed the old labour legislation and introduced the Labour Act, No. 11 of 2007, which excluded the prison staff.[71]

2.2 Convention No. 98: The Right to Organise and Collective Bargaining

In many labour economies, collective bargaining is extensively accepted as the primary tool of determining conditions and terms of employment. In some contexts, collective bargaining has been characterised as being adversarial between organised labour and employers.[72] In most instances, collective bargaining involves negotiation between parties with contradictory interests seeking to mutually attain acceptable agreements.[73] It plays an important role in granting employees a greater voice in organisations.

One of the core principles of the ILO is social dialogue, including collective bargaining. The ILO urges that social dialogue must be part of labour relations regulations in the public sector.[74]
Bargaining and dialogue can contribute to the public sector's performance, efficiency, and equity. Governments and public trade unions are also encouraged to bring collective bargaining

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[69] Article 15(3) of Convention 87.
[70] Labour Act No. 6 of 1992. The correctional Service members were organising since its establishment in 1994 before even Namibia ratified the Conventions 87 and 98 in 1995.
[71] Section 2(d) of the Labour Act 11 of 2007.
[72] D Du Toit 'What is the Future of Collective Bargaining and (Labour Law) in South Africa?'2007 *ILJ*.
[73] Godfrey Shane, Maree Johann, Darcy Du Toit and Jan Theron '*Collective Bargaining in South Africa – Past, Present and Future?* (2017).
[74] 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), International Labour Conference, 81st Session (1994), Geneva.

and social dialogue in the public sector because of competing interests.[75] Collective bargaining is a key contributor to conflict management and enhances industrial peace.[76]

The ILO Social Dialogue, Labour Law and Labour Administration Department published Paper No. 17, Public service labour relations: A comparative overview, which outlined the procedures for determining the terms and conditions of employment and dispute resolution mechanism in several countries. The report underlined the need to develop effective systems for the avoidance of industrial strife and conflicts resolution as envisaged by Article 8 of the Labour Relations (Public Service) Convention No. 151, 1978.[77]

Article 8 of Convention 151 provides that-

> "The settlement of disputes arising as a matter of determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between parties, or through independent and impartial machinery, such as mediation, conciliation, and arbitration, established in such a way to ensure the confidence of the parties involved".[78]

The Committee on Freedom of Association has pointed out the need for consultation with representatives of the government workers when considering crisis-related measures that affect their terms or conditions of employment.[79] It has been established that many states have employed collective bargaining to restrain the impact of a disaster in public administration. The CEACR highlighted that collective bargaining and social dialogue can help public services to maintain qualified and motivated staff, and a dynamic and depoliticised public management and administrative culture, with ethical focus, which combats administrative corruption, make use of new technologies, and are founded on the principles of confidentiality, responsibility, reliability, transparent management, and non-discrimination, both in access to employment and in the provision of benefits to the public.[80] Collective Bargaining is also found to contribute to

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[75] E Yemin 'Industrial Relations in the Public Service: A comparative Overview' 1993 *International Labour Review* 469.

[76] Ibid.

[77] Convention 151 of 1978.

[78] Article 8 of Convention 151 of 1978.

[79] *Freedom of association in practice: Lesson learned, International Labour Conference*, 97th Session, 2008.

[80] ILO: *Declaration of Fundamental Principles and Rights at Work and its Follow-up*.

adaptation to economic and political change, social peace, the fight against corruption, and promotes equality.[81]

To ensure that basic rights and the institution of social dialogue mechanisms are respected and acknowledged, Convention 98 and 87 must inform related policies and practices.[82] The Freedom of Association and Protection of the Right to Organise Convention 87 and the Right to Organise and Collective Bargaining Convention 98 enshrine basic workers' rights to organise and bargain collectively, including public services workers. "Robust democracy and freedom of association and collective bargaining rights may result in greater social and economic stability that improves economic performance and global competitiveness".[83]

The Principles and standards emerging from the ILO Recommendations, Conventions, and other instruments on the right to collective bargaining, and the principles set forth by the Governing Body, CEACR, and Committee on Freedom of Association based on these instruments, may be summarised as follows: ILO principles on the right to collective bargaining indicate that the right to collective bargaining is a fundamental right which States, on account of their membership of ILO, are obliged to respect, realise, and promote in good faith.[84] On the one hand, collective bargaining is a right of employees and their trade unions (industrial trade unions, federations, and confederations), and on the other hand, employers and their organisations. Public and private sectors should recognise the right to collective bargaining, and only the armed forces, the police, and public servants engaged in the administration of the state may, to the extent of the provisions of Convention 98 be determined by national laws.[85]

As it was mentioned above, the right to collective bargaining is also applicable in the context of public administration, and special modalities of application may be fixed per the provisions of the Convention. Collective bargaining aims to regulate the terms and conditions of employment in relations between parties.[86]

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81 Godfrey Shane, Maree Johann, Darcy Du Toit and Jan Theron '*Collective Bargaining in South Africa – Past, Present and Future?* (2017).
82 Ibid.
83 D Dutoit 'Statutory Collective Bargaining: A duty of fair representation?' 1993 *ILJ* 1167-1173.
84 *Freedom of association in practice: Lesson learned, International Labour Conference*, 97th Session, 2008.
85 Article 5 of Convention 98 of 1949.
86 *Freedom of association in practice: Lesson learned, International Labour Conference*, 97th Session, 2008.

The International Labour Organisation's Convention 98 of 1949 guarantees the right to organise and collective bargaining to workers, trade unions, and employers and employers' organisations. Article 1 of Convention 98 outlines that workers shall enjoy satisfactory protection against actions of anti-union discrimination in respect of their employment.[87] The Article further guaranteed protection more particularly against the acts that subject the employment of a worker to a condition that he/she shall not join a union or shall renounce trade union membership; and protection against the dismissal of or prejudice an employee for being a union member or because of participation in union activities outside working hours, or with the consent of the employer during working hours.[88]

The provision under Article 4 of Convention 98 assured that "measures appropriate to national conditions shall be pursued, where necessary, to promote and encourage the complete development and utilisation of platforms for voluntary negotiations between employers or employers' organisations and employees' trade unions, to regulate terms and conditions of employment by employing collective agreements".[89]

Members of the armed forces and police are also considered for this Convention but considered that their position is different. The Convention leaves it open to the member states to determine the scope to which the provisions of the Convention should be applied to members of the police and armed forces.

Article 5 of Convention 98 stipulates that:

> "The extent to which the guarantees provided for in Convention 98 shall apply to the armed forces and the police shall be determined by national legislation or regulations". [90]

In terms of Article 8 of Convention 98,

> "This convention shall be binding only upon member states of the International Labour Organisation whose ratifications have been registered with the Director-General".[91]

Namibia has also ratified Convention 98 on 13 January 1995. Similarly to Convention 87, Namibia is expected to put it in force on 12 January 1996, twelve months after the ratification was registered with the Director-General.[92]

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[87] Article 1 of Convention 98.
[88] Article 1 of Convention 98.
[89] Article 4 of Convention 98.
[90] Article 5 of Convention 98.
[91] Article 8 of Convention 98.

2.3 The difference between freedom of association and freedom to strike, and the meaning of collective bargaining.

One should first be defining the two phrases to explain the relationship or difference between freedom of association and freedom to strike. Freedom of association comprises an individual's rights either to join or leave groups voluntarily and the right of an association to accept or decline membership based on certain requirements.[93] Freedom to strike is the right of the group to take collective action for a legal purpose by use of legal means to pursue the interests of its members.[94] It has been suggested that the two require one another because the freedom to strike is a species of freedom of association. Freedom to strike is a passage through which workers exercise their freedom of association which is their fundamental entitlement. A strike is an economic weapon that can be used by workers in instances where the employer unilaterally changed the terms and conditions of employment.[95] The right to form or join a trade union of one's choice is characterized as the right to freedom of association.[96] This argument conforms to the ILO jurisprudence. ILO standards provide that the right of workers and employers to form and join organisations of their choosing is an integral part of a free and open society.[97]

It was highlighted by Gernigon, Odero and Guido that in the absence of freedom of association or in the absence of workers' and employers' organisations that are independent, autonomous, representative and endowed with the necessary guarantees and rights for the defence and furtherance of the rights of their members and the advancement of the common welfare, the principle of tripartism would be impaired if not totally stripped of all meaning, and the chances for greater social justice would be seriously prejudiced.[98]

Without freedom of association or, in other words, without employers' and workers' organizations that are autonomous, independent, representative and endowed with the necessary

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92 Article 8 of Convention 98 and Article 15 of Convention 87.
93 M Budeli 'Freedom of Association for Public Employees' (2003) 44 *Codicillus* 2.
94 B Nkabinde 'The Right to Strike, an essential Component of Workplace Democracy: Its Scope and Global Economy' (2009) 24 *Maryland Journal of International Law* 270.
95 L Madhuku 'The Right to Strike in Southern Africa' (1997) 134 *International Labour Review Journal* 509.
96 B Gernigon; A Odero and H Guido, ILO Principles Concerning the Right to Strike (1998) 137 *International Labour Review Journal* 4.
97 Convention No. 98.
98 B Gernigon; A Odero and H Guido, ILO Principles Concerning the Right to Strike (1998) 137 *International Labour Review Journal* 4.

rights and guarantees for the furtherance and defence of the rights of their members and the advancement of the common welfare, the principle of tripartism would be impaired, if not completely stripped of all meaning, and chances for greater social justice would be seriously prejudiced.[99]

Guarantees in freedom of association are not restricted. In some instances, public authorities restrict the right to assemble. Still, the relevant authority has to prove that this restriction is necessary and a last resort. The right to strike stimulates the functions of the trade union. Yet, the right to strike is not inherent in the right to freedom of association.[100] The workers can enjoy the freedom of association without the right to strike because the right to strike is not an inherent component of the freedom of association. The South African National Defence Force was granted the right to freedom of association by the Constitutional Court without the right to strike.[101] This prompts limitations or restrictions of the right to strike in certain industries which may be justified, for instance, in essential services. Authorities can restrict the right to strike to protect national security or public safety, prevent crime or disorder, and protects the health, morals, and freedoms of others.[102] However, workers cannot be denied the right to strike unduly or without legal justification.[103]

According to ILO Convention No. 154 of 1981, on Collective Bargaining, collective bargaining refers to all negotiations which take place between an employer, a group of employers, or one or more employers' organizations, on the one hand, and one or more workers' organizations, 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 workers' organization or workers' organizations.[104]

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99 Ibid.

100 L Sheldon 'Can you derive the right to strike from the Right to Freedom of Association?' (2010) 15 *Canadian Labour and Employment Law Journal* 271.

101 *South African National Defence Union v Minister of Defence and Other* 1999 (4) SA 469 (CC).

102 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), International Labour Conference, 81st Session, 1994. Geneva.

103 Ibid.

104 Convention 154.

2.4 The exceptions to the right to strike

It was discussed above that the ILO standards guaranteed in Convention 87 that all 'workers' without distinction whatsoever be entitled to establish and join trade unions or organisations of their choosing without intimidation. However, the recognition of the right of association of public servants in no way anticipates the question of the right of such officials to strike.[105]

Different jurisdictions have protected strike action or recognize a right to strike. In many industrialised economies or countries, the right to strike has been extended to public services.[106] The freedom to strike has been recognized by the ILO since strike action is a fundamental entitlement for enforcing the right of freedoms of workers' trade unions or organisations to organise their activities.[107] The right to strike is also recognized as a fundamental right in both regional and international instruments. Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights,[108] (hereinafter referred to Covenant) states-

> "The State Parties to the present Covenant undertake to ensure:
> the right to strike provided that it is exercised in conformity with the laws of the particular country".

Paragraph 4 of the Voluntary Conciliation and Arbitration Recommendation No. 92 adopted in 1951 refers to strikes and lockouts. Paragraph 7 of these Recommendations state that-

> "No provision of this recommendation may be interpreted as limiting, in any way whatsoever, the right to strike".

However, in addition to the fact that it is not binding, it does not itself recognize or regulate the right to strike.[109]

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) maintains that the right to strike is based on Article 3 of Convention 87 which stipulates that-

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105 Jane Hodges-Aeberhard and Alberto Odero de Dios 'The PRINCIPLES OF Committee on Freedom of Association concerning strikes' (1987) 5 *International Labour Review* 126.
106 Ibid.
107 Convention 98 of 1949.
108 Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights.
109 Voluntary Conciliation and Arbitration Recommendation No. 92.

