

**THE LEGAL IMPLICATIONS OF HARMONISING LABOUR  
LAWS IN THE SOUTHERN AFRICAN DEVELOPMENT  
COMMUNITY (SADC) REGION**

**by**

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## **DEDICATION**

To all my children: Onemhinyele'arenah, Ailen'onokhuria, Aiwanfoh and Ugheghe.

## SUMMARY

The purpose of this research is to explore the need for, and the legal implications of, harmonising labour laws in the Southern African Development Community (SADC).

Chapter One highlights a number of factors that call for the harmonisation of labour laws in the SADC region and discusses some of the reasons why labour laws are not well developed in the region.

The influence of globalisation on labour standards in southern Africa and the influence of regionalism on the harmonisation of labour laws are discussed at length. The inference that could be drawn from this discussion is that for a regionalisation process in southern Africa to be successful, there is an urgent need to harmonise the region's labour law system. This thesis confirms that Southern Africa has many lessons to learn from the regional harmonisation of labour law in the European Economic Community and the current European Union.

The implementation of international labour standards in southern Africa is investigated. The main areas examined include (1) freedom of association, (2) collective bargaining, (3) forced labour and (4) discrimination. The findings of this investigation show that there is no uniformity in the implementation of International Labour Organisation (ILO) standards in the SADC region and, therefore, it is recommended labour law should be harmonised in terms of ILO standards.

In respect of the benefits to be derived from the harmonisation process, an empirical investigation was conducted in the SADC region and the following is recommended: the harmonisation of labour law in the SADC region will help with the implementation of ILO standards, protection of workers against the economic power of employers in the workplace and maintaining similar benefits for migrants in the region.

**Key terms:** collective bargaining; compulsory labour; discrimination in the work environment; forced labour; freedom of association; harmonisation of labour law; international labour standards; occupational health and safety environment; SADC. Southern African Development Community countries

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Point of Departure and Focus of Study

The focus of this study is to explore the legal implications of harmonising labour law standards in the Southern African Development Community (hereinafter 'SADC') region.

In recent times, SADC countries have been subject to a range of regional and international influences that have particular effects on labour laws and labour markets. At the regional level, the SADC countries are all involved in one or more processes of regional economic integration. Ng'ong'Ola has argued that the creation of SADC is itself one of those influences, in particular through its protocols dealing with regional economic integration and the liberalisation of trade.<sup>1</sup> While limited progress has been made on issues relating to workers, labour law is likely to become a key issue as SADC moves towards the establishment of a common labour market. This, however, raises the question as to whether it is possible to harmonise labour laws throughout the SADC region.

In both academic and non-academic circles there are a number of arguments in favour of the harmonisation of labour laws in the SADC region. The first argument is that it would assist in the process of economic integration and development. Second, it would help to reduce the level of duplication required of businesses that operate in different countries in the region that have different labour law frameworks and industrial relations practices. Similarly, labour mobility, especially among migrant workers, would be favourably affected by harmonisation because of the different labour law regimes that currently exist in SADC countries.

Third, there is the frequently made argument that common minimum standards can operate as a tool or means of staving off unfair competition between SADC countries

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<sup>1</sup> See Ng'ong'Ola, C (2000) 'The Reconstitution of the Southern African Development Community: Some International Trade Law Perspectives' *South African Law Journal* 117, p 256.

as they move towards sound economic development, since they also compete with one another to attract foreign direct investment.<sup>2</sup>

Although the above arguments in favour of the harmonisation of labour laws have been highlighted, to date not much progress has been made in this regard. Senior officials from ministries of labour, and employers' and workers' organisations discussed the issue at a conference held in 1999, but no commitments were made to actual harmonisation.<sup>3</sup> There is, however, a SADC Charter of Fundamental Social Rights of Workers, adopted in August 2003 on the basis of a draft proposal made in 2001.<sup>4</sup> It takes its lead from Article 5 of the SADC Treaty, which includes the SADC objectives of alleviating poverty and the social inclusion of disadvantaged groups.

This charter also provides for equal treatment of workers and reconciliation of work and family obligations<sup>5</sup> and, in the same vein, gives priority to the protection of vulnerable groups, including the young and the elderly. It creates regular reporting requirements to tripartite structures, and requires SADC members to ratify and implement the core International Labour Organisation (hereinafter 'ILO') Conventions contemplated by the terms of the 1998 Declaration of Fundamental Principles and Rights at Work.<sup>6</sup>

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<sup>2</sup> See details of this point in Kalula, E 'Beyond Borrowing and Bending: Labour Market Regulation and the Future of Labour Law in Southern Africa' in Barnard, C et al. (Eds) (2004) *The Future of Labour Law: Essays in Honour of Bob Hepple* Oxford: Hart Publishers. See also Hepple, B (1999) 'Can Collective Labour Law Transplants Work? The South African Example' *Industrial Law Journal (South Africa)*; Takirambudde, P (1995) 'Protection of Labour Rights in the Age of Democratisation and Economic Restructuring in Southern Africa' *Journal of African Law* 39; Thompson, C (1993) 'Borrowing and Bending: The Development of South Africa' *Unfair Labour Jurisprudence* in Blanpain, R and Weiss, M (Eds) *The Changing Face of Labour Law and Industrial Relations: Liber Americum for Clyde W Summers* Baden: Nimos.

<sup>3</sup> Department of Labour (1999) *Communiqué of the Southern African Development Community (SADC) Labour Relations Conference* Johannesburg, South Africa, 13–15 October 1999 <http://www.labour.gov.za/docs/pr/1999/pr1015.html>.

<sup>4</sup> See the SADC Charter on Fundamental Social Rights of Workers of 2001.

<sup>5</sup> Fenwick, C and Kalula, E (2004) *Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives*. Occasional Paper 2/2004 Cape Town: Institute of Development and Labour Law University of Cape Town.

<sup>6</sup> See details in Article 5 of the SADC Treaty.

In order to understand some of the reasons why labour law is not as well developed in the SADC region as it is in the developed countries, one needs to examine how labour law in the SADC regions has been subjected to political demands. In most African countries, which of course include the SADC region, the ruling governments do not only impose their labour laws without consultation, they control the activities of trade unions. Post-colonial African states typically exercised significant control over trade union movements. They did so in a context in which all social organisations were brought under the control of the political parties in power so that they might dominate other possible sources of political control.<sup>7</sup>

The case of Tanzania illustrates this point. In the early 1960s Julius Nyerere's governing party, the Tanganyika African National Union, parted political ways with the Tanganyika Federation of Labour soon after independence. The government responded by destabilising the Federal Leadership: it absorbed its president into Cabinet, and deported his successors. It later passed the National Union of Tanganyika Workers Act of 1964, which dissolved all other union federations and unions, and created the National Union of Tanganyika Workers (hereinafter 'NUTW').

It also provided the president with power to appoint the new union's secretary general and to dissolve the union.<sup>8</sup> In recent years labour law in the SADC region has been used for other, more self-centred purposes. In many countries in the SADC region, the utilisation of labour law to achieve its goals without harmonising the law might be limited by its position within legal orders that are not well established as complete, and independent of politics and government.

In this perspective the role of the courts in the region in establishing and maintaining principles of labour law has been limited and disappointing, especially in the light of the fact that all but three SADC member countries have adopted a common law

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<sup>7</sup> Fenwick and Kalula (2004) *Law and Labour Market Regulation in East Asia and Southern Africa*.

<sup>8</sup> See details in Mwaikusa, J (1991) 'Government Powers and Human Rights in Africa: Some Observations from the Tanzanian Experience' *Lesotho Law Journal* 75 (6), pp 80–81. See also Rutinwa n 119, pp 5–7 and, more generally, Shivji, I (1998) 'Problems of Constitution-making as Consensus-building: The Tanzanian Experience' in Sichone, O (Ed) *The State and Constitutionalism in Southern Africa* Harare: SAPES Books, pp 23–49.



jurisdiction, which had its origin in either Roman–Dutch or British law (the exceptions being the Democratic Republic of Congo (hereinafter ‘DRC’), Angola and Mozambique). However, South African courts have the longest and strongest tradition of labour law activity among the SADC countries. Historical records show that in the late 1970s, the Industrial Court of South Africa had developed its ill-defined unfair labour practice jurisdiction by drawing on international sources, particularly the United State of America (hereinafter ‘US’) and Canada.<sup>9</sup> Most of the issues were later codified in the 1995 Labour Relations Act (hereinafter ‘LRA’). Courts in other SADC countries have played a limited role in defining and developing the scope of labour law, and this has adversely affected the labour relationship between employers and employees in the work environment.

Besides the political issues discussed above, the industrialisation strategies adopted by countries in the SADC region also influenced the application of labour laws. For example, a significant proportion of the workforce in southern Africa today is engaged in rural agriculture, often on a subsistence basis. This low level of industrialisation in SADC and the whole of Africa buttressed the fact that industrialisation is relatively new as a development policy in Africa generally. As a matter of fact, in most parts of Africa the issue of wage employment evolved after World War I and was further rekindled at the end of World War II. This contributed greatly to the poor development of labour law in Africa.<sup>10</sup>

For labour law to be developed in SADC countries, there is an urgent need to harmonise the different labour laws. This harmonisation is capable of playing the following roles: (1) protecting workers against the greater economic power of employers; (2) assisting in ensuring flexibility and efficiency to compete in global economic markets; (3) assisting in controlling labour migration; and (4) helping to maintain similar benefits for migrant labour in the SADC region.

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<sup>9</sup> Thompson, C (1993) ‘Borrowing and Bending: The Development of South Africa’s Unfair Labour Practice Jurisprudence’ in Blanpain, R and Weiss, M (Eds) *The Changing Face of Labour Law and Industrial Relations: Liber Amoricum for Clyde W Summers* Baden: Nimos.

<sup>10</sup> Freund, B (1988) *The African Worker* Cambridge: Cambridge University Press, p 76.

The matter of labour migration in SADC countries is now a burning issue because of the problems associated with it. The situation in southern Africa is unique in the variety of extremes confronted by its sub-regions.<sup>11</sup> According to Crush, James et al.<sup>12</sup> Botswana and Swaziland depend to a great extent on migrant labour remittance and this remittance contributes to the gross national product (about 20 000 miners from each country are engaged by South African mines). Lesotho, by contrast, is the classic labour reserve with about one-quarter of its working-age population employed outside its borders (approximately 100 000 working in mines) and whose remittances account for more than the gross national product.

In the case of Mozambique, the country is highly dependent on migrant labour (i.e., miners working on South African mines, which constitute about one-fifth of domestic wage employment with earnings accounting for one-third of current-account foreign-exchange earnings).<sup>13</sup>

Mozambique is confronting the challenges of taking care of 5 million refugees and dislocated persons, as well as demobilising about 100 000 soldiers.<sup>14</sup> Refugees from Mozambique have also moved to Malawi, which has to bear the tremendous economic cost of accommodating these refugees whose number was equal to 15 per cent of Malawi's own population.

In the case of Zambia in the early 1980s, the economic hardship brought about as a result of the structural adjustment policies and the influence of externalities in respect of loans taken from the International Monetary Fund (hereinafter 'IMF') and World Bank resulted in an exodus of high-level human resources to South Africa and other neighbouring countries.<sup>15</sup> This has paralysed the tertiary education and health

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<sup>11</sup> Crush, J W et. al (1995) *Labour Migration in Southern Africa: Prospects for Post-Apartheid Transformation* Labour Law Unit University of Cape Town.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> United Nations Office for Humanitarian Assistance Co-ordination (UNOHAC) (1993), *Post War Population Movements in Mozambique* New York: UNOHAC.

<sup>15</sup> Russel, S, Jacobson, K and Stanley, W (1950) 'International Migration and Development in Sub-Saharan Africa' Discussion Paper Washington: Africa Technical Department Series.

services. More recently, Zimbabwe has hosted most of these skilled human resources. In view of the economic hardship and the political instability of the country, there has been an exodus of Zimbabweans to South Africa and other neighbouring countries.<sup>16</sup> SADC countries have benefited from the mobility of these skilled human resources.<sup>17</sup> In the same vein, the unskilled migrants from those countries have also created problems for other SADC countries.

Perhaps one of the ways in which the problems encountered by the migrants themselves and the host countries can be minimised is to harmonise the labour laws in the region in terms of ILO standards.

The present study will, first, be undertaken against the background of the European Union (hereinafter 'EU') labour laws and ILO standards because of the high level of implementation of these standards in the EU. Secondly, a comprehensive body of standards of social policy and labour protection for workers has been built up in the EU countries.

While this edifice can never be complete and is not free from blemishes, the influence of ILO standards is not selective and occasional, but makes itself felt over the whole field of social and labour problems. This fact, evidently, influences the extent to which interested parties feel that they can find useful inspiration and guidance in ILO texts, particularly at a time when legislation is playing an ever-increasing role in implementing social policy. Thirdly, ILO standards include a large number of subjects and people. For example, the regulation of working conditions has been supplemented by a desire to protect fundamental liberties and to bring about a general improvement in the working and living conditions of certain population groups. These trends are reflected in the Conventions on Freedom of

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<sup>16</sup> Crush, J. et. al (1995) 'Labour Migrancy in Southern Africa' *Southern African Labour Monographs 3/95* Cape Town: Labour Law Unit, University of Cape Town. Also see de Vletter, F (1990) 'Prospects for foreign migrant workers in a democratic South Africa (World Employment Programme)' International Migration for Employment Working Paper, No. 48. Geneva: International Labor Office.

<sup>17</sup> In Santho, S and Sejanamane, M (Eds) (1991) *Southern Africa After Apartheid* Harare: SAPES Trust, p 40.

Association, Discrimination, and Forced Labour, which will be discussed later in this thesis.

The EU is an early example of an organisation or community that attempts to implement ILO standards. There are many lessons for developing countries to learn from the EU, especially in terms of the preliminary problems the union encountered in implementing ILO standards and in the integration of those countries that are economically poor into the EU. All Member States of the EU had their initial differences in terms of legal issues, political obstacles and economic problems that had to be resolved so as to be able to harmonise their labour laws. The situation at that juncture is quite similar to the present situation among SADC countries. It is for this reason that the experience of the European Community (hereinafter 'EC') which later became the EU will be considered as the basis of the thesis.

Before discussing the possibility of harmonising labour laws in the SADC region (as in the EU and within the parameters of the ILO standards), it is perhaps necessary to explain concisely what is meant by harmonisation of labour laws. In this thesis, harmonisation of labour laws mainly refers to the harmonisation of labour standards. It must be pointed out that the principal aim of labour standards is not to achieve uniformity in the level of social protection in order to ensure that fair labour practices are put in place in terms of international standards. In this regard, the Director-General of the ILO argues that: '[d]ifferences in conditions and levels of production are linked to a certain extent to differences in levels of development. Denying developing countries the advantages (relative and transitory) which ensue from these differences would be tantamount to denying them a share in the profits of globalisation and, by extension, the possibility of subsequent social development.'

This statement reflects the present situation of the SADC countries where there are sharp differences in levels of socio-economic development, in cultural and legal tradition, and in the pattern of industrial organisation. Nelson Mandela stated at the Summit Meeting of the Preferential Trade Area (hereinafter 'PTA') (replaced in 1993 with the Common Market for Eastern and Southern Africa (hereinafter 'COMESA')) that: '[t]he experience in Western Europe has shown that the relative uniformity of

socio-political conditions of the participating countries in an economic community of nations is essential for success.’<sup>18</sup>

The regional disparities in the southern African region should be seen as an important factor in determining the method of harmonisation of laws and social policy. In view of this, Sengenberger points out clearly that the term *labour standards* has two distinct meanings.<sup>19</sup>

The first refers to the actual terms of employment and well-being of the workers at a particular location and moment. The second meaning is a normative or prescriptive one. The latter type of standards stipulates normative rules, such as minimum wages, or maximum hours per week. Harmonisation of standards in the second sense does not necessarily imply that the actual level of protection achieved is the same in all the countries or that the same system of labour law will necessarily be adopted in each Member State.

While greater convergence of laws is a possible consequence, over time, of closer economic integration, the social dimension does not have as its goal the adoption of a single model of labour law. From this perspective the argument is that transnational standards as a floor of rights can be seen as setting a minimum floor below which state regulation may not fall, thereby seeking to prevent destructive competition between state regulations. If one examines the experience of the EC it becomes clear that EC law has this floor of rights character. All EC directives on social policy contain clauses to the effect that their provisions lay down minimum requirements, but do not prevent Member States from introducing higher standards in their own territory.<sup>20</sup> The *Green Paper on Social Policy* published by the commission in 1993 implies that social progress is itself a mechanism for achieving greater economic cohesion. This Green Paper also ensured, on the one hand, that

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<sup>18</sup> An extract from a speech delivered by Nelson Mandela at a Summit Meeting of the PTA, Quoted by Gibb, R ‘Towards a New Southern Africa: The Challenge of Regional Economic Co-operation and Integration. See Woolfrey, (1991) *ILJ (SA)*, p 124.

<sup>19</sup> Sengenberger, W, (2002) *Globalization and Social Progress: The Role and Impact of International Labour Standards* Bonn: Friedrich-Ebert-Stiftung, p 43.

<sup>20</sup> *Ibid*, p 51.

there is a minimum floor below which social standards should not fall in key areas and, on the other, a more proactive concept aimed at ensuring convergence through social progress:

The European Court of Justice made it clear that it regarded social policy as not completely subsumed into an economic integrationist rationale and stated that the community was not merely an economic union, but was at the same time intended by common action to ensure social progress, and seek the constant improvement of the living and working conditions of their people (as is emphasised by the Preamble of the Treaty establishing the EC).<sup>21</sup>

## **1.2 Aims and Objectives of the Research**

- To examine the legal implications of the implementation of ILO core labour laws in the SADC countries. The ILO core labour laws that will be examined in this thesis are:
  - freedom of association;
  - effective recognition of the right to collective bargaining;
  - elimination of all forms of forced and compulsory labour;
  - effective abolition of child labour; and
  - elimination of all forms of discrimination in respect of employment and occupation.
- To examine the nature and extent of the harmonisation of labour standards in the EU and in SADC countries.
- To investigate the benefits of harmonising labour laws in SADC countries.
- To examine the legal implications of the harmonisation of labour laws and the implementation of ILO standards in SADC countries.
- To examine the legal consequences of the harmonisation of occupational health and safety legislation in SADC countries.

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<sup>21</sup> *Ibid*, p 52.

### **1.3 Research Methodology**

In this research, an attempt is made to use both primary and secondary sources of information. In terms of primary sources, labour lawyers, trade union leaders and officials in the SADC region were interviewed.

As regards secondary source information, library material, including case law, ILO conversations and the labour legislation in the region are examined critically. An attempt is made to review past material on the harmonisation of labour issues in the European Economic Community (hereinafter 'EEC'). In addition to this material, current EU material on the harmonisation of labour laws is also discussed.

#### **1.3.1 Population of the Study**

The SADC region consists of developed, developing and least developed countries. There are 14 countries in the region, which can be classified as follows:

- (a) Developed countries
  - South Africa.
  
- (b) Developing countries
  - Botswana
  - Mauritius
  - Namibia
  - Seychelles
  - Swaziland
  - Zimbabwe.
  
- (c) Least-developed countries
  - Angola
  - DRC
  - Lesotho
  - Malawi

- Mozambique
- Tanzania
- Zambia.

For a fair representative overview of the SADC region, purposive sampling techniques were used to select 3 countries from the developing countries, 3 from least developed countries and 1 of the developed countries in SADC.

The identification of the 7 countries selected for this study out of the 14 SADC countries is based on purposive sampling, which has a direct bearing on the above classification. The selected countries are as follows:

- (a) South Africa
- (b) Botswana
- (c) Swaziland
- (d) Tanzania
- (e) Zambia
- (f) Namibia
- (g) Lesotho.

The 7 countries above, apart from South Africa, Namibia and Lesotho, are members of the frontline states that formed the SADC in 1992. The reconstruction of the Southern African Development Coordination Conference (hereinafter 'SADCC') later became known as SADC under a declaration and treaty, signed by ten Heads of State and Government (in Windhoek, Namibia, on 17 August 1992).

South Africa later joined SADC in August 1994. Mauritius joined the organisation in 1995, and the DRC and the Seychelles in 1997. Today the SADC membership stands at 14.

A total number of 224 respondents (including labour lawyers, trade union leaders and labour officials in the SADC region) were interviewed



## **1.4 Value of the Research**

From the research findings, an attempt was made to highlight the steps that should be taken in the harmonisation of labour laws in the SADC region. The findings will also be published in a reputable labour law journal. From the selected samples as indicated above, inferences will be drawn for other SADC countries not covered in this research.

## **1.5 Brief Description of the Chapters in This Thesis**

### **Chapter One: Introduction**

The introductory chapter deals with the focus and the value of the study.

### **Chapter Two: Historical background to the Southern African Development Community (SADC)**

The rationale for this chapter is twofold. In the first place, it deals with the birth of the SADC community and highlights the main reasons for its establishment. It also illustrates the founding fathers of the community and the early challenges the founding members encountered.

### **Chapter Three: Theoretical framework and literature review of the harmonisation of labour laws in terms of labour standards**

Theoretical issues and literature review on the harmonisation of labour laws. Chapter Three deals with the theoretical underpinning of the concept of harmonisation of labour law. This chapter reviews some of the important studies conducted on the harmonisation of labour law in the UK, Germany, other European countries and Japan.

## **Chapter Four: Historical background and the structure of International Labour Organisation (ILO)**

This chapter highlights the nature of the Conventions, Recommendations and the standard-setting process followed by the organisation. It also shows the obligations of the Member States, the composition of the committee of experts within the organisation.

## **Chapter Five: The implementation of Freedom of Association and Collective Bargaining in SADC countries in respect of ILO standards.**

The purpose of this chapter is to analyse the extent to which SADC countries have implemented Freedom of Association and Collective Bargaining process in terms of ILO standards.

## **Chapter Six: The elimination of all forms of forced, child and compulsory labour in SADC countries in respect of International Labour Organisation standards.**

The purpose of this chapter is to analyse the ILO Convention on forced, child and compulsory labour and also examine to what extent those selected SADC countries in this research have implemented the ILO standards in respect of forced, child and compulsory labour.

## **Chapter Seven: The Elimination of discrimination in employment and occupation in SADC countries in respect of ILO standards.**

This chapter deals with the major subjects covered by the Convention and also examine the extent to which the seven SADC countries under this study have conformed with ILO standards in the elimination of discrimination in employment and occupation.

## **Chapter Eight: The Implementation of occupational health and safety environment in SADC region in respect of ILO standards**

This purpose of this chapter is to evaluate to what extent the seven SADC countries under the study have implemented the ILO Convention and Recommendation on occupational health and safety environment.

## **Chapter Nine: An empirical investigation into the benefits of harmonising labour laws in the Southern African Development Community region.**

The three hypotheses in this research are fully tested and discussed in this chapter.

## **Chapter Ten: Conclusion and recommendations**

This chapter comprises the conclusion and recommendations. It summarises the major findings of this research and at the same time gives some useful recommendations on how labour law should be harmonised in the SADC region.

## CHAPTER TWO

### HISTORICAL BACKGROUND TO THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

#### 2.1 Introduction

The purpose of this chapter is to give a vivid account of how SADC was formed. This historical background will enable an understanding of the circumstances in which the organisation was formed. This discussion also sets out exactly who the founding members were and the specific roles they played in the establishment of SADC.

Today, the founding members of the organisation are referred to as *frontline states* mainly because they did the preliminary work for the establishment of the organisation. The founding members had a visionary pioneering leadership style and this made a significant contribution towards ushering in an era of political independence, peace, security and stability in the region. As a matter of fact, the solid foundation laid by the founding fathers (members) paved the way for the historic transformation of the organisation in Windhoek, Namibia, in 1992 from a loose alliance to a cohesive community geared to meet the daunting challenges and potential opportunities presented by both a wider regional social economic space and globalisation.<sup>22</sup>

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<sup>22</sup> Anglin, D (1983) 'Economic Liberation and Regional Cooperation in Southern Africa: SADCC and PTA' *International Organization* 37 (September), p 681.

## 2.2 Historical Background to the Southern African Development Community

The formation of SADC is well documented.<sup>23</sup> It can be traced back to the meeting of leaders of the so-called frontline states as mentioned above. This meeting was held in Arusha, Tanzania, in July 1979.

The formation of a development co-ordinating organisation was first highlighted at this meeting and the organisation was to provide an economic dimension to the political struggles in southern Africa against colonial or minority rule. The organisation was also expected to provide a mechanism that would enable the frontline states to withstand better the political and economic domination and destabilisation of the region by the apartheid regime in South Africa.<sup>24</sup>

The second meeting was held in Lusaka, Zambia, on 1 April 1980 and this was attended by leaders of the three other 'majority-ruled' states in the region. At the end of this meeting, the declaration issued at the meeting provided the first constitutive document for an organisation called the 'Southern Africa Development Coordination Conference' (hereinafter 'SADCC').<sup>25</sup>

The declaration listed the pursuit of the following objectives, attained through co-ordinated action, as the main tasks of the organisation: (1) reduction of economic dependence, particularly, but not only, on the Republic of South Africa; (2) forging of links to create a genuine and equitable regional integration; (3) mobilisation of

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<sup>23</sup> Anglin, 'Economic Liberation and Regional Cooperation in Southern Africa', p. 37, p 681; Meyns, P (1984) 'The Southern African Development Coordination Conference (SADC) and Regional Cooperation in Southern Africa' in Mazzeo, D (Ed) *African Regional Organisations* New York: University of Cambridge Press, p 196–224; and Mbogoro, D A K (1987) 'Regional Economic Integration and the Liberation Struggle in Southern Africa' in Msabaha, S R and Shaw, T (Eds) (1987) *Confrontation and Liberation in Southern Africa: Regional Directions after the Nkomati Accord* Boulder: Westview Press/London: Gower, p 143–155.

<sup>24</sup> *Ibid.*

<sup>25</sup> See Khama, S (Sir) (1981) 'Introduction' in Nsekela, A J (Ed) *Southern Africa: Toward Economic Liberation*, pp vii–xix. The frontline states were Angola, Botswana, Mozambique, Tanzania and Zambia. Zimbabwe joined the group after its independence in 1980.

resources to promote the implementation of national, inter-state and regional policies; and (4) concerted action to secure international co-operation within the framework of the strategy for the economic liberation.<sup>26</sup>

The declaration also identified the development of transport and communications – to lessen dependence on South African networks – food security and agricultural research as the priority areas for co-ordinated development activities.

During this declaration, the importance of developing trade in the region was acknowledged, but this was not listed as one of the areas or sectors of co-operation. It was envisaged that trade co-operation or liberalisation would continue to be pursued within the trade arrangements already in the region.<sup>27</sup> In this regard the framers of the SADCC had apparently drawn from the failure of other African arrangements to achieve regional integration on the basis of trade liberalisation and market integration. One of the lessons drawn was that the laissez-faire approach of market integration, among unequal or dissimilar economies, was unlikely to lead to the equitable distribution of the dividends of integration.<sup>28</sup>

African arrangements had not succeeded, partly because of the failure to address this phenomenon adequately. SADCC states preferred an integration model that would induce more equitable development in all countries, through co-ordinated planning and execution of development projects.

The SADCC states also eschewed the establishment under a formal treaty of a supra-national organisation to oversee the implementation of the objectives. They preferred an arrangement under which a designated Member State would be responsible for the implementation of projects in a particular sector, and a small

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<sup>26</sup> See Khama 'Introduction'.

<sup>27</sup> The Declaration envisaged that co-operation in the area of trade development would merely involve the study of existing payment arrangements and customs instruments 'in order to build up a regional trade system based on bilaterally negotiated annual trade targets and product lists'. See also Khama 'Introduction'.

<sup>28</sup> *Ibid.*

secretariat would be responsible for facilitating inter-regional co-ordination and external support.<sup>29</sup>

According to Ng'ong'Ola,<sup>30</sup> a memorandum of understanding was concluded in Harare in July 1981 which elaborated on this set-up.<sup>31</sup> This can be regarded as the second consultative document for the SADCC after the Lusaka Declaration. It is the main institution of the organisation and consists of the following: the Summits of Heads of State and Government, the Council of Ministers, a Standing Committee of Officials, Sectoral Commissions and a Secretariat.

The Summit was the supreme decision-making body, responsible for the general direction and control of the SADCC. The Council of Ministers (hereinafter 'the Council') was responsible to the summit for co-ordination and supervision of the activities of the other organs. The Standing Committee of Officials assisted the Council in the execution of its work. It comprised permanent Secretaries (or their equivalents) of the Ministers on the Council. These were also national contact points for the purpose of intra-SADCC co-ordination of activities. A small Secretariat to service these organs and to facilitate co-ordination efforts, located in Gaborone, Botswana, was placed under an Executive Secretary who was answerable to the Council and to the Summit. Sectoral Commissions were special organs created by Convention and entrusted with co-ordination of projects and plans in the select priority areas of transport and agricultural research.<sup>32</sup>

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<sup>29</sup> *Ibid.*

<sup>30</sup> Ng'ong'Ola, C (2000) 'The Reconstitution of the Southern African Development Community: Some International Trade Law Perspectives' *South Africa Law Journal* 117, p 256.

<sup>31</sup> See SADCC (1998) *Implementing the SADCC Programme of Action* Joint Study by the SADCC Secretariat and the OECD (March), pp 191–196; and Simba, I and Wells, F (1984) *Development Cooperation in Southern Africa: Structures and Procedures* Paris: Development Centre, Organization for Economic Co-operation and Development, pp 45–51.

<sup>32</sup> Ng'ong'Ola 'The Reconstitution of the Southern African Development Community'.

For other sectors and areas of activity, sector co-ordinating units were eventually created and located within establishments of governments or states entrusted with responsibilities over particular sectors.<sup>33</sup>

It is important to note that SADCC was initially acclaimed and enthusiastically supported as providing an alternative, innovative, but realistic, framework for achieving integration in the region. However, in no time – in fact, within a decade – this initial interest shown started to diminish. It had become apparent over this period that the institutional framework, for example, could only deliver modest results.<sup>34</sup> Unfortunately, it was not every country entrusted with sectoral responsibilities that was able to co-ordinate inter-state or regional activities in that area. The Secretariat in Gaborone was small and did not have the institutional capacity or legal powers to compel underperforming states to improve.<sup>35</sup>

There was too much deference to national sovereignty in the arrangement. There was also over-reliance on international donor support for the execution of projects and programmes. The organisation had little or no capacity to finance its projects from its own resources. It was envisaged earlier that donor fatigue would soon begin to affect the work of the SADCC.<sup>36</sup>

Historical records<sup>37</sup> confirm that there were other external influences that led to the readjustment of the SADCC model. It was also unfortunate that the decision by the summit to reduce the economic dependence on the Republic of South Africa was not sustainable. In addition to the above, the prospects of majority rule in South Africa presented an opportunity for re-orientation of southern African integration, in line with its economic realities. The success of the European, more traditional, model of

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<sup>33</sup> *Ibid.*

<sup>34</sup> See SADCC (1992) *Theme Document* Maputo, Mozambique, 29–31 January, pp 3–7 and 23. Also see Anglin, D (1983) 'Economic Liberation and Regional Cooperation in Southern Africa: SADCC and PTA 37. *International Organisations*, p 681.

<sup>35</sup> *Ibid.*, p 650.

<sup>36</sup> *Ibid.*, p 672.

<sup>37</sup> *Ibid.*



regional integration, founded on trade liberalisation, had also spawned the revival of regional trading arrangements in other parts of the world.<sup>38</sup>

African countries not wishing to be left behind had, by 1991, put in place their own plan for an African Economic Community (hereinafter 'AEC'), to be evolved from regional economic communities based on trade liberalisation and market integration.<sup>39</sup>

### **2.3 Institutional Aspects of the Southern African Development Community**

The transformation of the SADCC into the SADC was effected under a declaration and treaty signed by ten Heads of State and Government in Windhoek, Namibia, on 17 August 1992.<sup>40</sup> South Africa was allowed to join the SADC membership on 29 August 1994. Mauritius joined the organisation in 1995, and the DRC and the Seychelles in 1997. To date SADC membership stands at 14. The principal vision of the organisation is to ensure that there is an improvement in the economic well-being, and of the standard of living and quality of life, freedom, social justice, peace and security for the people of southern Africa. This shared vision is anchored in the common values and principles, and the historical and cultural affinities that exist between the people of southern Africa.<sup>41</sup>

The restructuring of SADC institutions took place on 9 March 2001 when SADC Heads of State and Government convened an extra-ordinary summit in Windhoek, Namibia. This summit approved a report on the restructuring of SADC institutions, which spells out the objectives and a common agenda for SADC based on the

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<sup>38</sup> *Ibid.*, p 677.

<sup>39</sup> See the Treaty Establishing the African Economic Community, signed at Abuja, Nigeria, by representatives of the Member States of the OAU on 3 June 1991. For a discussion of this treaty and its background, see Asante, S K B (1997) *Regionalism and Africa's Development: Expectations, Reality and Challenges* and Ng'ong'Ola, C (1999) 'Regional Integration and Trade Liberalisation in Africa, Treaty for the Establishment of the AEC Revisited' *Journal of World Trade* 33(1), p 125.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

objectives as outlined in Article 5 of the 1992 SADC Treaty. The report on the restructuring of SADC institutions articulates a more explicit common agenda, which takes into account a number of principles such as development orientation; market integration and development; and the facilitation and provision of trade and investment. Based on the above principles, SADC's common agenda includes<sup>42</sup> the promotion of sustainable and equitable economic growth and social-economic development that will ensure poverty alleviation with the ultimate objective of its eradication; and the promotion of common political values, systems and other shared values which are transmitted through institutions that are democratic, legitimate and effective; and the consolidation and maintenance of democracy, peace and security.<sup>43</sup>

In contrast to the country-based coordination of sectoral activities and programmes, SADC has now adopted a more centralised approach through which the 21 coordinating units have been grouped into clusters, namely: trade and industry, finance and investment; food, agriculture and natural resources; infrastructure and services, social and human development; and special programmes.

In order to provide strategic direction to the organisation and to operationalise the SADC Common Agenda, a Regional Indicative Strategic Development Plan (hereinafter 'RISDP') has been put in place.<sup>44</sup>

The RISDP is a 15-year plan being implemented in phases of 5 years each. In 2006 the RISDP entered its second year of implementation. It reaffirms the commitment of SADC Member States to good political, economic and corporate governance entrenched in a culture of democracy, full participation by civil society, transparency and respect for the rule of law. In this context, the African Union's New Partnership for Africa's Development (hereinafter 'NEPAD') Programme is embraced as a

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, p 125.

<sup>44</sup> See official SADC (1997) *Trade, Industry and Investment Review*.

credible and relevant continental framework, and the RISDP as SADC's regional expression and vehicle for achieving the ideas contained therein.<sup>45</sup>

The RISDP emphasises that good political, economic and corporate governance are prerequisites for sustainable socio-economic development, and that SADC's quest for poverty eradication and deeper levels of integration will not be realised if these are not in place.<sup>46</sup>

The RISDP is indicative in nature, merely outlining the necessary conditions that should be realised towards achieving those goals. In order to facilitate monitoring and measurement of progress, it sets targets and timeframes for goals in the various fields of cooperation. As a matter of fact, the purpose of the RISDP is to deepen regional integration in SADC. It provides SADC Member States with a consistent and comprehensive programme of long-term economic and social policies. It also provides the Secretariat and other SADC institutions with a clear view of SADC's approved economic and social policies and priorities.<sup>47</sup>

The Strategic Indicative Plan for the Organ (hereinafter 'SIPO') provides guidelines for the implementation of the Protocol on Politics, Defence and Security Co-operation.<sup>48</sup> Apart from spelling out specific activities in accordance with the Protocol's objectives, and the strategies for their realisation, SIPO also provides the institutional framework for the day-to-day implementation of the organ's objectives. SIPO is divided into four main sectors, namely political, defence, state security and public security. It provides the analysis and challenges of the four sectors, the objectives of the organ in the four sectors, and the strategies and specific activities to be implemented in order to realise the objectives of the organ.<sup>49</sup>

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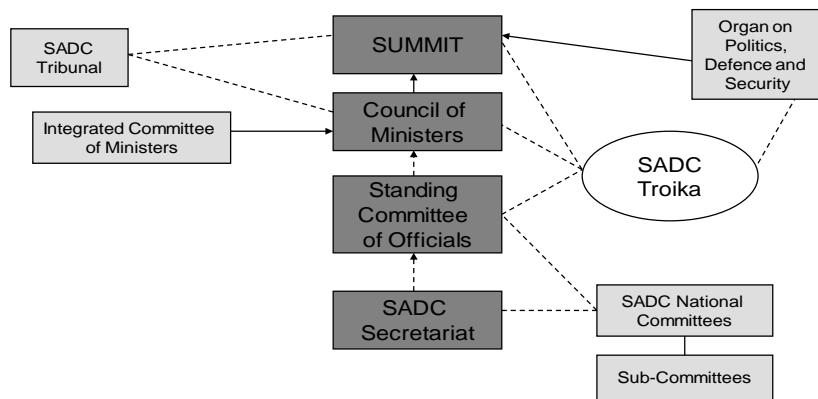
<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*



**Source:** SADC (1997) *Trade, Industry and Investment Review: 1997*

**Figure 2.1 The institutional framework of the Southern African Development Community**

The various institutions listed above play a specific role that has been assigned to them. For example, the Integrated Committee of Ministers (hereinafter 'ICM') ensures policy guidance co-ordination and harmonisation of cross-sectional activities. In terms of its composition, it comprises at least two ministers from each Member State.<sup>50</sup>

SADC National Committees have been established in each SADC Member State and their main function is to provide inputs at national level in the formulation of regional policies, strategies, the Southern African Development Community Programme of Action (hereinafter 'CPA'), and to co-ordinate and oversee the implementation of these programmes at the national level.<sup>51</sup> The other important institutions are the Summit, which is at the top of the hierarchy. Below the Summit is the Council of Ministers and below this is the Standing Committee of Officials. Below this Standing Committee is the SADC Secretariat which is located in Botswana. The

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

Secretariat is responsible for all the secretarial work required before all the other units meet.

The SADC Secretariat also helps both SADC National Committees and the sub-committees in all secretarial work. The units work together for SADC to be able to achieve its goals and objectives.

The main objectives of SADC as stated in its Treaty are as follows:<sup>52</sup>

To achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and to support the socially disadvantaged through regional integration to

- (a) evolve common political value systems and institutions;
- (b) promote and defend peace and security;
- (c) promote self-sustaining development on the basis of collective self-reliance and inter-dependence of Member States;
- (d) achieve complementarity between national and regional strategies and programmes;
- (e) promote and maximise productive employment and utilisation of resources of the region;
- (f) achieve sustainable utilisation of natural resources and effective protection of the environment; and
- (g) strengthen and consolidate the long standing historical, social and cultural affinities and links among the peoples of the region.<sup>53</sup>

## **2.4 Conclusion**

The discussion above highlights the objectives of the community as stated in the Treaty and confirmed the fact that SADC principally aims to harmonise the political, legal and socio-economic policies and plans of Member States.

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<sup>52</sup> SADC Treaty (1992) Article 5.

<sup>53</sup> *Ibid.*, p 125.

In terms of the harmonisation of legal issues, the interest in this thesis is only the harmonisation of labour laws in terms of international standards. In view of this, I shall examine the theoretical issues relating to the harmonisation of labour laws and, at the same time, review relevant literature on the harmonisation of labour laws in the next chapter.

## **CHAPTER THREE**

### **THEORETICAL FRAMEWORK AND LITERATURE REVIEW OF THE HARMONISATION OF LABOUR LAWS IN TERMS OF LABOUR STANDARDS**

#### **3.1 Introduction**

This chapter will examine the jurisprudential discourse that underpins the harmonisation of labour law standards and the rationale for incorporating international labour standards into national legal system. The two main theories that will be considered in light of this are, namely (1) the Monist Theory and (2) the Dualist Theory. International law theorists distinguish clearly between the two theories and these differences will be discussed in this chapter.

Furthermore, this chapter will also attempt to review past studies on harmonisation of labour law standards in Europe, America, Asia with particular reference to Japan, and Africa. The rationale for discussing the above four continents is that an attempt has been made to harmonise the labour law. In addition to the above, this chapter will examine the three issues below in respect of how they affect the harmonisation of labour law standards:

- The influence of globalisation on labour law
- The influence of regionalism on harmonisation of labour laws
- The influence of plurality of different laws on harmonisation of labour laws.

#### **3.2 Theoretical Framework: Monism and Dualism**

##### **3.2.1 The Monist Theory**

The Monist Theory has its origin in the work of the Australian legal scholar, Hans Kelsen.<sup>54</sup> This school of thought is of the view that state international treaties are

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<sup>54</sup> Dingake, O B K (2008) *Collective Labour Law in Botswana* Gaborone: Bay Publishing, p. 44. Dingake shows clearly how Kelsen insisted that the validity of domestic law must be tested against

included in the country's legal system, and by so doing become part of the domestic law of the monist state. It argues further that in such countries treaties have 'self-executing status', and a breach of treaty obligations may be enforceable in a court of law.<sup>55</sup> The Netherlands is a good example of a monist state which provides in its constitution that certain treaties are directly applied, thus supporting the fact that such treaties are superior to all Dutch laws, including its Constitution.<sup>55</sup>

Courts in a monist state may directly apply treaty standards to cases before them and of course, this is an example of the direct application of treaty obligations. The monists argue that not only do international legal rules and various national legal orders constitute a single universal system but in the case of conflict national legal orders take a subordinate position to international rules.<sup>56</sup> In addition to this, monists are of the view that the validity of domestic law must be tested against the 'universal legal order', they totally reject the claim that there can be no higher political allegiance and legal obligation than to the state nation.<sup>57</sup> Morgenstern argues that

[t]he essence of the monist view of the relation of international law and national law is that rules of law, international and municipal law alike, are applicable to individuals, and that international law can thus be directly operative in the municipal sphere. Modern decisions have affirmed that individuals can derive rights directly from treaties.<sup>58</sup>

### 3.2.2 The Dualist Theory

The central argument of this theory is that the law that exists in a state is established based on the voluntary will of the state itself. The scholars of this school of thought

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the 'universal legal order'. He rejected the claim that there can be no higher political allegiance and legal obligation than to the state nation.

<sup>55</sup> *Ibid.*, p 46.

<sup>56</sup> Brownlie, I (1990) *Principles of Public International Law*, 4th ed. Oxford: Clarendon Press, p 533.

<sup>57</sup> See Cotterrel, R (1989), *Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, London: Butterworths, p 112.

<sup>58</sup> Morgenstern, F (1950) 'Judicial Practice and the Supremacy of International Law', *British Year Book of International Law*, 27, 50.



view this act of state will which establishes the state law as totally different from international law. Both the domestic law and the international law are viewed as independent legal regimes.

The three most popular scholars in this school of thought are Hezel, Anzilotti and Triepel.<sup>59</sup> There is a consensus among the three scholars that the state law addresses the social relations between individuals while international law regulates the social relationships between states which alone are subject to it.<sup>60</sup> They also hold the view that domestic law is conditioned by the norm that legislation is to be obeyed, whereas international law is conditioned by the maxim: *pacta sunt servanda*.

In dualist systems, domestic law takes precedence where there is a clear inconsistency between domestic law and international law.<sup>61</sup> The dualist approach aims to maintain the sovereign power and authority of the state whilst accepting the importance of international law.<sup>62</sup>

### **3.3 The Use of International and Domestic Laws in Some Southern African Development Community Countries**

The reason for discussing the above theme briefly is to examine which of the countries in the SADC region have adopted the monist or the dualist approach in their legal system. The three countries that will be discussed in the light of this are (1) South Africa, (2) Botswana and (3) Namibia. The reason for choosing these three countries is that they are among the seven countries to be investigated in respect of harmonisation of labour law issues in this research.

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<sup>59</sup> See Cassese, A (1985) 'Modern Constitutions and International Law' *Recueil des Cours*. III 190, pp 9–90.

<sup>60</sup> *Ibid.*

<sup>61</sup> See Dingake, O B K (2008) *Collective Labour Law in Botswana*, p 47.

<sup>62</sup> Dugard, T. (2004) *International Law of South African Perspective*. Cape Town: Juta & Co, Ltd.

### 3.3.1 South Africa

It is an undisputed fact that South Africa played little or no role in the advancement of human rights during the apartheid era. However, the Constitution of 1996 states that customary international law is the law in the Republic unless it is inconsistent with the Constitution.<sup>63</sup> The South African Constitution stipulates that every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law when interpreting any legislation.<sup>64</sup> This interpretation is clearly seen in the case of *Hoffman v South African Airways*<sup>65</sup> where the Constitutional Court confirmed that an international agreement is binding on the Republic of South Africa once it has been ratified. This confirms that South Africa adopts the Dualist Theory in its legal interpretations.

Section 231(1) of the South African Constitution states that the negotiation and signing of all international agreements is the responsibility of the national executive. In addition to this, section 231(2) states that an international agreement is binding on South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. In respect of other agreements in terms of technical, administrative or agreement which does not require either ratification or accession but which has been negotiated or entered into by the national executive, bind the country with or without approval by the National Assembly and the National Council of Provinces.

In terms of s 231 (4) of the Constitution, any international agreement becomes law in the Republic of South Africa when it is enacted into law by national legislation. Today South Africa has a body of labour legislation that makes reference to international conventions.<sup>66</sup>

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<sup>63</sup> Section 232.

<sup>64</sup> Article 233.

<sup>65</sup> See (2000) (21) *ILJ* 2357 (CC).

<sup>66</sup> The various labour regulatory instruments such as the LRA of 1995 as amended in 2002, the Basic Conditions of Employment Act of 1997, the Employment Equity Act 55 of 1998 and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provide and give effect to obligations

### **3.3.2 Namibia**

In the case of Namibia, unless otherwise provided by the Constitution or an Act of Parliament, the general principles of public international law and international agreements binding upon Namibia under the Constitution shall form part of the law of Namibia.<sup>67</sup>

The preamble of the Namibia Labour Act 6/1992 shows that Namibia has adopted labour policy aimed at enacting legislation which should, where possible, adhere and give effect to international labour conventions and recommendations of the International Labour Organisation. This also confirms that Namibia adopts the Dualist Theory in its legal interpretation.

### **3.3.3 Botswana**

The recent case law in Botswana indicates that Botswana is an example of a dualist system.<sup>68</sup> The Botswana Constitution indicates that Botswana is an example of a dualist system. The Botswana Constitution has no provisions for the integration of international law into domestic law. The negotiation, signature and ratification of treaties are purely executive acts, for example, s 47 of the Constitution of Botswana vests executive power in the President. The ratification of conventions and treaties lies squarely within the prerogative of the President.

It must be noted that although there are no specific legislative provisions referring to the use of international law, there is some reference to international law in the Interpretation Act Cap 01:04. Section 42 of the Interpretation Act provides that, for purposes of ascertaining that which an enactment was made to correct, and as an aid to the construction of the enactment, a court may have regard to any textbook or other reference work; to any memorandum published by the authority in reference to the enactment; to any relevant international treaty, agreement or convention; and to

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incurred by South Africa as a Member State of ILO and that the interpretation of the Acts must comply with the public international law obligations of the state.

<sup>67</sup> See the Namibian Constitution.

<sup>68</sup> *Sarah Diau v Botswana Building Society*, IC 50/2003.

any papers laid before the National Assembly in reference to the enactment or to its subject matter.<sup>69</sup>

Furthermore, it is also interesting to note that the various courts in Botswana also play an important role through interpretation of the Constitution, statutes, the common law, in incorporating international conventions into the national legal system.<sup>70</sup> It is not uncommon to see Botswana courts use international law to resolve both labour and commercial law disputes referred to them. Mr Justice Dingake does not see anything wrong with the courts in Botswana making more use of international law than they have done before, especially in the area of human rights. He is of the opinion that customary international law has always been part of common law, with the result that it is always open to the courts of Botswana to apply those norms of human rights law that have been crystalised into custom, unless such norms are in conflict with legislative provisions.<sup>71</sup>

### **3.4 Regionalism and Southern Africa**

Generally, regional co-operation in Africa stems from a broad pan-Africanism, which expresses the deep-seated conviction that development and emancipation cannot be achieved without the preservation of natural resources – which is currently inhibited by the boundaries traced by the colonial authorities, often in total disregard of traditional ethnic borders.<sup>72</sup> Pan-Africanism represents an attempt to create and harmonise economic, social and political activities in the region. One of the principal aims of this is to promote free movement of persons and goods, and thus provide better jobs and more opportunities.

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<sup>69</sup> See Dingake, O B K (2008) *Collective Labour Law in Botswana* Gaborone: Bay Publishing Company, p 47.

<sup>70</sup> See *Selepe v Barclays Bank of Botswana* IC 76/1996

<sup>71</sup> *Ibid.*

<sup>72</sup> Adedeji, A et al. (Eds) (1991) *The Challenge of African Economic Recovery and Development* London: Frank Cass & Co. Ltd. See the article by Rasheed, S and Sarr, M D R 'From the Lagos Plan of Action to the Thirteenth Special Session of the United Nations General Assembly' in Adedeji, A et al. (Eds) (1991) *The Challenge of African Economic Recovery and Development* London: Frank Cass & Co. Ltd.

The emergence of a number of regional trading blocs in different parts of the world such as in Europe, which became a fully integrated economic bloc in 1992, send threatening signals of marginalising those non-European countries that have not been able to develop regional strategies for trade investment. This full economic integration in Europe motivated African policymakers to consider the issue of integration on the African continent as an issue that needs immediate attention. In view of this urgency, the Organisation of African Unity (hereinafter 'OAU') at its Lagos Summit, in 1980, adopted the Lagos Plan of Action (herein after 'the LPA') which clearly outlined a bold proposal for the creation of an African common market by the year 2000.<sup>73</sup>

In adopting the LPA in April 1980, the African Heads of State and Government outlined the philosophy for Africa's future, and laid down the foundations for the genuine development of the region.<sup>74</sup> Not only did the African Heads of State and Government define in each sector and in an integrated manner the activities required to ensure a self-reliant and self-sustained development process, they also, in the Final Act of Lagos (hereinafter 'FAL'), committed themselves to strengthening the economic co-operation of their respective countries at multinational and sub-regional levels so as to establish an AEC by the year 2000.

Rasheed and Sarr<sup>75</sup> argue further that the LPA does not limit itself to domestic issues of African development. External factors have also been taken into account, especially trade and economic co-operation with other regions of the world. In doing so, the African Heads of State and Government were aiming at ensuring that Africa plays the role it deserves in the international arena in order that peace may prevail on the continent.

It is also interesting to note that the LPA further details actions aimed at ensuring that the socio-economic structures of African countries are such that the efforts required for, and the benefits derived from, development will be equitably shared

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, p 15.

<sup>75</sup> *Ibid.*, p 16.

among various components of the population and that African economies no longer rely excessively on export of raw materials but provide the necessary basic intermediate, capital and consumer goods.<sup>76</sup>

In the food and agricultural sector, concrete measures were called for in the LPA, which included the reduction of food losses; the establishment of food security schemes at national, sub-regional and regional levels; and the increase in food production. Other measures of paramount importance were directed at the development of agricultural research and extension services, and the provision of adequate incentives to producers with respect to the pricing policy of agricultural commodities so as to ensure a better income distribution between the rural and the urban populations, as well as increased food production.<sup>77</sup>

In terms of human resources, the LPA spelt out clearly detailed actions to be taken at the national sub-regional, regional and international levels designed to ensure that African countries achieved a satisfactory level of self-reliance in trained and technical human resources, both in productive activities and in the services.<sup>78</sup> However, particular emphasis was put on the training of scientists and technicians, managerial staff, small-scale entrepreneurs and in-plant industrial workers.<sup>79</sup> Given the variety and specialisation of the skills required, the LPA also calls for the development of sub-regional specialised training institutions and co-operation among African countries in pooling their resources. However, the implementation of the LPA has not been as successful as expected because of the following problems:<sup>80</sup>

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<sup>76</sup> *Ibid.*, p 17.

<sup>77</sup> *Ibid.*, p 18.

<sup>78</sup> *Ibid.*, p 19.

<sup>79</sup> See (1983) 'ECA and Africa's Development 1983–2008: A Preliminary Perspective Study' *Economic Commissions for Africa* April.

<sup>80</sup> See (1981) 'Africa's Rapidly Escalating Economic Crisis: Proposals for a Short-term Immediate Programme for Survival' E/CN 14/ConF/81/01 ECA.

- The worsening international economic environment
- Domestic policy shortcomings
- The impact of the deteriorating climatic conditions.<sup>81</sup>

The problems stated above are, however, beyond the scope of this thesis.

In Africa regional co-operation has not been fruitful because of domestic problems and the influence of certain externalities. For example, the Economic Community of West African States (hereinafter 'ECOWAS') has made considerable progress towards the elimination of tariff and non-tariff barriers, and the creation of a common currency, but, unfortunately, this has not been entirely successful. In the SADC region not much progress has been made in terms of economic integration and very little progress has been made in the field of transport and investment. Furthermore, with regard to the Preferential Trade Areas of Eastern and Southern Africa (hereinafter 'PTA') little progress has also been made in terms of economic integration.<sup>82</sup> At a summit held in Swaziland in November 1990, the PTA launched a programme of monetary harmonisation which was to lead to the establishment of a monetary union within five years. At the same time, the summit approved a harmonised road transit charge and launched the African Joint Air Services as a step towards the creation of a PTA airline to serve the entire region.<sup>83</sup>

For its part, the then SADCC released a theme paper at its tenth summit in February 1990, in which it pledged to work towards the harmonisation of investment and exchange rates, and fiscal and monetary policies. It also committed itself to the institution of a common external relationship.<sup>84</sup> The OAU has also proposed a four-stage model of integration, namely, from a free trade area to a customs union to a

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<sup>81</sup> See (1968) 'Critical Economic Situation in Africa: report of the Secretary –General of the United Nations E/1984/68 1984 and A/39/594 1984.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Business Day* (1990) 26 November.

<sup>84</sup> (1990) 2 CIRI 15.

common market, and ultimately to an economic community.<sup>85</sup> There is a general belief that the three sub-regional groupings (ECOWAS, SADC and PTA) will surely provide a base for a high level of economic integration in Africa. A high hope in the SADC region is the presence of South Africa whose minerals, agricultural base, developed commercial and industrial sectors will provide much-needed technology and expertise to other Member States.<sup>86</sup>

From all indications, a greater integration of the southern African economies is going to take place in future, and this will be premised on much greater transnational labour and investment mobility.<sup>87</sup> In the researcher's opinion, the ultimate outcome of the process will be the creation of some form of free trading zone, or common market, possibly along the lines of the EEC. Critics may argue that these assumptions are too ambitious, perhaps even unrealistic. Yet, are they any more ambitious or unrealistic than those who planned the establishment of the EU some 30–40 years ago? The factors that have been cited as obstacles to integration in southern Africa, namely nationalism, language and cultural barriers, economic disparities<sup>88</sup> are not greater than those that confronted Europe during the process of integration.<sup>89</sup> In fact, these problems still confront Europe today.<sup>90</sup> There is also a general belief among the public that the 'geo-political' realities of the sub-region dictate not only the logic but also the inheritability of economic integration. These have been itemised by Peter Vale as geographical proximity, extensive transport links, migrant labour, industrial dependencies and the existence of region-wide

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<sup>85</sup> The proposed modes were elaborated on by the then Secretary-General of the OAU, Mr Salim, (1990) in an address to the Eastern and Southern African Management Institute *Southern African Political and Economic Monthly* 3 (6) pp 29–32.

<sup>86</sup> See Adedeji, A et al. (1991) *The Challenge of African Economic Recovery and Development*. London: Frank Cass & Co. Ltd, p 35.

<sup>87</sup> *Ibid.*, p 40.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> For an account of the regional and social disparities facing Europe, see *Social and Labour Bulletin* 2 (1989), p 18. According to European File (June/July 1990), published by the Commission of the European Communities, gross domestic product per head is more than six times higher in the richest regions of the EC than in the poorest. In terms of income, the publication reports, regional disparities are more than twice as large in the EC as in the United States.



bureaucracies to manage integration.<sup>91</sup> David Woolfrey is of the view that economic integration will require the harmonisation of law and policy in a number of fields. He is also of the view that labour law is one field that will require co-ordinated action at the regional level.<sup>92</sup>

### **3.5 Regional Harmonisation of Labour Laws in the European Economic Community: A Lesson for Southern Africa**

For many years the debate in Europe centred on the question of whether the EEC harmonising initiatives were to be confined to the economic and financial fields,<sup>93</sup> or whether they were to be extended to the domain of social policy, including labour law. Those who were opposed to the harmonisation of social measures founded their opposition on the interpretation of Articles 2, 3(h) and 100 of the EEC Treaty. Article 3(h) declares that 'the activities of the community shall include the approximation of laws of Member States to the extent required for the proper functioning of the common market'; Article 100 provides for the approximation of laws that 'directly affect the establishment and functioning of the Common market'. The argument was that Articles 3(h) and 100 authorise the approximation of law and policy not as an end itself, but merely as an instrument for attaining the wider objectives of the EEC.<sup>94</sup> Those objectives were, according to Article 2 of the Treaty, to promote a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated rising of the standard of living and closer relations between states belonging to the EEC.<sup>95</sup> The objectives were to be met specifically 'by establishing a common market and progressively approximately the economic policies of Member States'.<sup>96</sup> Thus, it was argued, the

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<sup>91</sup> Vale, P (1989) 'Integration and Disintegration in Southern Africa' *Reality* 21 (7), p 9.

<sup>92</sup> Woolfrey, D (1991) 'Harmonisation of Southern Africa Labour Laws in the Context of Regional Integration'. *Industrial law Journal* 12, pp 703–721.

<sup>93</sup> Close, G (1978) 'Harmonisation of Southern Africa Labour Laws: Use or Abuse of Powers Under the EEC Treaty' *European Law Review* 461, p 466.

<sup>94</sup> *Ibid.*, p 463.

<sup>95</sup> *Ibid.*

<sup>96</sup> See Article 2 of the EE Treaty.

EEC objectives were tied to economic measures, and could not be pursued by any other means.<sup>97</sup>

By implication, the above arguments assume that economic forces alone, underpinned by the 'four freedoms' (i.e., the free movement of (1) goods, (2) persons, (3) services and (4) capital), were sufficient to achieve the social objects of the Treaty. This view had been endorsed by the authors of the 'Speak Report' which preceded the Treaty of Rome.<sup>98</sup> According to Wedderburn,<sup>99</sup> the Speak Report saw 'a progressive coalescence of social policies' as the result of competitive forces in a common market; intervention would be needed only for correcting the effect of specific distortions. However, those who argued in favour of harmonisation in the social field rejected the narrow interpretation given to the concept of the common market.<sup>100</sup> They pointed to the 'social provisions' of the treaty, for example, Article 117 (which provides that 'Member States agree upon the need to promote improved working conditions and improved standards of living for workers'), Article 119 (which provides that men and women should receive equal pay for equal work) and Article 122 (which provides that the commission must include a separate chapter on social developments in the EEC in its annual report to the European Parliament).<sup>101</sup> These provisions, it was argued, established the social dimension of the EEC, and provided ample justification for EEC action to harmonise social policy. These arguments were later echoed in the view of Vogel-Polsky<sup>102</sup> that 'social measures have intrinsically the same importance as economic measures'. Their non-adoption may jeopardise the social equilibrium that is necessary for economic growth. According to Vogel-Polsky,<sup>103</sup> these social measures form part of the objectives that the realisation of an internal market is to fulfil. Those who are in favour of harmonisation of labour laws argued further that even on the basis of a narrow 'mercantilist' interpretation of the

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> Wedderburn, Lord of Charlton (1990), 'The Charter in Britain: Labour Law and Labour Courts' *Modern Law Review* 54 no 1 p 15.

<sup>100</sup> Close, 'Harmonisation of Southern African Labour Laws', p 466.

<sup>101</sup> *Ibid.*

<sup>102</sup> Vogel-Polsky, E (1990) 'What Future is There for a Social Europe?' *ILJ* (UK) 19, p 79.

<sup>103</sup> *Ibid.*

Treaty's powers, the harmonisation of labour laws was not only justifiable, but also imperative for the realisation of community goals.<sup>104</sup> They proceeded from the assumption that labour law is concerned not simply with apportioning the rights and duties of employers and employees, 'but also with its guiding object of fixing common rules for enterprises that have to resort to the labour market, so as to ward off unfair competition between businesses in the form of dumping'.<sup>105</sup> Disparities between national labour law systems create an uneven playing field for employers: progressive labour laws (e.g., those restricting the employer's right to reduce its workforce at will, or obliging it to negotiate with a representative trade union, or prescribing certain minimum health and safety standards) raise production costs for employers and place them at a disadvantage in relation to their competitors operating under more permissive labour law regimes.

In a region where capital is highly mobile this may have the consequence that business is attracted to those areas where labour standards are low or nonexistent. Perhaps this is likely to give rise to phenomenon of 'social dumping', namely 'countries with high levels of social protection reducing this to meet competition from countries with low labour costs'.<sup>106</sup> The only way to ensure 'conditions of competitive neutrality', according to Easson,<sup>107</sup> is to create a common set of labour standards applicable to all states in the region.

The issue of labour law harmonisation has resolved itself in an uncertain fashion. After an initial lapse in the 1960s, when there were many abortive efforts to harmonise social security measures, in October 1973 the EEC adopted a Social Action Programme, which culminated in the adoption of a number of labour law measures. Philippa Watson has catalogued them as follows:<sup>108</sup>

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<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, p 73.

<sup>106</sup> Hepple, B (1998) 'The Crisis in EEC Labour Law' *ILJ* (UK) 16 77, p 83.

<sup>107</sup> Easson, A J (1981) 'EEC Directives for the Harmonisation of Laws: Some Problems of Validity, Implementation and Legal Effects' *Yearbook of European Law* 1.

<sup>108</sup> Watson, P (1981) 'Harmonisation of Social Security and Labour Law in the European Economic Community' *Comparative Labour Law* 4, p 227.

1. Directive 42/117 on the approximation of the laws of Member States regarding the application of the principle of equal pay for men and women.
2. Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions;
3. Directive 75/129 on the approximation of the laws of the Member State relating to collective redundancies;
4. Directive 80/987 on the approximation of laws of the Member States relating to the protection of employees on the event of the insolvency of their employer.

According to Hepple,<sup>109</sup> the harmonisation programme has not been an unqualified success. He argues that since the early 1980s it has encountered stiff opposition from the ideology of the deregulated market.<sup>110</sup>

A cardinal pillar of this ideology is the pressure for labour market flexibility expressed in the conviction that a more rational utilisation of existing human resources is necessary, and that this can be achieved through, *inter alia*, 'the easing of legal and collective bargaining restrictions on working time and on working practises such as part-time work, temporary work and sub-contracting.'<sup>111</sup> Pressure for increased 'flexibility' here, according to Hepple, accounted for the defeat of a number of EEC proposals for united action on the labour front, including the draft directive on the labour front, the draft directive on part-time and temporary work (which aimed to provide certain protection for workers in these categories) and the draft directive (the 'Vredeling Directive') on company structure and administration, which would have provided for worker participation in the management of companies. In situations where employment protection measures have been adopted they have been less than effective, either because they have been disregarded or circumvented by a

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<sup>109</sup> Hepple, B (1987) 'The Crisis in EEC Labour Law' 16 *ILJ*, p 79.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.* p 80.

Member State,<sup>112</sup> or because they have been given an unduly restrictive interpretation by the European Court of Justice: Another important setback for the Community's labour law was the formulation of Article 100A of the single European Act, which has the effect that the adoption of harmonisation measures in the realm of labour law will require the unanimous assent of the 12 Member States of the Council of Europe, a requirement that has often proved to be elusive in the context of social security measures. The deregulatory trend in the EC has, according to Hepple, produced a crisis in EEC labour law<sup>113</sup> and 'the prospects for a revival of the social action programmes of the 1970's are nil.'<sup>114</sup> Thus Hepple's analysis notwithstanding; there are sufficient indications that the European labour law programme has been abandoned. The adoption of a Community Charter of Fundamental Social Rights (hereinafter 'the Social Charter'),<sup>115</sup> consisting of fundamental rights of workers and the right to information, consulting and participation of workers (e.g., the right to freedom of association and collective bargaining, the right to information, consulting and participation of workers, and the right to protection of health and security in the place of work), will provide continuing momentum for the EEC's labour law programme.

Although the Charter was not adopted in the form of a binding legal instrument (but also 'Solemn Declaration' of intent), the adoption, alongside the Social Charter, of a,

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<sup>112</sup> *Ibid.*, p 86.

<sup>113</sup> Hepple, B (1990) 'The Implementation of the Community Charter of Fundamental Social Rights' *Modern Law Review* 53 (643), p 649.

<sup>114</sup> Hepple, B (1987) 'The Crisis in EEC Labour Law' *ILJ* (UK) 16 (77), p 85.

<sup>115</sup> A 'declaration' constituting the Charter was adopted by 11 of the 12 Member States of the European Council (the United Kingdom (hereinafter 'UK') dissented) in Strasbourg on 8–9 December 1989. The Charter deals with the following: free movement in the community; the right to exercise every profession and every calling in the community under the same conditions as the citizens of the host country; equality of treatment with the citizens of the host country; freedom of choice in the exercise of a profession; fair pay; improvement of working and living conditions; the right to social protection; the right to freedom of association and collective bargaining; the right to professional training; the right to equality of payment between men and women; the right to information; consultation and participation of workers; the right to protection of health and security in the place of work; protection of children in adolescence; protection for the elderly; the rights of handicapped persons. (1990), *Courrier du Personnel* (EEC) 2 (516), p 4.

Programme of Action<sup>116</sup> setting out a time-table for the introduction of proposals to implement the provision of the Charter, has given concrete form to the EEC's social action programme. Furthermore, Hepple<sup>117</sup> argues that the treaties establishing the EC have little to do with social policy in general and labour in particular. A careful understanding of Article 2 of the EEC Treaty confirms that it proclaims the task of promoting 'an accelerated raising of the standard of living', which is based on the ideology of economic neo-liberalism. The task, says Article 2, is to be performed 'by establishing a common market and progressively approximating the economic policies of Member States'.<sup>118</sup> In the same vein, Article 117 of the EEC Treaty declares the faith of the founders in the economic functioning of the common markets as the automatic guarantee of improvements in living and working conditions.<sup>119</sup>

In 1955 the majority of a group of experts, set up by the Member States of the ECSC in collaboration with the ILO, expressed the opinion that special provisions should not be included in EEC Treaty because, in their view, fair competition did not depend upon an integrated social policy.<sup>120</sup>

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<sup>116</sup> The Action Programme (hereinafter 'AP') was published by the European Commission on 29 November 1989. It sets out a number of initiatives that are intended to implement the most urgent aspects of the Charter: see 1990 (2) *Courrier du Personnel* (EEC) at 7. Grouped under 13 Chapters, the AP mentioned 47 specific proposals, including 18 Directives, four other unspecified 'instruments and a miscellany of proposed recommendations, decisions and opinions. These proposals are to be put forward in work programmes for the years 1990–1992': Hepple, B (1990) *Modern Law Review* 53, pp 643–644. Matters dealt with in the AP include maximum daily and nightly working hours, limitations on shift and overtime work, health and safety and protection for 'a typical' workers (i.e., 'part-time', 'seasonal', 'casual', 'home working', 'lump-labour', 'temporary', 'agency' and 'fixed-term workers'): Wedderburn 'The Charter in Britain', p 9.

<sup>117</sup> Hepple, B (1983) in Adams, J (Ed) *Essays for Clive Schmitthoff* Abingdon: Professional Books Limited.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> ILO (1956) Studies and Reports (New Series) No. 46 *Social Aspects of European Collaboration* Geneva.

In this perspective, there were only two exceptions reflected both in the opinion of the experts' group and in the Treaty, where it was thought that social policy influenced economic union and free movement of workers in the community.

Articles 48–51 of the EEC Treaty, however, do not deal with harmonisation but rather with the creation of a new form of labour market administration.

The various Regulations and Directives<sup>121</sup> issued under these Articles of the Treaty have been aimed at removing all the impediments to the free movement of workers. There are ancillary measures, concerning the right to enter and remain in the territory of Member States, and trade union rights, and a few resolutions to alleviate the educational, housing and welfare problems of migrant workers.<sup>122</sup> The second exception is Article 119 which obliges Member States to establish and maintain the principle of equal pay for men and women for equal work. It was believed that the use of women as cheap labour could give some countries a competitive advantage and so distort the functioning of the common market. However, very little was done to implement this principle before 1975.<sup>123</sup>

The argument in support of some kind of international regulation of social and labour conditions as a means of ensuring fair economic competition was already discussed during the nineteenth and early twentieth centuries. The supporters of laissez-faire argued that labour legislation placed countries that adopted it in an unfavourable position in the international market. History shows that the response given by Robert Owen, the pioneer of international labour law, in his petition to the five powers at Aix-la-Chapelle in 1818,<sup>124</sup> was that international protective legislation would prevent the 'dumping', and would create a code of fair competition between employers and

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<sup>121</sup> In particular, Council Regulation 1612/68 JO 1968, L256/2; OJ 1968, 475; Council Directives 64/221, JO 1964, 850; 1963–64, 117; and Council Regulation 312/76, OJ 1976, 39/2.

<sup>122</sup> Council Directive 68/360, JO 1968, L257/13; OJ 1968, 485 Commission Regulation 1251/70, JO 1970, L142/24; OJ 1970, 420 Council Directive 72/194, JO 1972, L121/32; OJ 1972, 474.

<sup>123</sup> Hepple, B in Adams, J (Ed) (1983) *Essays for Clive Schmitthoff* Abingdon: Professional Books Limited.

<sup>124</sup> Ramm, T (1986) in Hepple, B (Ed) *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* Chapter 7 The Hague: Deventer Kluwer.

employees.<sup>125</sup> Theoreticians, trade unions, employers and politicians echoed these arguments for over a century.<sup>126</sup>

However, the argument based on competition became less important as it was realised that international competition had not prevented the main industrial countries of Europe from adapting national labour laws. The Preamble of Part XIII of the Treaty of Versailles, the constitution of the ILO, referred to the idea only as ancillary to other justifications for international legislation.<sup>127</sup> With regard to this argument, economists have been increasingly sceptical about the argument.<sup>128</sup> Costs and the competitive value of products depend on many factors, including available resources, the price of raw materials, investment, labour productivity, the tax system, available market and the type of skills available. It has been argued that the countries that are most successful in world markets are not always those where labour standards are less favourable.<sup>129</sup> By the time the EC was founded there was relatively little support for the view that fair competition and transnational social policy and labour law were closely interconnected.

Historical records show that by 1969 the ideology of economic neo-liberalism, typified in the theories of Hayek, had become increasingly removed from the reality of life in the Member States.<sup>130</sup> Economic integration was visibly failing to protect working and living standards; as the first signs of recession and decline appeared, and as political and industrial unrest spread through Europe, Karl Poppen's devastating critique of the thesis of lasting social progress in a liberal economic system proved appealing to many experts advising governments and the EC<sup>131</sup> Conferences of Presidents and Premiers of the Member States held in The Hague in December 1969 and in Paris in October 1972 declared 'that they attribute the same

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<sup>125</sup> *Ibid.*

<sup>126</sup> Valticos, N (1979) 'International Labour Law' in Blanpain, R (Ed) *International Encyclopaedia for Labour Law and Labour Relations*.

<sup>127</sup> *Ibid.*, p 16.

<sup>128</sup> *Ibid.*, p 19.

<sup>129</sup> *Ibid.*, p 19

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, p 17.



importance to energetic proceedings in the field of social policy as to the realisation of the economic and financial union'. They charged the organs the EC with the task of drawing up social action programmes.<sup>132</sup>

The three-year programme adopted in 1974 declared the aims of full employment, improvement of living and working conditions and increasing participation by employers' and workers' representatives in the economic and social decision-making of the EC, as well as of workers' representatives in enterprises. A number of general measures to achieve these aims were spelt out, including the harmonisation of employment policies, the introduction of equality of opportunities for men and women, and the adoption of industrial health and safety measures.<sup>133</sup>

According to Hepple,<sup>134</sup> specific measures were also proposed and most of them were subsequently achieved in modified form. These include Directive 75/117 which harmonises provisions on the application of the principle of equal pay for men and women; Directive 76/207 on the principle of equal treatment of men and women; Directive 75/129 on the harmonisation of provisions on collective redundancies; Directive 77/187 on the harmonisation of provisions on the protection of workers in the event of transfers of undertaking; and Directive 80/987 on the harmonisation of the provisions on the protection of workers in the event of insolvency of the employer, as well as Recommendation 75/457 for the reduction of the working week to 40 hours and the introduction of for weeks holiday with pay a year.

These measures were the product of the 1974 Social Action Programme.<sup>135</sup> Another series of measures, on industrial health and safety, resulted from the action programme of the Council of the EC of 29 June 1978. At that time, a few of the proposed measures resulted from the severe effects of the recession throughout Europe. The resolutions of the Council of 18 December 1979 and of the European

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<sup>132</sup> The first programme was adopted by the Council on 27 June 1971, OJ 1972, C 23, and the second on 21 January 1974, OJ 1974, C 13.

<sup>133</sup> *Ibid.*, p 20

<sup>134</sup> *Ibid.*

<sup>135</sup> See Hepple (1982) 11 *ILJ*, p 29.

Parliament of 17 September 1981 on work sharing<sup>136</sup> ('adaptation of working time') called for limits on overtime work, the encouragement of flexible retirement, the restructuring of part-time work and the regulation of temporary work.

This has, so far, led to the drafting of directives on the subject of voluntary part-time work and temporary work, both of which are considered to be particularly important for combining unemployment and discrimination against women.<sup>137</sup>

However, it should be noted that this process of harmonisation is, of course, not limited to supra-national legislation. The EC and its committees of independent experts seek to promote European-wide solutions in other ways as well.

### **3.6 The Legal Basis of the Harmonisation of Labour Laws in the European Community**

The EC steps to harmonise labour laws outlined above have brought a number of general problems with reference to both formal and substantive issues. At the formal level, there is the question of the legal basis under the EEC Treaty for the harmonisation of labour laws. Article 100 provides for the 'approximation' of laws that directly affect the establishment or functioning of the 'common market'. In this context, 'approximation' can be regarded as 'an indicator of the degree of harmonisation taking place rather than as a separate legal process clearly distinguishable from harmonisation'.<sup>138</sup> Article 101 permits directives to be issued to prevent the distortion of competition in the common market. The wording of these Articles seems to be clear: they empower the council to 'approximate' only if this is justified on economic grounds, and not for the sake of social progress in itself. Article 117 rests on the assumption that harmonisation will ensue spontaneously in the functioning of the common market. It is controversial whether Article 117 empowers the council to harmonise for the sake of improving working conditions and standards of living.

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<sup>136</sup> OJ 1981 C 260.

<sup>137</sup> *Ibid.*, p 23. Also see Creighton, W B (1929) *Working Women and the Law* London, pp 137–144.

<sup>138</sup> *Ibid.*, p 23.

The recent trend among commentators has been towards an 'objective' interpretation free from the neo-liberal thesis of the founders. Schnorr writes: 'The text of [Art 117 (1)] does not plainly affirm social progress as a consequence of economic integration, but contains an agreement between the Member States about the necessity to promote such social progress. This means, indeed, a contractual obligation on all Member States to co-operate in achieving the Community purpose of social progress.'<sup>139</sup>

However, Schnorr<sup>140</sup> recognises that even if Article 117 (1) is the principal legal basis for social action by the EC, this is not unlimited. First, 'the necessity for social action by the Community is not to be presumed a priori.'<sup>141</sup> The EC is free to act only when 'social progress is endangered by unfavourable economic impacts at the Community level'.<sup>142</sup> Secondly, Article 117 provides only the social aims and not the means of achieving them. This is why the legal basis of measures to implement the aims of Article 117 must be found elsewhere in the Treaty.

For these reasons, the directives adopted in the social field have proclaimed Article 100 in conjunction with Article 117 as their legal basis. For example, in the proposal for a directive on voluntary part-time work the Commission argues that the difference between Member States in terms of the protection afforded part-time workers by national law have a direct effect on the establishment of a common market in both economic and social spheres, and that there is a need for the approximation of laws on this matter, as clearly provided for in Article 100, in order to meet the requirement of Article 117.

The weakness of this legal basis is shown in the evidence of the Department of Employment to the House of Lords Select Committee on the European Communities

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<sup>139</sup> Schnorr, G (1980) 'European Communities' in Blanpain, R (Ed) *International Encyclopedia for Labour Law and Industrial Relations* Netherlands: Kluwer Law and Taxation Publishers, p 18, para 60.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

on the draft directive on voluntary part-time work.<sup>143</sup> The department's view was that it had not been clearly established that varying national provisions on part-time work directly affected the establishment or functioning of the common market and doubt was expressed as to whether standards of living would be improved, as envisaged by Article 117. In view of this, the department suggested that in the United Kingdom (hereinafter 'UK') the proposed directive would decrease job opportunities for part-time workers. Obviously, legal competence in this field turns upon economic and ideological assumptions about the impact of national and supra-national legislation on the functioning of markets. An example of the above issue is the interaction of Article 119 (which enshrines the equal pay principle) and Article 100. In fact, Article 119 was largely ineffective in practice before the series of cases brought by Gabrielle Defrenne against the Belgian national airline and Belgian state in the 1970s<sup>144</sup> and before the Council Directive 75/117.

As far back as July 1960, the Commission had issued a recommendation as to the form equal pay legislation should take in practice. In December 1961 the governments agreed to a timetable for the implementation of Article 119 for the elimination of all differentials by December 1964.<sup>145</sup> Unfortunately, this was not achieved and the report drafted by the French sociologist Evelyne Sullerot and presented to the EC in May 1972 concluded that there was still widespread sex discrimination in the Member States in terms of remuneration and general employment practices. The report provided the impetus for the Directive of 1975, with the backing of the European Parliament and Economic and Social Committee. The interesting feature of this initiative, from the formal point of view, was that it was not explicitly based on Article 119, but on Article 100 of the EEC Treaty.

The provisions of Article 1 of the Directive are confined, in the first paragraph, to restating the principle of equal pay set out in Article 119 of the Treaty and specify in the second paragraph the conditions for applying that principle where a job

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<sup>143</sup> House of Lords (1982) Minutes of Evidence Taken Before the Select Committee on European Communities (Sub-Committee c 31 March).

<sup>144</sup> *Defrenne v Sabena* [1976] ECR 445 (case 43/75).