> "Workers and employers' organisations shall have the right to organise their administration and activities and to formulate their programs".[110]

The CEACR, worryingly, in its 1994 General Survey paragraph 145 stated that-

> "in the absence of an express provision on the right to strike in the basic text, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject matter".[111]

The Namibian Labour Act (hereinafter referred to Labour Act No. 11 of 2007) also provides for the right to strike. Section 74(1) states that-[112]

> Subject to section 75, every part to a dispute of interest has the right to strike or lockout if-
>
> (a) the dispute has been referred in the prescribed form to the Labour Commissioner for conciliation under section 82;
>
> (b) the party has attended the conciliation meetings convened by the conciliator
>
> (c) the dispute remains unresolved at the end of
>
> (i) a period of 30 days from the date of the referral;

Due to the number of cases involving specific national practices and provisions restricting strike action, the CEACR concluded that restrictions on strike action, be the *de facto* or *de jure*, are not compatible with Conventions.[113] Nevertheless, the CEACR admits that there is a general principle allowing comprehensive regulation on a right to strike.[114] The Committee of Experts opines that the limitations on the right to strike require special justification which must be interpreted restrictively.[115] In the essence of 'essential services', the limitation of the right to strike is permitted only when the interruption of these services endangers the personal safety or

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110 Article 3 of Convention 87.

111 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), International Labour Conference, 81st Session, 1994. Geneva.

112 Section 74(1) of Labour Act 11 of 2007.

113 Report III (Part 4B), International Labour Conference, 81st Session, 1994.

114 Report III (Part 4B), International Labour Conference, 81st Session, 1994.

115 Ibid.

health of the entire population or part of the population.[116] The legislator limits the right to protect and provide for the welfare of the citizens' life and health.[117]

Notwithstanding, the fact that the ILO recognizes the freedom to strike, the international labour body also recognises three limitations: in the essential services, armed forces, and police service. It is stated in the Convention No. 87 that the extent to which this Convention to be applied to the members of the armed forces and police must be regulated by national laws.[118] If limitations are necessary for example, the right to strike of the armed forces and police, national laws must be promulgated to regulate the application of Convention 87 to the armed forces and police as well as public servant working on the administration of the state.[119]

Nevertheless, public servants' rights to strike are protected at the international level. Both the CEA and the CEACR agree that where the freedom to strike of public servants has been limited or prohibited, the officers should enjoy adequate guarantees to protect their interests at the workplace.[120] This may include conciliation and arbitration of disputes of interest on the condition that the arbitration award is binding on both parties and is fully implemented.[121]

As it is outlined above, regardless of the ILO support for the freedom to strike in the public sector with limitations on the armed forces, police, and essential services, in Namibia and as an ILO member state, the freedom to strike is completely prohibited in the armed forces, police, prison, and essential services. The question, though, is whether this prohibition on the armed forces, police, prison, and essential services' is justifiable in a democratic society in which the rule of law is encompassed. It was held in the South African Constitutional Court by O'Regan, in *SANDU v Minister of Defence and Others*,[122] that it has been said in previous cases that at times the interpretation of rights should be generous and such as to accord individuals the full protection of rights, although it has also been said that a purposive interpretation of rights will not always require a generous one.

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116 Ibid.
117 Ibid.
118 Convention 87.
119 Ibid.
120 Report III (Part 4B), International Labour Conference, 81st Session, 1994.
121 Ibid.
122 *SANDU v Minister of Defence and Others* 2007 (5) SA 400 (CC).

It was, however, argued in *SANDU v Minister of Defence and Others* that a trade union can function and can assist and further the interest of its members without participating in strike action.[123] The SANDF was granted the right to form and join SANDU without granted the right to strike. SANDU (the applicant) accepted that strike action was not appropriate in the military setup or context, hence the right to strike was not sought.[124] However, SANDU argued that the prohibition of strike action in the military should not prevent members of the SANDF from joining trade unions of their choosing.[125]

Though the Namibian Labour Act provides for the right to strike, this provision is not extended to the Namibian Correctional Service because it is excluded from its provisions. In effect, the Namibian Government has prohibited the correctional service from exercising the rights guaranteed in terms of Convention 87 and 98.[126]

In any democratic society, it is common that there are some grounds upon which any or some of the rights in the Bill of Rights may be limited or prohibited. Hence, this study also discusses the possible justifiable grounds upon which the right to strike may be prohibited in the Namibian Correctional Service. In *SANDU v Minister of the Defence Force & Others*, O'Regan held that-

> "The peculiar character of the Defence Force may well mean that some of the rights conferred upon workers and employers as well as trade unions and employers' organisations by section 23 may be justifiably limited".[127]

It is in the same vein that, due to the uniqueness of the character of the Namibian Correctional Service, the strike may be justifiably limited and not sweepingly prohibited. The Namibian Government's objective to protect the essential services is sufficiently important for the Constitution. It should be demonstrated that this objective justifies the limit on freedom of association imposed by the abrogation of the right to strike. It is, however, desirable that, to impair as little as possible the freedom of association of the Namibian Correctional Service by a legislative prohibition to strike, such prohibition must also be accompanied by a mechanism for

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123 Ibid.
124 Ibid.
125 Ibid.
126 Section 2(d) of Act 11 of 2007 prohibits the provisions of the Labour Act to the Correctional Service.
127 See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC).

dispute resolution by a third party which would adequately safeguard the members' interest. The members can enter into a service agreement that regulates strikes within the Namibian Correctional Service. O'Reagan in *SANDU v Minister of the Defence Force and Other*[128] held that a different and narrower legislative prohibition must be enacted to restrict the rights of expression of uniformed military personnel. This may be held to be a justifiable infringement of the freedom of expression.[129]

In some instances, the right to strike is not inherent or absolute. Hence, the International Labour Organisation recognises some exceptions (limitations) that may function against the right to strike. Contrary to these exemptions or limitations recognised by the ILO, the restriction and/or prohibition imposed on the right to strike will be in conflict with the International Labour Standards.[130] "General prohibition against the guarantee of the right to strike may be justifiable in the existence of acute national emergency".[131] Nevertheless, in such or similar situations, prohibition should only be for a specified or limited time. It is imperative to note that during a national emergency or disaster, it should be the responsibility of an independent body that has the confidence of all parties concerned, to suspend the strikes in the event of national security or public health, and not the government.[132]

In addition to the general exemption discussed above, the ILO recognises three groups that their right to strike may be limited. These are the members of the police, armed forces, and certain public officials engaged in the administration of the state.[133] The extent to which the exemptions or limitation or prohibition to the three groups, the member states have the discretion to determine it with their national laws.[134] It is clearly stated in Convention 97 and 87 that the limitations on armed forces and police should be regulated by national laws, while the provision

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128 Ibid.
129 Ibid.
130 General Survey, 1994, para 143: Article 8(1) of the International Covenant on Economic, Social and Cultural Rights refers to "…the right to strike, provided that it is exercised in conformity with the laws of the particular country".
131 Gernigon, A Odero and H Guido 'ILO Principles Concerning the Right to Strike' (1998) 137 *International Labour Review Journal* 4.
132 Ibid.
133 Convention 98 and Convention 87.
134 Ibid.

of Convention 87 does not extend to public servants engaged in the administration of the State.[135] Member states are at liberty either to limit or restrict or even prohibit the right to strike on the public servants undertaking the administration of the State.

It is recognized by ILO that workers may participate in a strike for three reasons: employment interest, secondary strikes, and protest action. Employees may embark on a strike in pursuit of employment interest if it relates to an occupational dispute. According to the Committee on Freedom of Association and the Committee of Experts, the right to strike could be exercised by employees to protect employment interests between them and employers and to enhance good employment relationships.[136]

Customarily, employees' ability to participate in a strike action was regarded as a vital factor in the promotion and maintenance of fair remuneration and reasonable or acceptable working conditions, thus, improving the social and economic welfare of the population.[137] These factors may be honoured through collective bargaining without taking industrial action.

2.5 Protection of the right to strike

In the context of labour or industrial relations, the Namibian Constitution affords all persons the rights to freedom of association, assemble, strike, engage in collective bargaining, demonstrate, present petitions, and picket.[138] The Constitution mandated the legislature to enact legislation that specifically regulates these rights to give them effect.[139] Hence, the Labour Act was enacted in 2007. Its purpose is to enhance labour peace, economic development, social justice, and the democratisation of the workplace.[140] For this purpose, it is to conform to International Labour Standards of recognising and protecting the right to freedom of association and the right to strike.

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135 Article 6 of Convention 98.

136 See in detail CEACR General Survey 1994 paragraphs 136-179 and CEACR General Survey 2012 paragraph 117. The CEACR assumes that there is a general principle allowing an extensive regulation on a right to strike. In its opinion, limitations require special justification which must be interpreted restrictively.

137 B Nkabide 'The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy' (2009) *Maryland Journal of International Law* 270.

138 Article 21 of the Namibian Constitution.

139 Article 95 of the Namibian Constitution.

140 Labour Act 11 of 2007.

Though labour movements in Namibia are no more active, over the past few years, workers have attempted to advance the impact of their strikes by using various tactics during industrial actions.[141] These tactics have impacted negatively on the lives and property of other people. These include vandalising properties, trashing cities, preventing shoppers from doing business, and forming picket lines at the supermarket. In every sector of the economy there have been strike-related disruptions or violence with no person held responsible for the damage.[142] Unruly behaviour of strikers and strikes that are characterised by violence are detrimental to the legal foundations upon which labour relations in Namibia are founded, and the national economy in general.[143] A strike that takes longer than expected with no solution to resolve the problem may also be detrimental to the national economy and lives of those affected.[144]

As mentioned above, the purpose of a strike is to induce the employer through peaceful withdrawal of work, to agree to the employees' demands.[145] It renders unlawful to force employers, through violent or other unacceptable conduct to agree to unions' demands. Certain degrees of disruptions may inevitably be expected and experienced. Any unruly conduct seriously undermines the fundamental values upon which the Namibian Constitution was founded.[146] This kind of conduct also contravenes the rights of non-striking workers to continue working with dignity in privacy, safety, and security, with peace of mind and honouring their contracts of employment. It is wise to note that the rights conferred by the Labour Act and the Constitution are not absolute, but may be limited in terms of Article 21(2) of the Namibian Constitution by taking into consideration public interest and the contradicting rights of others.[147] This right is not only subject to the general limitation contained in the Constitution but also

141 H Janch *Trade union in Namibia: Define a new Role* (2019).
142 T Ngcukaitobi 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836.
143 H Janch *Trade union in Namibia: Define a new Role* (2019).
144 T Ngcukaitobi 'Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836.
145 The right to strike and the ILO: The legal Foundations, presented at the International Trade Conference, March 2014.
146 L Madhuku 'The right to strike in Southern Africa' (1997) 136 *International Labour Review* 509.
147 Article 21(2) of the Namibian Constitution.

subject to procedural limitations set out in section 75 of the Labour Act.[148] These statutory provisions compel parties to resolve their differences through conciliation and arbitration.[149]

Employers and employees in the essential services are protected by the provision of section 75 of the Labour Act[150] that says a person must not take part in a strike or a lockout if-

> (e) the dispute is between parties engaged in an essential service designated in terms of section 77.

This provision refers to both disputes of right and dispute of interest. It is set out in section 78 of the Labour Act that says-

> "Any party to the dispute of interest, who is prohibited in terms of section 75(e) from participating in a strike or lockout because that party is engaged in essential services designated in terms of s 77, may refer the dispute to the Labour Commissioner".[151]

Hence, even though the rights to freedom of association may be extended to correctional service members, the right to strike may be prohibited because they render an essential service as stipulated in s 77 of the Labour Act. Both the employer and employees may not engage in industrial action because of the nature of the service they render. The ideal option that is open to them is collective bargaining, with access to the mechanisms of resolving labour disputes in Namibia, being conciliation, and arbitration.

2.6 Essential Services

'Essential services' means services, by whoever rendered, whether rendered to the government or to any other person, whose interruption of which would endanger the life, health, or personal safety of the whole or part of the population.[152] It depends on the circumstances of a country because what is essential in one country might not be essential in another.[153] Hence, the ILO urges member states in designating services as essential, to follow the objective standards of the

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148 Section 75 of the Labour Act 11 of 2007.
149 Section 75(e) of the Labour Act.
150 Section 75 of the Labour Act.
151 Section 75(e) of the Labour Act.
152 R Mthombeni 'The right or freedom to strike: An analysis from international and Comparative Perspective' (1990) 23 *Comparative International Labour Journal of Southern Africa* 337.
153 Ibid.

existence of a clear and impending threat to the life, personal safety, or health of the whole or part of the population.[154] Moreover, the concept of 'essential services' is not absolute, because non-essential services may be classified 'essential' if the strike lasts longer, beyond a certain time "thus put life at risk, endanger the personal safety or health of the whole or part of the population".[155] It was noted by the Committee on Freedom of Association that the norm regarding prohibiting strike in essential services might lose its purpose if the strike actions were being declared illegal in undertakings that are not performing essential services in the rigorous meaning of the term 'essential services'.[156] The CFA advised that it is not appropriate to treat all state undertakings as essential without differentiating between those that are genuinely essential and those services that are not. The accepted essential services by the CFA are electricity services, health sector, water supply, firefighting services, telecommunications services, armed forces, police, provision of food to pupils in schools and cleaning of schools, and air traffic controls.[157] Therefore, generous protection must be granted to workers in essential services where the right to strike has been limited, prohibited, or restricted to compensate for the limitations or restrictions.[158] Meaning, there should be proper channels for workers in essential services of addressing disputes of interest with their employers. Besides, there must be reliable, impartial, and speedy conciliation and arbitration proceedings to which parties to the dispute can resort at any stage of the dispute, and once the award is issued, it should be fully and promptly implemented.[159]

Section 1 of Labour Act No. 11 of 2007 defines essential service in the following words:

> "essential service means a service the interruption of which would endanger the life, personal safety, or health of the whole or any part of the population of Namibia and which has been designated as such in terms of section 77"[160]

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154 Ibid.
155 A Myburgh 'Interdicting Protected Strikes on Account of Violence' (2018) ILJ 703.
156 M A Chicktay 'Defining the Right to Strike: A Comparative Analysis of International Labour Organisation Standards and South African Law' 2012 *OBITER* 260.
157 M A Chicktay 'Defining the Right to Strike: A Comparative Analysis of International Labour Organisation Standards and South African Law' 2012 *OBITER* 260.
158 Ibid.
159 Ibid.
160 Section 1 of Labour Act 11 of 2007.