<sup>145</sup> Creighton, W B (1979) *Working Women and the Law* London: Mansell Information Publishing, pp. 137–144.

classification system is used for determining pay. This led the European Court of Justice in *Jenkins v Kingsgate Ltd*<sup>146</sup> to decide that Article 1 of the Directive was principally designed to facilitate the practical application of the principle of equal pay in Article 119 and in no way altered the content or scope of that principle.

It is not likely that this restrictive use of the directive (the wording of which is significantly wider than that of Article 119 of the Treaty because it covers not only equal work, but also work of equal value and all aspects and conditions of remuneration) was motivated by the Court's own doubts about the propriety of deriving a power to legislate from Article 100 in respect of a matter over which the Treaty obligations of the Member States had already been explicitly covered by Article 119. In this case the Court gave an answer that was not clear to the question of whether indirect discrimination against part-time women was illegal under Article 119.

It was only by considering the interpretation of the national equal pay legislation when the case went back to the British Employment Appeal Tribunal that the Tribunal was able to deal under British legislation with a situation that many had previously thought was covered by the Directive. Directive 75/117 on equal pay is complemented by Directive 76/207 on equal treatment. The equal pay principle standing alone has been found to be ineffective to limit sex discrimination if women could lawfully be segregated occupationally and restricted in their access to jobs and promotion. According to Hepple,<sup>147</sup> it is these wider questions of equality of opportunity that the Directive of 1976 tackles. Unfortunately, it is neither based on Article 119 nor Article 100 but, instead, on Article 235 of the EEC Treaty. That Article allows the Council, acting unanimously, to take measures necessary to attain the objectives of the Treaty, where the Treaty itself has not provided the necessary powers.

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<sup>146</sup> *Jenkins v Kingsgate (Clothing Productions) LTD*. (No. 2) [1981] IRLR 388. Also see *Jenkins v Kingsgate Ltd* (1981) in ERC 592 (case 96/80) and for comment see Szyszczak, E (1981) 44 MLR 672; on the earlier erroneous view of the CA in *O'Brien v Sim-Chem Ltd* [1980] ERC 429 on the effect of Article 1.

<sup>147</sup> Hepple in Adams, J (Ed) *Essays for Clive Schmitthoff*.

It should be noted that Article 235, unlike Article 100, is not limited to the economic functioning of the EC. Of course, this makes it possible to use Article 235 as the *legal basis* for achieving any of the aims of the EC, including the improvement of living and working conditions envisaged by Article 117. However, the question at this point is whether Article 235 can be used to create a supra-national labour law. On the one hand, Article 235 appears to be a subsidiary provision, an *ultima ratio*, to be used only if other measures fail. The measures taken under Article 235 must be 'necessary' to attain the objectives of Article 117. Directive 76/207 falls within this category because without it, Article 119, to which the Member States have explicitly committed themselves, would be incapable of achieving the objective of equal pay.

### **3.7 Political Obstacles and the Harmonisation of Labour Laws**

In substantive terms, the problems of harmonising labour laws are more formidable than the formal ones that are discussed above. The most important feature of EC activity in the social field is its sporadic nature. There has not been systematic harmonisation of all or even the major aspects of labour laws. The reason that can be advanced for this is that labour laws are closely linked to the peculiarities of national, industrial and political traditions.

According to Hepple,<sup>148</sup> although the Member States share similar capitalist market economies dominated by multinational enterprises, the marked differences in their labour laws, particularly in the field of collective labour relations (including workers' participation), to a great extent derive from different solutions to a common problem.<sup>149</sup> That problem was the illegality of trade unions and the illegalities attendant upon industrial struggle conducted by workers through trade unions.

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<sup>148</sup> *Ibid.*

<sup>149</sup> Wedderburn, (Lord of Charlton) (1980) '*Industrial Relations and the Courts*' *ILJ* 9, p.65; This article illustrates the comparable capitalist societies of Europe, the differences in labour law that determine the approach by courts to issues involving collective labour relations and this appears to be a common problem. The following countries: France, Italy, Germany, Sweden and Great Britain were faced at different dates with different problems of trade unionism and other industrial struggles coupled with different constitutional rights. For example, in France the Preamble to the Constitution declares that everyone has the right to strike, the right to defend his or her interest by trade union

The first stage of that solution was generally the same at comparable periods of the industrial revolution in each country.

The repeal of the Combination Acts of 1799 and 1800 in Britain in 1824; the law of March 1884 in France which removed the prohibitions on associations by the Loi de Chapelier; the German Trade Order of 1869; and the repeal of the laws forbidding combination in Italy by the Codice Zanardelli of 1889, all created an area of liberty of association for workers.<sup>150</sup> The second stage, according to Wedderburn,<sup>151</sup> was mainly to confer various positive rights on trade unions. This occurred in the continental countries in different ways and took various forms; such as the 'right to strike' in the French and Italian Constitutions, and the German system of Works Councils since 1920. Great Britain was, and remains, the notable exception because there are no positive rights of this kind comparable to those in continental system of labour law. There are innumerable reasons for these differences, which cannot be explored in this thesis, such as the stage of the industrial revolution during which trade unions developed; their relationship with the political parties; the stage at which the franchise was extended to the working class; the character of the employer's associations; the pressures of war; and the presence or absence of a written constitution and systematic code of labour law.<sup>152</sup>

However, the dangers and difficulties of imposing legal uniformity on this diversity of industrial relations systems is well-illustrated by the issue of the 'free choice' of union which was considered by the European Court of Human Rights in the case of *Young, James and Webster v UK* case.<sup>153</sup> The conclusion reached by the majority of the Court was that 'the individual does not enjoy the right to freedom of association under Article 11 of the European Convention on Human Rights if the choice which

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action and the right 'to belong to the trade union of his [or her] choice'. This element of a right of 'choice' between trade unions illustrates the law reflecting at the very highest level the social sub-structure – the reality of French trade unionism, namely a system of ideological pluralism.'

<sup>150</sup> *Ibid.* p 65.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Young James and Webster v UK* (1981) IRLR 408, p . Also see M Forde (1982) *ILJ* II (I) para 22.

remains available to him is either non-existent or therefore reduced to no practical value'.

The notion that being compelled to join a specific union violates fundamental rights reflects the reality of French and Italian trade unionism, namely a system of ideological pluralism in which trade unions are closely linked to the policy and structure of the divided parties of the left.<sup>154</sup> This is quite different from Great Britain where, as Kahn-Freund<sup>155</sup> pointed out, 'the restriction of entry into the labour market by means of the closed shop is a fundamental tradition within the framework of a unified trade union movement. In terms of the harmonisation process in the EC, it is therefore not surprising that there has been no serious attempt at supra-national regulation of collective labour relation at that post-in time.' However, there are a number of employers' associations and trade union federations at European level, but their functions are not comparable to those of national union centres. There is no effective collective bargaining or co-determination at European level.

These organisations take part in consultations and are essentially pressure groups and information centres, and for many years played no other visible functions.<sup>156</sup> In the light of this, there was a general belief that the common market, by creating freedom of establishment for capital and facilitating its operation, created an enormous concentration of power which the trade unions could counter only by European-wide collective bargaining.<sup>157</sup> Against this, the multinationals themselves have tended to say that the different standards of living and social conditions in the Member States make supra-national regulation impracticable.<sup>158</sup> The failure of trade unions to sustain multinational industrial actions on issues affecting workers in more than one country and the strong ideological hold of nationalism have tempted the unions towards increasing reliance on EC legislation.<sup>159</sup> This is confirmed by the consultation and information requirements of the directives on collective

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<sup>154</sup> Wedderburn 'Industrial Relations and the Courts' *ILJ* 9, p 65.

<sup>155</sup> Kahn-Freund, O (1980) *Labour Relations: Heritage and Adjustment* London, pp 42–44.

<sup>156</sup> Hepple, B A (1983) *The Making of Labour Law in Europe* The Hague: Deventer Kluwer, p 35.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*, p 37.

<sup>159</sup> *Ibid.*



redundancies of the directives and transfers of undertakings, and the directive on disclosure of information for employees in multinational enterprises.<sup>160</sup>

Of course, these directives do not achieve uniformity. A classical example is the situation where Member States retain the freedom to choose the form of workers' representation through which the obligation of consultation over proposed redundancies or transfers of undertakings are to take place. This, therefore, shows that the divergent structures of participation, such as the case of German work councils, the French *conseils d'entreprise* and the British shop stewards are untouched. Moreover, when implementing the obligations, Member States have often subtly altered the content of the obligations so as to conform to national predilections.<sup>161</sup> An example of this is the way in which the UK government omitted the vital words 'with a view to reaching agreement' when implementing the duty to consult workers' representatives pursuant to the directives on collective redundancies and transfers of undertakings. The other example that can be shown here in terms of the different relationships between the law and collective bargaining in the Member States is the implementation of the obligation in the Directive on transfers of undertakings that a collective agreement that exists at the time of transfer shall continue to be in force after the transfer.<sup>162</sup> The rationale for this was to create a legal safeguard against repudiation of a collective agreement simply by reason given by the employer. But the implemented British regulation contains the important provision that this is without prejudice to section 18 of the Trade Union and Labour Relations Act 1974.<sup>163</sup> That section states that collective agreements are presumed to be intended not to be legally enforceable unless they contain a provision in writing to that effect. This led a British Minister to say that the new employer can 'at once repudiate' collective agreements he [or she] does not like.<sup>164</sup> The Directive was framed with continental systems in mind where collective agreements generally have

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<sup>160</sup> OJ (1980) C.297, *Bulletin EC Supplement* 3/80.

<sup>161</sup> See Hepple, B and O'Higgins, P (1981) *Employment Law* 4th ed London: Sweet & Maxwell, pp 343, 345.

<sup>162</sup> *Ibid.*

<sup>163</sup> Trade Union Act and LRA of 1974.

<sup>164</sup> Transfer of Undertakings (Protection of Employment) Regulations CI 1981 No 1794 reg. 6; for comment see Hepple, B (1982) *ILJ* II (29), p 36.

contractual force. In Great Britain and Denmark where this is not the case the Directive can quite easily assume a different meaning.

National legal orders remain paramount in Member States and in the rules of private international law applied in each country, and this ensures that collective agreements do not offend against mandatory national labour legislation and makes it virtually impossible to reach European collective agreements that would be universally applicable. For this reason, the provisions in Articles 146 and 147 of the statute of a European company that confers capacity on the European company to contract with the trade unions represented in its enterprise<sup>165</sup> European collective agreements binding on all members of the participating unions is unlikely to make much contribution to harmonisation. A more fruitful development may be seen in the European model of collective agreements, of which there have long been examples in the field of agriculture.<sup>166</sup> These models became effective only when affirmed in national collective agreements. In other words, they rest *de facto* and *de jure* on the respective national systems of labour law. The sporadic nature of harmonisation is apparent from the list of instruments that was drawn up at that time. For example, some projects were shelved because of the difficulty of reaching agreement, such as the much-criticised regulation of the conflict of laws in employment relationships in the EC. This was superseded by the EC Convention on the law applicable to contractual obligations which, in Article 6, regulates the private international law for contracts of employment. Other projects such as the harmonisation of the 40 hours a week and the principle of four weeks' annual paid holidays have had to be dealt with by way of recommendation because of the reluctance of the UK, in particular, to have these matters regulated by legislation, rather than voluntary collective bargaining. The idea of harmonising individual contracts of employment by legislation has given way to the recommendation to adopt a model of European contract of employment which was drafted by a group of experts. However, Member States want their national systems of industrial relations and labour law to be

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<sup>165</sup> See details in Articles 146 and 147 of the Statute of European Company, which confers capacity on a European company to contract with trade union representatives.

<sup>166</sup> See Hepple, p 25.

troubled as little as possible by EC regulations so as to avoid upsetting the existing balance of industrial power relations.<sup>167</sup>

This means that harmonisation of labour laws is essentially a political process, as can be seen from the way in which harmonised EC rules are drawn up. In each case, the Directorate General for Social Affairs and Employment asks independent experts to prepare reports and analyse the main situation and the proposed harmonisation.<sup>168</sup> A coherent structure is imposed on the national reports, and these reflect the evaluations and preconceptions of the reports and of the commission. These preconceptions were removed by the extensive discussions that preceded the general report. There were consultations with the employers and union organisations at EC level, and those organisations transmitted the views of their affiliated organisations in all the Member States. Papers were submitted to the Commission whose officials discussed them with the organisations and governments. At that stage, another working party of experts was convened. The experts expressed their opinion rather than put forward the particular standpoints of their governments. On the basis of these discussions a draft proposal for directive was proposed by the officials of the Commission.<sup>169</sup> This draft was discussed on a tripartite basis in the same way as the general report before the Commission finally adopted it. The Commission proposal was then submitted to the Council, the EC main legislative body.

However, before the Council examined the proposal, formal consultations took place with the European Parliament and the Economic and Social Committee which is tripartite). The Commission then revised the proposals with the employers and unions again expressing their observations. Finally, the council discussed the modified proposals of the commission.<sup>170</sup> From this discussion so far, it is quite clear that the results of this process and discussion represent political compromises which may be far removed from the initial views of the experts. The need for political acceptability itself will have coloured the experts' proposals. The many changes that

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*, p 26.

<sup>169</sup> See Hepple (1982) *ILJ*, p 4.

<sup>170</sup> *Ibid.*, p 6.

have occurred in respect of the draft fifth directive on company law are a clear illustration.

Another phenomenon is the emasculation of the proposals for worker protection in respect of transfers of undertakings, which originally covered transfers of share mergers – the typical British form of takeover – but were limited to cases of a change in the identity of the employer, largely because of pressure by the British employers.<sup>171</sup>

It is also interesting to note that the other manifestation of political compromise is to be found in the technique of using directives, which allow Member States flexibility in achieving the objectives, and also of allowing Member States a series of alternative methods of achieving the prescribed objectives. An example of this is Directive 80/987 on the protection of workers in the case of insolvency of the employer. Member States have to guarantee workers' claims, but a wide range of alternatives is offered, reflecting the existing institutions in the Member States: special funds (i.e., Belgium, Denmark, Germany and the UK); payment through unemployment insurance (i.e., the Netherlands); and insurance based on contributions made by employer and employee associations (i.e., France). Those Member States who, as yet, have no such institutions may choose between these models. In some instances where the political will exists, broad principles that are not being implemented satisfactorily may be regulated in detail by directors. An example is the Directives on equal pay and treatment to which reference has already been made. Having reviewed some of the historical events in the process of the harmonisation of labour laws in the EC, the process of harmonising European company law will be reviewed because it affects the relationship between employer and employee in a workplace situation, and it also affects the level of worker participation in the EC.

Historically, the rationale for harmonising company law in the EC was to ensure the uniformity of transactions throughout the EC and at the same time to prevent the

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<sup>171</sup> See Hepple (1982) *ILJ* II, p 2.

experience of the Delaware Corporation in the US where companies tended to concentrate in states whose company laws were most lenient.<sup>172</sup>

In the light of this, the EC approaches the harmonisation of company law from two perspectives. In the first place, it obliges Member States to remove any restrictions on freedom of establishment and thus establish certain minimum requirements for corporate structure in the EC to protect third parties dealing with the company, creditors, investors and workers. Second, it seeks to establish a uniform company statute to enable a European company to be formed and treat its employees equally in the entire Member States.<sup>173</sup>

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The programme developed from the loose and rather weak Convention Between the Member States of the EEC on the Mutual Recognition of Companies of 1968.<sup>175</sup> It was the use of directives adopted under Article 54(3)(g) (EEC), however, that provided the main stimulus for the harmonisation programme. The success of this programme can be attributed and explained in the light of the political choice of the Directive. In the past it was reserved for areas that were economically sensitive and over which the Member States understandably wished to maintain some degree of control in the national sphere. The real compromise is the Directive. It clearly states a given European objective but gives each Member State a transitional period in which to adopt its internal law and to make a choice as to how to implement the

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<sup>172</sup> See the (1970) *Bulletin of the European Communities Supplement 8/75* at p 7.

<sup>173</sup> See the *Bulletin of the European Communities Supplement (1970) 8/75*, p 7.

<sup>174</sup> See Bulletin EC (1979).

<sup>175</sup> 'Employee Participation and Company Structure' *Bulletin of the European Communities Supplement 8/75*, p. 7.

policy objective. The European Court of Justice has clarified and extended the power of the Directive by stating that once the transitional period for implementation was over, a Directive would produce results analogous to directly applicable Regulations. This was clearly buttressed in the case of *Ministere Publics v Ratti*<sup>176</sup> and *Becker v Finanzamt Munster Innerstadt*.<sup>177</sup>

The application of these regulations has shown a 'vertical effect': it is between the Member States and legal *personae* such as companies. A 'horizontal effect', that is, creating obligations on natural or legal *personae*, has not yet been established and the European Court of Justice resisted ruling on the cases referred to it under Article 177 (EEC) concerning the equal pay and equal opportunity directives. The cases of *Worringham & Lloyds Bank*<sup>178</sup> and *Jenkins v Kingsgate*<sup>179</sup> illustrate this point. Academics have argued against this kind of application on the grounds that in theory an obligation is only imposed upon a Member State and cannot therefore indirectly create duties for other legal *personae*. This theory would retain the clear distinctions between Regulations and Directives found in Article 189 (EEC) and would seem to be the underlying approach adopted by the European Court of Justice in the case of *Ratti*.

In the case of *Fiirma Friendrich Haaga v Rechtspfleg*<sup>180</sup> the Court showed clearly that when construing and implementing legislation of a Directive, Member States and their agencies, such as the courts, must have regard to the text of the undertaking Directive. This gives a certain amount of leverage against a recalcitrant or inadvertent government that refuses to implement or just 'gets it wrong' when implementing the Directive. Thus, EC law provides a wider choice of legal claims. While EC law is paramount, at least in the UK national law remains as a parallel, but separate, system of law. An individual can, therefore, choose which source will provide the best result for the case. Thus, a preference is perhaps given to national

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<sup>176</sup> Case 148/71 *Ministere Publico v Ratti* (1979) ECR1629 (1980) CMLR at 96.

<sup>177</sup> Case 8/81 *Becker v Finanzamt Munster Innerstadt* (unreported).

<sup>178</sup> Case 69/80 *Worringham v Lloyds Bank* (1980) 1 CMLR.

<sup>179</sup> *Jenkins v Kingsgate* (1981) 2 CMLR at 24.

<sup>180</sup> *Fiirma Frederick Haaga GmbH v Rechtspfleger* (1994) ECR 1201; (1975) I CMLR at 32.

law, provided it is not inconsistent with EC policies, and provided it does not cover areas in the European provision.<sup>181</sup>

### 3.8 The Impact of the Harmonisation Programme on the United Kingdom

Historical records show that the success of the EC programme had an impact on UK labour law and company law.<sup>182</sup> The internationalisation of trade and capital influenced the process of harmonisation of these laws in the UK. Prior to accession in 1973, revision and reform of company law were of little importance. The usual procedure tended to be the sitting of *ad hoc* committees once every 20 to 30 years, whose ensuing reports would either be embodied in an amending or consolidating Act of Parliament or remain merely as a consultative document.<sup>183</sup>

The Companies Acts of 1980 and 1981 marked a change in the pace and development of UK company law, and have forced the legal and commercial world to come to grips with the alien terseness of European policy and legislation in respect of labour law issues.

The importance of lobbying and consultation in the formalisation of this policy was quickly assimilated by the business world and while the first company law Directive was enacted without the consultation of the UK in later Directives, one sees the UK's influence.<sup>184</sup> This is demonstrated, for example, in the Fourth Directive dealing with the lay-out and presentation of company accounts where the 'true and fair view has been adopted from UK accounting principles and where concessions have been made to small companies to submit abridged accounts'.<sup>185</sup>

Some criticisms have been levelled at the programme in the UK. Those who criticise the programme argue that its implementation is merely endemic to European

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<sup>181</sup> Case 6/64 *Costa v ENEL* (1964) ECR 585; (1964) CMLR 425; Case 106/77 *Italian Finance Administration v Simmenthal* (1978) ECR 629; 3 CMLR 263.

<sup>182</sup> Adams, J (Ed) (1983) *Essays for Clive Schmitthoff* London: Professional Books Limited.

<sup>183</sup> Directive 68/151 EEC, OJL 65/14.3.68.

<sup>184</sup> Directive 78/550, OJL 222/14/8/78.

<sup>185</sup> *Ibid.*

bureaucracy intent on standardisation and symmetry for the sake of it.<sup>186</sup> Others argue that the process was too slow and piecemeal to achieve any practical results and was, in fact, a hindrance to normal business activity. In contrast to these criticisms, the work of Schmitthoff takes a different view. In a research article published by Schmitthoff in 1976, he defends the use of so-called Salami tactics (a continental metaphor for the gradual slicing away of divergences between the European law).<sup>187</sup> He argues that critics have failed to appreciate the new style of policy-making in the EC, which he believes has stimulated discussion throughout Europe on the adoption of new principles of company law in the light of changing economic conditions. Realistically, he points out that the process was inevitable.<sup>188</sup>

### **3.9 Worker Participation in the European Community**

Unfortunately, the Directive programme did not achieve as much success as expected by the EC Commission. One of the major stumbling-blocks was the fifth Directive on employee participation. There has been a trend throughout continental Europe away from the traditional form of settling worker–management differences through collective bargaining procedures to structures that transcend the wage relationship, and impinge on companies' economic policies and the organisation of individual and commercial activities.<sup>189</sup> The acceptance of employee participation has, however, been in varying degrees, ranging from the merely consultative roles of works councils found in Belgium and Italy, through to the supervisory boards found in the larger companies of France and Holland, to the developed system of co-determination found in Germany. The first EC Commission proposal for employee participation in 1972 drew more in the German and Dutch systems, and was viewed

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<sup>186</sup> *Ibid.*

<sup>187</sup> Schmitthoff, C (1976) 'The Success of the Harmonisation of European Company Law'. *European Law Review*, pp 100–108. Owing to the variety of interests (spread across ten Member States) at government level and below, and the particular institutional accommodation of those interested in the political compromise struck at the European level.

<sup>188</sup> Directive 78/550.

<sup>189</sup> *Ibid.*



with hostility by trade unions and management in the UK where the debate over industrial democracy was just beginning to be heard.<sup>190</sup>

At this juncture the principle of co-determination developed in Germany will be examined briefly. In advance of other European states Germany implemented systems of insurance against sickness, accidents and disability, aspects associated today with the modern welfare state. They were introduced through initiatives on the part of Bismarck to thwart socialist demands.<sup>191</sup> Areas such as industrial relations, pay and working conditions were deliberately left untouched, and trade unions were outlawed.<sup>192</sup> When trade unions did establish themselves, they quickly separated into different occupational organisations and any unified social demands were muted by government reforms.<sup>193</sup> Thus, because of this fragmentation, identification of unitary class and political interest was difficult to achieve. This fragmentation was being formed by the decentralisation of negotiation and consultation procedures in the workplace when the Works Protection Act of 1891<sup>194</sup> established Workers Committees for the first time. Since then, with the exception of the period of the National Socialist regime, the idea of employee participation has been seen in various forms and for different reasons.<sup>195</sup>

The Weimer Constitution of 1919 in Germany gave works councils an official place in its 'economic plan' for the transition from a capitalist to a socialist mode of production. The Law on Works Councils of 1920<sup>196</sup> developed the functions of the Workers Committees, which had increased in number during World War I. Under the Weimar Constitution<sup>197</sup> it was contemplated that an integrated national economic plan would be given a role to play within it. The role of the Works Council was to

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<sup>190</sup> *Ibid.*

<sup>191</sup> Kahn-Freund, O (1981) in Lewis, R and Clarke, J (Eds) *Labour Law and Politics in Weimar Republic* Oxford: Basil Blackwell.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> See details in Works Protection Act of 1981, as discussed by Szyszczak, E in Adams, J (Ed) (1983) *Essays for Clive Schmittoff*.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

represent workers' interests vis-à-vis the employer and also to collaborate with the employer in the interests of what was called the 'works objectives'. The trade unions greeted the law with hostility as they viewed it as undermining their role in collective bargaining.<sup>198</sup> They moved quickly to maintain this role both with employers and also vis-à-vis the Works Council by claiming the prerogative of drawing up the list of candidates for the Works Council.

However, it is also interesting to note that the Law of Works Councils of 1920<sup>199</sup> received much criticism from academic and non-academic lawyers. Based on the early works of Marx, they argued that Works Councils only served to reify the corporate perspective, and to mystify the true relationship of subordination and independence interest in the employment contract further. They also argued that collective agreements negotiated through trade unions should be given priority over the Works Councils, since the unions maintained the true interest of the corporation and the workers.<sup>200</sup>

According to Erica Szyszczak, unfortunately, the economic and political objectives of the Weimar Republic were never achieved and with the collapse of the system, the transitionally minded judiciary associated the idea of 'work objectives' with that of employers' interests.<sup>201</sup>

The Works Councils were absorbed and eventually became another ambit of corporate structure.<sup>202</sup> Historical records show that after the death of the national socialist regime the weakness of militant trade unionism and the ideology of joint reconstruction combined to herald an extension of employee participation.<sup>203</sup> The Act of the Proportional Co-determination of Employees in the Mining Iron and Steel

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<sup>198</sup> See Szyszczak (1983) 'The Harmonization of European Company Law: Will Worker Participation be Accepted in Europe?' in *Essays for Clive Schmitthoff*, p 133.

<sup>199</sup> *Ibid.*, p 134.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.* p 137.

<sup>202</sup> *Ibid.*, p 138.

<sup>203</sup> *Ibid.*, p 140.

Production Industry, 1951<sup>204</sup> provided for equal representation of shareholders and employees on the Supervisory Board (five representatives each), together with the election of an eleventh neutral person. At the level of the Management Board, a Labour Director was to be elected (by a majority vote of the worker representatives on the Supervisory Board) with sole responsibility for personnel and social matters. Employee participation was extended to other industries by the LRA of 1952.<sup>205</sup> Elected Workers Councils were made obligatory and all companies employing more than 500 workers were obliged to establish a Supervisory Board with one-third of its members being employee representatives.<sup>206</sup> The LRA of 1972 enlarged the co-operation and co-determination rights of Workers' Councils to include rights to be fully informed of all personnel, social and economic matters connected with the firm and the right to refer disputes to an arbitration committee.<sup>207</sup>

The Co-Determination Act of 1976<sup>208</sup> extended the right to equal representation on the Supervisory Board with an allocation of three places to trade union representatives in companies with a workforce of 2 000 or more. The shareholders of the company still retained an upper hand in that their representatives elected the Chairperson of the Supervisory Board who had the casting vote.<sup>209</sup>

The Supervisory Board does not have any managerial functions, but in certain areas management does have to seek the Supervisory Board's consent and, if it is refused, the management can only proceed with a three-quarters majority vote of a shareholder meeting. From the discussion above, it is clear that Germany has a 'pyramid' system of co-determination, while the Supervisory Board deals with

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<sup>204</sup> For a further discussion of German co-determination, see Gruson, M and Meilicke, W (1977) 'Industrial Democracy' *The Business Lawyer* vi, p 571; Lutter, (1982) 'The German System of Worker Participation in Practice' *Journal of Business Law*, pp 154–161.

<sup>205</sup> See Adams, J (Ed.) (1983) *Essays on Clive Schmitthoff*, p 32.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> Gruson, M, and Meilicke, W (1977) 'Industrial Democracy' *Industrial Law Journal* vi, pp 65–84..

<sup>209</sup> *Ibid.*

general policy areas of the company, and the Works Councils are concerned with the more day-to-day matters affecting life in the workplace.<sup>210</sup>

### **3.10 A Brief History of the European Community's Fifth Directive and the United Kingdom's Response to the Directive**

The EC Commission proposed that in all companies employing 500 or more employees a Supervisory Board should have broad control over a Management Board, either one-third of the membership being elected by workers or the membership of the Board being determined by co-option by workers and the shareholders.<sup>211</sup> This was rejected by the Member States who had varying attitudes towards the principle of employee-participation and did not like the idea of being dominated by the German system, which they regarded as rigid. The Legal Affairs Committee of the European Parliament spent from 23 November 1972 to 4 July 1974 discussing, albeit intermittently, these proposals.<sup>212</sup>

Discussions of the draft European Company Statute were also seen as one of the main stumbling blocks in this proposal. The EC Commission went away to reunite its draft and came up with new proposals in the form of a Green Paper in 1975.

This introduced a series of concessions:<sup>213</sup> the idea of a two-tier Board structure remained with employees participating on the Supervisory Board, but this was not to be obligatory if a majority of workers opposed it. A transitional period was introduced for the implementation of the Supervisory Board elections, which were to be conducted through secret ballot and according to the continental principle of proportional representation. The company could choose to retain a unitary board structure provided that a majority of workers were not opposed to the idea. If this approach was adopted one third of the members of the Management Board could be elected by employees of the Management Board. This could continue to be appointed by the shareholders but would operate in tandem with a representative

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<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> European Parliament document 136/79 (26 April 1979).

body of workers who enjoyed the same rights to information and consultation as the non-executive members of the Management Board. During this period, a series of consultations took place and Clive Schmitthoff was appointed as the *rapporteur*. His draft report was adopted by the Legal Affairs Committee of the European Parliament on 26 April 1976 and this Committee later came up with the radical proposal of equal board representation for shareholders and employees.<sup>214</sup> This was later considered by the European Parliament on 10 and 11 May 1979, but not adopted. It went back to the newly directly elected Parliament and in September 1979, Aart Geurtsen was appointed the new *rapporteur*. During this time, it was clear that employee participation was to be incorporated into EC policy.<sup>215</sup> The tactics employed by those opposed to any notions of the idea (mostly the British Conservative Party) have been influential in determining the form taken by present proposal laid down in the Geurtsen Report.<sup>216</sup>

Under the Geurtsen proposal employee participation is obligatory for all limited liability companies with over 1 000 employees.<sup>217</sup> This proposal also establishes various options as to how participation can be implemented. Firstly, Member States can choose between Board structures: either a Unitary Board with non-executive directors with defined supervisory functions and powers or in two tiers as a Management or Supervisory Board.<sup>218</sup>

Second, there is a choice of participation schemes, which may take the form of one-third of the membership of the Supervisory Board being elected by employees or representation may be through co-option from the Management Board, shareholder and Works Council lists. It was also agreed upon<sup>219</sup> that after the transitional period employee representatives could take up to one half of the seats, provided that shareholders retained a casting vote. The national government would have a right to appoint members to the Supervisory Board of companies in which it had an interest.

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<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*

<sup>216</sup> See detail in Gruson and Meilicke 'Industrial Democracy'.

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

An alternative choice is for an Employees Representative Council to be established to operate alongside a co-opted Supervisory Board or a Unitary Board: If a Unitary Board is retained, at least one-third and up to one-half of the directors would be representatives of workers. Finally, it was also established that collective agreement leads to participation systems recognised by national law as sufficiently equivalent to other employee participation schemes. Participation systems may, however, be excluded if a majority of the employees are opposed to the idea. The transitional periods leading to a uniform two-tier structure was not used and, instead, the report suggests a review after five years to report on how the directive has worked. And once this report was adopted, the Member States were given 18 months to implement the Directive.<sup>220</sup>

A critical assessment of this report shows that it represents a much weaker and less uniform idea of industrial democracy than the original 1972 proposals. Because most Member States already operate systems of employee participation, the Geurtsen Report should be regarded as an acceptable compromise. In addition to this, with the precedent of majority voting set in the European Community Council Meeting of Agriculture Ministers, the UK government found itself being discussed in the Council of Ministers.<sup>221</sup> The British Conservative Government was resolutely opposed to ideas of employee participation and was reluctant to implement the Directive. In view of this British attitude, the EC Commission threatened to take action under Article 169 (EEC) against Britain. In response to this threat, the British quickly took measures to implement Directive 77/187 (EEC) on the protection of employee rights on the transfer of undertakings.<sup>222</sup>

As regards the other Directives on equal pay and equal opportunities, the British government claimed their provisions were already covered in the Equal Pay Act of 1970 and the Sex Discrimination Act of 1975.<sup>223</sup> This explanation notwithstanding,

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<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> OJ 1977 L61/26 Implemented in the UK through the transfer of undertakings (Protection of Employment) Regulation 1981.

<sup>223</sup> Case 61/81 *Ibid.*

the UK still exposed itself to legal action before the European Court of Justice for the non-implementation of some of the Directives.<sup>224</sup>

In the UK debates over industrial democracy were closely associated with the liaison between the Labour Party and the Trade Unions in the 1970s.<sup>225</sup> The aim was to introduce a programme to promote and increase individual and collective employment rights. While the latter made some progress, as demonstrated in the repeal of the Industrial Relations Act of 1971 and the implementation of the Employment Protection Acts in 1975 and 1978, and the Sex Discrimination Act of 1975, industrial democracy remained untouched. This was in part due to the controversies surrounding the Bullock Report of 1977, and the fact that neither the Labour Party nor the TUC could be reconciled over their major ideological conflict of distinguishing and accommodating the interest of shareholders and management with those of wage earners and trade unions.

The work of Piet Jan Slot on the harmonisation of the law in the EC attempts to show the relations between national and community powers and how they would legislate after the harmonisation process.<sup>226</sup> In addition to this, this work also analyses and describes the general features of harmonisation. The rationale behind reviewing this work here is to illustrate possible consequences the SADC region may face after the laws have been harmonised in future.

Slot's analysis shows that Article 3(h) of the EC Treaty provides for harmonisation of laws as one of the instruments to achieve the objectives of the Treaty. According to this provision, harmonisation will take place to the extent that it is required for the functioning of the common market. He is strongly of the view that harmonisation should be seen as complementary to the general prohibitive Articles in the Treaty.<sup>227</sup>

As long as the free movement of goods, persons, services and capital has not been achieved through the general provisions, harmonisation functions as a

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<sup>224</sup> *EC Commission v United Kingdom* case 61/81.

<sup>225</sup> *Ibid.*

<sup>226</sup> Slot, P J (1996) 'Harmonisation' *European Law Review* 21 (5), p 378.

<sup>227</sup> *Ibid.*, p 375.

complementing instrument. For the correct understanding of the harmonisation of laws, Slot argues that it is necessary to outline the relationship between the general prohibitive provisions. He illustrates this point clearly, by using the horizontal approach and focuses on the free movement of goods.<sup>228</sup> He argues that the system of the EC Treaty can be harmonised.

He also described the relationship between, on the one hand, Articles 30 and 36 and, on the other, Articles 100 and 100A.<sup>229</sup> Barriers to the free movement of goods must be eliminated on the basis of Article 30, which prohibits quantitative restrictions and all measures that have an equivalent effect to quantitative restrictions. The prohibition on import duties and charges having an equivalent effect plays a somewhat lesser role. In the area of services, Article 59 imposes a similar prohibition to that of Article 30.<sup>230</sup> The economic integration would, in the view of those who drafted the EC Treaty, be further achieved through the harmonisation of laws.

The authors felt that harmonisation should take place in all instances where differences between national rules and regulations could affect the functioning in the establishment of the common market.<sup>231</sup> The differences between national rules were, in the early days of the EC, rarely discussed in relation to the prohibition in Article 30 of measures that had an effect equivalent to quantitative restrictions. At that time, only the most audacious interpretation of Article 30 included measures that applied without distinction to both national and imported products. It was for this reason that in the early years of the common market an extensive harmonisation programme was proposed.<sup>232</sup> It is, nevertheless, clear that the broader the interpretation of the concept of measures having equivalent effect in Article 30, the smaller the sphere of application of the harmonisation of laws.

Although not even the most extensive interpretation will entirely do away with the need for harmonisation, Article 30 will continue to lead to negative integration, that is,

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<sup>228</sup> *Ibid.*, p 376.

<sup>229</sup> *Ibid.*, p 390.

<sup>230</sup> *Ibid.*, p 393.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*



eliminate barriers to imported goods. It may, therefore, be necessary to have recourse to positive integration, which would result in measures aligning product standards for both imported and nationally produced goods. It would also eliminate reverse discrimination of national products. Nevertheless, the development of case law in the field of Article 30 implies at the same time an inverse development of the harmonisation of laws. In 1974, 17 years after the EC really came into effect, the Court of Justice adopted a broad definition in the famous *Dassonville* case.<sup>233</sup> As a result of the wide definition of measures having equivalent effect, known as *the Dassonville formula*, harmonisation need not cover unlimited and immense areas. The rapid development of the case law on Article 30 by the Court gradually resulted in further clarification of the notion of harmonisation of laws. In the case of *Cassis de Dijon*<sup>234</sup> the Court almost incidentally formulated the rule that goods that have been lawfully marketed in one Member State must not be restricted in another Member State. The *Cassis de Dijon* judgement provided the impetus for the Commission to change its policy with respect to the harmonisation. In its 'Communication from the Commission concerning the consequences of the judgement given by the Court of Justice on February 20, 1979', the Commission posited the mutual acceptance principle. This principle provides that goods that have been lawfully produced and marketed in one Member State must be allowed in other Member States. In view of this principle, the Commission drastically adjusted its harmonisation programme.

It was accepted that most trade restrictive differences in national rules could be settled through the procedures under Article 30 and the effect of the mutual acceptance principle. In the future harmonisation was required only in cases where the difference in national rules was justified under either Article 36 or the *Cassis de Dijon* type of exceptions. Because as long as the difference in national rules affects the functioning of the common market, Articles 100 and 100A serve to deprive the safeguard measures of Article 36 and the said *Cassis de Dijon* exception – sometimes referred to as the *rule of session* or mandatory requirements of their functions.

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<sup>233</sup> Case 8/74 *Procureur v Dassonville* (1974) ECR 837.

<sup>234</sup> Case 1210/78 *Cassis de Dijon*.

According to Slot,<sup>235</sup> harmonisation means that the guarantee of essential interests in the areas of public health, public order, morality, security, as well as other interests takes place at the community level. In such instances community legislation sets the norms. From the point of view of the differences in the EC legislation, the characteristics of goods can be accepted in so far as they do not limit intra-EC trade. Many differences in the composition and contents of products can exist without harming public health. In that case the consumer will be protected by the indication of the composition or contents shown on the packaging. In certain instances, a balancing of interests is necessary, for example, between the environment and the free markets, as was the case in the Danish deposit-and-return system judgment.<sup>236</sup>

The case of *Commission v Denmark*<sup>237</sup> deals with the main elements of the integration process in the framework of the EC. The overall impression emerging from this picture is the continuity of the objective of eliminating barriers to trade dealing with matter for use in foodstuffs intended for human consumption in Member States. Recent Directives are still concerned with the objectives of creating a level playing field. It is also important to note that the methods employed to achieve this objective have changed greatly. It is a long way from total harmonisation with the unanimity voting requirement under Article 100 to minimum harmonisation under Article 100 A or Article 118A. In the meantime, harmonisation is increasingly resorted to for the achievement of other objectives that have taken on more important dimensions in the EC. The protection of the environment is one example and equal treatment is another. At the same time, harmonisation of standards has become an important element of the EC's individual policy. This means that Council Directive 95/53 of 25 October 1995, which fixes the principle governing the organisation of official inspection in the field of animal nutrition, the instrument of harmonisation has increasingly served often-conflicting interests.<sup>238</sup> This can clearly be traced in the legislative process of the EC. It is also reflected in the actual drafting of Directives and Regulations.

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<sup>235</sup> Slot 'Harmonisation', p 394.

<sup>236</sup> *Ibid.*

<sup>237</sup> Case 302/86 *Commission v Denmark* (1988) ECR 4607.