Thus one criterion used by the Namibian Essential Services Commission in determining whether a certain service is essential and whether the interruption of that service would endanger the life, personal safety, or health of the whole or part of the population of Namibia.[161] To ascertain the meaning of the phrase 'essential service', regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the Labour Act is to give effect to the right to strike that entrenched in section 21(1)(f) of the Namibian Constitution.[162]

The interpretative process must give effect to this purpose within the other purposes of the Labour Act as set out in the preamble.[163] For this reason, a restrictive interpretation of essential service must, if possible, be adopted to avoid unjustifiable limiting the right to strike.

2.7 Summary

This chapter reviewed international labour standards and relevant legislation to establish whether there is a statutory provision that guarantees the right to freedom of association and the right to collective bargaining for correctional officers (prisons staff). Firstly, the study explored the international standards in detail that provide for the right to freedom of association and the right to collective bargaining. The ILO standards reviewed are Convention No. 87 and Convention No. 98 of 1948. The study further reviewed relevant labour standards such as Labour Relations Convention No. 151 and Convention No. 154: Collective bargaining. The study explored the Conventions to establish whether they guaranteed the two rights to the correctional officers (prison staff), which is confirmed. It was also found that Convention No. 87 and No. 98 provide for the rights to be extended to the armed forces and the police. However, the Conventions outline that national laws must be enacted to regulate the application of these Conventions to the forces. Furthermore, it is revealed that the two Conventions are binding on the ILO member

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[161] Labour Act 11 of 2007.
[162] Section 74 of the Labour Act of 2007.
[163] PREAMBLE of the Labour Act 11 of 2007, To give effect to the constitutional commitment to promote and maintain the welfare of the people of Namibia in Chapter 11 of the Constitution {Article 95(c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices}; and to further a policy of labour relations conducive to economic growth stability and productivity by giving effect, if possible, to the conventions and recommendations of the International Labour Organisation.

states whose ratifications have been registered with the Director-General. It is also established that Namibia has ratified Conventions No. 87 and 98.

Secondly, the study establishes the difference between freedom of association and freedom to strike, and what entails collective bargaining. It is revealed that freedom of association and freedom to strike are two different aspects, but the two reinforce one another to pursue the interest of trade unions' members. Furthermore, literature was reviewed to discover whether there is exception to the right to strike and protection of the right to strike. Literature revealed that different jurisdictions recognise the right to strike, but some national practices and provisions restrict strike action. The ILO Committee of Experts advised that the limitation on the right to strike require special justification.[164] The Namibian Constitution mandated Legislature to enact Laws that specifically regulate the right to strike to give them effect.[165]

Lastly, the literature was also reviewed to define 'essential services', and the right to strike for the workers rendering essential services. It is revealed that essential service depends on the settings, conditions, situations and environments of a country because what is essential in one country is not essential in another. In some circumstances, essential service may not be absolute because, the service may be classified essential if the strike last longer and endanger life, health and safety of the whole or part of the population. So, in some countries the right to strike in the 'essential services' is limited while in some countries include Namibia, these rights are completely prohibited.[166]

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164 S Leader 'Can you derive a right to strike from Freedom of Association?' (2010) 15 *Canadian Labour and Employment Journal* 271.

165 Article 21(2) of the Namibian Constitution.

166 Section 75(e) of the Labour Act 11 of 2007 A person must not take part in a strike or lockout if the dispute is between parties engaged in an essential service designated in terms of section 77.

CHAPTER 3: CORRECTIONAL SERVICE IN NAMIBIA

3.1 Introduction

As indicated in the introduction of this study, the Namibian Correctional Service was established in 1994 in terms of Article 121 of the Constitution of the Republic of Namibia and its operation is administered in terms of the Correctional Service Act No. 9 of 2002.[167] Provisions regarding conditions and terms of employment for correctional officers, such as leave of absence; salary scales; allowances; salary increments; housing quarters; and other related matters are provided for in terms of section 13 of the Public Service Act No. 13 of 1995. [168]

The Namibian Correctional Service is one of the law enforcement agencies in Namibia. It is referred to as an apparatus of the state. It has adopted a military structure and rule among the members of the service, which was inherited from the South African Government before Namibia's independence. The NCS contributes to the safety of the public through the administering of court-imposed sentences for offenders. It also administers some post-sentence supervision of offenders who have been sentenced to Community Service Orders. The administering court-imposed sentences for offenders is to place offenders in a safe; humane, and secure environment, and ensure that rehabilitation and integration programs are successfully implemented.[169]

There are no labour relations activities in the Namibian Correctional Service. Their grievances are handled in terms of the Correctional Service Regulations.[170] The Commissioner-General is empowered by the Correctional Service Act to make rules and standing orders or administrative directives.[171]

It is provided for in terms of s (5) of the Correctional Service Act that-

> "Subject to the provision of this Act, the Commissioner-General may, for the efficiency supervision, administration, and control of the Correctional Service and observance by offenders

[167] Correctional Service Act No. 9 of 2002.
[168] Section 13 of the Public Service Act 13 of 1995.
[169] Correctional Service Act No. 9 of 2002.
[170] Correctional Service Regulations.
[171] Section (5) of the Correctional Service Act.

> and correctional officers, make or issue such rules, standing orders or administrative directives as he may consider necessary or expedient".[172]

Section 7(3) of the Correctional Service Act provides that-

> "The Commissioner-General may make rules relating to personnel and to matters required or permitted to be prescribed under these regulations".[173]

Despite that the service benefits of the correctional officers such as remuneration, medical aid, and leave of absence are administered in terms of the Public Service Act (hereinafter referred to Public Service Act No. 13 of 1995), some terms and conditions of employment such as appointment, promotion, discharge, and transfers are handled in terms of the Correctional Service Act.[174]

The correctional officers do not belong to any trade unions. This is due to the current labour legislative provisions. Notably, the officers were organising and could become members of trade unions under the provision of a repealed Labour Act No.6 of 1992.[175] Some correctional officers were members of the Public Service Union of Namibia (hereinafter referred PSUN) and some were members of Namibia Public Workers Union (hereinafter referred NAPWU). The provision of a new Labour Act that was enacted in 2007 has excluded the correctional officers from its provisions.[176] Upon the enactment of Labour Act No. 11 of 2007, the Commissioner of Prisons issued a directive in 2008 that informed the correctional officers to refrain from organizing and to give up their union membership.[177]

Attempts have been made by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) for the Namibian Government to take measures to make sure that the Labour Act of 2007 is amended. The CEACR has requested Namibia to review the provision and amend the legislation since 2008.[178]

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172 Section 5 of the Correctional Service Act No. 9 of 2002.
173 Section 7(3) Correctional Service Act No. 9 of 2002.
174 Act No. 9 of 2002.
175 Labour Act 11 of 2007.
176 Act 11 of 2007.
177 Commissioner of Prisons' Directive 03/2008.
178 CEACR Observation adopted 2008, 98th session.

Namibia has essentially revoked the right to organise and to collective bargaining from the correctional officers having ratified the ILO Conventions 87 and 98 in 1995. Namibia is required by ILO to provide reports detailing the steps that have been taken in law and practice to apply Conventions that the government has ratified.[179]

Every year of the report, Namibia has been reporting that the new legislation has not yet been tabled to Cabinet. It has also been reported that a proposal was made in 2014 for a tripartite meeting to include the Minister of Labour and Social Welfare, Minister of Prison Services, and a union representative to discuss ways to resolve the matter of legislation amendment, with the support of technical assistance from the ILO's Office.[180] The CEACR recommended that the Namibian Government must take steps to ensure that the prison services enjoy the guarantees under the Convention shortly.[181] The Committee has also requested the government to provide information on developments concerning the adoption of new legislation in this matter. In 2017, Namibia has also reported to the CEACR that the new Labour Act is not yet tabled to the Cabinet.[182]

The National Union of Namibian Workers (NUNW) hosted a workshop in 2008, chaired by a retired Judge of Appeal, Supreme Court of Namibia, Judge Pio Teek to allow police and the correctional service to be covered by the provisions of the Labour Act No. 11 of 2007, and join labour unions. NUNW expressed that the workshop intends to study and understand the labour relation laws applicable to the members of the services in a constitutional democracy, referring to Act No. 21 of the Namibian Constitution (hereinafter referred to the Namibian Constitution).[183] The national trade union pointed out that the Police Act is silent on the issue of trade unions but the Regulations passed in terms of the Act put restrictions on the constitutional rights to form or participate in trade unions' activities before written authorisation of the Inspector-General is not obtained.[184]

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179 Observation adopted 2014, 104th session.
180 Observation adopted 2017, 107th session.
181 Ibid.
182 Ibid.
183 Pio M Teek '*The workshop report on Police Labour Relations in Namibia, Time for new beginning?*' (2008).
184 Ibid.

The workshop had invited regional representatives of trade unions, police forces, and prison services from the SADC Region. These representatives were from the Republic of South Africa, Swaziland, and Lesotho. In his opening remarks, the then Minister of Prisons Services, Dr. Nick Iiyambo addressed the workshop that there are good reasons why the security agencies in Namibia are precluded from joining trade unions. These security agencies are Police (National and Municipal), Defence, Prisons Services, and National Intelligence Services.[185] The Minister referred to Chapter 2 of the Police Administrative Manual, and Regulations 15, section (ab)(i),(ii) and (iii) which makes it an offense for a member of the police to establish or, join, takes part or associates with the matters, objects, or activities of trade unions without written permission of the Inspector General.[186] He maintained that unionising the police and prisons services may not be a solution to the collective bargaining because existing grievance procedures are adequate and in conformity with the Namibian legal instruments. The Minister concluded that the decision to exclude the police force and the prison services members from joining the trade unions is in the interest of national security.[187] His remarks were also repeated by the then Minister of Labour and Social Services in his closing remarks that the uniformed services are excluded from most of the provisions of the Labour Act because of their unique role in the maintenance of security in the country and for them to operate impartially.[188] The Minister of Labour and Social services stressed that labour relations in Police and Correctional Service must be considered within the framework of the Supreme Law, the Namibian Constitution, Article

[185] See provisions of section 2(d) of the Labour Act 11 of 2007 that prohibits members of the services from its provisions.

[186] Regulations 15, Section (ab)(i) A member shall be guilty of misconduct if he or she without the written permission of the Inspector-General establishes a trade union or becomes a member of a trade union; (ii) without the written permission of the Inspector-General takes part in or associates with the activities, objects or matters of a trade union; (iii) before the permission contemplated in subparagraph (i) or (ii) has been obtained, whether on or off duty, knowingly and deliberately wears, exhibits or uses an badge, emblem, standard, colours, salute, greeting, distinctive gesture or device of any kind which associate him or her with such trade union.

[187] Pio M Teek '*The workshop report on Police Labour Relations in Namibia, Time for new beginning?*' (2008).

[188] Pio M Teek '*The workshop report on Police Labour Relations in Namibia, Time for new beginning?*' (2008).

21(1)[189] which right is not absolute as it must be read subject to Sub-Article 21(2). He further warned that discussions on the formation of trade unions in the security sector must take into account not only freedom of association but also the interests of national security and public order and draw attention to the interpretation of Article 9 of the ILO Convention 87, Freedom of Association and Protection of the Right to Organise of 1948 and Convention 98, the Right to Organise and Collective Bargaining of 1949 respectively. The Minister however promised to take the workshop's discussions forward. The two Ministers' arguments connote an erosion of the autonomy of the services because once a trade union is established, the uniformed leadership (armed, police, and correctional service) have to consult trade unions representatives on issues pertaining to personnel policies, practices, and other terms and working conditions of employment before decisions are being implemented.

In South Africa, the National Defence Force was forced to accept a pluralist labour dispensation, which denotes the acceptance of trade unions and collective bargaining rights.[190] The military leadership often opposed the functions of a trade union to represent an interest group (the bargaining unit) while in competition with the authority (management). Unitarist practices always come under strain where a reciprocal sense of loyalty and trust in leadership is questioned.[191] A change in the values of employees, raising aspirations, and the weakening of traditional attitudes towards officials constituted governance forces organisation to accept a new ideology.[192]

In *South African National Defence Union v Minister of Defence and Other* SANDF argued that promoting the idea of soldiers to join trade unions, is encouraging soldiers to commit an

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[189] Article 21(1)Provides that 'All persons shall have the right to: (e) freedom of association, which shall include freedom to form and join associations or trade unions and political parties; Sub Article 21(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, in relation to contempt of court, defamation or incitement to an offence'.

[190] Eric Z Mnisi 'National Security and the constitutional right to join military trade unions: Is constitutional amendment an imperative?' (2017) 2 *Scientia Militaria, South African Journal of Military Studies* 45

[191] Ibid.

[192] D Du Toit 'Statutory Collective Bargaining: A duty of fair representative?' 1993 *ILJ.*

unlawful act, and also doing a disservice to the country.[193] SANDF further claimed that union is not desirable because mass strikes and mutinies would undermine the operational readiness of the soldiers. SANDF had the fear that trade unions will politicise the forces and encouraging divisions among rank and file along the institutional chain of command.

O'Reagan pointed out that she was not convinced that permitting members of the Defence Force to form and join trade unions, no matter how its activities are hemmed, will be detrimental or undermine the discipline and efficiency of the Defence Force.[194] She held that there can be no doubt of the constitutional imperative of maintaining a disciplined and effective Defence Force.
Moreover, O'Reagan maintains that-

> "Indeed, it may well be that in permitting members to join trade unions and establishing proper channels for grievances and complaints, discipline may be enhanced rather than diminished".[195]

O'Reagan said, it will depend of course, on a variety of factors including the nature of the grievance procedures established, the permitted activities of trade unions in the Defence Force, the nature of the grievances, and the attitudes and conduct of those involved. The learned Judge pointed out that in her view, the nature of the Defence Force would require a different approach not only with the subject matter up for consultation and discussion with the trade union, it may further require a different approach to the nature and relationship between the trade union and the Defence Force.
She concluded that the total ban on trade unions in the South African Defence Force goes beyond what is reasonable and justifiable to achieve the legitimate state objective of a disciplined military force, and undermining the rights of those accused by the military system.[196]

In support of O'Regan's statement, POPCRU representatives during the 2008 workshop, stressed that the restrictive or prohibitive labour regulations are detrimental to fair labour practices and such tools are of oppression. The representative maintained that POPCRU became the voice of the members and fought for the creation of a platform where evils of discrimination, racism,

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193 *South Africa National Defence Union v Minister of Defence and Other* 1999 4 SA 469 (CC).
194 Ibid.
195 Ibid.
196 *South Africa National Defence Union v Minister of Defence and Other* 1999 4 SA 469 (CC).

salary discrepancies, non-recognition of trade unions, and victimisations of members could be addressed.[197]

It was unfortunate that the Namibian Correctional Service was not represented at the 2008 workshop. They do not feature in the workshop's report. The representatives from the Namibian Police Force informed the workshop that they were not mandated to partake in the technical discussion of the workshop. Hence, they did not present as apparently, they were not informed to do so. However, Nampol representatives informed the workshop that Namibian Police Force does not exist in a vacuum, it was established in terms of the Namibian Constitution.[198] A Commissioner from Nampol asked the participants that he would like to know about the benefits that NUNW derives from unionising the police force. He then pointed out an inherent problem in unionising the police force that will negatively be affecting the discipline and impartiality of members especially when such a Police Union is affiliated with a political party. He further stressed that the police force as a professional organisation should remain as such without a union.[199]

Another attempt was made by the correctional officers in the High Court of Namibia to fight the labour legislative provision that prohibits them from joining the trade unions. In *Venancia Simana and Others v The Commissioner-General of the Correctional Service & Others,*[200] applicants sought the Court to review and set aside a Directive issued by the Commissioner of Prisons in expectation of the implementation of the Labour Act No. 11 of 2007 which would impact on their working conditions because it excludes them from the application of the Act. The effect of the provision of the Labour Act would inter alia be that members of the Prison Service could no longer be members of trade unions and that they no longer would be entitled to overtime payment, this situation having been caused by the exclusion of members of the prison

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[197] Pio M Teek '*The workshop report on Police Labour Relations in Namibia, Time for new beginning?*' (2008).
[198] Article 115 of the Namibian Constitution provides that 'There shall be established by Act of Parliament a Namibian police force with Prescribed powers, duties and procedures in order to secure the internal security of Namibia and to maintain law and order.
[199] Pio M Teek '*The workshop report on Police Labour Relations in Namibia, Time for new beginning?*' (2008).
[200] *Venancia Simana and Others v The Commissioner-General of the Correctional Service & Others* 2011 (129) NA 57 (HC).

services from the application of the Act.[201] The Directive was issued in October 2008 and the applicants were aware of it, nonetheless the applicants launched proceedings in May 2011, but the Court was not satisfied with the explanation for the delay, hence, it held that condonation of delay was not justified in all circumstances.[202] Secondly, the Court held that the efficacy of review was also not given because of continuing underlying statutory provisions. Application for review was dismissed with costs on the ground of unreasonable delay.[203]

The Commissioner's Directive 03/2008 which had been posted on the notice board of the Walvis Bay Prison reads as follows:

'COMMISSIONER' DIRECTIVE NO 03/2008

DIVISIONAL HEADS
SUB-DIVISION HEADS
OFFICERS IN-CHARGE-ALL PRISONS
COMMANDANT-NAMIBIAN PRISON SERVICE TRAINING COLLEGE

IMPLEMENTATION OF THE LABOUR ACT, 2007 (ACT NO. 11 OF 2007)

As it was announced recently in the National Assembly by the Honourable Minister of Labour and Social Welfare, the Labour Act, 2007 (Act No. 11 of 2007) is expected to come into operation as from 01 November 2008. As you might aware, apart from section 5, this Labour Act excludes from its application the Namibian Prison Service, amongst other institutions.

This exclusion from the Labour Act, 2007 will bring to us significant changes which we are required to know and get prepared for them to ensure that no disruptions are occurring in fulfilling our duties. Among the changes which will take place as from the date of coming into of this Act include:

1. Overtime

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[201] Commissioner's Directive 03/2008.
[202] *Venancia Simana and Others v The Commissioner-General of the Correctional Service & Others* 2011 (129) NA 57 (HC).
[203] Ibid.

There will be no overtime payment for prison members. Thus, all of you are required to ensure that, prison members are doing their work within their normal prescribed hours of work. Where it is necessary that a prison member has to perform work over his or her prescribed ordinary hours of work, an arrangement can be done for such member to get an off day or off-hours for the extra hours he or she had worked, where the supervisor deems it necessary.

2. Sunday, Public Holiday, and Sunday Work Allowance.

There will be no allowance payment for prison members for work done during Sunday, public holidays, or during the night hours.

3. Membership to Trade Unions.

Prison members will no more be members of trade unions. Thus, those who are members of trade unions and are paying subscription to such trade unions through stop orders, should contact the respective trade unions in order to stop the deductions. The prison service will not be held responsible for any further deductions as from the date of coming into operation of the Labour Act, 2007.

There will no more representation by trade unions in our disciplinary inquiries except for the pending cases that started before the implementation of the Act and where the trade unions were already presenting the prison member.

To ensure the smooth running of activities especially during weekends, the prohibition for senior prison members to be weekend heads that were put in December 1994 through Circular No 15 of 1994 is hereby lifted. From the date of coming into operation of the Labour Act, 2007 senior prison members as from the rank of Prison Superintendent (SP) downwards, will have to be booked to be weekend heads. After the work as weekend heads, such heads will be given of day proportional to the days they were on duty. For example, if the weekend was booked to work on Saturday only, he or she will be given one-off day on Monday, die the following week, but if he worked on Saturday and Sunday he or she will be given two off days on Monday and Tuesday. The supervisors, for good reason, may give the off days on other days following week not necessarily being Monday or Tuesday.

> It is required all of you bring this information to all prison members under you and for the officer-in-charge to ensure that proper arrangements are put in place to ensure the normal performance of activities at their respective prisons. Don't hesitate to contact this Office for any other matter that may arise due to the implementation of the Act, which matter is not covered above or for any clarity.
>
> Yours sincerely
>
> E. Shikongo
> **COMMISSIONER OF PRISONS**

The correctional officers did not succeed in the case because they only attacked the Commissioner's Directive 03/2008 and left the underlying provision of the Labour Act (which prohibits them from forming and joining trade unions), unchallenged. The applicants sought a declaratory order that the Commissioner's Directive 03/2008 be declared unconstitutional. The Court also refused to exercise its discretion of acceding to declare the relief sought because the declaratory would cause inappropriate or absurd resultant position.[204] The irrational resultant position would be as a result of, on the one hand, the Commissioner General's Directive 03/2008 being declared unconstitutional and invalid, and on the other hand, the underlying provisions of the enabling statute, Labour Act would continue to exist. The Court held that this order would create a highly contradictory situation and a state of affairs that should for obvious reasons be avoided.[205]

The Court held that-

> "a delay of some two years and seven months in the bringing of a review application per se constitutes an unreasonable delay for which the Court's condonation would be required".[206]

It further held that-

> "Applicants had not been forthright in their explanation for the delay. The court was not placed in a position to assess the dilatory conduct of the applicants and their motives unless they intended their evasiveness to be deliberate to cover up their remissness. Applicants had not demonstrated

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[204] *Venancia Simana and Others v The Commissioner-General of the Correctional Service & Others* 2011 (129) NA 57 (HC).
[205] Ibid.
[206] Ibid

> any urgent resolve to take their grievance to a Court of law and to have the issues raised by them determined promptly".[207]

However, the Court appears to recognise that the case of the correctional officers has persuasive value.[208] The Court noted that the case 'raises important constitutional issues which will affect the rights of hundreds of Namibians. Geier states that it would be unfortunate if these issues were avoided because of mere technicality.[209] Geier H held that-

> "The Court's discretion in respect of the granting of alternative declaratory relief also had to be exercised against applicants due to the applicants confining the declaratory relief sought to the complained of Commissioner's Directive only and their failure to directly attack the underlying provisions of the Labour Act No. 11 of 2007 in the proper manner. This failure would thus only by implication pronounce itself indirectly on the constitutionality of the applicable provisions of the Labour Act of 2007".[210]

Geier further held that-

> "the resultant position created a highly contradictory situation and a state of affairs that should for obvious reasons be avoided. The continued survival of the underlying provisions of the Labour Act No.11 of 2007 directly undermined the efficacy of both the review and declaratory relief sought".[211]

Before the Court comes to the above conclusion, Judge Geier considered the entitlement to declaratory relief. He held that-

> "In such Circumstances, the alternative argument, mustered on behalf of applicants, comes to the fore. This argument pertinently raises the question whether or not the applicants would, nevertheless, and in circumstances where the Court will refuse to grant review relief, still be entitled to declaratory relief."[212]

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207 Ibid
208 Ibid
209 *Venancia Simana and Others v The Commissioner-General of the Correctional Service & Others* 2011 (129) NA 57 (HC).
210 Ibid.
211 Ibid.
212 Ibid.

Geier relied upon the High Court's approach in *Merlus Seafood Processors (Pty) Ltd v The Minister of Finance,*[213] a decision the Court referred and applied to the granting of declaratory relief which has set out the decision of *Daniel and Other v Attorney-General & Others,* and which entails the following:

> [17] The Court approaches the question of a declarator in two stages; first, is the applicant a person interested in any existing, future, or contingent right or obligation. Secondly, and only if satisfied at the first stage, the Court decides whether the case is a 'proper one' in which to exercise its discretion.[214]
>
> [18] It was decided in *Ex parte Nell 1963 (1) SA 754 (A)* that an existing dispute is not a prerequisite for jurisdiction under section 19(1)(a)(iii). There must, however, be interested parties on whom the declaratory order will be binding. The absence of an existing dispute may, of course, incline the Court, in the existence of its discretion, not to grant a declarator.[215]

The Court noted that the declaratory relief pursued by the applicants was sought on the limited scope that only the Commissioner's Directive 03/2008 was to be declared unconstitutional. However, the Court was doubtful whether justifiable and tangible advantage concerning the applicants existing and/or future constitutional rights would flow from the granting of the declaratory order sought herein view of the continued existence of the applicable provisions of the Labour Act, 11 of 2007.[216] The Court found that it would not be a proper instance in which to exercise any discretion in favour of the applicants. The Court believed that the applicants cannot overcome the second hurdle on the way to any declaratory relief.[217] The relief sought in the notice of motion did not attack the underlying provisions of the Labour Act.[218] It was disclosed in the notice of motion that no relief is sought in respect of any specific provisions of the underlying Labour Act No. 11 of 2007.[219]

The Court held that:

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213 *Merlus Seafood Processors (Pty) Ltd v The Minister of Finance* 2011 (417) NA 331 (HC).
214 *Daniel and Another v Attorney-General & Others* 2009 (230) NA 66 (HC).
215 *Venancia Simana and Others v The Commissioner-General of the Correctional Service & Others* 2011 (129) NA 57 (HC).
216 Ibid.
217 Ibid.
218 Ibid.
219 Ibid.