<sup>238</sup> *Ibid.*

Fortunately, these centrifugal forces have, to some extent, been stemmed by more sophisticated legal techniques and also quite clearly by the case law of the Court of Justice, as was recently covered in the judgement of *Security International v Signalson*<sup>239</sup> conferring direct effect on the direct provision containing the notification obligation. This conclusion remains valid, notwithstanding the fact that the Court has recently been giving the Member States a wider margin of discretion in applying the exceptions to Articles 36 and 56, and the mandatory requirements.

The research work done on harmonisation of national legislation and the EEC in 1990 by Daniel Vignes<sup>240</sup> shows that the EC looked to its external relations pendulum. He argues that in the early 1970s when it was completing the transitional period provided for in the EEC Treaty (12 years in duration), it had a dual concern apart from the process of completion, namely (1) strengthening and (2) enlargement of the harmonisation process.

Strengthening consisted in action restricted to what was strictly laid down in the EEC Treaty; in this way the goods of the Economic and Monetary Union were launched and there was talk of EC policies other than those established by the EEC Treaty, examples being industry and research.<sup>241</sup> Enlargement was completed on 1 January 1973, with the entry of the UK, Ireland and Denmark into the EC.

Enlargement at the beginning of 1986 with the accession of Spain and Portugal was followed up a few weeks later in February 1986 by a dual measure at external and internal level, carried through in a single Act.<sup>242</sup> To indicate this dual, not to say composite, content of a single instrument, it was dubbed *the Single Act*.<sup>243</sup> The Single Act embodies provisions directed towards the outside world and additionally brings forward political co-operation by laying down the conditions for European co-

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<sup>239</sup> Case C 1994/94 *Security International v Signalson* CIA.

<sup>240</sup> Vignes, D (1990) 'The Harmonisation of National Legislation and the EEC' *European Law Review* 15, pp 358–374.

<sup>241</sup> *Ibid.*, p 359.

<sup>242</sup> *Ibid.*, p 362.

<sup>243</sup> *Ibid.*

operation in the field of foreign policy. However, the Single Act also comprises an internal section that reforms various rules of institutional functioning and certain powers of action provided for in the EEC Treaty. Among the powers of action that underwent reform, the harmonisation of the laws of Member States is probably the most important. In fact, in combination with Article 235 EEC, this power of legislative harmonisation laid down as early as 1958 in Article 100 EEC has the feature of being one of the two peripheral powers of the EC enabling it, where necessary for the establishment of the common market, to extend EC competence by biting into the powers of the Member States. The matter is, and remains, within the purview of the Member States, each of which legislates, regulates and administers within the sphere of its residual sovereignty. From this perspective, it is clear that this variety of rules could have given rise to difficulties for European operators. Private international law would have talked in terms of conflicts of law and would seek to determine which is applicable. Under the EC system the process is different; what is wanted is that an economic operation initiated under the legislation of one Member State should continue within the framework of another State and enjoy the same chances of success and identical treatment as given to national operations in the second State. Despite the variety of legal systems, the aim is simply, despite their multiplicity, for products from one State to be able to move throughout any other State without this movement being hindered by the difference and superimposition of rules applicable in the countries of origin, receipt or consumption. The objective is that exporters should not be hampered by such differences, while at the same time ensuring that despite these differences, consumers can readily obtain products from Member States other than their own, especially where this is to their advantage. Given the difference in laws, regulations and administrative provisions, or the mere existence of varying, and perhaps similar, provisions that threaten to hamper relations, there is a need to harmonise such provision, level out differences and make them equivalent.<sup>244</sup>

According to Vignes,<sup>245</sup> harmonisation will admittedly be communal in nature in that it will impose common models, but it will apply to national rules which will undergo

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<sup>244</sup> *Ibid.*, p 631.

<sup>245</sup> *Ibid.*

only minimum modification and whose character as national provisions of the Member States will be respected after harmonisation.

At that time the EC was finding its way and the Member States retained responsibility over all matters that they had not explicitly handed over to the EC.<sup>246</sup>

Consequently, all that was created, in line with a scheme known in international law as a *customs union*, and all issues that fell under the customs union were covered by EC law. In addition to this, framework provisions were erected to enable the EC to apply or implement common policies.<sup>247</sup> As a result, quite specific rules of EC law were laid down regarding competition between undertakings.<sup>248</sup> Furthermore, a number of framework provisions were set down and the objectives of what could be a common agricultural policy were also posited.<sup>249</sup> Both these aspects, and the relevant future implementing provisions, were matters of EC law. Beyond that, the Member States retained jurisdiction, but in the event of differences, they were compelled to harmonise the rules that, nevertheless, remained their rules and were not EC law.<sup>250</sup>

This was the situation in 1958 in the EEC Treaty in which harmonisation was to respect the legal order of the Member States and was to constitute a relative rendering of laws into EC terms. In the main instrument of harmonisation, namely Article 100 EEC – and it is the main one in that others will follow – this reluctance to ‘communitanse’ legislation was discernible in three areas: (1) harmonisation was to operate only where it was genuinely necessary and, as the text states, only where there was a direct effect on the establishment of the common market through this situation of legislative variety; (2) harmonisation will require unanimity, meaning that any Member State can oppose the harmonisation proposal and cannot be compelled to accept it; and (3) what the EC does when carrying out harmonisation is not

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<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

substituting EC law for national law, as would be the case if Article 100 provided for action by means of regulations: the instrument enshrined in Article 100 is the Directive, that is, an Act that dictates to Member States the result to be achieved, but leaves to national authorities the powers regarding form and means. Member States receive directives that they have to transpose into their legislation.

One would certainly not maintain that from the 1958 viewpoint harmonisation was an unpopular operation with the negotiators on account of these three restrictive provisions: there is a general belief among the Member States that it was not encouraged, that Member States retained sweeping economic responsibilities, and that it was brought into play only where necessary and with effects limited to requirements.

This research conducted by Vigues shows that the process of internal strengthening through the Single Act takes account of the difficulties of bringing about the common market. A large market without frontiers was to be established within a short timescale, that is, by the end of 1992. One of the main instruments was set up through the addition to the EEC Treaty of an Article 100A.

Member States insisted on the term 'addition' to the EEC Treaty as Article 2100 remains in existence – having harmonisation as its subject. Article 100A facilitates the process of harmonisation by modifying the three restrictive conditions set out above and imparting to them a much more open character.

The first feature is the abandonment of unanimity. In dealing with its new task, the Council decided by a qualified majority, that is, in accordance with a weighting system whereby two-thirds of the Member States must come down on one side.<sup>251</sup> The abandonment of unanimity was no easy matter and it had to be stipulated that in certain cases a Member State in disagreement could retain national provisions under given conditions.<sup>252</sup> Furthermore, the operative threshold was lowered: Article 100A was to be the normal and direct instrument for implementing the internal market, and

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<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

it is the chief instrument of Article 8A of the Single Act, unless there is some other power to hand, as follows implicitly from the first sentence of Article 100A, paragraph 1. The strict requirement of a 'direct effect' on the common market disappears, having been replaced with 'measures which have as their object' the establishment of the internal market.<sup>253</sup> Perhaps the most important point here is that the harmonisation process was clearly expanded in the action which is, of course, no longer taken solely through directives but, if needs be, through Directives or through regulations, resulting in the substitution of EC law for national law.<sup>254</sup>

This text by Vigues also highlights the limits to the harmonisation process in the EEC. He shows that Article 100A, paragraphs 3 stipulates that, in its harmonisation proposals, the Commission must take as a base a high level of protection 'concerning health, safety, environmental protection and consumer protection', that is, that it must not wish unduly to facilitate transfinite transactions, sacrifice the interests thus mentioned. According to Vigues, by stipulating the names of those interests to be protected, a compulsory condition to be met, paragraph 3 makes harmonisation more difficult and, therefore, constitutes a limit on it.

The second limit, which is clearly laid down in paragraph 4, has much greater weight in the harmonisation process. It allows those States that have voiced their opposition to a harmonisation decision to continue to apply national provisions. This provision in the Single Act was the most strongly criticised, as it introduced into the EEC Treaty, for the first time, the right to disobey or, to be more accurate, not to yield to a majority decision.

There is good reason not to share that criticism, which appears to be made without justification. The question that could be asked at this juncture is: in what way is it more serious to obstruct everything by refusing to join in unanimity than to reject a common decision adopted by a majority, but which one voted against? In view of this, one can therefore understand those who defend paragraph 4, even though one

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<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

may regret the decision made of supporting the expression by a Member State which would have helped to maintain the unanimity provided for in Article 100, especially as paragraph 4 lays down conditions which, in the final analysis, will be subjectable to arbitration by the European Court.<sup>255</sup>

These conditions are two in number and reproduce virtually verbatim the provisions of Article 36; one is substantive and may be invoked by a Member State as a minority which may not apply to national provisions unless it considers that the protection requirements laid down in Article 36 and those of 'protection of the environment or the working environment' are not guaranteed, while the other is procedural, being a confirmation by the commission that such national provisions are not a means of arbitrary discrimination nor a disguised restriction in trade between Member States. This last condition may restrict the action of paragraph 4, but it must, nonetheless, be recognised that the latter is likely to curb the operation of harmonisation severely.

In their field and scope, harmonisation measures are bound by balance between, on the one hand, the need for obstacles to the completion of the single market to be removed and, on the other hand, the more or less diffuse wish of Member States to ensure the protection of their operators and consumers by means of national provisions. Unfortunately, these issues have been seen as obstacles or limits to the harmonisation process in the EEC.

### **3.11 The Harmonisation of Labour Laws in Japan**

The research work done by Takashi,<sup>256</sup> titled 'Equal Employment Harmonisation of Work and Family Life in Japan' shows that the harmonisation of work and family life was at the top of the labour legislation agenda in the 1990s in Japan. Various factors triggered this legislative drive. First, with the low fertility rate causing an anticipated

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<sup>255</sup> Article 100.

<sup>256</sup> Araki, T (1999) 'Equal Employment and Harmonisation of work and Family Life: Japan' *Soft Law Approach Comparative Labour Law and Policy Journal* 21 (1), pp 451– 466.



labour shortage, it was thought that women had to be encouraged to participate in the labour market. To that end, it was important to mitigate the difficulties that women were facing in bearing both family responsibility and workplace duties. As women still bear most of the family duties in Japan, this factor was important.

Second, the low fertility rate was thought to damage the future social security system seriously. The low fertility rate is said to be closely linked with an undesirable, but inevitable, choice on the part of working women. Women who wish to continue their careers tend to postpone childbirth because amidst the current Japanese practices it would be nearly impossible to be able simultaneously to balance work and family responsibilities.

Third, Japan's rapidly declining society gives rise to the problems of care for the elderly. Since socialisation of care for the elderly is undeveloped in Japan, working people currently shoulder the care of older family members. This factor also mandates that harmonisation measures be instituted.

Fourth apart from the foregoing economic reasons, the Japanese's traditional perception of division of labour between men and women, and of women's continuing careers is changing. The proportion of both men and women supporting and caring for their family after marriage is decreasing considerably, and the proportion supporting a view that a woman should continue to work even if she gets married and gives birth is increasingly steady.<sup>257</sup> The above factors notwithstanding, the most decisive was the need for equality in employment opportunity between men and women.

### **3.11.1 Equal employment policy and harmonisation of work and family life**

Although a large number of women are participating in the labour market in Japan, a considerable number of them withdraw when they have their first child and resume working after their children are old enough to attend school.<sup>258</sup> Such a career break

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<sup>257</sup> Sato, H (2000) 'The Current Situation of Family-Friendly' Policies in Japan', *Japan Labour Bulletin* 39 (2), p 5.

caused by childbirth poses a problem to employers when hiring women and investing in their training and education, and is consequently a hindrance to real equality in employment between men and women.

Another aspect that required harmonisation measures was the problem of the dual-track personnel system, which emerged after the enactment of the Equal Employment Opportunity Law (hereinafter 'EEDL') of 1985. Although blatant discrimination against women has gradually faded through vigorous antidiscrimination campaigns by the government, the more complex problem remains.

Companies have introduced this 'separate-track employment system' in which the employer provides workers with a choice of two or more career tracks.<sup>259</sup> One track is the 'general track', which involves routine jobs and no obligation for employees to comply with transfer orders entailing changes of residence. The other track is the 'integrated' or 'career track', which denotes an elite management track. Employees in this category engage in jobs involving discretionary decisions and are subject to company-wide transfers entailing relocation.

Since the different treatment in the two tracks, which have differing job content and responsibilities, is based on workers' own choice, it is not as easily classifiable as unjustified discrimination. Given that most women bear responsibilities, however, they are *de facto* led to choose the general track, which is more compatible with their family life. To guarantee a substantial choice for women, therefore, an institutional arrangement for harmonisation of work and family life, and an improvement in the social and employment environment are indispensable. These factors led to the enactment of the Child Care Leave Law of 1991,<sup>260</sup> and this law was revised and renamed the Child Care and Family Care Leave Law of 1995 (hereinafter 'CCFLL'),<sup>261</sup> which will be discussed briefly below.

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<sup>258</sup> Article 2 No 1; Art para.1.

<sup>259</sup> EEDL, *Ibid.*

<sup>260</sup> Child Care Leave Law of 1991.

<sup>261</sup> Child Care and Family Care Leave Law of 1995 (hereinafter 'CCFLL').

### 3.11.2 Child care leave

The CCFCLL of 1995 provides a worker, upon request, with the right to leave work to care for his or her child, including an adopted one, who is less than one year old. The law guarantees the right to both male and female workers. However, workers employed on a daily basis or on a fixed-term contract are excluded.<sup>262</sup>

As a general principle, the employer cannot reject request for leave.<sup>263</sup> Though the CCFCLL does not require the employer to guarantee any payments during the leave, by the several amendments of the Employment Insurance Law, currently 30 per cent of the worker's regular monthly wages earned before taking leave was paid as a Child Care Leave Basic Allowance and 10 per cent as a Returning Job Allowance from the employment insurance.<sup>264</sup> During the child care leave, social security premiums for health insurance and welfare pension insurance can be exempted at the worker's request.

### 3.11.3 Family care leave

The CCFCLL of 1995 clearly provides workers with the right to take family care leave in order to care for a family member who is in a condition requiring constant care for two weeks or more due to injury, sickness or physical or mental disability.<sup>265</sup> The scope of 'family member' in the law includes the spouse,<sup>266</sup> parents and child of the worker, parents of the worker's spouse,<sup>267</sup> and the worker's grandparents, siblings

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<sup>262</sup> Article 2 No 1; Art para.1.

<sup>263</sup> Article 6 para 1. The employer is prohibited from dismissing a worker by reason of the worker requesting child care leave or having taken the leave. This is also stated in Article 10. However, unlike the Labour Standards Law (hereinafter 'LSL'), the CCFCLL does not prescribe criminal sanctions against violations.

<sup>264</sup> Article 61–4 and 61–5.

<sup>265</sup> CCFCLL Art. 2 (2), (3); Enforcement Order CCFCLL Art. 1.

<sup>266</sup> A spouse in the CFCLL includes that in a common law marriage.

<sup>267</sup> Art. 2 (4).

and grandchildren on condition that they reside with and are dependants of the worker.<sup>268</sup> The period of a family care leave cannot exceed three months.<sup>269</sup>

The right to family care leave can, in principle, be exercised only by one family member.<sup>270</sup>

It should also be noted that an employer cannot reject requests for family care leave. However, exceptions are allowed when the employer concludes a written agreement with a majority representative union in respect of collective agreement.

Although the CCFCLL does not require the employer to guarantee any payments during the leave, the Employment Insurance Law (hereinafter 'EIL') provides that 40 per cent of the worker's regular monthly wages earned before taking leave is paid as a Family Care Leave Allowance from the employment insurance.

#### **3.11.4 Promoting 'family-friendly' measures**

Although the CCFCLL establishes an 'employee's right to take child care and family care leave', work-family harmonisation measures are not limited to these kinds of leave. For instance, family-friendly measures, such as a system of shorter working hours, flexitime, or the installation of a crèche at the workplace, can help harmonisation. However, while such family-friendly measures are adopted among some larger enlightened companies, most small and medium-sized enterprises pay little attention to them.

In view of this, the Ministry of Labour promoted family-friendly measures among companies by setting up 'awards for family-friendly firms'. The Ministry offers the

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<sup>268</sup> Enforcement Order CCFCLL; Art. 2.

<sup>269</sup> CCFCLL Art. 15.

<sup>270</sup> CCFCLL Article 11 proviso in question falls under one of the following: (1) a worker who has been employed for less than one year by the employer; or (2) those the Enforcement Order of the CCFCLL designates, such as a worker whose employment relation will apparently end within three months from the date of the request for the leave and a worker whose weekly work days are two days or less.

following awards: The Ministry of Labour's Good Company Awards, a Labour Minister's Award for Effort, and an Award of the Heads of the Women's and Young Worker's Office.

Family-friendly firms must meet the following four criteria, set by the Ministry of Labour, to receive awards:

- (1) Work rules or other provisions include schemes for child care and family care leave that are more generous than legally required, and the schemes are actually being used by employees;
- (2) The firm offers schemes (such as flexitime, a scheme for shorter working hours, or a home-based work system) that enable employees to explore a flexible working style taking into consideration the balance between work and family, and the schemes are used by its employees;
- (3) The firm offers various other measures making it possible for its employees to strike a balance between work and family life, such as a nursery in the enterprise or financial support for the costs of child care and family care services, and the schemes are being used by its employees;

The prevailing atmosphere in the firm already makes it easy for its employees to harmonise work with family life.

### **3.11.5 Japan's soft law approach to achieving equal employment and harmonisation of work and family life**

Before 1985, Japan had some regulations on sex discrimination, however, regulations for equal employment were not implemented until the enactment of the 1985 Equal Employment Opportunity Law (hereinafter 'EEOL'). It is interesting to note that the EEOL of 1985 was heavily criticised for the following three reasons: (1) its one-sided support for women to be kept in lower-paying jobs, (2) it did not prohibit discrimination in terms of recruitment, hiring, assignment and promotion, but merely

set forth a duty to treat all employees fairly and (3) it lacked an effective dispute-resolution mechanism.<sup>271</sup>

The EEOL of 1997 responded to most of these criticisms. First, though the 1997 EEOL still maintains it's the position of prohibiting discrimination against a person by reason of being a woman and has not reached a genuine discrimination prohibition law for both sexes, it prohibits preferential treatment for women when such treatment fixes job categories for women or maintains 'job segregation by sex'.

Second, discrimination in recruitment, hiring and promotion is prohibited. Third, mediation procedures can be commenced by the request of one party and, as a sanction against violation of the EEOL, the publicising of the violating company name was introduced. Therefore, the 1997 revision made significant progress in the equal employment policy in Japan.<sup>272</sup>

Japan's equal employment policy concerning the elimination of discrimination based on sex began with a modest intervention ensuring an outright prohibition, which would entail drastic modification of current practices. Through administrative guidance and campaigning, a gradual but steady modification of societal and company consciousness toward equal employment was sought. It should also be noted as a feature of Japan 'equal employment policy' that the policy of harmonisation of work and family life has developed simultaneously with the anti-sex discrimination policy. This might be evaluated as a method in a consensus-oriented society like Japan for redressing practices that are deeply rooted, but deemed socially inappropriate. After many years experience under the 1985 EEOL, the 1997 Revision witnessed no overt opposition against prohibiting discriminatory treatment in all stages of employment.

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<sup>271</sup> EEOL *Ibid.*

<sup>272</sup> Parkinson, L (1989) 'Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change' *Columbia Law Review* 89, pp 604.

As for harmonisation between work and family life, in a similar vein the CCLL of 1992 introduced child care leave.<sup>273</sup>

To implement the policies on harmonising work with family life, the government started a campaign to encourage family-friendly measures among firms by giving awards.

Such a soft law approach is one of the most significant characteristics of the legal policies in Japan. The Japanese legislator is of the opinion that such an approach is more effective in the end than direct legal intervention, and that when indirect intervention has not worked and more stringent regulations are needed or when society has accepted new norms and direct legal intervention will not cause serious confusion, regulations should take more direct and mandatory forms.

In conclusion, it can be argued that there are several defects in the equal employment legislation. Typically, the EEOL of 1997 aims to redress discrimination solely against women. However, one-sidedness in the promotion of women's status in the EEOL of 1985 was weakened and the character of the equal employment law for both sexes is emerging. In the harmonisation policy, the CCLL and CCFCLL already provide the right to take leave for both men and women. Therefore, the EEOL of 1997, which maintains regulations addressed to women may be evaluated as a transitional stage towards a genuine equal employment law for both sexes.

There are many lessons for SADC countries to learn from the Japanese experience discussed above. Today, Japanese employees enjoy CCFCLL and this enables the employees to take care of their children, including adopted children, spouses, parents, siblings, grandparents and grandchildren. In addition to this, it allows for shorter working hours, flexible time, and the installation of crèches at workplaces. This law has been harmonised in Japan and it has created a better relationship between employers and employees, thus motivating the employees to give their best to the employers.

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<sup>273</sup> Loraine, *Ibid.*

Unfortunately, in all seven SADC countries surveyed in this research, none of them have introduced labour legislation that cares much for their employees. Having discussed the EC and the Japanese experiences in the harmonisation of both labour and commercial law as it affects the employer-employee relationship in a work environment, I will now briefly review the research work of Rene Loewenson on the need to harmonise the Occupational Health and Safety legislation in Southern Africa.

### **3.12 Harmonisation of Occupational Health and Safety Legislation in Southern Africa**

This review provides a commentary on the occupational health and safety (hereinafter 'OHS') law and the practices in the countries listed below, and they are divided into two groups, namely the laws that

1. are actually in application; and
2. were still in draft form as at the time of the research conducted by Rene Loewenson.

The laws that were actually in application in the SADC region are the following:

Botswana:	The Factories Act of 1950, chapter 44:01 The Mines, Quarries, Works and Machinery Act of, chapter 44:02
Lesotho:	The Labour Code Order of 1992
Malawi:	The Factories Act, chapter 55:07
Mauritius:	The Occupational Health, Safety and Welfare Act 34 of 1988
Namibia:	The Labour Act 6 of 1992
South Africa:	The Occupational Health and Safety Act 85 of 1993 The Hazardous Chemical Regulations of 1995
Swaziland:	The Employment Act of 1980 The Factories, Machinery and Construction Works Act of 1972
Tanzania:	The Factories Ordinance of 1950, chapter 297 The Building Regulations of 1955
Zambia:	The Factories Act, chapter 514
Zimbabwe:	The Factories and Works Act, chapter 283 The National Social Security Act of 1989



Statutory Instrument 68 of 1990 (Accident Preventional Workers' Compensation Scheme Notice).<sup>274</sup>

Unfortunately, this research did not cover the health and safety laws of Mozambique and Angola because their documents were not available in English during the research.

The following laws have recently been enacted:

- The Namibian Draft Regulations on Occupational Health and Safety of 1995
- The Tanzanian draft Occupational Health and Safety Bill of 1995
- The Zambia Draft Occupational Safety and Health Bill of 1996
- The Malawi Draft Occupational Safety, Health and Welfare Bill of 1996.

After a thorough study of the differences in the occupational health and safety legislation in the SADC region, Loewenson submitted that there was a need for the harmonisation of the occupational health and safety legislation in the region.<sup>275</sup> Given the potential cross-border flow of hazardous substances, waste, pollution and major accident risks, there should be corresponding cross-border liability for information on, and management of, these occupational health risks. Hence it would be useful to have a database that supports regional prevention of OHS risks associated with major hazard installations, registered and prohibited chemicals (including standardised regional labelling of hazardous substances), and the transport of hazardous materials. Loewenson also suggested that it would be important to have common standards on the management of OHS risks associated with the production and trade in the region. Apart from the hazardous substances issue, harmonisation of OHS in the SADC region would also enable migrant workers in the region to know the standards of health and safety conditions in which they would expect to work when they move from one region to another. The uniform basic

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<sup>274</sup> Loewenson, R (1996) *Occupational Health and Safety Legislation in Southern Africa: Current trends* Cape Town: Institute of Development of Labour Law, University of Cape Town (Monograph). See Mavis Hermanus monograph on Occupational Health and Safety Legislation in Southern Africa.

<sup>275</sup> Loewenson, *Ibid.*

legal standards for OHS in the SADC region will also help in achieving the basic ILO standards for OHS, as set out in ILO Convention 155.<sup>276</sup> This standard will assist with a greater flow of labour, goods and services in the SADC region.

More details on this issue will be fully examined in Chapter Four of this thesis, which deals with the implementation of international labour standards in southern Africa.

### **3.13 Conclusion**

#### **3.13.1 Summary**

At this juncture, I will summarise the essential issues raised in this chapter. This chapter has explored some theoretical issues that have a direct bearing on the harmonisation of labour laws. These theoretical issues revolved around (1) globalisation of labour law; (2) recognition of labour law; and (3) the influence of the plurality of different laws on the harmonisation process. The implication of the above theoretical issues on harmonisation has been fully discussed in this chapter. It has also been argued here that the variation in labour laws in the SADC region and the level of development in the region would create some difficulties in the harmonisation of labour laws in the region.

#### **3.13.2 Possible models for harmonising labour laws**

From the literature review above, it can be argued that the choice of harmonisation models to be adopted in the SADC region depends on the subject matter for harmonisation and the degree of uniformity that is desired and feasible. The highest possible forms of integration are, of course, uniform laws throughout the region and unified institution dealings with supervision of enforcement and adjudication. This has, to a certain extent, been attained by the EU in the form of regulations, which become, after their adoption by competent European institutions, European laws that

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<sup>276</sup> *Ibid.*

are directly and uniformly applicable throughout the union, and that are, at the highest level, adjudicated by the European Court of Justice.

Unfortunately, SADC has not made a bold move in this direction. It is difficult to say exactly when SADC will do so in future, mainly because of the differences in levels of socio-economic development in cultural and legal traditions, and in the patterns of industrial organisation in the SADC region.

### **3.13.3 Harmonisation by Directive**

The literature review mentioned above shows clearly that the EC favoured the harmonisation of labour law by Directive. It was observed that a Directive binds the Member States to the results to be achieved, but leaves to the national authorities the choice of form and methods necessary to achieve the required results. Member States are thus under an obligation to enact laws that implement the principles laid down in the Directive. The advantage of this system is that it allows Member States to retain control over both the formulation and implementation of the required standards. At the same time, this approach allows for a fairly detailed formulation of standards investing the process with a sufficient degree of certainty. The Directives approach, however, requires a more integrated structure with supra-national law-making institutions that are able to formulate and adopt measures on an autonomous and continual basis. It would also require the establishment of an institutional structure for enforcing Member States' obligations.

In view of this integrated structure, regional integration definitely has obvious implications for the regulation of labour and social policies in SADC countries. However, regional integration per se does not define the basis of such regulation. It is necessary to look beyond current attempts at integration to formulate a credible basis for labour and social regulation.<sup>277</sup> Tom Fey is strongly of the view that the demands of globalisation and the market solutions they engender have a universal reach, a universal response is therefore necessary. Efforts by the ILO have been the most universal and credible attempts to formulate labour and social policy in this

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<sup>277</sup> Fey, T, *Ibid.*

century. International ILO labour standards therefore provide an enduring basis in that respect. It has been argued in academic circles that the ILO itself has not been spared the onslaught of globalisation and many critics have questioned the very basis of the ILO standard setting. In spite of the criticism of ILO standards, however, the former Director-General's<sup>278</sup> response to the criticism clearly makes a case for core labour and social standards that the world community can only ignore at its own peril. However, there seems to be greater acceptance of the fact that minimum labour standards should form part of the regulatory framework within which international trade takes place. At the Ministerial Conference of the World Trade Organisation in Singapore, the Ministries of Trade reviewed their commitment to the observance of internationally recognised core labour standards. They also recognised the ILO as the only competent body to set and deal with these standards.

In essence the ILO approach defines the scope and issues of labour and social regulations that SADC countries need to address in regional integration settings.

Some of those labour issues will be examined as a subtheme in the subsequent chapter which is entitled: 'The Implementation of International Labour Standards in Southern Africa.'

#### **3.13.4 Hypotheses**

From the above theoretical framework and the literature review, the following hypotheses were derived, which will be tested in this research analysis:

##### **(a) Hypothesis One**

The harmonisation of labour laws in the SADC region will help to maintain similar benefits for the migrant labour in the region.

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<sup>278</sup> *Ibid.*

**(b) Hypothesis Two**

The harmonisation of labour law in the SADC region will assist in the implementation of ILO standards in the region.

**(c) Hypothesis Three**

The harmonisation of labour laws in the SADC region will help to protect workers against the greater economic power of employers in the workplace.

## **CHAPTER FOUR**

### **HISTORICAL BACKGROUND AND THE STRUCTURE OF THE INTERNATIONAL LABOUR ORGANISATION**

#### **4.1 Introduction**

The purpose of this chapter is to discuss the historical background and the structural composition of ILO. This chapter also highlights the nature of the Conventions, Recommendations and the standard-setting process followed by the organisation. The obligations of Member States, the composition of the committee of experts within the organisation and the various supervision processes in the implementation of the Conventions and Recommendations are also discussed in this chapter.

#### **4.2 Historical Background to the International Labour Organisation**

The ILO is one of the specialised agencies of the United Nations (hereinafter 'UN'), but it differs from the other specialised agencies both in history and in structure: it is the only organisation in which not only government but also employers' and workers' organisations are represented; and it was established in 1919, long before the establishment of the UN system. The ILO is the only surviving major creation of the Treaty of Versailles which brought the League of Nations into being and it became the first specialised agency of the UN in 1946.<sup>279</sup>

The ILO formulates international labour standards in the form of conventions and recommendations, setting minimum standards of basic labour rights: freedom of association, the right to organise, labour, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standard regulating conditions across the entire spectrum of work-related issues. It provides technical assistance primarily in the fields of

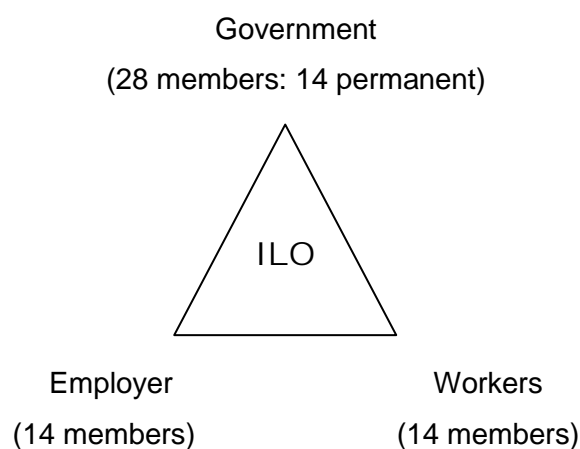
- vocational training and vocational rehabilitation;

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<sup>279</sup> Blainpain, R and Colucci, M (2004) *The Globalisation of Labour Standards: The Soft Law Track* The Hague: Kluwer Law International, p.10.

- employment policy;
- labour law and industrial relations;
- working conditions;
- management development;
- co-operations;
- social security; and
- labour statistics and occupational safety and health.

The ILO promotes the development of independent employers and workers organisations, and provides training and advisory services to these organisations. Within the UN system, the ILO has a unique tripartite structure with workers and employers participating as equal partners with governments in the work of its governing organs. The ILO accomplishes its work through three main bodies, all of which encompass the unique feature of the organisation: its tripartite structure which is illustrated in Figure 4.1.



**Figure 4.1: The tripartite structure of the International Labour Organisation**

### 4.3 Conventions and Recommendations

The two main instruments used by the ILO to create obligations and non-obligatory norms are through its Conventions and Recommendations.<sup>280</sup> There is a

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<sup>280</sup> Ghebali, V-Y (1988) *The International Labour Organisation* The Hague: Martinus Nijhoff Press.

fundamental juridical difference between these two instruments in terms of their obligatory roles. This shows that through their ratification, Conventions become binding on the countries that ratify them, like international treaties, while Recommendations essentially have the objective of orientating national action.

They may stand alone or supplement Conventions. However, although Conventions are meant to create obligations, they have no binding force in themselves. The Member States only assume the obligation to apply the provision of Conventions' which they ratify.<sup>281</sup>

#### **4.4 The Standard-setting Process Followed by the International Labour Organisation**

Government, employers and trade unions, or the ILO office, may come up with an idea that could constitute the germ for a Convention or Recommendation. In this case such an idea evokes the interest of the Governing Body and it may be selected for inclusion in the agenda of the International Labour Conference.<sup>282</sup> However, the first step is that the Governing Body requests the Office to prepare a preliminary brief on the law and practices of Member States relating to the subject. On the basis of this report, the Governing Body decides whether or not to continue with the standard-setting process. If the Governing Body decides to place the item on the Conference agenda, a more detailed law-and-practice report and the outline of possible instrument are prepared in questionnaire format. On the basis of the government replies, the Office prepares a set of proposed conclusions which is tantamount to an initial draft of the proposed text. When the Conference meets, it normally appoints a tripartite committee to examine the proposals and formulate conclusions. The Committee text is then submitted to the full Conference, which decides whether to include the question on the agenda of the next Conference session, with a view to the adoption, at the time, of the proposed Convention and/or Recommendation.<sup>283</sup>

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<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*



In a normal situation, if the result of this first Conference discussion is positive, the Office drafts a provisional text of the proposed instrument and sends it to the governments for comments. The Office then prepares a final report reflecting those comments and containing a revised proposed text. At the Conference, the draft is again discussed by a tripartite committee and an agreed text – often the result of long negotiations between government, employers and workers representatives – is put before the full Conference for approval. If it receives the votes of two-thirds of the delegates it is formally adopted as an ILO Convention or Recommendation.<sup>284</sup>

#### **4.5 Obligations of Member States**

In terms of the discussion above, it appears that employers and workers play an important role, together with the government, in those countries that have ratified the Tripartite Consultation (International Labour Standards) Convention of 1976 (No. 144). The governments concerned are bound to tripartite consultation in replying to the office questionnaires contained in the first report as indicated above. Once a Convention or Recommendation has been adopted by the Conference, governments must submit both Conventions and Recommendations ‘to the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action’.<sup>285</sup> They are expected to report back to the ILO on the measures they have taken in that respect and on the action taken by the ‘competent’ authority. Since the implementation of a Convention or Recommendation frequently requires legislation, the ‘competent’ authority will, in most cases, be the national parliament or legislative assembly: it is for that body to decide whether the action of the International Labour Conference should be followed up at national level.

As soon as the submission procedure has been completed, and steps taken communicated to the Office, the government’s obligation in terms of the adoption of the new instrument by the Conference is fulfilled. It is also important to send a report back to the Office on the action taken as part of the procedure required. This is

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<sup>284</sup> *Ibid.*

<sup>285</sup> Gladstone, A (1986) *The Manager’s Guide to International Labour Standards* Switzerland: ILO.

because the report helps the ILO and its supervisor bodies to ensure that the obligation to submit new instrument to the competent authorities is respected. Only Conventions are subject to ratification by the national authorities. Once ratified, the Conventions become binding.<sup>286</sup>

#### **4.6 The Supervision and Machinery Relating to Conventions and Recommendations**

In terms of Article 19 of the ILO Constitution, the Governing Body may call on all Member States to report on the position of their law and practice with regard to matters dealt with in an unratified Convention and Recommendation, the extent to which effect has been given or is proposed to be given to its provision and the difficulties that prevent or delay its ratification. Each year, the Governing Body selects a number of Conventions and Recommendations to be reviewed. Article 19 also makes provision for reporting measure taken in respect of the newly adopted Conventions and Recommendations.

Article 22 of the Constitution provides that each Member State shall ‘make an annual report to the office on the measure which it has taken to give effect to the provisions of Conventions to which it is a party’. In view of the increasing number both of Member States and of ratified Conventions, it becomes necessary to change the periodicity of reporting. Under the present system, detailed reports are requested every two years for certain important Conventions, such as those dealing with basic human rights, while for other Convention reports are normally requested at four-yearly intervals.<sup>287</sup>

#### **4.7 The Committee of Experts**

For many years, the Committee of Experts has played an important role in the supervision and applications of Conventions and Recommendations. Since 1927<sup>288</sup>

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<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid.* n 89.

<sup>288</sup> *Ibid* n 102.

the examination of government reports has been carried out in the first instance by this Committee, which consists of 20 independent persons with eminent qualifications in the legal or social fields, and with an intimate knowledge of labour conditions or administration, and drawn from all parts of the world. They are appointed in their personal capacity by the Governing Body for a period of three years on the proposal of the Director-General.<sup>289</sup>

The basic roles played by the Committee can be strictly divided into two major parts:<sup>290</sup> (1) the examination of reports on the application of ratified Convention; (2) the examination of reports on the situation of national law and practice with regard to selected unratified Conventions and Recommendations to the competent authorities. It must also be pointed out here that in examining the effect given to ratified Conventions, the Committee is not limited to the information provided by governments; it may also take into consideration the conclusions of other ILO bodies, such as Commissions of Inquiry and the Governing Body Committee on Freedom of Association, and comments made by employers' and worker' organisations.

In situations where the Committee finds that a government is not fully complying with the requirements of a ratified Convention, or with its obligations under the ILO Constitution regarding Conventions and Recommendations, it addresses a comment to that government drawing attention to the shortcomings and requesting that steps be taken to eliminate them.<sup>291</sup> The Committees' comments may take the form of an observations or direct request. To give an example of an observation made by the Committee, here is a comment on the application of the Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87): 'In its previous observation the Committee had commented on the employers' organisations which, in its opinion, do not constitute employers' organisations in the sense of the terms of

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<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.*

the Convention, that is to say, Organisations whose main purpose is to further and defend the interest of employers.<sup>292</sup>

Certain observations made by the Committee are sometimes directly related to the activities of employers and managers, as was the case in the following observation made in respect of the Right to Organise Labour and Collective Bargaining Convention, 1949 (No. 98).

#### **4.8 The Conference Committee**

The report of the Committee of Experts is submitted to the International Labour Conference, where it is examined and discussed by a tripartite Conference Committee on the application of the Conventions and Recommendations.<sup>293</sup> It is at this stage of the supervision procedure that employers' representatives play an important role. This Committee examines individual cases. Governments that have been mentioned in the report of the Committee of Experts for not complying with their Constitutional obligations, or not fully applying a ratified Convention, are invited to make a statement to the Conference committee to explain their position. Although there is no formal obligation, the government usually agrees because the objective of the Committee is not to apportion blame, but to obtain results, that is, better application of international labour standards. The report of the Conference Committee is finally submitted to the full Conference for discussion. If adopted by the Conference, the report is sent to the member States, and governments are asked to take certain points into consideration when preparing their next report to the ILO.<sup>294</sup>

Having discussed the ILO machinery and the procedure used in implementing labour standards, an attempt will be made in this chapter to examine how successful the seven SADC members that have been selected in this study are in the implementation of the six core ILO labour standards. In this study the core areas of the ILO labour standards are the following:

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<sup>292</sup> *Ibid.*

<sup>293</sup> De la Cruz, H B, von Potobsky, G and Swepston, L *The International Labour Organisation* Boulder Colorado: Westview Press, p 8.

<sup>294</sup> *Ibid.*

- The freedom of association
- The effective recognition of the right to collective bargaining
- The elimination of all forms of forced and compulsory labour
- The effective abolition of child labour
- The elimination of discrimination in respect of employment and occupation.
- The occupational health and safety environment.

All the core labour standards cited above will be critically examined in the seven SADC countries selected for this research. The first to be discussed here is the freedom of association.