> "It thus became clear that the issue up for decision would thus essentially have to be confined to the validity of the directive alone".[220]

It further held that:

> "At best the constitutional questions raised about the validity or otherwise of the aforesaid 'Commissioner's Directive' would thus only by implication pronounce itself indirectly on the constitutionality of the applicable provisions of the Labour Act of 2007".[221]

The Court makes it clear that any judicial pronouncement on the Constitutionality of the applicable provisions of the Labour Act would be *obiter* as the real issue to be determined falls to be decided within a much narrower compass.[222]

Enquiries have revealed that, nothing has changed the status quo of the correctional personnel as there was no agreement or resolution reached or made. They are still excluded by the provisions of the labour legislative provisions. No noticeable action is underway to resolve the matter, all is at standstill. The government is reluctant to amend the labour legislation to extend the constitutional rights to the correctional personnel because it has a fear that it might be harmful to the national security and tempers with the discipline of the members. Moreover, from the correctional point of view, the correctional officers might not be aware of their constitutional rights to freedom of association and collective bargaining, or have the fear of being victimised or possibly dismissed from the service. A further investigation is required in this sense of why the correctional officers are not claiming their rights.

3.2 The right to Freedom of Association and Protection of the right to organise and Collective Bargaining in the Namibian Correctional Service.

It is indisputable that the Namibian Constitution guarantees the right to freedom of association and the right to organise and collective bargaining for all persons.[223] It is clearly stipulated in terms of Article 21(1)(e) of the Namibian Constitution. Provisions made in terms of the

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220 *Venancia Simana and Others v The Commissioner-General of the Correctional Service & Others* 2011 (129) NA 57 (HC).
221 Ibid.
222 Ibid.
223 Article 21(1) of Act 21 of 1990.

Convention 87 and 98 said it all that these rights must be extended to every worker and employer.[224]

Article 75 states that the State will promote the welfare of people by promoting and adopting policies aimed at the formation of independent trade unions to protect workers' rights and interests and to promote sound labour relations and fair employment practices.[225]

Reference should be made to the *South African National Defence Union v Minister of Defence and Another* because the dispute is of the same nature as the issue under study. It is found relevant to refer to this case law because it has similar persuasive value as the phenomenal under study. Some provisions in the Constitution of the Republic of South Africa, and the South African Labour Relations Act No. 66 of 1995, are also similar to some provisions made in terms of the Namibian Constitution and the Namibian Labour Act No. 11 of 2007. The Namibian law system was inherited from the South African law system, hence, it is appropriate to refer the issue understudy to the South African case laws.

The Court has observed that South Africa ratified a Convention on the Right to Organise and Collective Bargaining, 87 of 1949.[226] The International Labour Organisation, hence, considers members of the armed forces and the Police to be "workers" for these Conventions. The South African Police and the South African Correctional Service are covered by the Labour Relations Act, 66 of 1995.[227] The SAPS and the Correctional Services are members of the trade union, POPCRU, and South African Police Union (SAPU), they are organising and bargaining correctively. The South African Police Labour Relations Regulation that was promulgated in 1993 in terms of the then Police Act[228] guaranteed labour rights to members of the South African Police Force. The regulations permits members of the police force the right to form and join trade unions of their own choice and partake in collective bargaining. The South African Police

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224 Article 21(1)(e) of the Namibian Constitution provides that 'All persons shall have the right to freedom of association, which shall include freedom to form and join associations or unions, include trade unions and political parties.

225 Article 75 of the Namibian Constitution.

226 *SANDU v Minister of Defence and Another* (1999) 20 ILJ 2265 (CC).

227 Provisions of the Labour Relations Act 66 of 1995 does not exclude the South African Police and the South African Correctional Service.

228 Police Act 68 of 1995.

Labour Relations Regulation, however, did not guarantee the police force the right to participate in strike action.[229] In 1995, members of the SAPS fell under the provision of the LRA. They entered into a minimum service agreement, to regulate industrial action because they are rendering essential service.[230]

Secondly, Article 95(d) of the Namibian Constitution governs the adherence to and action in accordance with the International Labour Organisation's Conventions and Recommendations.[231] This applies to the correctional officers in the sense that Namibia has ratified the same Conventions which are binding and became part of the Namibian Law.[232]

Despite, Namibia's assurance to the CEACR that the labour legislation amendment will be tabled to the Cabinet for endorsement, in their reports, the country has been reporting that it faces challenges to implement the ILO's Conventions under discussion.[233] The CEACR gave its recommendations to Namibia without a road map or guidance, and a time frame to implement the two Conventions.[234] It looks like that there was an oversight from the Namibian Government to amend the labour legislation in 2007 that excludes the members of the correctional service from forming and joining trade unions. The labour statute was passed when Namibia had already ratified Convention 87 and 98 in 1995, without considering that the two Conventions are binding. The Labour Act completely precluded the Correctional Service from forming and participating in trade unions' activities.[235] This total ban in the armed forces was determined by the South African Constitutional Court as going beyond what is reasonable and justifiable to achieve the legitimate state objective of a disciplined military force.[236]

The provisions of articles 3, 4, and 5 of Convention 87 are important:

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229 South African Police Labour Relations Regulations.
230 Ibid.
231 Article 95(d) of the Namibian Constitution.
232 Namibia ratified Conventions 98 and 87 in January 1995.
233 Regional SADC-ILO Workshop to improve Implementation of ILO Core Conventions No. 87 on Freedom of Association and No. 98 on Collective Bargaining, Governance Convention No.144 on Tripartite Consultations and Labour Relations (Public Service) Convention No. 151 (2017), Johannesburg.
234 CEACR Observation Report 2017, International Labour Conference 107th.
235 Section 2(2)(d) of the Labour Act 11 of 2007.
236 *South Africa National Defence Union v Minister of Defence and Other* 1999 4 SA 469 (CC).

Article 3: Machinery appropriate to national conditions shall be established, where necessary, to ensure respect for the right to organise as defined in the preceding Articles.[237]

Article 4: Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations, with a view to the regulation of terms and conditions of employment through collective agreements.[238]

Article 5 of Convention 87 provides that-

> "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws".[239]

This implies that the Conventions must be extended to armed forces but if there is any need for limitation, national laws must be enacted to regulate the limitations. ILO therefore considers the armed forces as unique, hence, it leaves it open to member states to determine the extent or compass to which the provisions of the Conventions should be applied to members of the armed forces and the police.[240]

The South African National Defence Force was granted the rights to join unions and to collective bargaining by the Constitutional Court. The South African Constitutional Court decided that General Regulations must be passed to regulate trade unions and collective bargaining within the South African National Defence Force, *SANDU v Minister of Defence and Other*.[241] O'Reagan ordered that the order of unconstitutional invalidity made by the Constitutional Court be suspended for three months to allow the Minister of Defence to make regulations to provide for labour relations as a result of the lifting of the ban on trade union membership.[242] Section 87(1)(rB) of the Defence Act 44 of 1957 empowered the Minister to issue Regulations-

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237 Article 3 of Convention 87 of 1948.
238 Article 4 of Convention 87 of 1948.
239 Article 5 of Convention 87 of 1948.
240 Conventions 87 and 98.
241 *South Africa National Defence Union v Minister of Defence and Other* 1999 (4) SA 469 (CC).
242 Ibid.

> "relating to the rights of members of the Permanent Force in connection with all matters concerning labour relations between them and the State as their employer (including conditions of service, salaries, and other benefits) and the administration and management of such matters, including the settlement of disputes and the establishment of mechanisms for such purpose".[243]

The SANDF's General Regulations have the force of statutory provisions and form an important adjunct to the Defence Act No. 42 of 2002, dealing as they do with the administration of the Armed forces.[244] With the provision of Chapter XX, SANDF has a complete labour relations system in place for its members. SANDF's s labour relations is a parallel system to that in the civilian sector, with its bargaining council (Military Bargaining Council or MBC) and its arbitration tribunal (the Military Arbitration Board or MAB).

Regulation 3 of Chapter XX provides that the objectives of the Regulations are to provide for fair labour practices, the establishment of military trade unions and collective bargaining on certain issues of mutual interest, to ensure that trade union activities do not disrupt military operations, military exercises and training and do not undermine the Constitutional imperative of maintaining a disciplined military force, and generally to provide for an environment conducive to sound and health service relations.[245] Regulation 4(1) states that-

> "subject to the Regulations, a member of the Permanent Force shall be entitled to exercise his or her labour rights envisaged in section 23 of the Constitution, on an individual basis or collectively through a military trade union".[246]

Under the heading 'Limitation on collective bargaining rights', Regulation 36 provides that-[247]

> Military trade unions may engage in collective bargaining, and may negotiate on behalf of their members, only in respect of-
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> (a) the pay, salaries, and allowances of members, including the pay structure;
> (b) general service benefits;

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243 Section 87(1)(rB) of the Defence Act 44 of 1957.
244 *South African National Defence Union v Minister of Defence and Others* 2007 (65) SA 10 (CC).
245 Regulation 3 of Chapter XX made in terms of the Defence Act. 42 of 2002.
246 Regulation 4(1) of Chapter XX.
247 Regulation 36 of Chapter XX.

(c) general conditions of service;
(d) labour practices; and
(e) procedures for engaging in union activities within units and bases of the Defence Force.

Lastly, the first objective of the SANDF MBC is, as per the provisions of the Defence Act, Regulations, and the Constitution of the MBC, to-

> "negotiate and bargain collectively to reach agreement on matters of mutual interest between the employer and members represented by the admitted Military Trade Unions (MTU) in the Council, and to prevent and resolve disputes between the employers and such Military Trade Union through negotiation, consultation or otherwise, including, but not limited to, the utilisation of procedures for dealing with disputes".[248]

It is noted that statutory provisions that suit the nature and operations of the Namibian Correctional Service may be formulated to regulate the rights of the members to join trade unions and collective bargaining within the service.

3.3 The application of the Labour Act No. 11 of 2007 to the Namibian Correctional Service.

In terms of s 2(2) of the Labour Act, law enforcement agencies which include the Municipal and Namibian Police, Prison Services, Defence Force as well as the Namibian Central Intelligence Services are not permitted to form part of any trade union, hence, there is no provision for collective bargaining between employees and employers in this sectors.[249]

Section 50 (1) of the Labour Act[250] stipulates that

> It is an unfair labour practice for an employer or an employers' organization-
> (a) to refuse to bargain collectively when the provision of this Act or a collective agreement requires the employer or the organisation to bargain collectively;
> (b) to unilaterally alter any term or condition of employment;
> (c) to engage in conduct that-

[248] Provisions of the Regulations of the Defence Act 42 of 2002.
[249] Act 11 of 2007.
[250] Section 50 (1) of the Labour Act 11 of 2007.

(i) subverts orderly collective bargaining; or

(ii) intimidates any person.

Correctional officers are public servants like any other government employees, employed by the Government of the Republic of Namibia on a full-time, or part-time basis or under any contract of employment contemplated in section 22 of the Public Service Act (hereinafter referred to as Public Service Act No. 13 of 1995).

Section 34(1)(c)[251] provides that-

34(1) The Prime Minister may on the recommendation of the Public Service Commission, make regulations relating to-

(c) conditions of service and entitlements, including the occupation of official quarters of staff members and members of the services

(f) the procedures to be observed in the process of negotiation and collective bargaining with recognised trade unions.

In short, the Labour Act No. 11 of 2007 does not provide the right to freedom of association and the right to engage in collective bargaining for the Namibian Correctional Service. Collective bargaining in Namibia is provided for in terms of the Labour Act.[252] Section 2(2) of the Labour Act contradicts the provision of the Namibian Constitution by excluding the members of the Namibian Correctional Service from collective bargaining.[253] This means any labour relations between the members of the Namibian Correctional Service and the Namibian Government, is not governed by the provisions set out in the Labour Act.

[251] Section 34(1)(c) of the Public Service Act 13 of 1995.
[252] Labour Act 11 of 2007.
[253] Section 2(2) of the Labour Act 11 of 2007.

3.4 Criticism of the application of the Labour Act No. 11 of 2007 on the Namibian Correctional Service.

A degree of conflict is expected within the relationship between an employee and the employer.[254] Typically however, employers, including the public service, enjoy overwhelming backing resources.[255] This is a result of inequality in the relationship between an employee and the employer. When employees are making their plight heard, they are working in association to put pressure on the employer to make a substantial impact. These are the basics of collective bargaining, putting the employer and employee in equal positions during collective bargaining.[256]

In the Namibian Correctional Service, workers are not permitted to challenge the employer nor make demands for improved working conditions such as wage increases due to the prohibition by the Labour Act,[257] notwithstanding the provisions of the Namibian Constitution, adopted in 1990 soon after independence. The rights of all persons are entrenched in Article 21 of the Namibian Constitution, in Chapter 3 ("Fundamental Rights"). Article 21(1)(e) of the Namibian Constitution states that-

> (1) all persons shall have the right to-
>
> (e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties.[258]

Article 21(2) stipulates that-

> "The fundamental freedom referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or about contempt of court, defamation or incitement to an offense".[259]

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254 M Salamon *Industrial Relations: Theory and Practice 4 ed* (2000).
255 Ibid.
256 D Du Toit 'What is the Future of Collective Bargaining (and Labour Law) in South Africa?' 2007 *ILJ*.
257 Act 11 of 2007.
258 Article 21(1)(e) of the Constitution.
259 Article 21(2) of the Namibian Constitution.

Article 22 of the Namibian Constitution[260] also governed the limitation upon Fundamental Rights and Freedoms. It is stated that-

> "Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:
> (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
> (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest".

The provision under Article 25 of the Namibian Constitution "Enforcement of Fundamental Rights and Freedoms" [261] outlines the followings:

(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that-

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;

(2) Aggrieved persons who claim that the fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom and may approach the ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

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[260] Article 22 of the Namibian Constitution.
[261] Article 25 of the Namibian Constitution.

(3) Subjects to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.

Chapter 11, Principles of State Police: Article 95, Promotion of the Welfare of the People provides that-

(a) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices;
(b) membership of the International Labour Organisation (ILO) and where possible, adherence to and action following the International Conventions and Recommendations of the ILO.[262]

Amendment of the Namibian Constitution is provided under Chapter 19, Article 131: Entrenchment of Fundamental Rights and Freedoms.

Article 131 stipulates that-

"No repeal or amendment of any of provisions of Chapter 3 (Fundamental Human Rights and Freedoms) hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force".[263]

Lastly, the Namibian Constitution has also provided for under Chapter 21, Article 144: International Law that-

[262] Article 95 of the Namibian Constitution.
[263] Article 131 of the Namibian Constitution.

> "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international and international agreements binding upon Namibia under this Constitution shall form part of the Law of Namibia".[264]

As a result of the contradiction of the provisions of the Namibian Constitution by the Labour Act, the following questions have been raised by the study to make appropriate recommendations to stakeholders.

3.4.1 Is the legislative exclusion from the Labour Act No. 11 of 2007 unconstitutional, infringes or violates or denies correctional officers the constitutional right to freedom of association and the right to collective bargaining?

3.4.2 Is the legislative exclusion of the Namibian Correctional Service from the provision of the Labour Act a justifiable limitation and reasonable restriction of the right as contemplated by Sub-Article 21(2) and 22 of the Namibian Constitution?

3.4.3 Do the Correctional Officers have the right to approach the competent Court of Law to make an order that shall be necessary and appropriate to secure the enjoyment of the rights conferred on them under the provisions of the Namibian Constitution?

3.4.4 Do Correctional Officers have the right to form and join trade unions to engage in collective bargaining with the employer and reach collective agreements on terms and conditions of their employment?

3.4.5 Are Convention 98 of 1949 and Convention 87 of 1948 binding upon Namibia, and form part of the Law of Namibia?

3.4.1 Legislative exclusion from the Labour Act No. 11 of 2007 is unconstitutional, infringes or violates or denies correctional officers the constitutional right to freedom of association and the right to collective bargaining

This question was answered in *South African National Defence Union v Minister of Defence and Another*. The South African legal system and lawyers were tested by the South African Military Forces by approaching the competent Court of Law demanding unionisation of the South African Defence Force. There was a concern in the above-mentioned case of whether the prohibition of members of the armed forces from participating in public protest action and from forming and joining trade unions was constitutional. In the Transvaal High Court, Justice Hartzenburg declared that the provision of the Defence Act, 44 of 1957 which prohibits members of the

[264] Article 144 of the Namibian Constitution.

Defence Force from joining trade unions or engage in any "protest action", as stipulated in the Act, was unconstitutional.[265] For his order to have any force and effect, however, the declaration of invalidity had to be confirmed by the Constitutional Court.

In the South African Labour Legislation, Section 2 of the Labour Relations Act states that-[266]

> This Act does not apply to members of-
>
> (a) The National Defence Force

The Labour Relations Act is a statute that regulates collective bargaining in South Africa.

While section 18, 23(1), 23(2)(a),(b), and (c) plus 23(5) of the Constitution of the Republic of South Africa provides for the Bills of Rights, which includes the following:

Section 18, Everyone has the right to freedom of association;[267]

Section 23(1), everyone has the right to fair labour Practices;[268] and

Section 23(2) stipulates that every worker has the right[269] –

(a) to form and join a trade union;

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

(c) to strike.

Sections 23(5) provides that-

> "Every trade union, employers' organisation has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)".[270]

Section 36(1) stipulates that-[271]

> The rights in the Bill of Rights may be limited only in terms of Law of General application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors-
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;

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[265] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC).
[266] Secton 2 of the Labour Relations Act 66 of 1995.
[267] Section 18 of the Constitution.
[268] Section 23(1) of the Constitution.
[269] Section 23(2) of the Constitution.
[270] Section 23(5) of the Constitution.
[271] Section 36(1) of the Constitution.

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

Sections 36(2) outlines that-

> Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.[272]

As it was mentioned above that it is viable to compare and refer the arguments, analysis, findings, and conclusions of this study to the *South African National Defence Union v Minister of Defence and Another* because of the similar persuasive value appears in both the phenomenal under study and the referred case law. The above-mentioned case's final decision was reached based on the provision of the Constitution of the Republic of South Africa. The Constitution does not provide that the rights to form and join trade unions, and to collective bargaining be prohibited. The Constitution outlines that these rights may be limited to the extent that the limitation is reasonable and justifiable.

Similarly, in the Namibian context, Section 2(2)(d) of the Labour Act No. 11 2007 provides that-[273]

> Subject to subsection (3) to (5) all other sections of this Act apply to all employers and employees except to members of the-
>
> (d) Prison Service, unless the Prison Service Act, 1998 (Act No. 17 of 1998) provides otherwise.

There is a gap in this provision because, the stated Prison Act was repealed in 2002 by the Correctional Service Act No. 9 of 2002 before the enactment of the Labour Act No.11 of 2007 in November 2007. The Prison Act referred to is no longer in force, this requires amendment to read as follows: 'unless the Correctional Service Act, 2002 (Act No. 9 of 2002) provides otherwise'. Nevertheless, the Correctional Service Act, 2002 which is in force is mute regards the right to freedom of association and to collective bargaining in the Namibian Correctional Service.

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[272] Section 36(2) of the Constitution.

[273] Section 2(2)(e) of the Labour Act 11 of 2007.

Correspondingly, Articles 21(1)(e), 21(2), 22(a) and (b), 95(a), 25(1) of the Constitution of the Republic of Namibia provide for the following:

Article 21(1), All persons shall have the right to-[274]

(e) freedom of association, which shall include freedom to form and join association or unions, including trade unions and political parties.

Article 21(2),

"The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence".[275]

Article 22, Whenever or wherever in terms of Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall-[276]

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

Article 95, The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies and aimed at the following:[277]

(c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices.

It is provided in Chapter 3, Article 5 of the Namibian Constitution that-

"The fundamental rights and freedom enshrined in this Chapter shall be respected and upheld by the Executive, Legislature, and Judiciary and all organs of the Government and its agencies and,

[274] Article 21(1) of the Namibian Constitution.
[275] Article 21(2) of the Namibian Constitution.
[276] Article 22 of the Namibian Constitution.
[277] Article 95 of the Namibian Constitution.

> where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed".[278]

Article 25 (1) stipulates that-

> "Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter (Chapter 3: Fundamental Human Rights and Freedom), and any law or action contravention thereof shall to the extent of the contravention be invalid". [279]

Lastly, it was found relevant to regard the provision of the Labour Act No. 11 of 2007 unconstitutional because it is contrary to the provisions of the Namibian Constitution, Articles 5, 95, 21(1)(e), 21(2), and 25 (1). The provision of the Labour Act contradicts the provision of the Namibian Constitution by prohibiting the correctional officers from joining trade unions and bargaining collectively. The Supreme law provides that all persons in the Republic of Namibia shall have the right to freedom of association. The Namibian Constitution allows limitation on the exercise of the right to freedom of association which should be reasonable restrictions in a democratic society. It further provides that the Fundamental Human Rights and Freedoms shall be respected and upheld by all natural and legal persons plus the Executive, Legislature, Judiciary and all organs of the Government and its agencies in Namibia. And if any law or action contravene thereof the Fundamental Human Rights and Freedoms, shall to the extent of the contravention be invalid.

To determine whether the provision of the Namibian Labour Act infringed or violated the rights of the Namibian Correctional Service guaranteed by the Namibian Constitution to form and join a union of their choosing, and to organise and bargain collectively, firstly, we must acquaint ourselves with the provisions made in terms of the Constitution.

The Labour Act prohibited the members of correctional service to the rights provided in Article 21(1)(e) and Article 75 respectively. Again reference is made to *South African National Trade*

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[278] Article 5 of the Namibian Constitution.
[279] Article 25(1) of the Namibian Constitution.

Union v Minister of Defence and Another, whereby the provisions of the Defence Act prohibited SANDF members from forming and joining trade unions came under constitutional inquiry. Section 126B of the Defence Act provides that-

> (1) A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 28 of 1958 (herein referred to as Act No. 28 of 1958); Provided that this provision shall prohibit any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.[280]

The applicant contended that section 126B infringed the constitutionally enshrined right found in the Constitution. O'Regan J referred to the words of Hefer JA in *National Media Ltd and Others v Bogoshi*[281] where she said that freedom of expression is at the heart of democracy. She then referred to Mokgoro J in *Case and Another v Minister of Safety and Security and Others* [282] as she alluded to the following:

> "We must understand the right embodied in section 15, not in isolation but as part of a web of mutually supporting rights enumerated in the Constitution, including the right to "freedom of conscience, religion, thought, belief, opinion", the right to privacy and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communication interaction that is both instrumental and intrinsic value".

The court held that section 126B of the Defence Act infringed the rights of the members of SANDF. Taking into account the provision of section 126B, the Court decided that the scope of this section is excessive. O'Reagan J stated that SANDF is almost completely prohibited from expressing their views and concerns and engaging in discussions. She found that the scope of s 126B of the Defence Act extended far beyond what is provided for in section 199(7) of the Constitution. She said the following:

> "The ambit of the prohibition under challenge advocates that members of the Defence Force are not entitled to hear, form, and air, opinions on the matter of public interest and concern. It is suggested that enrolment in the Defence Force requires a detachment from the interests and activities of the ordinary society and of ordinary citizens. Such a conception of the Defence Force

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[280] Section 126B of the Defence Act 44 of 1957.
[281] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA).
[282] *Case and Another v Minister of Safety and Security and Others* 1996 (5) SA 608 (CC).

> cannot be correct. Members of the Defence Force remain part of our society, with obligations and rights of citizenship. All that section 199(7) of the Constitution requires is that they perform their duties dispassionately and objectively. It does not require that they lose the rights and obligations of citizenship in other aspects of the lives".[283]

As O'Reagan J concluded that members of the Permanent Force constitute "workers" for s 23(2) of the Constitution, thus, the provisions of section 126B(1) of the Defence Act[284] infringed their rights to form and join trade unions.

On the same note, as the Namibian Correctional Officers constitute "workers" for Article 21(1)(e) and Article 95(c) of the Namibian Constitution, there is no doubt that the provision of the Namibian Labour Act infringed their right to form and join trade unions of their choosing and to organise and bargain collectively.

3.4.2 Are the limitations of the provisions of the Labour Act No. 11 of 2007 justifiable as contemplated by Sub-Article 21(2) of the Namibian Constitution?

To determine whether the Labour Act provision is justifiable as contemplated by Article 21(2) of the Namibian Constitution, attention should also be drawn from *SANDU v The Minister of Defence Force & Others.* After O'Regan found that the provisions of section 126B(1) that infringed the right of the members of the Defence Force to form and join trade unions are inconsistent with the Constitution and the provisions in question infringes the rights protected by the substantive clauses of the Bill of Rights, she considered the next question whether such infringement is a justifiable limitation in terms of section 36.[285] At the second stage of the constitutional inquiry, O'Regan inquired the purpose of the impugned provisions, its effect on the constitutional rights and is the provision well-aligned to that purpose.

Before O' Regan considered the question of a justifiable limitation, she noted that there is an additional matter that needed to be addressed afore. She discussed whether section 36 of the Constitution is applicable in the case because the applicant is concerned with the complete denial of section 23(2) rights to members of the Permanent Force. O'Regan suggested that the complete

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283 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC).
284 Ibid.
285 Ibid.

denial did not constitute a "limitation" of rights as referred to in section 23. She concluded that the provision of 126B(1) in this case is not justifiable in terms of section 36.[286]

Similarly, in the Namibian Correctional Service, members are denied the rights as contemplated in section 21(1)(e) of the Namibian Constitution. The exclusion of the Correctional Service members provided in the Labour Act is not compatible with the provisions of Article 21(2) that stipulates the limitation on the exercise of the rights enshrined in Article 21(1)(e). The Legislature has misinterpreted the provision of Article 21(2), hence the correct interpretation should be made. Reference may be made to the closing remarks by the then Minister of Labour and Social Welfare during the 2008 workshop, that the provisions of Article 21(1) is not absolute but it must be read subject to Sub-Article 21(2).[287] It is also concluded that the provisions of section 2(2)(d) of the Labour Act No. 11 of 2007 in this regard are not justifiable. If the Labour Legislature wishes to limit any of the rights conferred on members of the Correctional Service by Article 21, it must do so in terms of Article 21(2) and Article 22.