#### **4.9 Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87)**

The General Conference of the ILO convened in San Francisco on 17 June 1948<sup>295</sup> declared ‘the recognition of the principle of freedom of association’ to be a means of improving conditions of labour and of establishing peace. This principle of freedom of association was unanimously adopted and since then it has formed the basis for international regulation. The contents of freedom of association are spelt out in the Articles below:

##### **4.9.1 Part I of the Convention**

###### **Article 1**

Each member of the ILO for which this Convention is in force undertakes to give effect to the following provisions.

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<sup>295</sup> ILO (1985) *Freedom of Association Digest of Decisions and Principles of the Committee on Freedom of Association of the Governing Body of the ILO* 3rd ed. Geneva: ILO pp. 52–53.

## **Article 2**

Workers and employers without distinction whatsoever shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisation of their own choice without previous authorisation.

## **Article 3**

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

## **Article 4**

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

## **Article 5**

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

## **Article 6**

The Provision of Articles 2, 3, and 4 hereof apply to federations and confederations of workers' and employers' organisations.

## **Article 7**

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4.

### **Article 8**

1. In exercising the right provided for in this Convention workers' and employers' organisations, like other persons or organised collectivises, shall respect the law of the land.
2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

### **Article 9**

1. The extent to which the guarantees provided in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the ILO the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

#### **4.9.2 Parts II and III of the Convention**

Part II of the Convention deals with the protection of the right to organise, while Part III, which is the last part of the Convention, deals with miscellaneous provisions.

#### **4.10 A Summary of the Convention on Freedom of Association and the Right to Organise**

The general policy of this Convention is that all the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices, and respect relevant international standards.<sup>296</sup>

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<sup>296</sup> *Ibid.*

Workers employed by multinational enterprises should, without distinction whatsoever, have the right to establish and subject only to the rules of the organisation concerned, and to join organisations of their own choosing without previous authorisation.<sup>297</sup> They should also enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Organisations representing multinational enterprises or the workers in their employment should enjoy adequate protection against any acts of interference by each other's agents or members in their establishment.<sup>298</sup>

Where appropriate, in the local circumstances, multinational enterprises should support representative employers' organisations. Governments, where they have not complied with ILO standards, are urged to apply the principles of Convention No. 87 and its Articles.<sup>299</sup> Article 5 specifically relates to a multinational company and workers in such an organisation are free to affiliate with international organisations of employers and workers of their choice.

In situations where the government of host countries offers special incentives to attract foreign investment, these incentives should not include any limitation of the workers' freedom of association or the right to organise and bargain collectively.

Representatives of workers in multinational enterprises should not be hindered from meeting for consultation and the exchange of views among themselves, provided that the functioning of the operations of the enterprise and the normal procedures that govern relationships with representative of the workers and their organisations are not thereby prejudiced.

Finally, the Convention on Freedom of Association also supports the idea that governments should not restrict the entry of representatives of employers' and workers' organisations who come from other countries at the invitation of the local or

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<sup>297</sup> *Ibid.*

<sup>298</sup> Blanpain, R and Colucci, M (2004) *The Globalisation of Labour Standards: The Soft Law Track* The Hague: Kluwer Law International.

<sup>299</sup> *Ibid.*



national organisations concerned for the purpose of consultation on matters of mutual concern, solely on the grounds that they seek entry in that capacity.<sup>300</sup>

In addition to the above discussion of the ILO Convention on Freedom of Association and the Right to Organise, it is also necessary in this chapter to highlight ILO general procedure for the protection of rights of freedom of association. This will also enable one to examine to what extent the SADC countries have complied with general procedure for the protection of the right to freedom of association in their respective countries.

#### **4.11 International Labour Organisation Special and General Procedures for the Protection of Rights and Freedom of Association**

##### **4.11.1 Background**

As far back as January 1950, the Governing Body of the ILO Office, which is responsible for labour standard-setting, negotiated with the Economic and Social Council of the UN to set up a fact-finding and conciliation on freedom of association commission, and defined its terms, the general lines of its procedure and criteria for its composition. In addition to this, it was also decided to communicate to the Economic and Social Council a certain number of suggestions with a view to formulating a procedure for making the services of the Commission available to the UN organisation.

In February 1950 the Economic and Social Council of the UN noted the decision of the Governing Body and adopted a resolution in which it formally approved this decision based on the fact that it corresponded to the intent of the Council's resolution of 2 August 1949 and that it would help to protect the rights of Trade Union.<sup>301</sup> The Economic and Social Council of the UN accepted this on behalf of the UN and clearly laid down a procedure, which was later supplemented in 1953, in

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<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

terms of which it would refer to the ILO complaints received by the UN concerning Members of the UN who were also Members of the ILO.<sup>302</sup>

#### **4.11.2 Procedural Process of Forwarding Complaints in Respect of International Labour Organisation Regulations**

- (a) In terms of the procedure for the examination of complaints of alleged infringements of the exercise of trade union rights, as it has been established, it provides for the examination of complaints presented against Member States of the ILO. Evidently, it is possible for the consequences of events that gave rise to the presentation of the initial complaint to continue after the setting up of a new State which has become a Member of the ILO, but if such a case should arise, the complainants would be able to have recourse, in respect of the new State, to the procedure established for the examination of complaints relating to infringements of the exercise of trade union rights.<sup>303</sup>
  
- (b) The Committee, when examining allegations concerning the infringement of trade union rights by one government, indicated that there existed a link of continuity between successive governments of the same State and, while a government cannot be held responsible for events that took place under a former government, it is clearly responsible for any continuing consequences which these events may have had since its accession to power.<sup>304</sup>
  
- (c) Where a change of regime has taken place in a country, the new government should take all necessary steps to remedy any continuing effects which the events on which the complaints are

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<sup>302</sup> See *Report of the International Labour Organisation to the United Nations* (1952) Geneva: ILO, and the 6th *Report of the International Labour Organisation to the UNO* in 1953.

<sup>303</sup> Blanpain and Colucci *The Globalisation of Labour Standards*.

<sup>304</sup> *Ibid.*

based may have had since its accession to power, even though those events took place under its predecessor.<sup>305</sup>

- (d) In accordance with a decision originally taken by the Governing Body, complaints against member States of the ILO were submitted in the first instances to the officers of the Governing Body for preliminary examination. Following discussions at its 116th and 117th Sessions, the Governing Body decided to set up a Committee of Freedom of Association to carry out this preliminary examination. At this juncture, an attempt will be made to examine to what extent the selected countries of SADC in this research implemented the rights to freedom of association in terms of ILO standards.<sup>306</sup>

#### **4.12 Conclusion**

Having highlighted the historical background and the structural composition of the International Labour Organisation, an attempt will be made in the next chapters to examine how the seven SADC countries selected in this research have implemented the five core areas of ILO labour standards. These core areas are:

- (1) Freedom of association and collective bargaining
- (2) Elimination of all forms of forced and compulsory labour
- (3) Effective abolition of child labour
- (4) Elimination of discrimination in respect of employment and occupation
- (5) Occupational health and safety environment.

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<sup>305</sup> *Ibid.*

<sup>306</sup> See ILO (1995) *Law on Freedom of Association: Standards and Procedures* Geneva, Switzerland: International Labour Office.

## **CHAPTER FIVE**

### **THE IMPLEMENTATION OF FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING IN SOUTHERN AFRICAN DEVELOPMENT COMMUNITY COUNTRIES IN RESPECT OF INTERNATIONAL LABOUR ORGANISATION STANDARDS**

#### **5.1 Introduction**

The ILO 1948 Convention on Freedom of Association and the Convention on Collective Bargaining of 1949 (No. 98) seems to be one of the most important of all the ILO Conventions and the one most valued by workers everywhere. It provides that workers and employers, without distinction whatsoever, shall have the right to establish and join organisations of their own choosing. It also provides for guarantees permitting those organisations, and any federations they may be established, to carry on their activities without interference from public authorities. Member States ratifying the Convention are to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

Convention No. 98, which supplements this standard, is designed to protect workers against acts of anti-union discrimination, to safeguard workers' and employers' organisations from mutual interference, and to promote voluntary negotiation between management and labour. However, in recent years, the ILO has adopted more labour law standards to support both the Convention on Freedom of Association and the Convention on Collective Bargaining. The new labour law standards include the Workers Representatives Convention (No.135), and Recommendation (No.143) of 1971, which are aimed at ensuring that workers representatives in enterprises are effectively protected against any prejudicial act based on their status or activities as workers' representatives or on their union activities and provide that facilities shall be afforded in the enterprise to enable those representatives to carry out their functions promptly and efficiently. The new Conventions also include the Rural Workers' Organisations Convention (No. 141) and Recommendation (No. 149) of 1975, which states clearly that all categories of rural workers are entitled to establish and join organisations of their own choosing,

and provide that measures must be taken to facilitate the establishment and growth of strong and independent organisations of their choice.

Unfortunately, the above ILO Conventions and Recommendations have not been implemented in the SADC region in the same way. Each country in SADC operates differently in the implementation of freedom of association and collective bargaining rights. For example, in South Africa and Botswana employees do not enjoy the same freedom of association in their respective work environment. In the same vein, employees also find it difficult to exercise their organisational rights equally in Botswana and South Africa in respect of participating in trade union activity of their choice.

In respect of collective bargaining, the ILO formally recognised the right of both employees and employers to collective bargaining at the General Conference convened in Geneva by the Governing Body of the International Labour Office on 3 June 1981. At this conference, the ILO realised that there was an urgent need to achieve the general principle set out in Article 4 of the Right to Organise and Collective Bargaining Convention, 1949, and the Collective Agreements Recommendation of 1951. Having considered all the proposals in respect of the collective bargaining and labour standards, it was finally adopted as an international Convention on 3 June 1981. This international Convention is divided into three parts: Part I deals with the scope and definition, while Part II deals with methods of application and Part III deals with the promotion of collective bargaining. The various parts are highlighted below:

### **5.1.1 Right to Organise and Collective Bargaining Convention, 1949**

#### **a) Part I: Scope and Definitions**

##### **Article 1**

1. This convention applies to all branches of economic activity.
2. The extent to which the guarantees for in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice.

3. As regards the public service, special modalities of applications of this Convention may be fixed by national laws or regulations or national practice.

#### **Article 2**

For the purpose of this Convention the term "Collective bargaining" extends to all negotiations which take place between an employee, a group of employers or one or more employers organisations, on the one hand, and one or more workers organisations, on the others, for

- a) determining working conditions and terms of employment, and / or
- b) regulating relations between employers or their organisations and a workers organisations or workers organisations.

#### **Article 3**

1. Where national law or practice recognises the existence of workers representative as defined in Article 3, subparagraph (b), of the workers representatives convention, 1971, national law or practice may determine the extent to which the term " collective bargaining" shall also extend for the purpose of this Convention, to negotiations with these representatives.
2. Where, in pursuance of paragraph 1 of this Article the term " collective bargaining" also includes negotiations with the workers representatives referred to in that paragraph, appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers organisations concerned.

### **b) Part II: Methods of Application**

#### **Article 4**

The provisions of this Convention shall in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or

in such other manner as may be consistent with national practice, be given effect by national laws or regulations.

**c) Part III: Promotion of Collective Bargaining**

**Article 5**

1. Measures adapted to national conditions shall be taken to promote collective bargaining.
2. The aim of the measures referred to in paragraph 1 of this Article shall be the following:
  - a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this convention,
  - b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a),(b), and (c) of Article 2 of this convention,
  - c) the establishment of rules of procedures agreed between employers and workers organisations should be encouraged.
  - d) collective bargaining should not be hampered by the absence of rules governing the procedures to be used or by the inadequacy or inappropriateness of such rules,
  - e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

**Article 6**

The provision of this Convention does not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitrations machinery or institutions in which the parties to the collective bargaining process voluntarily participate.

### **Article 7**

Measures taken by public authorities to encourage and promote the development of collective bargaining shall be subject of prior consultation and, whenever possible, agreement between public authorities and employers and workers organisations.

### **Article 8**

The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining. Having highlighted the various Articles of the collective bargaining convention of 1981, an attempt will be made to critically assess to what extent the SADC countries selected in this research have conformed with the ILO labour standards in terms of collective bargaining structure and process. The first country to be examined here is South Africa.

## **5.2 The South African Experience of Freedom of Association in the Workplace**

Section 4 of the South African Labour Relations Act 66 of 1995 (hereafter the 'LRA') confers on every employee the right to participate in the formation of a trade union and to join a trade union. Once a member, an employee has the right to participate freely in a trade union's lawful activities and to participate in the election of its office-bearers and to be eligible for appointment as an office-bearer, and to assist any other employee or an office-bearer of a trade union to exercise any such right.<sup>307</sup>

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<sup>307</sup> Section 4 of the LRA states that '(1) every employee has the right – (a) To participate in forming a trade union or federation of trade unions; and (b) Every member of a trade union has the right, subject to the constitution of that trade union – (a) to participate in its lawful activities; (b) to participate in the election of any of its office bearer or officials or trade union representative; (c) to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office, and (d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of trade union representative in terms of this Act or any collective agreement union or workplace forum; (ii) participating in forming a trade union or federation of trade unions or establishing a workplace forum.'



The LRA further prohibits employers from discriminating against employees or applicants for employment for exercising any of the rights in section 4 (2)(a) and (b) and, in particular, they may not require employees or persons seeking employment not to be members of a particular trade union or unions generally, or act to their prejudice for past, present or anticipated union members.<sup>308</sup>

Any provision in a contract that has the effect of limiting any of these employee rights is invalid.

However, it should also be noted that employee's rights of association are limited by subjecting them to agency shop and closed-shop agreements.<sup>309</sup> An agency shop agreement is one in terms of which the employer is required to deduct an agreed agency fee from the wages of its employees who are not members of a trade union, and such monies are to be paid into a separate account administered by the trade union concerned to protect the socio-economic interests of employees.<sup>310</sup> In terms of section 25 of the LRA, a union may be the beneficiary of an agency shop agreement only if it is registered and if it alone, or together with another union or unions with which it acts jointly, represents a majority of employees in a workplace or sector or area. The fee paid over by non-members must not exceed the subscription paid by the union's members and contributors must not be forced to become members of the union.

In terms of the closed shop agreement, all employees covered by the agreement are required to join a particular trade union. In terms of section 26 of the LRA, only a

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<sup>308</sup> See s 5 of the LRA, which states clearly the protection of employees and person seeking employment. Section 5(1) states that: '[n]o person may discriminate against an employee exercising any right conferred by this Act. (2) Without limiting the general protection conferred by subsection (1), no person may do or threaten to do any of the following- (a) require an employee or a person seeking employment (i) not to be a member of a trade union or workplace forum (ii) not to become a member of trade union or workplace forum or (iii) to give up membership of a trade union or workplace forum; (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or (c) prejudice an employee or a person seeking employment because of past, or present anticipated- (i) membership of a trade.'

<sup>309</sup> Section 25 of the LRA.

<sup>310</sup> *Ibid.*

registered trade union representing a majority of employees in a workplace or sector or area can enter into a closed-shop agreement.<sup>311</sup>

In terms of international labour standards on freedom of association, the South African LRA conforms to Article 2 of the ILO international labour standard Convention in terms of sections 4, 5, and 6 of the LRA. In addition to the above sections, some case law will be examined here to assess to what extent the issue of freedom of association has been allowed in a workplace environment in South Africa.

### 5.2.1 Case law

In the case of *IMATU and others v Rustenburg Transitional Council*<sup>312</sup> the Labour Court fully supported section 4 of the LRA on the freedom of association terms in the international standards. The facts of this case are as follows:

On 27 January 1998 the respondent, a local council operating under the Local Government Transition Act 209 of 1993, adopted a resolution in terms of which, *inter alia*, it determined that an 'employee on job level 1–3 should not be allowed to serve in executive positions of trade unions or be involved in trade union activities'. This was followed by an objection by the first applicant, which is the trade union and as a result of this objection, it was deleted from the resolution, but the other aspect of the resolution was left unchanged. In view of the fact that the union was not satisfied with the remaining part of the resolution, the union launched proceedings which

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<sup>311</sup> Section 26 of the LRA.

<sup>312</sup> *IMATU and others v Rustenburg Transition Local Council* (2000) 21 ILJ 377 (LC) that 'employee on job level 1–3 should not be allowed to serve in executive positions of trade unions or be involved in trade union activities'. This was followed by the first applicant, which is the trade union and as a result of this objection, it was deleted from the resolution, but the balance was left unchanged. In view of the fact that the union was not satisfied with the remaining part of the resolution, the union launched proceedings which culminated in the present claim for an order to set the resolution aside as a contravention of the Labour Relations Act 66 of 1995 and the Bill of Rights in the Constitution.

culminated in the claim for an order to set the resolution aside as a contravention of the LRA and the Bill of Rights in the Constitution (section 18).

In terms of the council's job-grading system, the job levels referred to in this resolution comprise the senior executive and management officials of the council. The incumbents perform the functions traditionally assigned to top management of an organisation. They give advice and make recommendations to the councillors, who are ultimately responsible for formulating policy, and ensuring that the council's resolutions are carried out properly. For this purpose, they must direct, motivate and, where necessary, discipline the members of staff under their control in the departments into which the administration of the council is divided.<sup>313</sup>

For them to do the work properly, they must enjoy the trust and confidence of the council and, perhaps more than any category of employee, must place the interest of the council above their own and above those of third parties.<sup>314</sup> The council contended that these senior officials cannot simultaneously discharge their obligations as employees and sit on the branch executive of the union. In its reply to the statement of care it gives three reasons for taking this stance.<sup>315</sup>

1. The officials have access to confidential information 'such as levels of maximum increases to which the respondent might agree in wage negotiations which they would be duty bound to disclose to the first applicant if they served on its executive'.
2. They are required to initiate or conduct disciplinary hearings against employees and, should the accused be a member of the union, the membership of the executive of the first applicant would 'at the very least, be seen to compromise the fulfilling of the disciplinary duties'.

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<sup>313</sup> *Ibid*, p 380.

<sup>314</sup> *Ibid*, p 377.

<sup>315</sup> *Ibid*.

3. They might, by reason of their membership of the union executive, find themselves in the position in which they were 'unable or unwilling to fulfil essential tasks required of them'.

In view of the above facts, the Court held that although the respondent had not expressly contended that members of management would commit a breach of their duty of fidelity by the very act of accepting a position on the executive of a union, it was prepared to accept for purposes of the judgement that the issue could be properly considered. When employees joined a trade union they committed themselves to a body, the primary object of which is to maximise the benefits its members derive from their employment. In the pursuit of this, unions extracted what they could from the employer by negotiating. With the passage of time, unions had been recast from their adversarial role into partners in corporate enterprise. However, conflict between capital and labour remained. By committing themselves to unions, therefore, employees 'go over to the opposition'.<sup>316</sup>

This could amount to a breach by the employees concerned of their duty of fidelity towards their employer. Dismissal in such circumstances might be lawful under the common law. In the case of senior employees, greater loyalty could be expected.<sup>317</sup> A senior employee who took up a leadership role in a union was placed in the vanguard of the struggle against the employer. At common law, therefore, a senior employee was not permitted to join a union.<sup>318</sup>

However the Constitution granted every employee the right to join and hold office in a union and to participate in its activities. So, too did the LRA of 1995 as amended 2002.

The Court argued further, that had the legislature wished to draw a distinction in this regard between managerial and ordinary employees, it would have done so expressly. Employees were obliged to engage only in a union's 'lawful activities'.

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<sup>316</sup> *Ibid*, p 1289.

<sup>317</sup> 1999 12 *BLLR* 1299 (LC).

<sup>318</sup> *Ibid*.

This did not affect the position of managerial employees. There was nothing untoward or absurd about giving senior managers the right to take part in union activities. If the LRA were to be interpreted to exclude them from the right to join and take office in unions, it could not be established where the line could be drawn. A prohibition on senior managers joining unions could not therefore be held to be implicit in the Act. The protection conferred by the organisational rights contained in the Act gave all employees an absolute right to join and hold office in unions. These rights legitimised acts that would otherwise constitute a breach of contract by employees. This does not prevent employees who joined unions from performing the work for which they were formally employed. If they failed to perform their normal duties, they can be charged for misconduct. Conclusively, the ruling Judge was of the opinion that the senior employees who decided to join unions must do so with care and in view of this the resolution was accordingly set aside as requested by the trade union.

One of the striking features of this judgement is that it supports freedom of association in terms of international standards. The ILO Convention on Freedom of Association does not distinguish between officials of managerial class and ordinary employees.

In this case the Judge regarded all employees as one body no matter the position the individual occupied in the organisation. This perspective fully conforms to ILO Convention on Freedom of Association in respect of international standards.

*WUSA v Crouse NO & Another*<sup>319</sup> illustrates to what extent freedom of association has been permitted or allowed in the workplace environment in South Africa. The case is an appeal in terms of section 111(3) of the LRA against the decision of the first respondent, the Registrar of Labour (hereinafter 'the Registrar'), who refused to register the appellant in terms of sections 95 and 96 of the LRA.

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<sup>319</sup> *WUSA v Crouse NO and Another* (2005)11 BLLR 1156 (LC).

The facts of this case are as follows:

The appellant union (WUSA) was formed as a result of an initiative by workers employed at the Atlantis Forge Plant in Atlantis, Western Cape. In October 2003 an internal meeting was held where it was decided to form the union. Those present elected an interim executive committee which was given a mandate to investigate the requirements for the union's establishment and registration in terms of the Act, and to look into a drafting of the constitution. The rationale for establishing the union in actual fact arose in 2002 when some former members of the union recognised as Atlantis Forge, the National Union of Metalworkers of South Africa (hereinafter 'NUMSA'), came to the conclusion that their interests were not being adequately served and that there was a lack of faith in the ability of the union's organisers to represent the workers. The members of the interim executive committee were Randall Muller, Kenneth Booyesen, Neade Scott, Gershwin Stevens, Dalton Braaf and David Willemse.

Among these members, Braaf and Willemse were former employees of Forge Plant in Atlantis who were now unemployed since they had been dismissed from the company earlier. However, their involvement in the formation of the union was due to their experience in the trade union organisation and their previous positions as shop stewards.

However, the application for registration was delivered to the first respondent, the Registrar, in April 2004, and officials of the Department of Labour visited the union's offices. On their advice, the appellant opened a bank account in its name. Unfortunately, the Registrar refused to register the appellant for the following reasons:

- The union was not a genuine organisation as envisaged by the Act
- The union was not functioning in terms of its constitution
- The trade union was established for financial gain and to circumvent the provision of the LRA.

The Registrar made it clear in his response that his decision was final. On appeal, the appellant contended that the Registrar had reached his conclusion as a result of a misreading of the Act, and a miscomprehension of the basic facts on which he had to exercise his powers. The Registrar claimed that he did not regard the appellant as a genuine trade union because its formation was not initiated, formed and managed by employees to regulate their relations with employers, and because the applicant did not function as a trade union. The Registrar added that he regarded it as against the public interest to allow the proliferation of trade unions formed against a background of personal interests and the pursuit of personal vendettas.<sup>320</sup>

The Court held that, while the Registrar appeared to have acted in good faith, he had misconstrued his authority and introduced criteria and requirements not sanctioned by the LRA. At the time, the Registrar's functions were restricted to determining whether applicant trade unions had adopted names that met with the requirements of the Act, whether they had adopted a constitution that compiled with statutory requirements and whether they were independent. If those requirements were satisfied, the Registrar was obliged to register the union. If not, he was obliged to give it 30 days to remedy any defect he had identified.<sup>321</sup>

The Court was also of the view that although the word 'genuine' was not defined in the Act, its meaning could be gleaned from guidelines published by the Minister. According to the guidelines, a distinction is drawn between the requirements for the registration of a genuine trade union and the de-registering of existing unions. The guidelines suggest that a less onerous test must be applied to applicants for registration. In such cases the manner in which the organisation was formed is the main criterion. It was apparent that the Registrar had regard to the appellant's activities and the fact that it was not functioning as a trade union. Furthermore, it was argued that the union was formed by people who were not employees.

The Court held that this was irrelevant because the fact that some people who played a central role in the formation of a union were not employees does not mean

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<sup>320</sup> *Ibid.*

<sup>321</sup> *Ibid.*

that the organisation was not an association of employees formed for the purpose envisaged in the Act. A requirement that a trade union must have been formed by persons who were employed would impose an unnecessarily restrictive limitation on the *right to freedom of association* and this, in the opinion of the Judge would not conform to ILO labour standards. The Registrar's powers under the Act should be constructed with reference to the mischief which the 2002 amendment sought to address. These were set out in an explanatory memorandum that accompanied the amending Act, and included fraudulent practices and exploitation of members. In addition to this, the amendment regulates the organisational rights of trade unions. The amendment also facilitates and promotes collective bargaining at workplace and sectoral level.

The Court buttressed the fact that the Registrar had produced no evidence that the appellant was involved in any such practices and that it was clear that the Registrar had refused registration because he disapproved of the formation of unions as a result of dissatisfaction with existing unions and of the proliferation of trade unions in general. And in the view of this ruling, the reliance on this consideration constituted a misdirection. The reason advanced by the Judge is that while the principle of majoritarianism might be the favoured policy, it does not operate to prevent registration of new unions and that the LRA does not give the Registrar the power to use the tool of a majoritarian gatekeeper role at the stage of registration.

Furthermore, the ruling Judge was not satisfied with the Registrar's argument that the appellant was formed for the gain of certain individuals since there was no evidential proof thereof. In view of the above facts, the appeal was accordingly upheld and the Registrar was ordered by the Court to register the appellant as a trade union.

The LRA also confers various organisational rights on trade unions, depending on their membership and the degree of support they enjoy among workers in the workplace.<sup>322</sup> Registered trade unions that are sufficiently representative may claim rights in respect of the following organisational rights:

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<sup>322</sup> See ss 12, 13 and 18 of the LRA



- (a) Access to the workplace.<sup>323</sup>
- (b) Deduction of trade union subscription or leave for trade union activities.<sup>324</sup>
- (c) Leave for trade union activities.

In respect of access to the workplace, section 12 of the LRA stipulates the following:

- (1) Any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve members' interests.
- (2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.
- (3) The members of a representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated in that trade union's constitution.
- (4) The rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.

In terms of the deduction of trade union subscriptions or levies, section 13 of the LRA stipulates the following:

- (1) Any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.
- (2) An employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not

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<sup>323</sup> See s 12 of the LRA.

<sup>324</sup> See s 13 of the LRA.

later than the fifteenth day of the month first following the date each deduction was made.

- (3) An employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice.

With regard to leave for trade union activities, section 15 of the LRA states as follows:

- (1) An employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office.
- (2) The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.

The above points show that the pursuance of freedom of association and organisational rights in South African industry is greatly influenced by trade union activities.

### **5.2.2 The collective bargaining process in South Africa**

In broad terms, the process of collective bargaining in South Africa can be defined as the process in which employers and employees collectively seek to reconcile their conflicting goals through a process of mutual accommodation. While its dynamic is demand and concession, its ultimate objective is agreement. Its main feature is that there is willingness on each side not only to listen to the representations of the other, but also to abandon fixed positions where possible so as to find a common ground

for agreement. This is clearly illustrated in the case of *Metal and Allied Workers Union v Hart Ltd.*<sup>325</sup>

Today, in South Africa, at the heart of employment relations is the collective bargaining process, and institutions involved have been changed by the LRA. These institutions are the Commission for Conciliation, Mediation and Arbitration (hereinafter 'CCMA'), workplace forums, bargaining councils and statutory councils.

The above forums are structured through legislation or by agreement between unions and employers.<sup>326</sup> The forums may be permanent institutionalised structures or temporary arrangements to facilitate bargaining of the annual wage agreement in a specific enterprise. Finnemore argues that if there is to be more stability in collective bargaining, at the very least, the forums and levels at which it takes place should be accepted by the parties. However, the forums and levels themselves are often the terrain of heated dispute between the parties.<sup>327</sup> Employers and unions will seek to bargain collectively at a site where they can derive maximum benefit. He further argues that the role of the state in the determination of bargaining forums and levels is thus also a sensitive political issue.

In summary, the four main objectives of collective bargaining are as follows:

- (1) The provision of institutionalised structures and processes whereby potential conflicts over matters of mutual interest e.g. wages and working conditions may be channelled and resolved in a controlled manner thus reducing unnecessary disputes;

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<sup>325</sup> (1985) 6 ILJ 478 (IC). In this case, the judge showed that there was a distinct and substantial differences between consultation and bargaining. To consult meant to take counsel or seek information or advice from someone and did not imply any kind of agreement, whereas to bargain meant to wrangle so as to arrive at some agreement on terms of give and take. The term *negotiate* was akin to bargaining and meant to confer with a view to compromise and come to agreement.

<sup>326</sup> Finnemore, M (1999) *Introduction to Labour Relations in South Africa* Durban: Butterworths, p. 161.

<sup>327</sup> *Ibid*, p .

- (2) The creation of conformity and predictability through the development and commitment to collective agreements which establish common substantive conditions and procedural rules;
- (3) The promotion of employee participation in managerial decision-making that concerns the working lives of employees (workplace forum); and
- (4) The enhancement of democracy, labour peace and economic development at a national level.

To achieve these objectives, collective bargaining may occur within various forums and at various levels.

In recent times, at organisational level, employers are faced with the introduction of workplace forums and new rights for trade union representatives, and recognition agreements need to be reconsidered. A careful understanding of the LRA shows that the collective bargaining model it introduced was aimed at reducing and minimising adversarialism, which was one of the main features experienced during the early 1980s and 1990s. Collective bargaining is now seen to be the preferred method of securing labour peace, economic development and minimising labour unrest.<sup>328</sup>

The LRA promotes the spirit of bargaining by placing a high value on agreements reached between parties and by allowing parties to contract out of the provisions of the LRA. Trade union recognition is the starting point of collective bargaining. However, trade union rights can only be obtained if the unions are representative.<sup>329</sup> The LRA protects the right to strike as an important part of collective bargaining.<sup>330</sup>

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<sup>328</sup> See s 1(c) and (d) of the LRA of 1995.

<sup>329</sup> Finnemore *Introduction to Labour Relations in South Africa* p. 163.

<sup>330</sup> *Ibid.*

### **5.2.3 Bargaining levels and structures in respect of the Labour Relations Act 66 of 1995**

The *bargaining level* refers to whether bargaining takes place between unions and individual employers (plant-level or decentralised bargaining) or between one or more unions and a group of employers from a particular industry or occupation (sector – level or centralised bargaining).<sup>331</sup>

The *bargaining structure* encompasses the concepts of bargaining units and bargaining levels. The bargaining unit represents the employers who are covered by an agreement. The manner in which a bargaining unit is composed determines on behalf of whom and with whom bargaining is undertaken. It is the bargaining unit that determines whether negotiations are conducted with plant-level management, with the head office of a company, or with a number of employers from different industries. Bargaining levels are accordingly established at industry (centralised bargaining) or plant level (decentralised bargaining).

The rationale for centralised bargaining is to enable employers throughout the industry to pay the same wages and grant the same conditions of service.<sup>332</sup> In the case of collective bargaining at sector level, employers are expected either to stand or fall together. Centralised bargaining tends to favour bigger and better organised unions: section 1(d) (11) of the LRA states clearly that it will promote collective bargaining at sectoral level. The primary structure for centralised bargaining is the bargaining council.<sup>333</sup>

### **5.2.4 Bargaining councils**

In terms of section 29 of the LRA, registered trade unions and registered employer organisations may establish a Bargaining Council for a sector and area by adopting a constitution that meets the requirements of section 30 of the Act. The state may be

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<sup>331</sup> Bendix, S (1996). *Labour Relations in the New South Africa* Cape Town: Juta & Co.

<sup>332</sup> Section 27 of the LRA.

<sup>333</sup> Sections 27–34 of the LRA.

a party to a Bargaining Council if it is an employer in the sector and area in respect of which the Bargaining Council is established.

The powers and functions of a Bargaining Council are set out in section 28 of the LRA. In accordance with its registered scope, a bargaining council may

- conclude collective agreements;
- enforce those collective agreements;
- prevent and resolve labour disputes;
- perform the dispute resolution functions;
- establish and administer a fund to be used for resolving disputes;
- promote and establish training and education schemes;
- establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes, or funds or any similar schemes; and
- determine, by collective agreement, the matters which may not be an issue in dispute for the purpose of strike or a lockout in the workplace.

A collective agreement concluded in a Bargaining Council binds only those parties to the council who are parties to the collective agreement.<sup>334</sup> According to section 32 of the LRA, a Bargaining Council may ask the Minister in writing to extend such a collective agreement to non-parties to the collective agreement within its registered scope and identified in the request, if, at a meeting of the bargaining council

- the members of one or more of the major registered trade unions in the bargaining council vote in favour of the extension; and
- the members of one or more of the major registered employer organisation in the bargaining council vote in favour of the extension.

The minister is also expected to extend the collective agreement within 60 days, as requested, by publishing a notice in the Government Gazette declaring that the said agreement will bind the non-parties stipulated in the notice from a specified date and for a specified period.<sup>335</sup>

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<sup>334</sup> See s 31(a)–(c) of the LRA.

<sup>335</sup> See s 32 of the LRA of 1995.

### 5.2.5 Bargaining conduct

The LRA of 1995 has empowered both the Labour Court and Arbitration processes to intervene in the bargaining process only to the extent that one of the parties violates the others statutory rights, or those arising from a collective agreement.<sup>336</sup> It is interesting to note that quite a large number of rights both statutory rights and rights arising from collective agreement have been included in the LRA of 1995.

These rights include, among other things, the following: 'Trade unions are entitled to information from the employers, and to reasonable access to their members at the workplace, this prevents employers from resorting to questionable practices such as by-passing union representatives.'<sup>337</sup>

Secondly, an attempt to undermine trade unions by offers of reward to non-union members is prohibited.<sup>338</sup>

In union–management negotiations the parties are in principle free to call a halt whenever they please, provided that they have accorded the others their statutory rights before doing so. In short, this means an employer would, for example, de facto be compelled to return to the bargaining table if a union successfully applied for disclosure. It can be argued from the above discussion that South Africa has complied, to a great extent, with the ILO Collective Bargaining Convention principles of 1981.

### 5.2.6 Duration of the bargaining process

The ultimate goal in the bargaining process is a solid agreement that is acceptable to both parties. The courts cannot prescribe the outcome: the parties are, in principle,

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<sup>336</sup> See s 31(a) of the LRA of 1995.

<sup>337</sup> See s 5(1), (2) and (3) of the LRA of 1995, see also *Food and Allied Workers Union v Sam's Foods Grabouw* (1991) 12 ILJ 1324 (IC); *National Union of Mineworkers v East Rand Gold and Uranium, Co Ltd* (1991) 12 ILJ 1221 (A).

<sup>338</sup> See *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* (1997) 18 ILJ 1149 (A).

free to decide when to stop the negotiation and when there is a deadlock to enter into a power play or unilateral action (except in the case of essential service employees, where the subject is reserved for joint consultation with a workplace forum).<sup>339</sup> In the case of *SA Chemical Workers Union v Sasol Industries (Pty)*,<sup>340</sup> the Court described the duty to bargain as a continuing obligation and it cannot be sound industrial relations policy to stultify negotiations because a party has formed the belief that it cannot alter its position in regard to any demand or proposal.

The Court is also of the view that employers are obliged to keep the channels of communication open even after employees have resorted to industrial action<sup>341</sup> - this is also applicable, even after striking employees have been dismissed.<sup>342</sup>

In respect of issues that are reserved for joint decision-making with workplace forums, collective bargaining must continue until consensus is reached.<sup>343</sup> In union–management negotiations, the parties are in principle free to call a halt whenever

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<sup>339</sup> See Grogan, J. (2002) *Workplace Law* Cape Town: Juta & Co, Ltd.

<sup>340</sup> *SA Chemical Workers Union v Sasol Industries (Pty)* (1989) *ILJ* 10 1031 (IC), p 10494.

<sup>341</sup> *National Union of Metalworkers of SA and others v Elm Street Plastics Ha ADV Plastics* (1989) 10 *ILJ* 328 (IC). See also *SA Commercial Catering and Allied Workers Union v Southern Sun Corporation (Pty) Ltd* (1991) 12 *ILJ* 835 (IC) (in which the court ordered the employer to negotiate arrangements to facilitate communications between striking employees and their union, but refused to grant the union's request for an order granting it access to the employer's property) and *National Union of Metalworkers of SA v TEK Corporation Ltd and others* (1990) 11 *ILJ* 721 (IC). The reason why the obligation to bargain may endure even after one of the parties had resorted to industrial action was clearly illustrated in *Food and Allied Workers Union and SA Breweries Ltd* (1990) 11 *ILJ* 413 (Arb) at 422 C–D: 'Of course the obligation to negotiate continues for so long as a dispute remains unresolved. Although parties may have reached the stage where economic sanctions may legitimately be invoked, this cannot prevent or diminish the obligation. However, it is not uncommon to see that in situations where primary round of negotiations have failed, negotiations in addition with economic pressure can produce a settlement.'

<sup>342</sup> *SA Chemical Workers Union v Sasol Industries (Pty) Ltd and others (2)* (1989) 10 *ILJ* 1031 (IC) at 1049H.

<sup>343</sup> Grogan, J. *Workplace Law* n 29.



they please, provided that they have accorded the others their statutory rights before doing so.<sup>344</sup>

Grogan (2000) argues that the point at which a party withdraws from collective bargaining will, however, remain relevant to assessing the fairness of the dismissal of workers who engage in a strike over the unresolved issue.

It must also be noted that the LRA of 1995, in terms of section 64 (4) and (5) provides that employees and unions can temporarily undo an employer's unilateral changes to conditions of service.

- (4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission (CCMA) may –
  - (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
  - (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.
- (5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral by the employer.

### **5.3 The Botswana Experience of Freedom of Association in the Workplace**

In the case of Botswana, the Constitution makes provision for freedom of assembly and association.<sup>345</sup> This is clearly stated in section 13 of the Constitution. Section 13(1) states that '[ex]cept with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other association for the protection of his interests.'

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<sup>344</sup> An employer would, for example, de facto be compelled to return to the bargaining table if a union successfully applied for disclosure. See Grogan *Workplace Law* n 29.

<sup>345</sup> Botswana Constitution of 2002.

Section 13(2) states the following:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- (b) that is reasonably required for the purpose of protecting the rights or freedom of other persons;
- (c) that imposes restrictions upon public officers, employees of local government bodies or teachers; or
- (d) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration of members necessary to constitute an association of trade unions qualified for registration) and conditions whereby registration may be refused on the grounds that any other trade union already registered, or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be done reasonably justified in a democratic society.

Apart from the Constitution that supports the freedom of association, the Botswana Trade Unions and Employers' Organisation Act<sup>346</sup> also fully supports freedom of association in the workplace. Section 56 of the Act states the following:

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<sup>346</sup> See the Botswana Trade Unions and Employer's Organisation Act 16 of 2003.

- (1) No employer shall make it a condition of employment of any employee that the employee shall not be or become a member of any registered trade union or other organisation representing employees in any industry or of a particular registered trade union or other such organisation or participate in the activities of a registered trade union or other such organisation.
- (2) Notwithstanding anything to the contrary in any enactment, no employer should prohibit an employee from being or becoming a member of any registered trade union or other organisation such as is referred to in subsection (1) or of a particular registered trade union or other such organisation or subject him to any penalty by reason of his membership or participation in the activities of a registered trade union or other such organisation.
- (3) Any employer who contravenes this section and any other person who is knowingly a part to the contravention shall be guilty of an offence and liable to a fine not exceeding 200 pullar or to imprisonment for a term of not exceeding 12 months, or both.