3.4.3 Correctional Officers have the rights to approach the competent Court of Law

In terms of Article 25(2) of the Namibian Constitution[288], the correctional officers have the right to approach the competent Court of Law. Article 25 provided that-

> 2. Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

This was attested in the Namibian High Court in *Venancia Simana and Others v The Commissioner-General & Others* in which the applicants sought relief and a declaratory order to declare the Commissioner's Directive 03/2008 unconstitutional. Unfortunately, the correctional

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286 Supra para 131.
287 Pio M Teek '*The workshop report on Police Labour Relations in Namibia, Time for new beginning?*' (2008).
288 25(2) of the Namibian Constitution.

officers did not succeed due to a technicality, although the Court recognises that their case had persuasive issues.[289]

The South African Defence Force Union took the South African Defence Force to Court seeking relief for the Defence Force Directives to be declared unconstitutional. SANDU succeeded in the case and the SANDF members joined the Defence Trade Union without any prejudice.
In view of this study, the correctional officers must re-organise themselves and go back to the drawing board to craft well their case against the constitutionality of s 2(2)(d) of the Labour Act, 2007 and re-launch their application in the competent Court of Law.

Reference should be made to *SANDU v Minister of Defence and Other.* Though the SANDF was also excluded from the provision of the Labour Relations Act (herein referred to Labour Relations Act No. 66 of 1995), the trade union that represented them was formed. SANDU took the South African Government to court for the rights guaranteed under Convention 87 and 98 to be extended to the Defence Force.[290]

3.4.4 Correctional officers have the right to form and join trade unions to engage in collective bargaining with the employer

Chapter 11, Article 95 of the Namibian Constitution[291] provides for the formation of independent trade unions.

Article 95 states that-

> The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:
>
> (a) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices.

The correctional officers, although excluded from the provisions of the Labour Act, 2007 still have the constitutional right to form a trade union, although the trade union would be excluded from the rights and protections in the Labour Act, 2007.

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289 *Venancia Simana and Others v The Commissioner-General & Others* 2011 (59) NA129 (HC).
290 *SANDU v Minister of Defence and Another* (1999) 20 *ILJ* 2265 (CC).
291 Article 95 of the Namibian Constitution.

After O'Regan ruled that members of the Permanent Force are entitled to their constitutional rights, she was convinced by SANDF (the respondents) that it is potentially risky to afford the rights without an appropriate regulatory framework.[292] It was ordered by O'Regan that the framework must be established as soon as possible. In the same vein, this study has also observed that it is necessary upon or before the granting of the constitutional rights stipulated in Article 21(1)(d) to the Namibian Correctional Service, the framework regulating these rights must be formulated. The framework will be instituted in terms of Article 22 of the Namibian Constitution[293] which states that:

> "Whenever or wherever in terms of this Constitution the Limitation of any fundamental rights or freedoms contemplated by this Chapter is authorized, any law providing for such limitation shall:
>
> (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
>
> (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest".

SANDF argued that a trade union would be constitutionally entitled to bargain collectively on behalf of its members and to conduct strike action. SANDF further argued that the discipline and combat readiness of the Defence Force as required by the Constitution would be undermined or weakened. In their argument, they further claimed that if the Defence Force is to be weakened by granting the rights to freedom of association to the Permanent Members, it would have severe negative consequences for the South African State.[294] The same claim was also made by the Namibian Minister of Labour and Social Welfare, and the Minister of Safety and Security during the opening and closing of the workshop in 2008, that the armed forces and security services will not form and join trade unions because of the national security, and public order.[295] They made these comments out of fear that trade unions will be violating the military standards and

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[292] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC).
[293] Article 22 of the Namibian Constitution.
[294] Lindy Heinecken and Michelle Nel 'Military Unions and the Right to Collective Bargaining: Insights from the South African Experience' (2007) 3 *The International Journal of Comparative Labour Law and Industrial Relations* 23.
[295] Pio M Teek '*The workshop report on Police Labour Relations in Namibia, Time for new beginning?*' (2008).

principles with strikes, without considering that laws may be enacted and agreements could also be reached to regulate labour relations matters including strikes within the armed and security forces.

Nevertheless, SANDU maintained that it did not seek the right to strike on its behalf or behalf of its members. But, argued that a trade union can function and can assist and further the interests of its members without participating in strike action.[296] O'Regan had also made it clear that by granting the constitutional rights to the Defence Force, she had never lost sight of the significance of discipline and obedience in the Defence Force.[297] She considered a judgment awarded by *L'Heureux-Dube in R v Genereux*[298] that

> "[T]he armed forces depend upon the strictest discipline to function effectively…. Clearly, without the type of rigorous obedience to a rigid hierarchy which the military demands of its members, our national defence and international peace-keeping objectives would be attainable".

In a separate and concurring judgment in the same case of *SANDU v The Minister of Defence Force & Others,* Justice Sachs complimented O'Regan' decision by saying the following:

> "a blindly obedient soldier represents a greater threat to the constitutional order and the peace of the realm, than one who regards him or herself as a citizen in uniform, sensitive to his or her responsibilities and rights under the Constitution".[299]

Sachs further held that it is proclaimed by section 198(a) of the Constitution that national security is not simply directed towards the maintenance of power but "must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want to seek a better life.[300] He reminded the applicant of the primary objective of the defence force by pointing out section 199(5), s 199(6), and s 200(2) by stating that-

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296 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC)
297 Paragraph 28.
298 *R v Genereux* [1992] 1 SCR 259 (Canadian).
299 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC).
300 Para 47.

> "These provisions contemplate conscientious soldiers of the Constitution who can be expected to fulfill their constitutional duties more effectively if the values of the Constitution extended appropriately to them and infuse their lives in the armed forces".[301]

The findings of this study correlate with the observations made by Justice O'Regan and Sachs before they granted the rights to the defence force to form and join trade unions. The study found that the correctional officers can also be granted their rights without violating or undermining their mandate for maintaining national security and public orders. As long as laws that institute reasonable limitations on the right to strike may be enacted.

The study further found that the correctional officers have the right to form and join trade unions in terms of Article 21(1)[302] which provides that "all persons shall have the right to freedom of association...", without mentioning the word 'workers'. Similarly Justice Sachs observed that everyone has the right to freedom of association in terms of section 18, and 'everyone' has the right to fair labour practices in terms of section 23(1).[303] He concluded that this clearly entitled soldiers to set up an organization such as SANDU to look after their employment interests. He did not consider it necessary as it was done by O'Regan by examining the complex question of whether soldiers qualify as 'workers'.[304] Sachs avows that "the aura that any military force requirements cannot take away the need for soldiers to be able to speak in their own distinctive voices on mundane but meaningful questions of service", he referred to the phrase *esprit de corps.*[305]

3.4.5 Convention 98 of 1949 and Convention 87 of 1948 are binding and form part of the Law of Namibia

The Namibian Constitution states in terms of Article 144 that the international laws and agreements that are binding upon Namibia shall be part of the law of the land. Under the provision of the Namibian Constitution in Article 144 it is stipulated that-

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301 Para 47.
302 Article 21(1) of the Namibian Constitution.
303 Section 23(1) of the Constitution.
304 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC).
305 Para 48.

> "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia".[306]

Article 15 of Convention 87 and Article 8 of Convention 98 respectively, has also stated that-

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Namibia ratified Convention 98 and 87 in 1995, whereby these Conventions became part of the Namibian law and binding on her. Namibia is obliged by the provisions in terms of the Namibian Constitution and the two Conventions to extend the rights guaranteed to all persons and every worker.[307] Hence, Namibia has since agreed to amend the Labour Legislation to extend its provisions to the Namibian Correctional Service.[308] The unfortunate situation is that the implementation process has not taken place and appears to be stalled. The process requires a driving force that will coerce Namibia to take action.

3.5 Substantive issues impacting the right to organise and collective bargaining in the Namibian Correctional Service

Labour unions and the Namibian Correctional Service are reluctant to take the Namibian Government to Court for the Labour Act provision that prohibited members of the Correctional Service to organise and bargain collectively, to be amended. It is a common practice around the world that some trade unions have appealed to the courts to challenge governments' decisions, and have submitted comments to the ILO supervisory bodies alleging violations of ratified Conventions, a classic example of *South African National Defence Union v Minister of Defence and Other*.[309]

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306 Article 144 of the Namibian Constitution 21 of 1990.

307 Article 21(1)(e) All persons shall have the right to freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties; Article 3 and 4 of Convention 98; Article 2 of Convention 87.

308 International Labour Organisation *Freedom of Association: Observation of the CEACR* Session 104th International Labour Conference (2015).

309 *South African National Defence Union v Minister of Defence and Other* 27 SA 78 (CC).

Currently, in Namibia, there is no trade union formed that intended to represent the members of the correctional service. The correctional officers are voiceless in the absence of a representative. Moreover, there are no labour union activities in Namibia. The labour movement is inactive, trade unions are invisible, and workers are not pushing trade unions to engage employers for collective bargaining.[310]

National Union of Namibia Workers (NUNW), Namibia's largest trade union federation maintained its associations with SWAPO after independence through "affiliation accord", this made the federation an affiliate of the ruling party.[311] The federation link to the ruling party has fueled heated debates both within and outside the federation. Some are arguing for a different relationship between the federation and the ruling party. This group of people pointed out that a continued affiliation between the federation and the ruling party would undermine the independence of the labour movement and it will wipe out prospects for trade unions in Namibia.[312] Trade unions outside the umbrella of NUNW have repeatedly charged that NUNW would not act independently and play the role of watchdog over the government as long as it is affiliated to the ruling party.[313] Many Namibian trade unions include public service trade unions are under the umbrella of the NUNW. It appears that NUNW is reluctant to push the government to extend the rights guaranteed by Convention 87 and 98 to members of the correctional service due to its affiliation to the ruling party. Apart from the workshop conducted by NUNW and Public Service Union of Namibia (PSUN) in 2008, the federation (NUNW) turned blind eyes to the issue of legislative exclusion of the correctional service by the labour legislation.[314] Previously under the provision of the repealed Labour Act No. 6 of 1992, correctional staff were organising under the membership of the Namibian Public Workers Union (NAPWU) and Public Service Union of Namibia (PSUN). Both NAPWU and PSUN are members of the Federation, NUNW. NAPWU and PSUN are currently silent on the issue of the right to organise and collective bargaining to be extended to the correctional officers. These two trade unions should

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310 H Jauch *Trade union in Namibia: Define a new role* (2019).

311 H Jauch *Understanding the past and present – mapping the future: The National Union of Namibian Workers (NUNW) facing the 21st century* (2014).

312 H Jauch *Understanding the past and present – mapping the future: The National Union of Namibian Workers (NUNW) facing the 21st century* (2014).

313 Ibid.

314 Ibid

rally behind the correctional officers to claim back their rights and to promote conducive labour relations within the service.

The deep divisions among Namibia's labour movement have failed trade unions to achieve or live up to the proclaimed epitome of "one country, one federation" and "one industry, one union".[315] Namibia has a multitude of trade unions grouped into three (3) federations compete with each other over membership.[316] Political divisions among the Namibian trade unions make it difficult for trade unions to cooperate even on matters of common interests, resulting in detrimental effects on the Namibian workers at large.[317] After independence, Namibia's labour movement has slowly shifted away from basic activism that characterised many Namibian trade unions in the 1980s, towards more hierarchical ways of decision-making which weakened workers' control and democracy in their respective rank and file.[318] This concern needs to be reversed for unions to remain accountable to their members and to act in their interest all the time. The main challenge is the division between industrial trade unions and their federations which destabilises labour's capacity to make a significant contribution to Namibia's overall development, based on workers' interests.[319] The three (3) union federations as well as their industrial unions need to explore ways of constructive collaboration on issues of mutual interest such as; the protection of workers' rights, unemployment, fighting exploitation, and improving labour legislation. Accordingly, trade unions must focus on unorganized sectors such as security and explore new ways of organizing to reach workers.

To conclude, no force drives the process to amend the legislation for the provisions to join trade unions and collective bargaining to be extended to the correctional service. The ILO has also not managed to pressure the Namibian Government to make provisions for the correctional service to form and join trade unions and to participate in collective bargaining. Namibia submits the same report repeatedly that the legislation amendment proposal is to be submitted to the Cabinet.

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315 G Delgado and H Jauch *Trade unions at the cross roads: Reflections on challenges and opportunities facing Namibian labour movement* (2014).

316 Ibid.

317 H Jauch *Understanding the past and present – mapping the future: The National Union of Namibian Workers (NUNW) facing the 21st century* (2014).

318 G Delgado and H Jauch *Trade unions at the cross roads: Reflections on challenges and opportunities facing Namibian labour movement* (2014).

319 Ibid.

Although the ILO system for monitoring standards is composed of regular and special procedures, ILO has no enforcement measures at its disposal.[320] Only, political and moral pressure exercised through the public discussions can play a critical role in encouraging the implementation of ILS by governments.[321]

3.6 Mechanisms to organise and collective bargaining for the Namibian Correctional Service

Apart from the provisions of Article 21 of the Namibian Constitution, Convention 87 and 98, there are no mechanisms to organise and collective bargaining within the Namibian Correctional Service. The Correctional Service Act (hereinafter referred to Correctional Service Act No. 9 of 2002) is silent on the issue of trade unions and collective bargaining within the service. Additionally, there are no internal Regulations passed in terms of the Act to regulate labour relations within the Namibian Correctional Service.

In the absence of workers representatives, there will be no mechanisms in the work place to drive the labour relations activities in an organization.[322] For the Namibian Correctional Service members to enjoy the rights provided by the Namibian Constitution and guaranteed by Convention 98 and 87, they should form a trade union that will facilitate the formulation and enactment of collective bargaining mechanisms within the Namibian Correctional Service. In his presentation during the workshop 2008, the then General Secretary of POPCRU highlighted that after SAPS and the Department of Correctional Service recognised POPCRU, a reshaping of the police and correctional services labour relations to be in line with the new democratic dispensation began in recognition of the rights enshrined in the Constitution of South Africa.[323]

He further alluded that the new trend led to the introduction of police labour regulations which articulated how collective bargaining would be conducted as well as regulating the relations between the department and organised labour (trade union). He informed the participants that in

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[320] Alfred Wisskirchen 'The standard-setting and monitoring activity of the ILO' (2005) 3 *International Labour Review Joournal* 144.
[321] Ibid.
[322] Pio Marapi Teek *The workshop report on Police Labour Relations in Namibia: Time for a New Beginning?* (2018).
[323] Ibid

the Department of Correctional Service the situation was different.[324] "There was a staff association which enjoyed the rights to freedom of association and collective bargaining and was operating under the provisions of the Labour Relations Act No. 66 of 1995".[325] POPCRU's General Secretary maintained that after the Department of Correctional Service recognised POPCRU, nothing much was changed except that structures had to be aligned with the new Labour Act. The tremendous change was on the Police Department where POPCRU has to lobby the government to abolish the previous Police Labour Regulations for the police to be included within the framework of the Labour Relations Act.[326] He indicated that POPCRU succeeded in this regard. The General Secretary quoted ILO Conventions that police and correctional services are classified as essential services and are not allowed to strike.[327] He stated that this principle applies to them but the law makes provisions for an institutionalised dispute resolution and arbitration processes.[328] The developments led to the formation of the Safety and Security Sectoral Bargaining Council (SSSBC) which is responsible to implement and monitor collective agreements concerning armed forces, and security and safety members, which have been concluded in the Public Service Collective Bargaining Council (PSCBC).[329] He concluded that the new structure enhanced and strengthened social dialogue which eliminated unilateral change of terms of conditions of employment and has reduced unfair labour practices such in terms of promotion, unfair dismissals, etc.[330] It is recommended that the Namibian Correctional Service to benchmark with POPCRU, the SAPS, and the Department of the South African Correctional Services to develop collective bargaining mechanisms within the service. POPCRU has also indicated that they were dealing with the project on the unionisation of the police in the SADC Region.[331] This will be a solidarity work to assist the Namibian Correctional Service.

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[324] Pio Marapi Teek *The workshop report on Police Labour Relations in Namibia: Time for a New Beginning?* (2018).
[325] Ibid.
[326] Ibid.
[327] Ibid
[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] Pio Marapi Teek *The workshop report on Police Labour Relations in Namibia: Time for a New Beginning? (2018).*

3.7 Conclusion

This is the key Chapter of the study. It highlights that the legislative provisions in terms of the Labour Act Act No. 11 of 2007 impede the members of the correctional service to organise and bargain collectively, contrary to the Namibian Constitution and Conventions 98 and 87. Members of the correctional service are excluded from the Labour Act. The provision of the Labour Act that prohibits the correctional officers to organise and collective bargaining is unconstitutional, unreasonable, and unjustifiable. There are no statutory provisions regulating the formation of trade unions and collective bargaining, and labour relations in the correctional service. It is proposed that the correctional officers must form a trade union in terms of the Namibian Constitution, to represent the members of the service in a competent Court of law or in any other proceedings. The formation of a trade union will enable the correctional officers to challenge the constitutionality of the Labour Act provision.

CHAPTER 4. RECOMMENDATIONS

Based on the previous chapters, the purpose of this chapter is to provide measurable, attainable, and realistic recommendations. The recommendations are aimed at the Labour Advisory Council; the trade unions' federations and labour unions; the Namibian Correctional Service; and the Ministry of Labour, Industrial Relations and Employment Creation.

Firstly, the Labour Advisory Council should investigate and advise the Minister of Labour to amend section 2(2)(d) of the Labour Act to ensure that the provisions of the Act are extended to the correctional officers. The amendment of the labour legislative will permit members of the Namibian Correctional Service to form and join trade unions to promote collective bargaining on terms and conditions of their employment. Collective bargaining will enable the Government of the Republic of Namibia and the Namibian Correctional Service to enter into Collective Agreements. The inclusion of the correctional officers into the statute to organise and join unions will ensure democratic and healthy working relations and environment within the Namibian Correctional Service. It will also promote performance, efficiency, and equity within the Correctional Service. The Council should advise the government on any drawback that may hinder or in conflict with the implementation of the Conventions. Again, it should advise the Government on the consequences thereof, if the Government failed or unable to implement the Conventions. The Council should include members of the Namibian Correctional Service to map up the implementation process of the two Conventions.

Secondly, NUNW and its industrial trade unions such as NAPWU and PSUN (these are public service unions) must focus on the unorganized sectors such as Security and explore new ways of organising to reach workers in these sectors. Correctional officers need a driving force that may assist them to form or join a trade union. The Public Service Union of Namibia (PSUN) has knowledge on this matter because it acted as the representative of the litigants when the correctional officers took the Commissioner-General and Others to Court.

Alternatively, the Namibian Correctional Service should form a trade union that will represent them. This trade union should solely represent them unlike before when correctional officers were represented by a comprehensive trade union of all professions in the public service, except

teachers. The correctional officers require a trade union that will only deal with their labour issues in terms of their uniqueness, operations, and functions.

Thirdly, the correctional officers should approach the Office of the Ombudsman to channel their grievances and possibly refer a dispute to the competent Court of Law. The Office of the Ombudsman may assist them with the legal representative to represent them during the hearing. They should challenge the provision of the Labour Act that prohibits them to organise. Unlike before in *Venancia Simana and Others v The Commissioner-General of Correctional Service & Others*, whereby they only attacked the Commissioner General's Directive's provision and left the provision of the Labour Act No. 11 of 2007 unchallenged.

Fourthly, a process should be agreed for the drafting of an appropriate regulatory framework, as it is desirable for framework to be established before the granting of such rights. These statutory provisions must suit the nature and operation of the Namibian Correctional Service to regulate the rights of the members to join trade unions and collective bargaining within the Service.

Finally, adequate budget should be provided to ensure that adequate resources are available to drive the implementation process. This may include, funding of traveling expenses to neighbouring countries for benchmarking, hosting of meetings, workshops, and training with relevant stakeholders. Namibia should benchmark with neighbouring countries such as South Africa who have successfully implemented the two Conventions on the Prison Services. Members of the South Africa Prison Services and members of the POPCRU may be assigned to the Namibian Correctional Service for advisory purposes to drive the implementation process.

CHAPTER 5. CONCLUSION

In closing, the study centered on the rights guaranteed by Convention No. 87 of 1948 No. 98 of 1949, the Right to Organise and Collective Bargaining and Freedom of Association and Protection of the Right to Organise within the Namibian Correctional Service. Firstly, the two ILO's Conventions were discussed in general by defining them, analysing their applicability to workers and employers, and their organisations. The study discussed the difference between Freedom of Association and Freedom to strike. It further highlighted the exception to the right to strike and protection against industrial actions, and also what entails essential services.

The primary purpose of the study was to investigate the application of Convention No. 98 and No. 87 to the Namibian Correctional Service, and to make recommendations to the relevant stakeholders to allow the Namibian Correctional Service to enjoy the rights that are guaranteed by the two Conventions. It was revealed that the Namibian Correctional Service does not organise nor belong to a trade union. It is deprived of the two rights guaranteed by the two Conventions by the legislative provisions. Furthermore, Freedom of Association and the Protection of the Right to Organise are fundamental rights in the Namibian Constitution. The Constitution provides that freedom of association is a fundamental right for every person, which includes the freedom to form and join unions or associations, including trade unions and political parties. The Namibian Labour Act No. 11 of 2007 has provided for freedom of association and collective bargaining. It is found that the two rights guaranteed by Convention No.87 and No.98 were extended to the prison services by a repealed Labour Act No. 6 of 1992, however the guaranteed rights were revoked from the correctional officers in 2007 after the introduction of the Labour Act No. 11 of 2007, despite Namibia having already ratified the two Conventions in 1995. The rights were withdrawn without any indication of a violation of the interests of the national security or public order which is the reason for abrogating the rights from the correctional service.

The study noted that attempts have been made to ensure that Namibia amends the Labour Act to extend the scope of application to the Correctional Officers. Namibia is required by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to report regularly on the measures that have been taken to implement the two Conventions on the correctional service. The CEACR has observed that Namibia is not committed to implementing the two Conventions, and has requested Namibia to amend its Labour Act No. 11 of 2007 to make provision for the Namibian Correctional Service to organise and bargain collectively the terms and conditions of their employment. Namibia has been reporting since 2009 that the Labour Act is to be tabled to the Cabinet for endorsement, which never happened.

This study has also observed that there was a workshop on "Police Labour Relations in Namibia" that took place in September 2008. The workshop was hosted by the Namibia Union of Namibia Workers (NUNW), with the purpose to allow the Namibian Police and Correctional Service to join Labour Unions. Many labour unions include POPCRU have also attended the above-mentioned workshop. POPCRU has indicated that restrictive or prohibitive labour regulations are incompatible with fair labour practices and as such are tools of oppression. The main emphasis of the workshop was to pass a resolution that will lead to the amendment of the Labour Act No. 11 of 2007 in the interest of Police and Correctional Officers. The study also noted that the parties to the matter under discussion misunderstood and misinterpreted the laws, in particular the Minister of Labour and the Social Services, Minister of Safety and Security, and the Nampol representatives. The Minister of Labour and Social Welfare referred the participants to statutory provisions which he interpreted inconsistently, for example, Article 21(2) and Article 9 of Convention 87 on the limitations on the rights to freedom of association. Instead, the provisions emphasise extending the rights with some restrictions and not completely prohibiting the rights.

The study further found that there was an attempt made by the correctional officers to take the Commissioner-General of the correctional service and others to court to challenge the provision of the Commissioner General's Directive that revoked the rights of and prohibits the correctional officers to be members of trade unions. It was noted that the court declined to exercise its discretion in favour of a review and declaratory relief sought by the correctional officer 'despite the matter raising important constitutional issues. The Court took into account that the correctional officers failed to attack the constitutionality of the underlying provisions in the

Labour Act No.11 of 2007 that prohibited them to join trade unions. The Court held that any judicial pronouncement of the constitutionality of the applicable provisions of the Labour Act would be *obiter* as the real issue to be determined falls to be decided within a much narrower ambit. The Court held that the order will be an irrational one if the Court would accede to the relief sought. In other words, this would have resulted in the Court declaring the 'Commissioner General's Directive 03/2008' unconstitutional and invalid and the underlying provisions of the enabling legislation, the Labour Act would continue to exist. The application was dismissed with costs.

In a presentation by a Namibia representative at a workshop in Johannesburg to assist SADC Member States to improve the application of ILO Conventions No. 98 and No. 87 held in September 2017, the representative indicated that the Ministry of Labour and the Namibia Correctional Service have not committed to tackling the employees' issues. The Ministry of Labour has been inviting the Namibian Correctional Service to meet and discuss the issue of the amendment of the Act but this has not materialised.

Finally, the study made recommendations to all relevant stakeholders to address the gaps. It recommends that the Labour Advisory Council should advise the Minister of Labour to amend the labour legislation; trade unions federations and labour unions must focus on unorganised sectors such as security; correctional officers should visit other institutions such as Office of the Ombudsman to register their grievances and for possible solution to their dispute; appropriate regulatory framework should be drafted to regulate the right of freedom of association and the right to collective bargaining within the correctional service; and adequate budget should be allocated to fund the implementation process, trainings and benchmarking with neighbouring countries.

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