An attempt has been made in Botswana to implement the above clauses on freedom of association in terms of ILO standards, but this has not been successfully achieved. With the help of section 13(1) and (2) of the Constitution, the implementation of freedom of association in terms of section 56(1) (2) and (3) of the Trade Unions and Employers' Organisation Act 16 of 2004 has been successful. The Constitution of Botswana had earlier promoted the awareness of employees' rights to form and join any union of their choice.

### **5.3.1 Botswana and the implementation of the International Labour Organisation Convention on Collective Bargaining**

In Botswana the Trade Unions and Employer Organisations Act 16, as amended in 2004, recognises collective bargaining in terms of Part X1 section 48(4) and (5)–(8) of the ILO.

Section 48(4) states that '[a]n employer who has granted recognition, to trade unions in terms of section 32 of the Trade Disputes Act,<sup>347</sup> shall bargain in good faith with the union on the following matters:

- a) remuneration and other terms and conditions of employment, including the physical conditions under which employees are required to work.
- b) employment benefits,
- c) employment policies concerning, *inter alia*, the recruitment, appointment, training, transfer, promotion, suspension, discipline and dismissal of employees,
  - a. the collective bargaining relationship including
    - I. organis ational rights,
    - II. negotiation and dispute procedures, and
    - III. grievance, disciplinary and termination of employment procedures, and
- d) Any other agreed matter.

Section 48(5) illustrates that a trade union that has been granted recognition shall bargain in good faith with the employer who recognises it in respect of the issues raised in (d). In the same vein, section 48(6) and (7) shows that any dispute concerning the duty to bargain in good faith shall be referred to the Commissioner for Mediation in accordance with section 7 of the Trade Disputes Act. It is also stated in section 7 that if a dispute is not settled, the dispute may be referred to the Industrial Court for determination.

In order to illustrate the above discussion, one of the cases in respect of collective bargaining will be discussed.

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<sup>347</sup> See the Trade Dispute Act 15 of 2006.

### 5.3.2 Case law

The case of *Botswana Mining Workers Union v Botswana Diamond Company (Pty) Ltd*<sup>348</sup> refers. The facts of this case are as follows:–

Among the two parties in this case, there existed a recognition agreement which established and regulated the collective bargaining relationship between them and, in particular, imposed certain obligations on the parties in relation to dispute-resolution procedures and the conditions that must be fulfilled for industrial action to be valid.

In accordance with clause 5.3 of the agreement, a substantive agreement regarding the terms and conditions of employment of the union's members would be negotiated annually. The negotiations for the 2004/05 year commenced between the parties on 18 March 2004 and they met about nine times prior to 16 June 2004. However, they were unable to reach settlement and conclude an agreement. In view of this, the union referred the dispute to the Commissioner of Labour in terms of section 7 of the Trade Dispute Act.<sup>349</sup>

Unfortunately, there was a deadlock in this settlement and in view of this stalemate the Commissioner issued a certificate reflecting a failure to settle a trade dispute in terms of section 8(1) of the Act. By 22 July 2004 the parties had failed to conclude a substantive agreement for 2004/05. However, a notice was later received by the company from the union which indicated its intention to embark on a strike from 26 July 2004. It was this that prompted the company on 23 July 2004 to bring an urgent application in the Industrial Court, in terms of section 42(2) of the Act, for an order

- a) declaring the contemplated strike an unlawful strike in breach of the Act;

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<sup>348</sup> *Diamond Company v Botswana Mining Workers Unions and Others* case numbers K 257/2004 and 258/2004.

<sup>349</sup> Section 7 of the Trade Dispute Act of 2003.

- b) interdicting and restraining the union and its members from breaching the provisions of the recognition agreement and the members from breaching their contracts of employment by participating in, an unlawful strike; and
- c) ordering the union to ensure that its member complied with the provisions of the Act and of their employment contracts and /or of the recognition agreement.

This application was opposed by the unions. This case was heard in the Industrial Court on 6 August 2004 and the Court found that the contemplated strike would not be a lawful strike and, therefore, interdicted the proposed action. The court found the strike to be unlawful because the union did not comply with the procedure to be followed before declaring a strike action in terms of section 42 (2) (a) of the Trade Dispute Act 15 of 2003.

A critical assessment of the above case shows that the implementation of the collective bargaining process in respect of ILO standards is a difficult task for many organisations in Botswana. This difficulty can be attributed to both the substantive issues and the procedural process required for the implementation of a collective bargaining process. For example, in the above case the Botswana Mining Workers Union could not fulfil all the conditions required to carry out a protected strike action. Although the conditions were negotiated through a collective bargaining process, the conditions were still difficult to be complied with fully. It should also be noted that the Botswana Constitution provided for collective bargaining for unions that had enrolled 25 per cent of a labour force as members.<sup>350</sup> In reality, only the mineworker unions had the organisational strength to engage in collective bargaining and because of the requirement that only unions that had enrolled 25 per cent of their labour force could engage in collective bargaining, this had contributed greatly to the non-existence of collective bargaining in most other sectors.<sup>351</sup> This requirement needs to be rectified if Botswana is to meet the ILO standards in terms of the collective bargaining Convention.

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<sup>350</sup> See Dingake, O B K (2008), also see (2004) *BWCA*, 9.

<sup>351</sup> *Ibid.*

## 5.4 The Namibian Experience of Freedom of Association in the Workplace

In the case of Namibia, sections 9, 10, and 11 of the Namibian Employment and LRA 2004<sup>352</sup> clearly set out employees' right to freedom of association. Section 9(1) of the Act states the following:

Every employee shall have the right:–

- (a) to form and join a trade union
- (b) to participate in the lawful activities of a trade union

9(2) notwithstanding the provisions of subsection (1)-

- (a) a magistrate may only form or join a trade union that restricts its membership to its officers;
- (b) a prosecutor may only form or join a trade union that restricts its membership to prosecutors or other court officials;
- (c) a senior management employee may not belong to a trade union that represents the non-senior management employees of the employer.

9(3) No person shall discriminate against an employee on the grounds that the employee-

- (a) exercises or has exercised any right under this Act or any other written law administered by the Minister;
- (b) belongs to or has belonged to a trade union; or
- (c) participates or has participated in the lawful activities of a trade union.

Section 9(4)–(6) indicates that no person shall discriminate against an official or an office bearer of a trade union or federation for representing it or participating in its lawful activities. The above sections also made it clear the penalties for those who contravene those sections. Section 10(1)–10(4) protects the rights of employers and the penalties for those who contravene those sections. In the same vein, section 11 protects the rights of organisations in the following perspectives:

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<sup>352</sup> Sections 10–11 of the Namibian Employment and Labour Relations Act 15 of 2004.

Every organisation has the right to:–

- (a) determine its own Constitution
- (b) plan and organise its administration and lawful activities
- (c) join and form a federation
- (d) participate in the lawful activities of a federation.

The above sections of the Namibian Employment Act and the LRA outline three major areas where freedom of association in the workplace is fully implemented.

These areas are the following:

- 1. employee's right to freedom of association;
- 2. employer's right to freedom of association; and
- 3. trade union and employer associations' rights to freedom of association.

Namibia has a wide spectrum in its implementation of freedom of association. It is also interesting to note that in section 11(e) it promotes and encourages the above three bodies to affiliate with, and participate in, the affairs of any international workers' organisation or the ILO. This discussion confirms that Namibia embraces ILO labour standards.

A closer examination of the case of *Namibia Seaman and Allied Workers' Union (NASAWU) v Lalandi Fishing (Pty) Ltd and Others*<sup>353</sup> shows that the Labour Court emphasised the importance it attaches to a union that represents the majority of the employees and freedom of association of members. In the above case, the employees were able to move so freely between the two existing unions that it became difficult to know exactly which of the two unions should be regarded as a majority union.

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<sup>353</sup> *Namibia Seaman and Allied Workers (NASAWU) v Lalandi Fishing Pty Ltd* (2003) NR71, pp 71–80.



The facts of the above case are as follows: towards the end of March 2002 the applicant, which is one of the trade unions, had brought an application on a semi-urgent basis for the following interdictory and mandatory relief:

1. A rule *nisi* calling upon the respondents to show cause, if any, why an order in the following terms should not be granted:–

That the respondent should not be interdicted and restrained from, in any manner whatsoever, implementing any agreement or decision reached between the first and second respondent during the current wage negotiations;

(1.1) That the respondent should not be interdicted and restrained from, in any manner whatsoever, implementing any agreement or decision reached between the first and second respondent during the current wage negotiations;

(1.2) That the respondents should pay the costs of the application.

2. Ordering that the relief sought in prayers 1.1 and 1.2 shall operate as an interim interdict pending return date of the rule *nisi*, and
3. Ordering the Labour Commissioner (third respondent) to hold a ballot in terms of s 58 of the Act.

The Labour Court held that although the applicant had a large number of employees as members, it did not represent the majority of the employees, as it was not a majority union. The second respondent was regarded as the majority union since it had the majority employees as union members and because of this, the applicant could not negotiate on behalf of the employees as a majority union. The Court held further that the applicant had not made out a proper case and had not laid a proper factual basis in its founding affidavit. Moreover, the second respondent, (the other union) had produced documentation which indicated conclusively that it represented a majority of the first respondent's (employer) workers.

The applicant was accordingly not entitled to request the holding of a ballot in order to determine which of the two unions a majority union was.

The Court held further that the applicant should pay the costs of the application, since the proceedings had been frivolous and vexatious. Apart from the fact that the applicant had not made out a proper case, it had known from the outset that the second respondent represented the majority of the first respondent's workers and because of this the application was dismissed with costs.

#### **5.4.1 Namibia and the Implementation of the International Labour Organisation Convention on Collective Bargaining**

The Namibia Labour Act<sup>354</sup> replaced Namibia's first post-independence labour law of 1992. The above Labour Act of 2004 spells out various regulations guiding the relationship between employer and employee. However, an attempt will be made here to examine the issue of collective bargaining and to what extent this has been implemented in terms of ILO standards.

Sections 62–71 of the Namibia Labour Act 15 of 2004 deal with the implementation of collective bargaining and it will be outlined as follows:–

Section 62 deals with the recognition and representation of bargaining agents of employees. Section 62(1) states as follows:

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<sup>354</sup> The Namibia Labour Act 15 of 2004 became effective on 14 October 2004 and it deals mainly with the core of labour law as it is traditionally understood: the regulation of the individual working relationship and collective labour relations through the formation of trade unions and regulation of collective bargaining. This means that it does not purport to include all matters affecting the work relationship and legal regulation of the labour market. In that sense, other relevant laws passed since independence include the Employees Compensation Amendment Act of 1995, the Public Service Act of 1995, the Social Security Act of 1994, the Export Processing Zone Act of 1995 and the Affirmative Action (Employment) Act of 1998.

- (1) A registered union that represents the majority of the employees in an appropriate bargaining unit, is entitled to recognition, for the purpose of negotiating a collective agreement or any matter of mutual interest as the exclusive bargaining agent of the employee in that bargaining unit. An employer or employers' organisation must not recognise a trade union as an exclusive bargaining agent in terms of this Act unless:–
  - (a) The trade union:–
    - (a) is registered in terms of this Act; and
    - (ii) represents the majority of the employees in the bargaining unit; or
  - (b) an arbitrator, in terms of subsection (9), declares the trade union to be so recognised.
  
- (2) A registered trade union may seek recognition as an exclusive bargaining agent of an appropriate bargaining unit by delivering a request, in the prescribed form – to an employer to recognise it as the exclusive bargaining agent of its employees or some of its employees or an employers' organisation to recognise it as the exclusive bargaining agent of the employee of its members.

Section 63 deals with trade union access to premises of the employer. In summary, this section underscores the fact that an employer must not unreasonably refuse access to the employer's premises to an authorised representative of a trade union that is recognised as an exclusive bargaining agent.

Section 64 deals with the deduction of trade union dues. The emphasis here is that an employer must not deduct from employee remuneration any fee due to a trade union that is not registered under this Act. In the same vein, an employer must deduct a fee due to a registered trade union from an employee's remuneration if the trade union is recognised as an exclusive bargaining agent by the employer.

Section 65 deals with workplace union representatives. This section spells it out clearly that in any workplace, any ten or more employees who are members of a registered trade union are entitled to elect from among themselves:–

one workplace union representative, if there are 10 members; or

(a) two representatives, if there are more than 25 members; or

(b) three representatives, if there are more than 25 members; or

(c) if there are more than 100 members.

In addition to this, an employer must provide such facilities that are reasonably necessary for the purpose of conducting an election contemplated in subsection (1).

Sections 66–67 deal with organisational rights in respect of collective agreements. This section states clearly that nothing in this Act precludes the conclusion of collective agreements to regulate the rights of a recognised trade union.

Section 68 deals with collective agreement and its legal effects. Subsection (1) states that a collective agreement binds:–

(a) the parties to the agreement

(b) the members of any registered employers' union

(c) the members of any registered trade union that is a party to the agreement

(d) the employees in the recognised bargaining unit, if a trade union that is a party to the agreement has been recognised as an exclusive bargain agent in terms of section 65, and

(e) any other employees, employers, registered employers' organisation to whom the agreement has been extended in terms of section 69.

Subsection (2) states that a collective agreement remains binding for the whole period of the agreement and every person bound in terms of section (1)(b) and (c) who was a member at the time when it became binding or who becomes a member after it becomes binding, irrespective of whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the agreement.

Subsection 3 makes provision for collective agreements relating to the terms and conditions of employment in respect of every contract of employment between an employee and an employer who are both bound by the agreement.

Section 69 deals with the extension of collective agreements to non-parties. Section 70 deals with the exemption from an extended collective agreement, while section 71 deals with the dispute arising from application, interpretation or enforcement of a collective agreement.

#### **5.4.2 A critique of the Namibian collective bargaining process in respect of International Labour Organisation Standards**

In Namibia the right to organise and bargain collectively is often associated with the union that the law allows to conduct their activities without interference, and the government protects this right in practice. The law provides employees with the right to bargain individually or collectively and to recognise the exclusive collective bargaining power of the union when a majority of the workers were members of that union; workers exercised these rights in practice.

Collective bargaining is not practised widely outside the mining, construction, agriculture and public service sectors.<sup>355</sup>

Most collective bargaining is conducted in the workplace and at company level. According to the Ministry of Labour, lack of information and basic negotiation skills are the factors hampering workers' ability to bargain with employers successfully.

Except for workers who provide essential services, such as those working in public health and safety, workers have the right to strike once conciliation procedures are exhausted and 48 hours' notice has been given to the employer and Labour Commissioner. Under the law, strike action can only be used in disputes involving

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<sup>355</sup> <http://www.state.gov/g/dr/r/s/hrrpt/2006/78749.htm>.

specific workers' interests, such as an increase in pay. Disputes over workers' rights, including dismissals, must be referred to the Labour Court for arbitration.<sup>356</sup>

The law protects workers engaged in legal strikes from unfair dismissal. The law also specifically protects both union organisers and striking workers from employer retaliation. However, it has been argued in some circles that the scarcity of judges and lack of experts in labour law caused lengthy and unnecessary delays in such cases. In view of this, there is an urgent need for the Namibian Government to increase the number of judges and also to increase its human resources in terms of those who are experts in labour law. This is necessary if the process of collective bargaining is to be progressive in Namibia.

## **5.5 The Lesotho Experience of Freedom of Association in the Workplace**

In Lesotho, section 168 of the Lesotho Labour Code Order of 1992 recognised the freedom of association stated in section 168 (1) and (2) of the above Labour Code Order:

- (1) Workers and employers, without any distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation of the Government.
- (2) The right of association referred to in subsection (1) is guaranteed to workers and employers in all sectors of the economy, including agriculture. All persons engaged in agriculture, in whatever manner, shall enjoy the same rights of association and combination as workers in other sectors.

Although the freedom of association exists in the Labour Code Order of 1992, it has not been fully implemented in terms of the International Labour Standard. Article 2 of

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<sup>356</sup> *Ibid.*

the ILO recognition of the principle of the freedom of association states that '[w]orkers 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.' In addition to Article 2 of the ILO, Article 23 of the Universal Declaration of Human Rights, sub-Article 4 provides: 'Everyone has the right to form and join trade unions for the protection of his interests.'

The United Nations established the ILO to oversee the promotion and interests of both workers and employers. Lesotho is a member of the ILO, but, unfortunately, it has not been able to implement freedom of association in ILO standards and this is reflected in the case of *Lesotho Union of Public Employees v The Speaker of the National Assembly and Others*.<sup>357</sup>

The facts of the above case are as follows: The applicant (public servants) sought an order, *inter alia*, declaring null and void the provisions the Lesotho Public Service Bill and directing the respondent (Lesotho Government) to delete them from the text of the Bill and the Lesotho Government refused. In the hearing the Court held that the only issue for decision was whether the provisions of the Lesotho Public Service Act of 1995, prohibiting public officers from joining trade unions and excluding them from the provisions of the Labour Code Order of 1992 were unconstitutional. The applicant contended that the prohibition was not legitimate as there was no pressing need to protect the government against a trade union that was regulated by law. The respondent contended that trade unions were confrontational and suited to the private sector in which enterprises were profit-oriented. Unions and industrial action, by contrast, had no place in the public sector.

The Judge observed that the respondent had not specifically addressed the allegations that trade unions were confrontational. He concluded from his personal experience that their fears were not unfounded. Past cases had shown trade unions

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<sup>357</sup> *Lesotho Union of Public Employees v The Speaker of the National Assembly and Others* (1997) 11BLLR 1485 (Les).

to be not only confrontational, but also unreasonable in that they usually resorted to strike action without conforming to the requirements of the law and without taking into account the country's economic resources. The tendency of employees in Lesotho was to compare salaries to those with similar positions in South Africa, which was altogether unreasonable as the two countries were not comparable economically. The Judge argued further that if public-sector trade unions were to behave like those in private sector, government services would come to a standstill, and large-scale retrenchment could ensue.

It was also argued in Court that the government was empowered by the Constitution to impose restrictions on public officers in the field of labour relations provided it justified the restrictions by showing that they had not abridged their rights and freedoms to an extent greater than necessary in a democratic society. 'Necessity' implied a pressing social need. In this case, the Judge's argument was based on how to curb growing unemployment and the preservation of a sound economy. As to whether the Act went further than was proportionate, the Court noted that the freedom of association of public officers had not been eliminated because, although they were not allowed to join trade unions, they were free to establish and join staff associations and provision was made for a Public Service Joint Advisory Council, one of the aims of which was to secure co-operation between the government and the general body of public officers. Since the legislation struck a proper balance between the applicant's interests in establishing a staff association and the general public interest of preserving a sound economy, it could not be said to violate the Constitution. The application was dismissed.

The above case shows that freedom of association in terms of the ILO standards is not fully respected and implemented in Lesotho. When the ruling Judge encouraged public servants to join staff associations that did not have the power of trade unions, and when the Judge also argued that trade unions were confrontational and also unreasonable in their demands, it was quite clear that he was not in support of the public servants joining a trade union of their choice. Article 2 of the ILO Convention on the Freedom of Association and section 23 of the Universal Declaration of Human Rights sub-section 4 clearly state that 'everyone has the right to form and join trade unions for the protection of their rights'. This clause specifically referred to trade



union and not staff association. The inference that can be drawn from the above case is that the Lesotho Government has not implemented freedom of association in terms of ILO standards.

### **5.5.1 Lesotho and the implementation of the International Labour Organisation Convention on Collective Bargaining**

The Lesotho Labour Code (Codes of Good Practice) Notice 2003 shows that provision is made for the recognition of collective bargaining in the workplace environment, section 22 of the Labour Code states as follows:

- (1) Collective bargaining is one of the fundamental policies promoted by the Labour Code. It is through the collective prevention and resolution of labour disputes that the fundamental aims of the Labour Code is realised. Those aims are the protection of employees from exploitation, industrial democracy and industrial peace 29.
- (2) To the extent that this code advances an interpretation of the law, that interpretation is the policy of the Directorate and will be applied by conciliators and arbitrators unless that interpretation is reversed by a decision of the Labour Court or Labour Appeal Court.

Section 23 deals with the employer's duty to bargain in good faith – generally.

- (1) Section 198 A(2) reads: 'An employer shall bargain in good faith with a representative trade union.'
- (2) A representative trade union is a registered trade union that represents over 50% of the employees, see section 198(1).
- (3) If an employer or employers' organisation has recognised a trade union:–

- (a) that employer or organisation must bargain in good faith with the union; and
  - (b) the union must bargain in good faith with the employer or organisation.
- (4) The duty to bargain in good faith includes a number of duties
- (5) the duty to bargain itself;
- (6) the duty to disclose relevant information;
- (7) the trade union's duty to fairly represent all employees in certain circumstances;
- (8) The failure to bargain in good faith is an unfair labour practice.

Section 24 deals with the recognition of a trade union as the collective bargaining agent on behalf of an agreed constituency of employees.

- (3) Section 24(2) states that there is no duty to recognise a trade union. The obligation is only to bargain with a representative one. It makes sense however that once a trade union is representative for the employer to recognise, it may enter into a recognition agreement for the following reasons:
- (a) it formalises the relationship
  - (b) the procedure for bargaining no longer becomes a statutory procedure but one that can be tailored to the needs of the employer:
  - (c) the employer can negotiate over the bargaining unit in respect of which the trade union is recognised.
  - (d) the employer can negotiate such matter in respect of which it will bargain.

- (e) the employer can negotiate such matter as the size of the union delegation, when and where meetings take place, the procedure for initiating negotiations and how dispute will be resolved.

Section 25 deals with the issues of appropriate bargaining units in the following terms:

- 1) Since recognition is voluntary, what is appropriate will be decided by the employer and trade union in negotiations.
- 2) In some agreements, the trade union is recognised in respect of its members only. In others, the trade union is recognised in respect of a particular constituency.
- 3) Generally speaking, management is not included in a bargaining unit. This does not mean that management may not belong to trade unions, only that the union is not recognised as representing them for the purpose of collective bargaining. The reason for this is that a manager represents the owner in the workplace. This means that managers cannot form trade unions of their own – it means that the managers should not represent the employer in negotiations if they have an interest in the outcome of the negotiations.

Section 26 deals with the bargaining matters. In this section, the Labour Code contemplates that the issues that a trade union is entitled to bargain about are those issues that form the content of a collective agreement. The Labour Code defines a *collective agreement* as a written agreement entered into between a registered trade union and an employers' organisation in respect of any matter of mutual interest, and includes agreements such as a written agreement entered into between a registered trade union and an employers' organisation in respect of any matter of mutual interest and includes agreements on recognition, agency shops and grievance, discipline and dispute procedures.

This section also explains the concept of *a matter of mutual interest*, which includes matters that relate to the relationship between employer and employee. Examples of matters of mutual interest are as follows:

- (a) collective bargaining matters (recognition, organisational rights etc);
- (b) terms and conditions of employment;
- (c) the employment related consequences of technological change, restructuring or re-organisation of the business including, for example, the transfer of part of business, sub – contracting or outsourcing;
- (d) employment policies and practices (such as policies on recruitment, promotion and training)
- (e) the termination of employment (dismissal)
- (f) grievance and dispute procedures;
- (g) benefits;
- (h) any matter that has historically been an issue that the employer has bargained with unions in the past.

Section 27 deals with the duty to bargain in good faith where a trade union is recognised while section 28 deals with a deadlock in the process of negotiation.

Section 29 deals with the duty to bargain in good faith where a trade union is not recognised.

### **5.5.2 An assessment of the collective bargaining process in Lesotho in respect of International Labour Organisation standards**

In respect of the above discussion, it should be noted that workers in Lesotho have the right to join and form trade unions without prior government authorisation, and workers exercise this right in practice. However, some employers in the textile sector do not observe trade union freedoms. The Labour Code prohibits civil servants from joining or forming unions, but allows them to form staff associations. The government regards all civil servants as essential employees; therefore, essential employees do

not have many of the normal labour rights, such as the right to strike or the right to negotiate. However, in 2004 civil servants established a professional association.

It is also interesting to note that the Police Service Act prevents members of the service from belonging to trade unions. However, it allows them to establish a staff association charged with promoting the professional efficiency and interest of members of the service.

In respect of the Labour Code, which was prepared with the assistance of the ILO, all trade union federations must register with the government. The government routinely grants registration. In 2007 the Department of Labour stated that there were 38 functional trade unions with a membership of 20 706, excluding three unions, which did not have proper records of membership.<sup>358</sup>

The majority of Basotho mine workers were members of the South African National Union of Mineworkers (hereinafter 'NUM'). While NUM, as foreign organisation, was not allowed to engage in union activities in the country, it provided training, constructed agricultural projects, and performed other social services for retrenched mineworkers and the families of deceased miners.

The law prohibits anti-union discrimination, and the government generally enforces this in practice. Reports have been issued that some employers have harassed union organisers, intimidated members and fired union activists, particularly in domestic industries. In 2004 unions referred about 28 cases of unfair labour practice to the Independent Directorate of Dispute Prevention and Resolution (hereinafter 'DDPR').<sup>359</sup>

Thirteen cases were brought to agreement, two of which were referred to the Labour Court for settlement. One of the cases was withdrawn and sixteen were upheld. The Commissioner of Labour, who operated as part of the Ministry of Employment and Labour, was tasked with investigating allegations of labour law violations. During the

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<sup>358</sup> <http://www.state.gov/g/drl/rls/hrrpt/2005/61576>.

<sup>359</sup> <http://www.state.gov/g/drl/rls/hrrpt/2005/6157.htm>.

year, there were no reports of employers preventing workers from becoming members of unions, gaining access to factories, or threatening workers with loss of employment.

In terms of the right to organise and bargain collectively, the Labour Code allows unions to conduct activities without interference and the government generally protects them in practice. However, some private sector employers have tried to restrict these rights. Collective bargaining is protected by law and freely practised.

It should also be noted that the Labour Code provides for a limited right to strike. However, civil servants are not allowed to strike and, by definition, all public sector industrial actions are not authorised. In the private sector the labour code requires an escalating series of procedures to be followed by workers and employers before strike action is authorised. In 2004 there were no legal or illegal strikes.

The labour code establishes the DDPR in the Ministry of Employment and Labour to provide dispute prevention and resolution mechanisms. The DDPR is independent of government and maintains a record of handling cases promptly. The DDPR had resolved 1 365 out of 1 422 cases by the end 2004. The Commissioner of Labour is authorised to order the reinstatement of wrongfully dismissed employees and the payment of back wages, but has no authority to impose criminal fines.

## **5.6 The Tanzanian Experience of Freedom of Association in the Workplace**

In Tanzania, the Employment Act and LRA of 2004 make provision for the recognition of freedom of association.

This is clearly stipulated in sections 9, 10 and 11 of the Act:

Section 9(1): every employee shall have the right:–

- (a) to form and join a trade union;
- (b) to participate in the lawful activities of the trade union.

- (2) notwithstanding the provisions of subsection (1)
  - (a) a magistrate may only form or join a trade union that restricts its membership to judicial officers;
  - (b) a prosecutor may only form or join a trade union that restricts its membership to prosecutors or other court officials;
  - (c) a senior management employee may not belong to a trade union that represents the non-senior management employees of the employee.
  
- (3) No person shall discriminate against an employee on the grounds that the employee
  - (a) exercises or has exercised any right under this Act or any other written law administered by the minister;
  - (b) belongs to or has belonged to a trade union;
  - (c) participates or has participated in the lawful activities of a trade union.
  
- (4) No person shall discriminate against an official of an office bearer of a trade union or federation for representing it or participating in its lawful activities.
  
- (5) Any person who contravenes the provisions of subsections (3) and (4), commits an offence.

10(1) every employer shall have the right

- (a) to form and join an employer's association;
  - (b) to participate in the lawful activities of an employer's association.
- (2) no person shall discriminate against an employer on the grounds that the employer –
- (a) exercises or has exercised a right under the Act;
  - (b) belonged or has belonged to an employees Association;
  - (c) participates or has participated in the lawful activities of an employers' association.

- (3) No person shall discriminate against an official or office bearer of an employer's association or federation for representing it or participating in its lawful activities.
- (4) Any person who contravenes the provisions of subsection (2) and (3) commits an offence.

11. Every organisation has the right to:–

- (a) determine its own constitution;
- (b) plan and organise its administration and lawful activities.
- (c) join and form a federation
- (d) participate with, and participate in, the affairs of
  - any international workers' organisation or international employers' organisation or
  - the International Labour Organisation, and to contribute to, or receive financial assistance from, those organisations.

Sections 9, 10 and 11 of the Employment and LRA of 2004 confirm employers' rights to freedom of association. It also confirms the employer's right to freedom of association and, lastly, the rights of trade unions and employers' associations to affiliate with any international organisation of their choice. From these premises, it can be argued that the Tanzania Employment LRA of 2004 supports the ILO labour standards.

However, the full implementation of the above sections is still in its embryonic stage since this Act was only implemented in 2004.

### **5.6.1 Tanzania and the Implementation of the International Labour Organisation Convention on Collective Bargaining**

The Tanzanian Employment and LRA of 2004<sup>360</sup> recognise the importance of collective bargaining and this is covered in Part V1 of the Act.

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<sup>360</sup> Tanzania Employment and Labour Relations Act 2004.



Section 67 states as follows:

- 1) A registered trade union that represents the majority of the employees in an appropriate bargaining unit shall be entitled to be recognised as the exclusive bargaining agent of the employees in that unit.
- 2) An employer or employers association may not recognise a trade union as an exclusive bargaining agent unless the trade union is registered and represents the majority of the employees in the bargaining unit.
- 3) A registered trade union may notify the employer association in the prescribed form that it shall seek recognition as the exclusive bargaining agent within an appropriate bargaining unit.
- 4) Within thirty days of the notice prescribed in subsection (3), an employer shall meet to conclude a collective agreement recognising the trade union.
- 5) Where there is no agreement or the employer fails to meet with the trade Union within thirty days, the union may refer the dispute to the Commission for mediation. The period of thirty days may be extended by agreement.
- 6) If the mediation fails to resolve the dispute the trade union or the employer may refer the dispute to the Labour Court for decision.
- 7) The Labour Court may decide any dispute over the representativeness of the trade union by arranging any appropriate person to conduct a ballot of the affected employees.

Section 68 states as follows:

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- 1) An employer or employers association shall bargain in good faith with recognised trade union.
- 2) A recognised trade union shall bargain in good faith with the employer or employers' association that has recognised it or is required to recognise it under the provisions of section 67. Section 69 deals with withdrawal of recognition with the following clauses:
  - (1) Where a recognised trade union ceases to represent the majority of the employees in the bargaining unit, the employer shall,
    - (a) give the trade union notice to acquire a majority within three months
    - (b) Withdraw exclusive recognition, if it fails to acquire that majority at the expiry of three months.
  - (2) Where a recognised union has ceased to represent the majority in the bargaining unit any other trade union may request for new elections or order to demonstrate that the union has become the most representative; provided that, no application for the withdrawal of recognition of a union can be made within six month of the union being recognised as the exclusive collective bargaining agent.
  - (3) If a party to a collective agreement prescribed in section 67 or a party subject to a recognition order, materially breaches the agreement or order, the other party may apply to the Labour Court to have recognition withdraw by
    - (a) terminating the recognition agreement
    - (b) rescinding the recognition order.

- (4) The Labour Court may decide any dispute over the representativeness of the trade union by arranging any appropriate person to conduct the ballot of the affected employees.
- (5) The Labour Court may make any appropriate order including –
  - (a) giving the trade union an opportunity to become representative;
  - (b) altering the bargaining unit;
  - (c) suspending recognition for a period;
  - (d) withdrawing recognition

Section 70(1) of the Act shows that an employer that has recognised a trade union shall allow the union to engage effectively in collective bargaining. In addition to this, it also indicates as follows:

- (2) An employer shall not be obliged to disclose information that:
  - (a) is legally privileged
  - (b) the employer cannot disclose without contravening a law or an order of court
  - (c) is confidential and, if disclosed, may cause substantial harm to an employee or the employer;
  - (d) is private personal information relating to an employee without that employee's consent.

Section 71 of the Act deals with the binding nature of a collective agreement and also indicate all the required formalities in the implementation of collective agreement.

#### **5.6.2 An assessment of the implementation of the International Labour Organisation Convention on Collective Bargaining in Tanzania**

Having highlighted the provisions dealing with collective bargaining in the Employment LRA, 2004 of Tanzania, an attempt will now be made to assess how fruitful the implementation of the collective bargaining provision in the Act is.

Before assessing this, it is important to know that the island of Zanzibar, which is part of Tanzania, is not included in the Employment LRA, 2004 of Tanzania. Zanzibar has its own labour law, which is not applicable in the mainland of Tanzania. The labour law of the mainland applies to both the public and private sectors, whereas the labour law of Zanzibar applies only to the private sector.<sup>361</sup>

Tanzania has not been successful in the implementation of collective bargaining in terms of the ILO standard for the following reasons: first, the process required to negotiate collective agreements is mechanistic and cumbersome. For example, any issue agreed upon as a result of a collective agreement must be submitted to the Industrial Court for approval and may be refused registration if it does not comply with the government's established economic policy. As a matter of fact, collective bargaining does not exist in the public sector. Unions and government representatives each submit proposals, and the authorities make recommendations on the basis of these, which have to be adopted by Parliament.

It is also stated in the Public Service Act of 2002 that workers in the public services do not have the right to collective bargaining. In the same vein, the government sets wages for employees in the government and state-owned enterprises. There is also a minimum membership requirement of 30 people for a union to be registered, which is excessive according to *international standards*. The Public Service Act also prevents strikes by 'Staff Grade Officers', which include heads of public learning institutions.

The Act allows for compulsory arbitration which, of course, is at the government's discretion and government decides the conditions and terms for public service employees. Strategically, this amounts to banning strikes.

For workers to be able to go on strike in terms of failed negotiated issues or failure to implement a collective agreement, it is an uphill task since they have to go through a series of complicated and protracted mediation and conciliation procedures which

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<sup>361</sup> See the Report of the WTO (2006) *General Council Review of the Trade Policies of Tanzania*, 25 and 27 October Geneva: WTO.

can prolong a dispute for months without resolving it. The law does not protect those taking part in legal strikes and walkout because of the lengthy process involved in calling a legal strike.

In June 2005 the Tanzanian Government dismissed 148 interns at Tanzania's largest hospital, the Muhimbili National Hospital in Dar es Salam, after they had been on strike for a week demanding increased allowances. However, they were later reinstated after much negotiation. In November 2005, 52 doctors were dismissed from the hospital<sup>362</sup> after one week of striking to achieve an increase in their basic salary. The doctors were dismissed after they had ignored a government ultimatum to accept the latest pay offer, which was below the figure recommend to the government by the Medical Association of Tanzania. The police then banned a march by nurses, auxiliary staff and at least 100 medical interns, who had joined the strike during the second week to support the doctors, to state and to present their grievances to Prime Minister Benjamin Mkapa. The government refused any negotiations and drafted in 30 military doctors and 35 Ministry of Health doctors to staff the hospital.

From the above discussion, it is clear that the Tanzanian Government does not encourage a collective bargaining process to arrive at major discussions. Instead force is used to implement policies. This negates ILO policies in the establishment and implementations of collective agreements.

## **5.7 The Swaziland Experience of Freedom of Association**

In Swaziland, Part IX (sections 98 and 99) of the Industrial Relations Act of Swaziland, as amended in 2005 deals with the freedom of association and the right to organise labour.

Section 98 states as follows:

An employee may–

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<sup>362</sup> ICFTU (2006) Annual Survey of Violation of Trade Union Rights.

- (a) take part in the formation of any trade union or staff association or federation as the case may be;
- (b) be a member of any trade union or staff association and take part in its lawful activities outside working hours or, with the consent of the employer, within working hours;
- (c) hold office in any trade union, staff association or federation;
- (d) take part in the election of work place trade union representative or staff association representative, or be a candidate for such election.
- (e) in the capacity of the workplace trade union representative or staff association representative
- (f) exercise any right conferred or recognised by this Act, and assist any employee, staff association or trade union to exercise such rights.

Both sections 97 and 98 of the Swaziland Industrial Relations Act, as amended in 2005, promote freedom of association for both employees and employers in the workplace.

Since Swaziland is a member of the ILO, it is expected to conform to ILO labour standards as do other members. There is no serious case or allegation that Swaziland does not comply or conform to ILO labour standards.

In view of the fact that Swaziland is also a member of UN, it is expected to comply with section 23 of the Universal Declaration of Human Rights, sub-Article 4 which provides that '[e]veryone has the right to form and join trade unions for the protection of his interests.'

## **5.8 The Zambian Experience of Freedom of Association**

In Zambia the concept of *freedom of association* is reflected in section 5 Part II of the Industrial and LRA 30, as amended in 1997. Part IV of the Act spells out clearly the rights of employers in respect of employer's associations. Section 5 Part II of the Act states that every employee shall have the following rights:

- (a) the right to take part in the formation of a trade union;
- (b) the right to be a member of a trade union of that employee's choice
- (c) the right, at any appropriate time to take part in the activities of a trade union.
- (d) the right of any employee not to be a member of a trade union or be required to relinquish membership.
- (e) the right not to be dismissed, victimised or prejudiced for exercising or for the anticipated exercise of any right recognised by this Act or any other law relating to employment; or for participating in any proceedings relating thereto;

Part IV section 37(i) of the Industrial and LRA 30, as amended in 1997, states the rights of an employer in the following terms:-

- (a) employers shall have the right to participate in the formation of, and to join, an association and to participate in the lawful activities of such employers' organisation.
- (b) Nothing contained in any law shall prohibit any employer from being or becoming a member of any employers' organisation lawfully in being or subject the employers' membership of any such employers' organisation.
- (c) no person shall impede, interfere with, or coerce, an employer in the exercise of his rights under this Act;
- (d) no person shall subject an employer to any form of discrimination on the ground that the employer is or is not a member of any employers' organisation;
- (e) no person shall subject another person to any form of discrimination on ground that the person holds office in an association;
- (f) no person shall impede or interfere with the lawful establishment, administration or functioning of an employers' organisation.

In terms of section 37(2), no employee shall cease or suspend doing work for his employer on the ground that the employer:-

- (a) is or is not a member or holds or does not hold office, in an employers' organisation.
- (b) participates in the lawful activities of an employers' organisation.
- (c) has appeared as a complainant or as a witness or has given evidence in any proceedings before the Court or any other court; or
- (d) is or has become entitled to any advantage, award, benefit or compensation in consequences of a decision made by the Court or any offer in favour of the employer, or in favour of an employers' organisation or class or category, of employers to which such employee or against the trade union or class or category of employees to which such employee belongs or against any other person.

In summary, it can be concluded that the seven SADC countries listed in this research have implemented freedom of association for both the employers and employees in the workplace in different ways. However, much needs to be done to promote this freedom of association in some of the organisations that have not fully implemented freedom of association in respect of ILO standards. This analysis has also shown that Lesotho and Swaziland have not fully implemented freedom of association when compared to other SADC countries in this research.

#### **5.8.1 Collective Bargaining Convention of 1981 (No. 154)**

The ILO formally recognised the right of both employees and employers to collective bargaining at the General Conference convened in Geneva by the Governing Body of the International Labour Office on 3 June 1981. At this conference, the ILO realised that there was an urgent need to achieve the general principle set out in Article 4 of the Right to Organise and Collective Bargaining Convention, 1949, and the Collective Agreements Recommendation of 1951. Having considered all the proposals in respect of the collective bargaining and labour standards, it was finally adopted as an international Convention on 3 June 1981. This international Convention is divided into three parts: Part 1 deals with the scope and definition, while Part 2 deals with methods of application and Part 3 deals with the promotion of collective bargaining. An attempt will be made to highlight the various parts below:



a) **Part I: Scope and Definitions**

**Article 1**

1. This convention applies to all branches of economic activity.
2. The extent to which the guarantees in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice.
3. As regards the public service, special modalities of applications of this Convention may be fixed by national laws or regulations or national practice.

**Article 2**

For the purpose of this Convention the term "Collective bargaining" extends to all negotiations which take place between an employee, a group of employers or one or more employers organisations, on the one hand, and one or more workers organisations, on the others, for

- a) determining working conditions and terms of employment, and / or
- b) regulating relations between employers or their organisations and a workers organisations or workers organisations.

**Article 3**

1. Where national law or practice recognises the existence of workers representative as defined in Article 3, subparagraph (b), of the workers representatives convention, 1971, national law or practice may determine the extent to which the term " collective bargaining" shall also extend for the purpose of this Convention, to negotiations with these representatives.
2. Where, in pursuance of paragraph 1 of this Article the term " collective bargaining" also includes negotiations with the workers representatives referred to in that paragraph, appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers organisations concerned.

**b) Part II: Methods of Application**

**Article 4**

The provisions of this Convention shall in so far as they are not otherwise made effectively by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.

**c) Part III: Promotion of Collective Bargaining**

**Article 5**

1. Measures adapted to national conditions shall be taken to promote collective bargaining.
2. The aim of the measures referred to in paragraph 1 of this Article shall be the following:
  - a. collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this convention,
  - b. collective bargaining should be progressively extended to all matters covered by subparagraphs (a),(b), and (c) of Article 2 of this convention,
  - c. the establishment of rules of procedures agreed between employers and workers organisations should be encouraged.
  - d. collective bargaining should not be hampered by the absence of rules governing the procedures to be used or by the inadequacy or inappropriateness of such rules,
  - e. bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

### **Article 6**

The provisions of this Convention do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitrations machinery or institutions in which the parties to the collective bargaining process voluntarily participate.

### **Article 7**

Measures taken by public authorities to encourage and promote the development of collective bargaining shall be subject of prior consultation and, whenever possible, agreement between public authorities and employers and workers organisations.

### **Article 8**

The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining. Having highlighted the various Articles of the collective bargaining convention of 1981, an attempt will be made to critically assess to what extent the SADC countries selected in this research have conformed with the ILO labour standards in terms of collective bargaining structure and process. The first country to be examined here is South Africa.

#### **5.8.2 Zambia and the implementation of the International Labour Organisation Convention on Collective Bargaining**

The Zambian Industrial and Labour Relations (Amendment) Act of 1997 spells out the extent to which it promotes the collective bargaining process between employers and employees. Parts VII and VIII of the above Act deal with recognition agreements and collective agreements respectively.<sup>363</sup>

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<sup>363</sup> The Zambia Industrial and Labour Relations Act 1997.

Section 64 of part VII of the above Act states as follows:

1. Not later than three months from the date of registration under section sixty three, a registered employer and a trade union, if any, to which the employees belong, shall enter into a recognition agreement. Duty to enter into recognition agreement.
2. Not later than three months from the date of issue of certificate of registration, an employer's organisation and trade union to which the employers belong, shall enter into a recognition agreement.
3. The Minister may, for good cause extend the period laid down in subsection(1) and (2).
4. A recognition agreement registered under the Industrial Relations Act, 1990, shall be deemed to be registered in this Act as amended.
5. Where the parties' referred to in subsection (1) or (2) fail to conclude a recognition agreement under this Part, the failure shall be deemed to be a collective dispute and the necessary rule shall apply.

Part V111 of the Act (section 66) deals with Collective Agreement and this section states the following:

1. Within three months from the date of registration of the recognition agreement between the employer or employer's organisation, as the case may be, and the trade union, they shall enter into collective bargaining for the purpose of concluding and signing a collective agreement.
2. Collective bargaining may be undertaken (a) at the level of negotiations between the management of the undertaking and the trade unions representing the eligible employees, or (b) at the level of an industry, through negotiations between the employer's

organisation and the trade union representing the eligible employees.

3. Every valid collective agreement in force prior to the commencement of this Act shall continue in force until its expiry or replacement under this Act. Section 68 states that, every collective agreement shall contain clauses, in this part referred to as statutory clauses, stipulating:
  - (a) the date on which the agreement is to come into effect and the period for which it is to remain in force, and
  - (b) the methods, procedures and rules for reviewing, amending, replacing or terminating the collective agreement.

Section 69 deals with the obligations of the bargaining units, while section 70 deals with the lodging of a collective agreement with the commissioner.

The above provisions in the Act show that the Zambian Government attempts to comply with the ILO standards in respect of the Collective Bargaining Convention 1981 (No. 154). The question on how effectively this standard has been implemented can be accessed through case law which, unfortunately, I could not access in the course of this research. However, from the provision made in sections 64–70 in the Zambia Industrial and LRA as amended in 1997, Zambia supports the ILO standards in respect of collective bargaining issues.

## **CHAPTER SIX**

### **THE ELIMINATION OF ALL FORMS OF FORCED, CHILD AND COMPULSORY LABOUR IN SOUTHERN AFRICAN DEVELOPMENT COMMUNITY COUNTRIES IN RESPECT OF INTERNATIONAL LABOUR ORGANISATION STANDARDS**

#### **6.1 Introduction**

The purpose of this chapter is to analyse the ILO Convention on forced, child and compulsory labour and also to examine to what extent those selected SADC countries in this research have implemented the ILO standard in respect of forced, child and compulsory labour.

Furthermore, the Abolition of Forced Labour Convention of 1957 which has also been ratified by 31 states in October 1995 will be discussed. However, before doing so, an assessment as to what extent ILO standards on forced labour have been implemented in the SADC region will be made.

#### **6.2 International Labour Organisation Convention on Forced, Child and Compulsory Labour**

This Convention was adopted by the ILO Conference in 1930 and came into force on 1 May 1932.<sup>364</sup> It had been ratified, as of 31 October 1995, by 138 states. This Convention defines its objective clearly: 'to suppress the use of forced or compulsory labour in all its forms (Art 1(1)', and indicates that this applies to labour extracted from 'any person' (Art 2(1)). As a matter of fact, it applies to all persons without distinction.

By definition, the expression 'forced or compulsory labour' is 'all work or service which is exacted from any person under the menace of any penalty and for which the

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<sup>364</sup> *Forced Labour Report* and draft questionnaire ILC, XII session (1929), *Proceedings*, ILC, XII session (1929); *Forced Labour Report I*, XV session (1930); *Proceedings* ILC, XIV Session (1930), pp 267–341, 475–480.

said person has not offered himself voluntarily'.<sup>365</sup> Its origin is in Article 5 of the Slavery Convention adopted by the League of Nations in 1926 and was retained by the ILO in order to maintain similar terminology.<sup>366</sup>

As used in the Convention, the terms *forced* and *compulsory* are synonymous, and this kind of compulsion can be encountered in all kinds of situations: in cities as well as in rural areas, in factories, workshops, businesses and other closed undertakings.

The term 'work or service' brings out in general terms the human activities that may be carried out in the service of a third party. No limitation is expressed concerning the kind of relationship between the provider of the work or service and the person who imposes it: this relationship may be *de facto* or *de jure*, permanent or temporary, accepted explicitly or tacitly.<sup>367</sup>

Another important element in the definition is that the work or service must be exacted 'under the menace of any penalty'. It should be made clear that the 'menace' of not being paid if one does not carry out work or services freely agreed to, does not constitute a 'menace' within the meaning of the Convention; this would simply be non-fulfilment of obligations imposed under an agreement when the other party does not meet his/her own obligations. Of course, it should be noted that this, in turn, depends on the element of freedom that is contained in the words 'and for which the said person has not offered himself voluntarily'. The Convention thus refers to the menace of a 'penalty' which involves a sanction that goes beyond the normal element of an employment relationship or contract for the delivery of services.<sup>368</sup> This does not refer only to 'penalties' in the strict sense of penal sanctions; it also includes deprivation of any rights or privileges.<sup>369</sup>

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<sup>365</sup> See Art 2, para 1.

<sup>366</sup> Code Art 1210 n 49.

<sup>367</sup> De la Cruz, H B, von Potobsky, G and Swepston, L (1996) *The International Labour Organisation: The International Standards System and Basic Human Rights* Boulder Colorado: Westview Press.

<sup>368</sup> Code Art 1210 para 46.

<sup>369</sup> See in particular Code Art. 1210 n 49; and CE *General Survey* (1979) para 21.

The words ‘and for which the said person has not offered himself voluntarily’ may become of crucial importance in circumstances in which there is a possibility, or the certainty, that if a person does not do certain work or provide certain services he or she would lose advantages or rights. In such cases, a decision as to whether the work or service was done with the free consent of the person concerned would allow a determination of whether this was ‘forced or compulsory labour’ in the terms of the Convention.

### **6.3 Cases or Situations Excluded as Forced Labour in Respect of the Convention**

At this juncture, those services or works that are not considered within the general scope of the definition of ‘forced labour’ will be discussed.

- (a) *Compulsory military service:* The Convention excludes ‘any work or service exacted in virtue of compulsory military service for work of a purely military character.’<sup>370</sup> This provision raises questions in some countries where the authorities consider that the use of the military for work of public utility is a way of keeping them usefully occupied, of using skills such as road engineering not easily available otherwise, or that it is an effective method of dealing with national emergencies such as floods, earthquakes or imminent loss of crops.

This exception applies only to members of the armed services laws. It does not apply to career military personnel, or to soldiers who have enlisted voluntarily. In addition, the ILO Committee of Experts has found that this exclusion from the Convention’s coverage cannot be invoked to justify denying career servicemen the right to leave the service either at certain reasonable intervals or by means of notice of reasonable length.<sup>371</sup>

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<sup>370</sup> Art 2, para 2(a).

<sup>371</sup> Committee of Experts *General Survey* (1979) para 33. The question of restrictions on freedom to leave employment also concerns Convention No. 105.



- (a) *Normal civic obligations:* The other kind of work that is not considered to be 'forced or compulsory labour is any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country'<sup>372</sup>
- (b) *Prison labour:* A third exception is 'any work or service exacted from any persons as a consequence of a conviction in a court of law'.<sup>373</sup> If there has been no conviction in a court of law, compulsory prison labour is contrary to the Convention. It is therefore contrary to the Convention to impose prison labour on persons who have been deprived of liberty but have not been convicted. This does not mean, of course, that these person should be denied the possibility of carrying out prison labour while they are awaiting trial, as the Convention does not prohibit work as long as it is on a purely voluntary basis (except, for common sense reasons, for keeping the prisoners' own cell clean and orderly).<sup>374</sup>
- (c) *Emergencies:* The term *forced or compulsory labour* does not include 'any work or service exacted in cases of emergency'.<sup>375</sup> This is defined in the same provision as 'in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or serious diseases, invasion by animals, insects or vegetable pests, and in general any circumstances that would endanger the existence or well-being of the whole or part of the population'.

In the light of this the Committee of Experts has emphasised the restrictive nature of the notion of emergency and has insisted that the power to call up labour should be confined to genuine cases of emergency. It has found that the concept of *emergency* involves a sudden, unforeseen happening calling for instant counter-measures. It

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<sup>372</sup> Art. 2, para. 2(b).

<sup>373</sup> Art. 2 para. 2(c).

<sup>374</sup> *Ibid.*

<sup>375</sup> Art. 2, para. 2(d).

has also stated that the duration and extent of compulsory service, as well as the purpose for which it is used, should be limited to what is strictly required by the exigencies of the situation.<sup>376</sup> In respect of the above, the Committee has considered different restrictions on the freedom to leave employment. It has considered that statutory provisions preventing termination of employment of indefinite duration by means of notice of reasonable length turn a contractual relationship based on the will of the parties into service by compulsion of law. This is also the case when a worker is required to serve beyond the expiry of a contract of fixed duration.<sup>377</sup>

- (a) members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services'.  
However it must also be noted that Child Labour is a form of forced labour and in particular Child Labour is an abusive condition which should not be allowed.

## **6.4 The Application of this Convention in Southern African Development Community Countries**

### **6.4.1 The South African experience of forced labour**

Today, children in South Africa are found working in family enterprises without pay, primarily in agriculture and trade.<sup>378</sup> A higher proportion of children in rural areas than urban areas are engaged in some type of work.<sup>379</sup> Rural children fetch wood and water, and work in commercial agriculture and on subsistence farms planting and harvesting vegetables, picking and packing fruit, and other annual crops.<sup>380</sup> Children work as paid domestic servants in the homes of third parties, particularly in urban areas. Many work as unpaid domestic servants, especially on subsistence

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<sup>376</sup> *Ibid.*, para 38.

<sup>377</sup> Art. 2 para 2(e).

<sup>378</sup> US Department of State (2006) 'South Africa' *Country Reports on Human Rights Practises* 2005 Washington DC (8 March) s 6d.

<sup>379</sup> Government of South Africa South Africa Schools Act 84 of 1996 (15 November 1996) Chap 2 s 3(1) 5 6.

<sup>380</sup> US Consulate Johannesburg *Reporting* 3 September 2004 para 9.

farms<sup>381</sup>. In urban areas children work on the street as vendors, car guards, trolley attendants, shop assistants and taxi conductors.<sup>382</sup> Some children are forced into prostitution to support their families.<sup>383</sup>

South Africa is regarded as the country of origin, transit and destination for children trafficked for sexual exploitation and forced labour.<sup>384</sup> Girls are trafficked from Mozambique, Swaziland, Tanzania, China and Thailand into South Africa for sexual exploitation.<sup>385</sup> Trafficking of children from rural areas to urban areas for domestic service is also a problem. South African girls are occasionally trafficked to Asian and European countries for sexual exploitation.<sup>386</sup>

#### **6.4.2 Child labour laws and their enforcement in South Africa**

The Basic Conditions of Employment Act<sup>387</sup> establishes the minimum age for employment at 15 years.<sup>388</sup> However, employers may hire children younger than 15 years to work in the performing arts with permission from the South African Department of Labour.<sup>389</sup> Children who are under 18 years may not perform work that is harmful to their well-being and development.<sup>390</sup> The Minister of Labour is authorised to set additional restrictions on the employment of children aged 15 years

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<sup>381</sup> *Ibid.*

<sup>382</sup> *Ibid.*

<sup>383</sup> ILO–IPEC (2003) ‘AIDS and Child Labour in South Africa: A Rapid HIV/ Assessment’ Paper No. 4 (March), pp 27 and 38.

<sup>384</sup> US Department of State (2006) ‘South Africa (Tier 2 Watch List)’ in *Trafficking in Persons Report 2006* Washington DC (5 June) <http://www.State.gov/g/tip/rls/tiprpt/2006/65990.htm>.

<sup>385</sup> US Department of State (2006) *Trafficking in Persons Report – 2006: South Africa*.

<sup>386</sup> *Ibid.*

<sup>387</sup> 75 of 1997.

<sup>388</sup> Government of South Africa Basic Conditions of Employment Act 75 of 1997 (5 December 1997) ss 43(1)(a)(b) and 43(3), 93.

<sup>389</sup> See *Sectoral Determination 10: Children in the Performance of Advertising, Artistic Cultural Activities*, 2007. Performing arts includes the use of children to advertise children’s products like sweets and dresses.

<sup>390</sup> See the Amended Basic Conditions of Employment Act (2002) s 43 (1–2).

and above.<sup>391</sup> The law provides for the right of every child, defined as a person younger than 18 years of age, to be protected from age-inappropriate and unfair labour practices.<sup>392</sup> The penalty for illegally employing a child is a fine or maximum jail term of 3 years.<sup>393</sup> The law prohibits all forms of forced labour and establishes a maximum penalty of three years in prison for imposing forced labour on another person.<sup>394</sup> The maximum penalty for violating this law is 20 years' imprisonment. The law establishes 18 years as the minimum age for voluntary military service, military training and conscription, even in times of national emergency.<sup>395</sup> The law criminalises the sexual exploitation of children and sets a penalty of up to 10 years of imprisonment and/or a fine for any person who participates or is involved in such an activity.<sup>396</sup> Children can be arrested for prostitution despite being victims of commercial sexual exploitation.<sup>397</sup> Such cases, however, are generally referred by the Office of the National Director of Public Prosecutions to Children's Courts which determine the children's need for care.<sup>398</sup>

The South African Department of Labour (hereinafter 'SADoL') is tasked with enforcing labour laws. There are approximately 1 000 labour inspectors nationwide, who have the responsibility of enforcing labour laws including those pertaining to child labour.<sup>399</sup> According to the United States Department of State, the SADoL adequately enforces child labour laws in the formal non-agricultural sector, but less so in other sectors.<sup>400</sup>

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<sup>391</sup> Basic Conditions of Employment Act s 44(1) and (2).

<sup>392</sup> Government of South Africa *Constitution of the Republic of South Africa* (10 December 1996) Chap 2 ss 28(3) and 28 (1)(e) and (f).

<sup>393</sup> Basic Conditions of Employment Act ss 43 (1)(a)(b), 43 (3), 44 (2), 48, and 11 (93).

<sup>394</sup> *Ibid.*, ss 48 and 11 (93).

<sup>395</sup> *Child Soldiers Global Report 2004* [online] <http://child-soldier.org/document> (accessed 19 19 October 2006).

<sup>396</sup> *Ibid.*

<sup>397</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ss 17 (1)–(5).

<sup>398</sup> *Ibid.*

<sup>399</sup> US Department of State (2006) *Country Reports – 2006: South Africa* s 6d.

<sup>400</sup> *Ibid.*

### **6.4.3 Current government policies and programmes to eliminate the worst forms of child labour in South Africa**

In the light of the ILO and the Forced Labour Convention, the Government of South Africa has established the Social Security Agency which provides grant assistance to children 18 years and under to help them meet basic necessities and stay out of the workforce.<sup>401</sup> The Child Protection Unit (hereinafter 'CPU') and the Family Violence, Child Protection, and the Sexual Offences Unit in the South African Police Service are involved in child protection. The CPU offers services to child victims: it investigates and raises awareness of crimes against children.<sup>402</sup> Although there is the CPU and the Family Violence, Child Protection, and the Sexual Offences Unit in the South African Police Service, violence against children, including domestic violence and sexual abuse, has remained widespread. While there was increased attention to the problem, a lack of coordinated and comprehensive strategies to deal with violent crime continued to impede the delivery of needed services to young victims.<sup>403</sup> According to the 2009 SAPS annual report, 27,417 children were victims of sexual offenses between April 2009 and March 2010. Of that total, 965 were killed and 12 062 were assaulted with intention to do grievous bodily harm. Observers believed that these figures represented a small percentage of the actual incidence of child rape since most cases involving family members were not reported. According to the NGO Childline, 25 per cent of girls and 20 per cent of boys were at risk of being raped before the age of 16.

According to a June 2009 report released by Solidarity, the country's largest independent trade union, 45 per cent of all rapes were perpetrated against children, and more than 88 per cent of child rapes were never reported to the police.

In 2006 the Government of South Africa enacted the Children's Act<sup>404</sup>. This legislation specifically outlaws the trafficking of children, creates Children's Courts,

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<sup>401</sup> Government of South Africa *National Child Labour Action Programme* p 19.

<sup>402</sup> Child Protection Unit (2003) August <http://www.saspcan.org.za/childprot.htm> (accessed 19 October 2006).

<sup>403</sup> See SAP (2009) *Annual Report on Crime*.

<sup>404</sup> Children's Act 38 of 2005 ss 284 (2) (3) and (4).

and establishes a Child Protection Register. The SAdoL chairs the Child Labour Intersectoral Group (hereinafter 'CLIG'), a national stakeholder group that coordinates anti-child labour activities conducted by the government, unions, and non-governmental organisations (hereinafter 'NGOs'), and raises awareness about child labour and the enforcement of child labour laws.

The Children's Act also states that no child under the age of 12 can consent to any sexual activity and sets 16 as the lowest age for consensual sex with another minor. Statutory rape is defined as sexual intercourse between anyone under 18 and an adult more than two years older. The statutory sentence for rape of a child is life in prison; however, the law grants judicial discretion to issue more lenient sentences. South Africa has a low conviction rate on child abuse.<sup>405</sup>

The South African Government is currently making every effort to maintain ILO Forced Labour Convention Standards. This is reflected in the collaboration of the South African Government with ILO International Programme for the elimination of Child Labour (hereinafter 'IPECL') in implementing a US\$5 million-funded regional child labour project in southern Africa. Efforts in South Africa are focused on supporting the Government of South Africa's Child Labour Programme of Action by raising awareness, enhancing capacity for policy implementation and monitoring through direct action programme.

The government's Child Labour Programme of Action integrated the priorities of government ministries to combat child labour with a variety of government financial support mechanisms. The Children's Amendment Act no. 41 of 2007, signed into law by President Mbeki in 2008, was officially implemented on April 1. This Act strengthens the Children's Act no. 38 of 2005, which set national regulations outlining the care and protection of children, the responsibilities of parents and the prosecution procedures in the case of violations. The original act also reduced the majority age from 21 years to 18 years. The 2007 Amendment Act expands the scope of the Children's Act by delegating responsibility over which both the national and provincial governments share functions and duties. However, the largest factor

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<sup>405</sup> See US Department of State (2010) *Report on South Africa – 2010*, p 27.

in reducing child labour remained the government's 250 rand (\$35) per month child support grant to primary care givers of children under the age of 16. The age was scheduled to be increased to 17 in January 2011 and 18 in 2012.<sup>406</sup>

## **6.5 The Namibian Experience of Forced or Compulsory Labour**

### **6.5.1 Prohibition of forced labour in Namibia**

Although the law prohibits forced or compulsory labour, including the use of children<sup>407</sup>, it still occurs. There continue to be media reports that farm workers, including some children on communal farms, and domestic workers often receive inadequate compensation for their labour and are subject to strict control by employers.<sup>408</sup> Given the Ministry of Labour's resource constraints, labour inspectors sometimes encounter problems in gaining access to the country's large communal and family-owned commercial farms to investigate possible labour code violations.

The Namibian labour law protects children from exploitation in the workplace.<sup>409</sup> However, the exploitation of child labour continues to be a problem. Criminal penalties and court orders are available to the government to enforce child labour laws, but such action involves a complicated legal procedure.<sup>410</sup> Under the law, the minimum age for employment is 14 years, with higher age requirements for night work in certain sectors of the economy such as mining and construction.<sup>411</sup>

Children below the age of 14 often work on family-owned commercial farms and in the informal sector, and some also work in communal areas.<sup>412</sup>

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<sup>406</sup> See also the US Department of State's annual *Trafficking in Persons Report* [www.state.gov/g/tip](http://www.state.gov/g/tip).

<sup>407</sup> <http://www.state.gov/drl/rls/hrrpt/2006>.

<sup>408</sup> See US Department of State (2006) *Report on Namibia – 2006*.

<sup>409</sup> *Trafficking in Persons Report* [www.state.gov/g/tip](http://www.state.gov/g/tip).

<sup>410</sup> *Ibid.*

<sup>411</sup> Section 2(2) of the Labour Act 11 of 2007. Also see section 19(1) and (2) of the above Act (2007).

<sup>412</sup> US Department of State (2006) *Report on Namibia – 2006*.

The Ministry of Labour is responsible for enforcing child labour laws and investigates child labour as part of its regular labour inspections.<sup>413</sup>

The Ministry of Labour's National Initiative to Eliminate the Worst Forms of Child Labour continues with its baseline study of the extent of child labour in the country. The Ministry of Gender Equality and Child Welfare recently conducted several programmes aimed at encouraging parents and guardians to allow children to attend school.<sup>414</sup>

The Namibian Government has introduced several programmes aimed at supporting children to stay at school and away from the labour market.<sup>415</sup> The Ministry of Gender Equality and Child Welfare, and Ministry of Health and Social Services coordinated welfare programmes for orphans, including those affected by HIV/AIDS, providing grants and scholarships to keep them in school.<sup>416</sup> In addition to this, the government also collaborates with the Namibia Agricultural Union and the Namibia Farm Workers Union in efforts to eliminate child labour through awareness campaigns. The government also continues to work with NGOs such as Project Hope to assist the victims of Child Labour.<sup>417</sup>

### **6.5.2 Current government policies and programmes to eliminate the worst forms of child labour in Namibia**

The Government of Namibia is currently working with ILO–IPEC to implement a US dollar-funded regional child labour project in southern Africa, which includes activities in Namibia. Project activities in Namibia include piloting methods for the prevention and withdrawal of children from the worst forms of child labour, conducting research on the nature and incidence of exploitative child labour, and building the capacity of

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<sup>413</sup> Section 125(1)–(4) of the above Act (2007).

<sup>414</sup> Section 5(2) and (3) of the above Act.

<sup>415</sup> US Department of State (2006) *Report on Namibia – 2006*.

<sup>416</sup> Section 5(d) of the above Act (2007).

<sup>417</sup> *Ibid.*, US Department of State (2006) *Report on Namibia – 2006*.



the government to address child labour issues.<sup>418</sup> The American Institutes for Research, in collaboration with the government and NGOs, is implementing a US dollar-funded project to improve quality and access to basic and vocational education for children who are working or at risk of being engaged in exploitive child labour.<sup>419</sup>

The Government of Namibia launched a national policy in February 2005, with the support of the United Nations International Children's Emergency Fund (hereinafter 'Unicef'), to protect the well-being of orphans and vulnerable children and reduce their vulnerability to HIV/AIDS.<sup>420</sup> The United States Agency for International Development (hereinafter 'USAID'), in collaboration with the Ministry of Women's Affairs and Child Welfare, and NGOs, is building community capacity to provide for the needs of orphans and vulnerable children. USAID also supports school programmes, psycho-social services for children, through the Orphans and Vulnerable Children Trust Fund.<sup>421</sup> The US Embassy supports child education through the Ambassador's Girls' Scholarship Fund. The Government of Namibia's Ministry of Gender Equality and Child Welfare, and the Ministry of Health and Social Services aim to keep orphans and vulnerable children in school through the provision of grants and scholarships.<sup>422</sup>

These scholarships are directed especially towards child-headed households. In addition to this, the Ministry of Education is implementing its Namibia Plan of Action 2002–2015 for education, called the Education and Training Sector Improvement Programme (hereinafter 'ETSIP').<sup>423</sup>

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<sup>418</sup> ILO–IPEC *Supporting the Time-Bound Programme to Eliminate the Worst Form of Child Labour in South Africa's Child Labour*, pp 38–39.

<sup>419</sup> US Department of State (2006) *Report on Namibia – 2006*.

<sup>420</sup> *Ibid.*

<sup>421</sup> US Agency for International Development (2005) *USAID Namibia 2005* [online] <http://www.usaid.org.na/project> (accessed 17 June 2005).

<sup>422</sup> US Department of State (2006) *Report on Namibia – 2006*.

<sup>423</sup> Government of Namibia *National Plan of Action 2002–2005* in Unicef Namibia [online] <http://www.un.na/unicef/projects.htm> (accessed 17 June 2005).

## 6.6 The Lesotho Experience of Forced Labour

### 6.6.1 Prohibition of forced or compulsory labour

The Government of Lesotho prohibits forced or compulsory labour of children.<sup>424</sup> There are statutory prohibitions against the employment of minors in commercial, industrial, non-family enterprises involving hazardous or dangerous working conditions.<sup>425</sup> However, child labour is a problem in the informal sector because the government has no mechanism for inspection of the informal sector.<sup>426</sup>

The legal minimum age for employment in commercial or industrial enterprises is 15 years, and the legal minimum age for hazardous employment is 18 years.<sup>427</sup> However, children under 14 years of age reportedly are employed in family-owned businesses.<sup>428</sup>

Children under 18 years of age may not be recruited for employment outside the country<sup>429</sup>. Child labour covers all sectors except the agricultural sector. Many urban street children work in the informal sector.<sup>430</sup> Most jobs performed by children are gender-specific: boys as young as age four and five are livestock herders, carry packages for shoppers, wash cars, and collect fares for minibus taxis; teenage girls are involved in prostitution; and both boys and girls work as street vendors<sup>431</sup>.

The Ministry of Employment and Labour is responsible for investigating child labour allegations. The labour inspectors conduct quarterly inspections in the formal sector.<sup>432</sup>

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<sup>424</sup> Section 7(1) and (2) of the Lesotho Labour Code Order (1992).

<sup>425</sup> *Ibid*, section 101 of the above Labour Code Order (1992).

<sup>426</sup> <http://www.state.gov/g/drl/rls/hrrpt/2005>.

<sup>427</sup> Section 123(1) and section 125(1).

<sup>428</sup> US Department of State (2007) *Report on Lesotho – 2007*.

<sup>429</sup> Section 125(4) and (5).

<sup>430</sup> US Department of State (2007) *Report on Lesotho – 2007*.

<sup>431</sup> *Ibid*.

<sup>432</sup> See the Lesotho Labour Code, section 210 Article 3, clause d.

The Government of Lesotho has made a good effort to implement the ILO Forced Labour Convention of 1930.<sup>433</sup> This effort is reflected in the zero report of forced labour in Lesotho.<sup>434</sup> There are no reported law cases or media reports on forced labour in Lesotho. The labour code strictly prohibits forced labour and this is carefully monitored by the labour inspectors and the police force.

## **6.7 The Botswana Experience of Forced Labour and the Implementation of the International Labour Organisation Convention of 1930**

Botswana law prohibits forced and compulsory labour of children.<sup>435</sup> The law prohibits child labour and also spells out clearly the minimum age of employment.<sup>436</sup> The Children's Act addresses squarely how children must be protected.

The Children's Act of Botswana states clearly that only immediate family members may employ a child age 13 years or younger, and no juvenile under the age of 14 may be employed in any industry without permission from the Commissioner of Labour.<sup>437</sup> No organisation has petitioned the Commissioner for such permission. Only persons over the age of 16 may be hired to perform night work, and no person under the age of 16 is allowed to perform hazardous labour, including mining.<sup>438</sup>

District and municipal councils have welfare divisions, which are responsible for enforcing child labour laws. Unicef and officials of the Ministry of Local Government, Lands, and Housing generally agreed that child labour was limited to young children in remote areas who worked as cattle tenders' domestic labourers.<sup>439</sup> Childline, a child welfare organisation, received 12 reports of child labour abuses from January to July in 2006.<sup>440</sup>

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<sup>433</sup> See US Department of State (2007) *Report on Lesotho – 2007*.

<sup>434</sup> See Part II s 7 of the Labour Code Order of 1992.

<sup>435</sup> Employment Act Cap: 47:01, ss 69–72.

<sup>436</sup> See ss 103–110 of the above Act. It deals with employment of children and young persons.

<sup>437</sup> Section 131.

<sup>438</sup> <http://www.state.gov/g/drl/r> also see Employment Act Cap:47:01 ss 69 and 70, p 12.

<sup>439</sup> US Department of State (2009) *Human Rights Reports: Botswana*, p 12.

<sup>440</sup> Unicef, *A World Fit for Children Mid Decade Review: Botswana Progressive Report*.

The law provides that adopted children may not be exploited for labour and protects orphans from exploitation or coercion into prostitution.<sup>441</sup> However, HIV/AIDS has resulted in numerous orphans, many of whom have been forced to leave school, having to care for sick relatives and are potentially vulnerable to such exploitation.<sup>442</sup>

In respect of acceptable conditions of work, the minimum hourly wage for most full-time labour in the private sector is 2.90 pula, which is about U\$0.64.<sup>443</sup> This, of course, does not provide a decent standard of living for a worker and his or her family. The Ministry of Labour is responsible for enforcing the minimum wage, and each of the country's districts has at least one Labour Inspector. Civil service disputes are referred to an Ombudsman for resolution.<sup>444</sup> Private labour disputes are mediated by Labour Commissioners.<sup>445</sup> However, an insufficient number of commissioners has resulted in one- to two-year backlogs in resolving such disputes.<sup>446</sup>

Formal sector jobs generally pay well above minimum wage levels. Informal sector employment, particularly in agricultural and domestic service sectors, where housing and food are included, frequently pay below the minimum wage.<sup>447</sup> There is no mandatory minimum wage for domestic workers, and the Ministry of Labour does not recommend a minimum wage for them.<sup>448</sup>

The law also provides that workers who complain about unpleasant work and hazardous conditions may not be fired, and authorities effectively enforce this right.<sup>449</sup> The government's ability to enforce its workplace safety legislation is limited

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<sup>441</sup> Ibid., s 71 of the Employment Act.

<sup>442</sup> US Embassy – Gaborone (2007) *Reporting January 20*, p 10.

<sup>443</sup> Ibid., Unicef.

<sup>444</sup> Sections 5–9.

<sup>445</sup> Section 58(2) and (3) of the Employment Act.

<sup>446</sup> *ILO, Botswana: Labour Inspection Structure and organisation* [online] <http://www.ilo.org/Uba> (accessed 23 February 2010).

<sup>447</sup> US Department of State (2006) *Country Reports on Human Rights Practices*

<sup>448</sup> Sections 135 and 137–138 of the Employment Act.

<sup>449</sup> Sections 104 and 106.

by inadequate staffing and unclear jurisdictions among different ministries.<sup>450</sup> Generally, employers provide for their worker's safety, except in the construction industry where much needs to be done.<sup>451</sup> Illegal immigrants from poorer neighbouring countries, mainly Zimbabweans, are easily exploited and abused in labour matters since they would be subject to deportation if they complain about their employers.<sup>452</sup>

### **6.7.1 Government policies and programmes to eliminate the worst forms of child labour in Botswana**

It is interesting to note that the Government of Botswana is working with ILO–IPECL on a US dollar-funded regional child labour project in southern Africa. Activities in this US\$5 million project in Botswana include research on the nature and incidence of exploitive child labour and efforts to build the capacity of the government to address child labour issues.<sup>453</sup> The American Institute for Research, with the support of the Government of Botswana, is implementing another regional US dollar-funded project. This US\$9 million project has been designed to combat the worst forms of child labour through the provision of quality accessible education for children who are working or at risk of working. This project aims to prevent 1 625 children from engaging in exploitive labour and the possible occurrence of forced labour in Botswana.<sup>454</sup>

The government has included a module on children's activities in its 2005/06 National Labour Force Survey. This will help to identify the extent and location of child labour in Botswana.<sup>455</sup>

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<sup>450</sup> See *Labour Inspection Reports* (2009).

<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*

<sup>453</sup> ILO–IPECL (2003) *Supporting the Time-bound Programme to Eliminate the Worst Forms of Child Labour in South Africa's Child Labour*. (September) pp, 38–39.

<sup>454</sup> American Institute for Research *Reducing Exploitive Child Labour Southern Africa* (RECLISA) project document Washington.

<sup>455</sup> US Department of State (2007) *Country Reports on Human Rights Practices*, p 6.

## 6.8 The Tanzanian Experience of Forced Labour and the Implementation of the International Labour Organisation Convention of 1930

Tanzania ratified both ILO Convention 29 (Forced Labour Convention 1930) and Convention 105 (Abolition of Forced Labour Convention, 1957) on 30 January 1962. The Law prohibits forced or compulsory labour, and labour law passed during the year 2005 specifically prohibits forced labour by children and closed some existing loopholes in the national constitutional ban on such labour.<sup>456</sup> Although the above law exists, the media still report on forced and compulsory labour by children in Tanzania.<sup>457</sup>

The Prisons Act, for example, still permits prisons to require prisoners to work without pay on projects in the prison, such as on agriculture so that the prison can be self-sufficient.<sup>458</sup> Prisoners are used to forced labour on projects outside the prison, such as on road repair and government construction projects.<sup>459</sup>

In some companies in Tanzania workers are forced to work overtime without any remuneration. This was confirmed in a 2004 survey of the mining company, where it was established that 85 per cent of workers interviewed confirmed this.<sup>460</sup> Unfortunately, the national law does not expressly prohibit all forms of trafficking, and reports confirm that women and children are trafficked to, from, and in the country for the purposes of forced labour and sexual exploitation. Most victims are trafficked internally: boys are trafficked for exploitative work on farms, in mines, and in the large informal sector, while the girls from rural areas are generally trafficked to the towns for involuntary domestic labour. Girls are reportedly trafficked

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<sup>456</sup> Sections 5 and 6 of the Employment and Labour Relations Act 6 of 2004.

<sup>457</sup> See the *Report for the INTO General Council Review of Trade Policies of Tanzania* (25 and 27 October 2006) Geneva.

<sup>458</sup> Prisons Act.

<sup>459</sup> See the Tanzanian Prisons Act.

<sup>460</sup> *Ibid.*

to South Africa, Saudi Arabia, the UK and possibly other European countries for forced domestic labour.<sup>461</sup>

In the same vein, children in low-income families are at significant risk of being trafficked, and girls are more vulnerable than boys since girls are considered more of an economic burden on their families. Girls who complete primary school but do not enter secondary school have been found to be at a higher risk.<sup>462</sup>

As regards the abolition of child labour, the law established in this area has not been as effective as expected. For example, the law establishes 14 years as the minimum age for contractual employment, in which children can only be employed to do light work unlikely to be harmful to their health and development.<sup>463</sup>

Unfortunately, the minimum employment age is inconsistent with the age for completing educational requirements. The law stipulates that children under the age of 18 years shall not crew on a ship or be employed in a mine, factory or any other worksite, including non-formal settings and agriculture, where work conditions may be considered hazardous.<sup>464</sup>

The national law provides for seven years of compulsory education, through to the age of 15. Primary education is compulsory, free and universal on both the mainland and in Zanzibar. But the 2005 Unicef report on Tanzania shows that there are few schools, teachers, books and other educational materials to meet the growing demand.<sup>465</sup> In some cases parents have to pay for books, uniforms and school cases, and they are unable to meet these expenses.

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<sup>461</sup> US Department of State (2008) 'Trafficking in Persons Report – 2008: Tanzania'. See also Government of Tanzania, *The Anti-Trafficking in Persons Act*, IV 30.

<sup>462</sup> See *Unicef Report on Tanzania* (2005).

<sup>463</sup> Section 5 of the Employment and Labour Relations Act 6 of 2004.

<sup>464</sup> *Ibid.*

<sup>465</sup> Unicef miscellaneous and World Bank surveys, 'Child Economic Activity', 'School Attendance', and 'Combined Working and Studying Rates', 2005–2010. See also 'Tanzania Statistics on Working Children and School Attendance'.

The 2005 Unicef report also states clearly that the net primary school attendance rate was 47 per cent for boys and 51 per cent for girls. In a few regions the rate of enrolment in school for girls generally declined in 2005 with each additional year of schooling, largely because girls often have to care for younger siblings, do household work and enter early marriages.

The ILO and Unicef report that children who leave home to work as domestic labourers in other towns or villages are often subjected to commercial sexual exploitation.<sup>466</sup> According to the Conservation, Hotel, Domestic and Allied Workers Union (hereinafter 'CHDAWU'), and the ILO, the majority of domestic child labourers in the country are girls, mostly between the ages of 13 and 15. Most of them work between 12 and 14 hours every day, 7 days a week, without rest or being compensated for the extra time worked: they often work under abusive and exploitative conditions.<sup>467</sup>

The ILO has also estimated that 3 000 to 5 000 children are engaged in seasonal employment on commercial farms, sometimes under hazardous conditions.<sup>468</sup>

In mining regions between 1 500 and 3 000 children work in unregulated gemstone mines as 'snake boys' working with explosives and crawling through narrow tunnels to help position mining equipment.<sup>469</sup>

On the island of Zanzibar there is widespread child labour, and children are generally used in fishing, clove picking, domestic labour, petty business such as selling cakes,

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<sup>466</sup> UNESCO, *From Street Child to Star Pupil* <http://www.unesco.org/en/efarereports/2010> (accessed June 2010). See also 'Government of Tanzania Review on Enforcement of Child Labour Legislation in Ten Selected Districts in Tanzania'.

<sup>467</sup> See UN Committee on the Rights of the Child (2008) *Summary Record of the 1363rd Meeting: Consideration of Reports Submitted by States Parties CRC/C/SR* para 66.

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*



and commercial sexual exploitation.<sup>470</sup> However, with the enactment of the Employment and Labour Relations Act of 2004<sup>471</sup>, the Tanzanian Government has tried to minimise child labour in Zanzibar. It is unfortunate that with the above Act, the enforcement of child labour laws is still weak and this remains a problem in Tanzania.<sup>472</sup> Today the Ministry of Labour remains ultimately responsible for the enforcement of labour laws along with two new institutions established under the Labour Institutions Act<sup>473</sup>, namely the Commission for Mediation and Arbitration (CMA) and the Labour Court. In 2005, more officers and inspectors were recruited and trained so as to increase the national labour inspection force, and yet, not much has been achieved on both the mainland and in Zanzibar to eliminate child labour in Tanzania.<sup>474</sup> Restrictions on exercising labour rights are worst on the island territories of Zanzibar and Pemba where a distinct legal regime for labour rights prevails.<sup>475</sup>

Among the SADC countries that form part of this research, Tanzania appears to have a very poor record of forced or compulsory labour in addition to child labour. In view of this it is strongly recommended that the Government of Tanzania enforces urgently and without delay numerous measures to tackle the problems on forced labour identified above.

## **6.9 The Swaziland Experience of Forced or Compulsory Labour**

The labour law in Swaziland prohibits forced or compulsory labour of children, and the government rarely has to enforce this prohibition<sup>476</sup>. However, U.S. reports

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<sup>470</sup> US Department of Labour (2010) *Trip Report of Site Visit to Tanzania: May 15–28*. Washington DC. See also Government of Tanzania (2006) *Key Findings on Child Labour in Tanzania: Based on the Analysis of Findings of the Integrated Labour Force Survey* Dar es Salaam.

<sup>471</sup> See ss 5, 6 and 7 of the Employment Labour Relations Act of 2004.

<sup>472</sup> USDoL report *Ibid*.

<sup>473</sup> US Embassy – Dar es Salaam (2009) *Reporting January 30* para 8. See Government of Tanzania. *Review on Enforcement of Child Labour Legislation in Ten Selected Districts in Tanzania*, p 12.

<sup>474</sup> USDoL report *Ibid*.

<sup>475</sup> *Ibid*.

<sup>476</sup> Employment Act of 1980 Article 97–99. Also see the Constitution of Swaziland.

confirm that such practices do occur<sup>477</sup>. The 1998 Administrative Order allowed forced labour for the reason that it reinforced the tradition of residents performing tasks for chiefs without receiving compensation and penalised them for non-participation.<sup>478</sup>

The law also prohibits child labour, but child labour is found to be a serious problem in Swaziland<sup>479</sup>. The Employment Act of 1980<sup>480</sup> distinguishes between a 'child' (under 15 years) and the ages of 15–18, but it does not establish a minimum age of employment<sup>481</sup>. The law prohibits hiring a child below the age of 15 in an industrial undertaking, except in cases where only family members are employed in the firm or in a technical school where children are vulnerable to joining the workforce early, and the law does not guarantee a primary school education.<sup>482</sup> Legislation limits the number of night hours that children may work on school days and also limits children's work hours per week<sup>483</sup>. Employment of children in the formal sector is not common<sup>484</sup>. However, children below the minimum age are frequently employed in the agricultural sector, particularly in the eastern cotton-growing region.<sup>485</sup> Children are also employed as domestic workers and as herd boys in rural areas.<sup>486</sup> Children

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<sup>477</sup> US Embassy – Mbabane (2009) *Reporting* January 20, paras e–f. See also Solidarity Centre (2006) *Justice for All: The Struggle for Worker Rights in Swaziland* September Washington D.C [online] <http://www.solidaritycentre.org/files/swazilandFinal.pdf>.

<sup>478</sup> See the *Administrative Order* No. 6 of 1998.

<sup>479</sup> US Department of State (1980) 'Country Report 2009: Swaziland' s 6d. See also Government of Swaziland (1980) *King and Parliament of Swaziland: The Employment Act* Part 1: Preliminary, article 97(1) [online] [http://www.doingbusiness.org/Documents/LawLibrary/Swaziland-Employment-Act-1980\(Excerpts\).pdf](http://www.doingbusiness.org/Documents/LawLibrary/Swaziland-Employment-Act-1980(Excerpts).pdf) See also *Internationally Recognised Core Labour Standards*, p 19.

<sup>480</sup> See the Employment Act of 1980.

<sup>481</sup> US Embassy – Mbabane (2010) *Reporting 3 February* para 1.3.

<sup>482</sup> See UNESCO (2008) *Education for All Global Monitoring Report: 2009; Overcoming Inequality: Why Governance Matters* Paris: Oxford University Press.  
<http://unesdoc.unesco.org/images/0017/001776/177683e.pdf>.

<sup>483</sup> See the Employment Act of 1980.

<sup>484</sup> ILO–IPEC (2009) *Action Against Child Labour: IPEC Highlights 2008* February Geneva: ILO–IPEC, p. 34.

<sup>485</sup> ILO–IPEC, *Ibid*.

<sup>486</sup> See the US Department of State Website at <http://www.state.gov>.

are victims of prostitution and trafficking<sup>487</sup>. The Ministry of Enterprise and Employment Department of Labour are responsible for enforcement, but its effectiveness is limited by lack of personnel<sup>488</sup>. This Ministry sets wage scales for each industry<sup>489</sup>. There is a legally mandated sliding scale of minimum wages depending on the type of work performed.<sup>490</sup>

The minimum monthly wage for a domestic worker is approximately US\$45 (300 emalangeni), for an unskilled worker US\$63 (420 emalangeni) and for a skilled worker US\$90 (600 emalangeni).<sup>491</sup> These minimum wages generally do not provide a decent standard of living for a worker and his or her family.

In a normal work environment, there is a maximum 48 hour work week in the industrial sector, except for security guards, who work up to 6–12 hour shifts per week.<sup>492</sup> The labour law permits all workers one day of rest per week and provides for premium pay for overtime<sup>493</sup>. Most workers receive a minimum of 12 days' annual leave.<sup>494</sup> The Labour Commissioner often conducts inspections in the formal sector. However, these inspections generally do not result in enforcement of the law<sup>495</sup>. General working conditions in Swaziland are not favourable to employees. There are allegations that employers pay employees at casual or probationary wage scales, regardless of their position or length of service, and that some supervisors physically abuse employees.<sup>496</sup> Media reports confirm that on 25 August 2005, the Acting Chief Justice of the Court of Appeal ordered the Sun Taylor Company to pay a woman

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<sup>487</sup> UNDP (2009) *Human Trafficking: Red Light 1* September [online] <http://www.undp.org.sz/index/php> (accessed 15 January 2010).

<sup>488</sup> US Embassy – Mbabane, *Ibid.*

<sup>489</sup> See Industrial Relations Act of 2000 as amended 2005. Section 61. Also see US Department of State (2009) 'Swaziland', in *Country Reports on Human Rights Practices – 2009*. Washington, D.C..

<sup>490</sup> *Country Report on Human Rights Practices, Ibid.*

<sup>491</sup> Swaziland Employment Act of 1980.

<sup>492</sup> Employment Act of 1980, *Ibid.*

<sup>493</sup> *Ibid.*

<sup>494</sup> *Ibid.*

<sup>495</sup> ILO–IPEC *TECL Implementation Plan – Swaziland*, pp 5–7.

<sup>496</sup> See Foundation for Socioeconomic Justice report in 2008.

US\$2 064 (13 829 emalangeneni) in damages, after a supervisor had slapped the woman twice in the face on 21 January 2005.<sup>497</sup>

In Swaziland forced labour and child labour is a serious problem. The enactment of the Administrative Order in 1998 rekindled forced labour. This is a situation where citizens can perform various tasks for the chief of the locality without compensation. This is an abuse and it negates the principle of democracy.

Conclusively, the Swaziland Government must discourage this forced labour at all costs. Among all the SADC countries selected for this research, Swaziland remains the only country where forced labour is still supported by legislation. This confirms that Swaziland now ranks first among other SADC countries where forced labour is still very common. Child labour is another problem in Swaziland. The Government of Swaziland should make specific efforts to end child labour.

## **6.10 The Zambian Experience of Forced Labour and the Implementation of the International Labour Organisation Convention of 1930**

### **6.10.1 Incidence and nature of child labour in Zambia**

Statistical records from the Zambian Central Statistical Office estimated that 11.6 per cent of children between the ages 5 and 14 years in Zambia were working in 1999.<sup>498</sup> The highest rates of child work are found in the agricultural sector. Children can also be found working in commerce, various business and personal service occupations, fisheries, and manufacturing.<sup>499</sup> Children also reportedly work in the informal sector in domestic service, the hospitality, industry and in transportation.<sup>500</sup>

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<sup>497</sup> *The Times of Swaziland* Sunday (2008), 27 June.

<sup>498</sup> Official Statistical Record from Zambian Central Statistical Office (1999).

<sup>499</sup> See Matenga, F (2208) *Final Report: Rapid Assessment of Child Labour in Non Traditional Mining Sector in Zambia* pp 10, 12, 44–47. Also see ILO–IPEC *Support to Time Bound Measures in Zambia*, p 9. See UCW *Understanding Children's Work in Zambia*, pp 26, 67, 73.

<sup>500</sup> Matenga, *Ibid.*

It is common to find children working in hazardous industries and occupations, including the construction industry.<sup>501</sup>

In view of the fact that HIV/AIDS has claimed the lives of many adults in Zambia, there are a growing number of orphans who have been forced to migrate to urban areas, increasing the population of street children and they are forced by economic hardship to do various forms of work.<sup>502</sup> Street children are especially vulnerable to commercial sexual exploitation, and the problem of child prostitution is wide.

Zambia is a source and transit country for women and children trafficked for the purpose of exploitation.

## **6.10.2 Child labour laws and enforcement**

The Zambian Constitution establishes 15 as the minimum age for employment.<sup>503</sup> The Employment of Young Persons and Children Act of 2004 prohibits children up to the age of 18 from engaging in hazardous work.<sup>504</sup> The Zambian Parliament passed the New Employment of Young Persons and Children Act in 2004 and this Act recognises the ILO Convention on Minimum Age and the ILO Convention on Worst Forms of Child Labour. Although it does not have a comprehensive trafficking law, the Constitution prohibits *forced labour* and the trafficking of children and young persons.

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<sup>501</sup> UCW, *Understanding Children's Work in Zambia*, pp 26, 67, 73. See also Plan International, *Gender Based Violence: A situation in Chadiza, Chibombo, Mansa and Mazabuka*, 3. See ILO–OPEC (2008) *Zambia: Child Labour Data Country Brief* 4 January Geneva.

<sup>502</sup> ILO–OPEC *Rapid Assessment Report on HIV/AIDS and Child Labour [Stated in Six Selected districts of Zambia: Lusaka, Luanshya, Livingstone, Kapiri Mposhi, Katete and Chipata]*, vi, x. Plan International, *Gender Based Violence: A situation in Chadiza, Chibombo, Mansa and Mazabuka*, pp 3, 19, 23.

<sup>503</sup> See article 24 of the Constitution of the Republic of Zambia (As amended by Act 18 of 19996). See also *Employment Act, Cap. 268 of 1997, section 12 (1)*.

<sup>504</sup> Government of Zambia (2004) *Employment of Young Persons and Children Act (Amendment)*, 2004, Part 1, s III.

In conclusion, this chapter has illustrated the various measures currently taken by some SADC countries to minimise all forms of forced and child labour in the region.

The Ministry of Labour and Social Security (hereinafter 'MLSS') is responsible for enforcing labour laws and has established Labour Units specifically to address issues relating to child labour. To carry out this function, the units conduct monthly inspections of workplaces and the Zambian Government has also given sufficient resources to these units so as to be able to perform their functions in terms of ILO standards.

### **6.10.3 Current government policies and programmes to eliminate the worst forms of child labour**

The Government of Zambia is currently implementing a number of initiatives to combat forced and child labour. For example, provision is now made for vocational training for the youth who would have been victims of forced and child labour.<sup>505</sup> There are also programmes that are used to discourage children from participating in child labour.<sup>506</sup>

It should also be noted that the US Department of Labour and the Zambian Ministry of Education are collaborating on an education project that will help to educate schoolchildren so that they will no longer be victims of child labour.<sup>507</sup>

The current national policy on education, 'Educating Our Future', focuses primarily on a new curriculum for basic education that is more relevant to the society. This will enable the children to be gainfully employed, especially for those who cannot further their education to higher institutions. With support from various donor groups, the Zambian Government is now implementing the universal primary education called the *Basic Education Subsector Investment Programme* (hereinafter 'BESSIP').<sup>508</sup>

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<sup>505</sup> US Department of State (2003) *Country Report – 2003: Zambia*.

<sup>506</sup> *Ibid.*

<sup>507</sup> US Department of State (2003) *Country Reports – 2003: Zambia* s 5.

<sup>508</sup> US Embassy – Lusaka (2010) *Reporting, February 8*.

In conclusion, this chapter illustrates the various measures currently taken by some SADC countries to minimise all forms of forced and child labour in the region. The next chapter (Chapter Seven) examines the issue of discrimination in employment and occupation in the SADC region in respect of ILO standards.

## CHAPTER SEVEN

### THE ELIMINATION OF DISCRIMINATION IN EMPLOYMENT AND OCCUPATION IN SOUTHERN AFRICAN DEVELOPMENT COMMUNITY COUNTRIES IN RESPECT OF INTERNATIONAL LABOUR ORGANISATION STANDARDS

#### 7.1 Introduction: The Nature and Contents of International Labour Organisation Standards in Respect of Discrimination (Employment and Occupation) Convention of 1958 (No. III)

The discrimination (Employment and Occupation) Convention no. III was adopted on 15 June 1960 and in 1995 it was ratified by 119 countries. The Convention clearly fixes the general objective that states are to pursue when they ratify it, and does not exclude any category of persons from its coverage, the Convention is therefore of universal coverage.<sup>509</sup>

The major subjects covered by the Convention, in addition to its basic principle, are the notions of 'employment' and of 'occupation', and the various grounds for discrimination: race and colour, sex, religion, political opinion, national extraction and social origin.<sup>510</sup>

- (a) *Basic principle:* Every state that ratifies the Convention 'undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view of eliminating any discrimination in respect thereof' (see Article 2). The national policy should incorporate, as an objective, the elimination of discrimination on the grounds listed in the Convention; this principle is

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<sup>509</sup> *Discrimination in the Field of Employment and Occupation* ILC 40th Session 1957, Reports VII(1) and (2); Reports IV (1) and (2), 42nd Session; *Proceedings*, 42nd Session 1958 especially pp. 709–717.

<sup>510</sup> De la Cruz, H B et al. (1996) *The International Labour Organisation* Boulder Colorado: Westview Press, pp 257–262.



developed in Article 3, which refers to the measures laid down to ensure the application of the principle of equality.<sup>511</sup>

- (b) *Notions of ‘Employment’ and ‘Occupation’*: The term *employment and occupation* includes ‘access to vocational training, access to employment and to particular occupations, and terms and conditions of employment’ (Article 1(3)). Historical records show that during the first discussion leading to the Convention’s adoption, it was decided to insert the definitions of ‘employment:’ and ‘occupation’ to make it clear that guaranteeing access to employment would not be sufficient, and that it was necessary also to ensure that everyone had the free choice of an occupation.<sup>512</sup> It should also be noted that this Convention is applicable not only to the treatment accorded to a person who has already gained access to employment or to an occupation, but is extended expressly to cover the possibility of gaining access to employment or occupation.<sup>513</sup>
- (c) *Measures regarded as discrimination*: The term ‘discrimination’ includes ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’ (Article 1, paragraph 1(a)).

The Committee of Experts has distinguished three elements in the definition. The first is *factual*, which is the difference in treatment (the existence of a distinction, exclusion or preference without indication whether it arises from an act or an omission). The second is the *ground* on which the difference of treatment is based, and the third is the *objective result* of this difference (nullifying or impairing equality of opportunity or treatment).<sup>514</sup>

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<sup>511</sup> *Ibid.*, paras 18–20.

<sup>512</sup> Report IV (1) extracts from the *Report of the Conference Committee*, pp 6 and 7. It was also declared in this report that the self-employed were covered as well as employed persons.

<sup>513</sup> *Ibid.*, para 76.

<sup>514</sup> *Ibid.*, para 22.

- (d) *Race and colour:* Although the Convention refers separately to race and colour, these two grounds for discrimination are often considered together. Race and colour may be considered as two parts of the same idea. On the issue of race and colour, the first office report leading to the Convention's adoption stated in terms that have lost none of their relevance that while an ethnic group might in a given situation have lower employment capabilities than other groups, any distinction imposed solely on race, without regard to the extent to which the individual might have overcome obstacles that held him back, must be held to be discriminatory.

The office report also referred to the origin of distinctions on continents in which there were ethnic groups of different origin, in particular 'persons of European stock' with African or indigenous peoples. It stressed that 'the relations between individuals of European origin and those of African descent on the American continent were determined by the fact that the former were the descendants of free migrants with a relatively high degree of social evolution, while the latter were mostly descendants from forced slave populations. As regards indigenous peoples, the office noted that a similar situation had arisen in which the system of wage employment had been introduced to indigenous population by other ethnic groups.'<sup>515</sup>

- (e) *Sex:* The ILO Convention on discrimination recognises that the situation of women and sex in the workplace is closely linked to their situation in society: when women are in an equal or nearly equal position to that of men, the adverse distinctions to which they are subject in access to employment are few; but when their situation is markedly inferior to that of men, the ILO office considered that it was probable that women would either be barred by custom from many types of employment outside the home, or that they would be restricted to the more menial work.<sup>516</sup> The Committee of Experts on the Discrimination Convention is of the view that distinctions based on sex include those that are made explicitly or

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<sup>515</sup> Report VII (1), pp 9 and 10.

<sup>516</sup> Report VII (1), p 12.

implicitly, to the disadvantage of one sex or the other, though it has noted that it is relatively rare to find cases in which discrimination on the basis of sex prejudices men.<sup>517</sup> On the contrary, it noted that distinctions based on pregnancy, confinement and childbirth are often discriminatory, as these situations can only affect women. In addition, and in relation to distinctions based on civil status, the Committee has found that although they are usually not discriminatory in themselves, they may become so when they require of persons of one sex, male or female, something not required of persons of the other sex.<sup>518</sup>

Another form of discrimination based on sex, and which has recently become a problem in the workplace is sexual harassment, or unsolicited sexual attention. The Committee of Experts has stated that, in order to be regarded as sexual harassment within the bounds of the Convention, the behaviour should also show one of the following characteristics: be justly perceived as a condition of employment or a precondition for employment; influence decisions taken in this field, or prejudice occupational performance; or humiliate, insult or intimidate the person suffering from such acts.<sup>519</sup>

To prove a case of sexual harassment is difficult. However, due to the frequent reporting on it, techniques to deal with the issue are now beginning to be evolved.

- (f) *Religion:* It has also been observed by the Committee of Experts that discrimination on religious ground often arises from an absence of religious freedom, or from a climate of intolerance, and, in some cases, from the existence of a state religion. The Committee has pointed out situations which may give rise to this kind of discrimination. One type of problem lies in the co-existence in communities of different religions,

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<sup>517</sup> CE (1988) *General Survey* para.38.

<sup>518</sup> *Ibid.*, para 57.

<sup>519</sup> *Ibid.*, para 45. See also a recent study on this subject contained in ILO (1992) *Conditions of Work Digest* Geneva: ILO.

which may give rise to similar problems to those encountered in multi-racial or multi-national communities. In other cases, discriminatory acts in employment derive more specifically from an attitude of intolerance towards persons who profess a particular religion, or who profess no religion. The committee has also noted that religious considerations hold a large place in public and social life, and in particular where one religion has been established as the religion of the state, care has to be taken that this will not lead to consequences as regards employment and occupation.<sup>520</sup> The Committee has also found that a large number of constitutions and other fundamental laws give statutory effect to the principle of non-discrimination on grounds of religious attitudes. In many cases, discrimination on the basis of religion is not an institutionalised nature, but results from practices contrary to constitutional provisions.

- (g) *Social origin*: The ILO office noted in the first report prepared with a view to the adoption of the Convention, that in some European countries in the nineteenth century, class origin was an element in admitting individuals to certain kinds of jobs.<sup>521</sup>

The office of the ILO pointed out that in some countries; a conscious attempt had been made to create a new 'intelligentsia', from persons of worker or peasant origin, and therefore suggested including social origin as one of the prohibited grounds of discrimination.<sup>522</sup> This problem of discrimination on the basis of social origin arises when an individual's membership in a class, a socio-occupational category or a caste determines his or her occupational future, either by denying access to certain jobs or activities or, on the contrary, assigning him or her to certain jobs. Legislative provisions and regulations which may have the effect of introducing discrimination in employment and occupation on the basis of social origin are frequent. They may consist of preferences afforded to

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<sup>520</sup> *Ibid.*, paras 48 and 51.

<sup>521</sup> *Ibid.*

<sup>522</sup> Report VII (1), pp 19 and 33.

individuals on the basis of their social origin or the merits of their parents as the situation was during the apartheid era in South Africa.

There are, however, certain societies where belonging to certain social classes or castes may have a profound effect, in spite of attempts to diminish the prejudice caused to individuals. India, with its lingering caste system and the existence of special legislation to protect the *harijan* or untouchables, and Japan with its long history of discrimination against the *buraku* are good examples.

Other measures that have been regarded as being discriminatory are the following:

- (a) Situations where there is a distinction, exclusion or preference that has the effect of nullifying or impairing quality of opportunity or treatment in employment or occupation as may be determined by the member after consultation with representative employers' and worker's organisations, where such exist, and with other appropriate bodies.<sup>523</sup>
- (b) Situation where an employer or employees are not treated fairly because of educational level, place of birth, family relationship with other worker in the enterprise, accent or physical appearance.

However, there are measures that are not considered discrimination by the ILO Convention on discrimination and these measures are:

- (a) *Inherent qualifications or requirement for a particular job*: This Convention provides that '[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.'<sup>524</sup>

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<sup>523</sup> Article 1 (1) (b) of the Convention.

<sup>524</sup> Article 1, para 2.

- (b) *Security of the state:* The Convention also provides that '[a]ny measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the state shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice'.<sup>525</sup>
- (c) *Special measures provided for in other ILO instruments:* The Convention expressly provides that '[s]pecial measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination'.<sup>526</sup>
- (d) *Special measures adopted after consultation with employer's and worker's organisation:* Paragraph 2 of Article 5 states that '[a]ny member may after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirement of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally reorganised to require special protection or assistance, shall not be deemed to be discrimination'.<sup>527</sup>

In view of the Committee of Experts' findings, this type of preferential treatment is designed to re-establish a balance, and is part of a broader effort to eliminate all inequalities. The Committee also emphasised that the use of terms such as 'positive discrimination' or 'reverse discrimination' that are used in some countries may lend themselves to confusion to the extent that it is not really a question of granting to these categories of workers more favourable treatment, but of providing them with

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<sup>525</sup> Article 4 of the Convention.

<sup>526</sup> Article 5 (1) of the Convention.

<sup>527</sup> Article 5 (2) of the Convention. Also see the report of the Committee on Discrimination, para 32.

conditions of work equal to those enjoyed by other workers.<sup>528</sup> This will be discussed in detail when the SADC region is examined.

Article 3 conclusively provides concrete measures, but not exhaustive content, to the policy requirement that ratifying states undertake and this includes the following:

- (a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
- (b) to enact such legislation and to promote such educational programmes as maybe calculated to secure the acceptance and observance of the policy;
- (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- (d) to pursue the policy in respect of employment under the direct control of a national authority;
- (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
- (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

In the light of the above measures, an attempt will now be made to examine how those SADC countries selected in this research have complied with the ILO Convention on discrimination.

In the light of the above measures, an attempt will now be made to examine how those SADC countries selected in this research have complied with the ILO Convention on discrimination.

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<sup>528</sup> Para 146 and n 70.

## 7.2 The South African Experience in the Post-Apartheid Era

In 1994 South Africa became a democratic nation and in 1996 she had adopted a Constitution, Chapter 2 of which contains an entrenched Bill of Rights. Section 9 of the Bill of Rights consists of the equality clause which states as follows:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National Legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9 of the Bill of Rights shows clearly that individuals in South Africa have constitutional rights not to be discriminated against. In the same vein, employees in the workplace environment are specifically protected against discrimination by section 6(1) and (2) of the Employment Equity Act of 1998. This section specifies a range of specific grounds that an employer is not permitted to take into account



when deciding on the fate of an employee; the specific grounds are precluding dismissal for any 'arbitrary ground' – being a consideration that either has nothing to do with, or should not in fairness be taken into account in, the assessment of an employee.

Section 6(1) and (2) of the EEA prohibits unfair discrimination and reads as follows:

6. Prohibition of Unfair Discrimination:

- (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
- (2) It is not unfair discrimination to –
  - (a) take affirmative action measures consistent with the purpose of this act; or
  - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.'

It is also important to know that discrimination can be either direct or indirect. Indirect discrimination is considered to have taken place when an employer chooses apparently non-discriminating criteria for selecting employees for dismissal, which have an unjustifiably disproportionate effect on employees of a particular category or class. The mere fact that it has such an effect does not, however, mean a dismissal is unfair. In the same approach, if an employer adopts last-in, first-out (hereinafter 'LIFO') principles among hourly paid workers in a retrenchment context, resulting in the selection of say, black workers alone, or members of a particular union, it will not necessarily be found to have been guilty of indirect discrimination or if it is, that such discrimination was unfair.<sup>529</sup> Case law in support of the above statement is that of

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<sup>529</sup> Grogan, J (2002) *Workplace Law* Cape Town: Juta & Co Ltd.

*CWIU v Johnson and Johnson (Pty) Ltd.*<sup>530</sup> In this case an employer had selected employees for retrenchment on the basis of LIFO, which was applied among female staff only. The union argued this amounted to a discriminatory dismissal, with which the Court agreed. The employer contended that the selection of women was justifiable on the basis that the remaining jobs were suitable for males only. However, the Court found that the employer had, in fact, afforded the union an opportunity to show why the selection criterion that had been used was unfair, and to indicate whether any of the female retrenches were willing to do the 'male-type' of work that remained.<sup>531</sup> Since this had not been done, the casual link between the selection criteria and the women's dismissal had been broken, precluding a finding that the dismissal had been rendered unfair by the use of the discriminatory selection criteria.

In a situation where an employee is dismissed for any of the impermissible reasons on the basis that he or she possesses or has acquired characteristics unsuited to the inherent requirements of his or her job, the justification is clearly in part related to capacity and in part operational. The same is true of dismissal on the ground of age.

### **7.2.1 Issues of unfair discrimination in South Africa**

Generally speaking, unfair discrimination is discrimination with an unfair impact. It has this impact where it imposes burdens on people who have been victims in the past patterns of discrimination, for example, discrimination against women or black people, or where it impairs, to a significant extent, the fundamental dignity of the complainant. In addition to this, where the discriminating law or action is designed to achieve a worthy and societal goal it may make fair what would otherwise be unfair discrimination.<sup>532</sup>

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<sup>530</sup> (1997) 9 *BLLR* at 1187 (LC).

<sup>531</sup> *Gqibitoli v Pace Community College* 20 (1997) *ILJ* at 1270 (LC). Also see *Harvis v Bakker and Steyger (Pty) Ltd* (1993) 14 *ILJ* at 1553 (IC); *Schweitzer v Waco Distributors* (1998) 10 *BLLR* at 1050 (LC).

<sup>532</sup> De Waal, J et al. (1999) *The Bill of Rights Handbook* Cape Town: Juta & Co Ltd, p 204.

One of the early cases illustrating the distinction between unfair discrimination and discrimination that is not unfair is the case of *Pretoria City Council v Walker*.<sup>533</sup>

In the above case, the task before the Constitutional Court was to examine two policies of the Pretoria City Council in which the residents of Pretoria paid electricity and water rates according to the amount consumed, whereas the people in Atteridgeville and Mamelodi paid a flat rate per household, no matter how much water and electricity they consumed.

Mr Walker, a resident in Pretoria, was not satisfied with this policy and because of this, he felt that the flat rate in Mamelodi and Atteridgeville was lower than what people in Pretoria were paying and this meant that the residents of Pretoria subsidised those two townships.

Mr Walker also argued that only the residents of Pretoria town were singled out by the council for legal action to recover arrears owed for services, while a policy of non-enforcement was followed in respect of Mamelodi and Atteridgeville.

This case was carefully examined by the Constitutional Court and on the basis of this, the majority of the judges argued that the first set of action that Walker complained of in terms of the flat rate paid by the residents of Atteridgeville and Mamelodi was not unfair discrimination. Unfair discrimination is differentiation that has an unfair impact on its victims. In this perspective, the Court first took into account that Walker was white, and therefore belonged to a group that had not been disadvantaged by the racial policies and practices of the past.

The Court argued further that in an economic sense, South Africans were neither disadvantaged nor vulnerable, having been benefited rather than adversely affected by discrimination in the past.

The Council's decision to confine the flat rate to Atteridgeville and Mamelodi, and to continue charging the metered rate in Pretoria town was dictated by circumstances.

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<sup>533</sup> *Pretoria City Council v Walker* (1998) 2 SA at 363 (cc); 1998(3), *BCLR* at 257 (cc) para 47.

For example, there was no metering equipment in township houses and because of this it was not possible to charge the residents on the basis of the water and electricity used by them. In these circumstances the policy of charging different rates of payment was not unfair discrimination.

However on the selective recovery of outstanding service charges by the Council the majority of justices of the Constitutional Court held that it was unfair discrimination because both payments could be enforced equally. The policy of not taking legal action to enforce payment of arrears had nothing to do with the ability of resident to pay. In these circumstances, the Council had not discharged the burden of showing that the racial discrimination was not unfair.

### **7.3 Discrimination in Recruitment and Selection Processes**

It should also be noted that, apart from dismissal, discrimination also occurs in the process of selection or recruitment. The case of *McPherson v University of KwaZulu-Natal and another*<sup>534</sup> illustrates this. The facts of this case are as follows:

In this case, the applicant, Mr McPherson was employed by the newly established University of KwaZulu-Natal on a five-year contract. The post of Head of Physics was advertised, with the requirement that only permanent members of the university staff at the level of senior lecturer or above could apply. The applicant felt he was qualified and applied for the post, but unfortunately he was informed that he did not qualify mainly because he was employed on a fixed-term contract.<sup>535</sup> In view of this, the applicant immediately referred the dispute to the CCMA, claiming that the university's appointment policy was discriminatory. After unsuccessfully seeking an order from the Labour Court interdicting the university from continuing with the selection process, the applicant resigned and assumed a better paid post at another University. In a further action in the Labour Court, the applicant contended that the University's recruitment and selection criteria had unfairly discriminated against him.

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<sup>534</sup> *McPherson v University of KwaZulu-Natal & Others* (2008) 2 BLLR 170 (LC).

<sup>535</sup> *Ibid.*, n 7 paras G–H.

He sought compensation. The first respondent contended that its policy was based on its operational requirements and the requirements of the job.<sup>536</sup>

Considering the fact that the applicant was the only member of the university's staff who had protested against the restriction of applicants for certain posts to permanent members of staff, the Court noted that the recruitment and selection process for posts of heads of schools were governed by the university's employment equity policy, which of course had to be read subject to the prohibitions against unfair discrimination in the Constitution of the Republic of South Africa, 1996 and the Employment Equity Act 55 of 1998.<sup>537</sup>

Furthermore, the Court noted that the respondent had many employees on its staff who, for historical reasons, had been appointed on fixed-term contracts, and that they constituted a vulnerable group. The Court was of the opinion that by excluding 'temporary' staff from consideration for certain senior positions, the respondent discriminated against the applicant. The Court also observed that the report of the sub-committee had been conspicuously silent on why certain posts should be reserved for permanent members of staff, nor had the respondent's witnesses given any convincing explanation. The Court argued that permanent members of staff may well resign earlier than those on fixed term contracts would be required to leave. In view of this, the Court is of the opinion that the exclusion of temporary employees was based, not on operational requirements, but on the personal preference of a few

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<sup>536</sup> *Ibid.*, n 29 para D.

<sup>537</sup> The first respondent places reliance, for the discriminatory eligibility requirement, on sections 6(2)(b) of the EEA to show that it acted fairly. Commenting on the justification of unfair discrimination, Murphy AJ (as he then was) in the case of *IMATU and another v City of Cape Town* (2005) 26 *ILJ* 1404 (LC), also reported at (2005) II *BLLR* 1084 (LC) had this to say:

'Unfair discrimination can be justifiable in our law. The justificatory stage is where the respondent seeks to justify otherwise unfair discrimination. In human rights or constitutional law, the notion of unfair discrimination focuses on the holder of the right, whereas justification focuses on the purposes, actions and reasons of the government, and not the rights of the holder. Factors that would or could justify interference with the right to equality are to be distinguished from those relevant to the enquiry about fairness. The one is concerned with justification, possibly notwithstanding unfairness; the other is concerned with fairness and with nothing else – *President of the Republic of South Africa v Hugo* 1997 (4) SA I (CC) at 36 B-C.

senior academics. This, therefore, rendered the eligibility requirement for the post of head of school unfairly discriminatory.

In terms of the relief given to the applicant by the Court, the Court held that from the moment the applicant was informed that he did not qualify for the post for which he had applied, he had to suffer humiliation of being a victim of unfair discrimination and that it was because of this humiliation that the applicant resigned.

Considering the facts of the case, the ruling Judge, Cele AJ, considered the equivalent of six months' remuneration for the applicant and the respondent was ordered to pay the applicant compensation of that amount, and his costs.

Further case law to illustrate the meaning of unfair discrimination is the case of *New Way Motor and Diesel Engineering Pty Ltd v Marsland*.<sup>538</sup> In this case the respondent employee suffered a nervous breakdown after his wife deserted him during a family holiday in KwaZulu-Natal. In view of this nervous breakdown, he was hospitalised for a month. He later returned to work and noted a marked change in the manner in which he was now treated by his managerial colleagues. He felt isolated as if he had a contagious disease. A few months later, after the respondent had resumed work, he relapsed into depression and took a week off. When he returned, he was told to 'pull himself together', then he was summoned to a disciplinary inquiry and given a final written warning for poor work performance. The respondent appealed and after this appeal he was instructed to vacate his office and denied access to his filing cabinet and other official documents.<sup>539</sup>

Other projects on which the respondent had been working were cancelled, and he was not allowed to make telephone calls. Other employees threatened to assault him. He was humiliated and abused verbally.

On the day his appeal against the final warning was to be heard, he was summoned to a meeting where he was told that his functions had been outsourced and that his

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<sup>538</sup> *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* (2009) 12 BLLR 1181 (LAC).

<sup>539</sup> *Ibid.* n II paras G–H.

post of marketing manager had become redundant. When he was physically threatened by the managing director, the respondent went home, never to return. The respondent claimed that he had been constructively dismissed for a reason which was automatically unfair. After the company closed its case without leading evidence, the Labour Court found that the respondent had been constructively dismissed, and that the dismissal constituted discrimination on the bases of the employee's mental condition and this is automatically unfair. The ruling Judges – DM Davis, AN Japie and RMM Zondo argued that the mental condition of the respondent was the dominant reason for the ill treatment to which he was subjected and discriminated against. The Judges also referred to the case of *Marsland v New Way Motor and Diesel*<sup>540</sup> in arriving at this judgement and the respondent was awarded compensation equal to 24 months' remuneration plus overtime pay of R77 658.75.

#### **7.4 The Meaning of Affirmative Action**

In terms of section 15(l) of the Employment Equity Act 55 of 1998 (hereinafter 'EEA'), affirmative action can be regarded as measures designed to ensure that suitably qualified persons from designated groups have equal employment opportunities and are equitably represented at all occupational levels in the workplace.<sup>541</sup>

Section 20(3) of the EEA confirms that a person may be suitably qualified for a job as a result of any one or more of the following:

- Formal qualification
- Prior learning
- Relevant experience; or
- The capacity to acquire, within a reasonable time, the ability to do the job.

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<sup>540</sup> 2008 II *BLLR* 1078 (LC).

<sup>541</sup> See s 15(l) of the Employment Equity Act 55 of 1998. Also see du Plessis, J V and Fouché, M A (2006) *A Practical Guide to Labour Law* Durban: Lexis Nexis Butterworths, p 82.

An employer is expected to review the above factors when considering whether a person is suitably qualified and has the ability to do the job based on the above factors. In the process of considering the above factors, it would be unfair discrimination if the applicant were discriminated against solely on the grounds of lack of relevant experience in terms of section 20(4) and (5) of the EEA. In the light of this section of the EEA, affirmative action measures implemented by a designated employer must include

- (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
- (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people.
- (c) Making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of designated employer;
- (d) Subject to subsection(3) measures to: –
  - (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and level in the workforce; and
  - (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of parliament providing for skills development.

It should be noted that the measures referred to in subsection (d) include preferential treatment and numerical goals, but excludes quotas.

## **7.5 The Concept of *Inherent Requirements of the Job***

The term *inherent* suggests that the possession of a particular personal characteristic (e.g., speaking of a particular language required for the job, the height of the individual to be able to perform the job, being a male or female, being free of disability or having acquired a particular skill required for the job) must be necessary for effective performance of his or her duties attached to a particular position.



However, it is also interesting to note that in English and Canadian courts it was held that employment criteria that are discriminatory would be defensible on objectively determinable grounds which correlate with a 'real need of the enterprise' and be necessary to meet that need.<sup>542</sup> This notwithstanding, there are limits to the degree to which an employer can rely on customer preference or desire. For example, male customers' preference for a female bartender or airline steward may not be sufficient to justify limiting such position to a female.<sup>543</sup>

## **7.6 Unfair Discrimination and the Promotion of Affirmative Action**

It is important to state at the beginning of this discussion that the South African Constitution prohibits unfair discrimination and in view of the inequalities of the past, the Constitution is committed to substantive equality in which the right to equality includes protection against unfair discrimination. This substantive equality, however, requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld. This is different from formal equality which means the sameness of treatment: the law must treat individuals in the same manner regardless of their circumstances and this simply requires that all persons are equal bearers of rights.

Section 9(2) of the Constitution requires the State not to discriminate unfairly. In the case of employers, Section 9(4) imposes a positive obligation to eliminate unfair discrimination in the work place. However, there are circumstances where it is not unfair to discriminate.

## **7.7 Circumstances Where It Is Not Unfair to Discriminate**

There are a number of defences an employer can use to defend itself against a case of alleged unfair discrimination. For example, the implementation of affirmative action can be used by the employer as a defence against an alleged unfair discrimination.

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<sup>542</sup> *Ibid.*

<sup>543</sup> *Diaz v Pan American World Airlines Inc* 442 Fzd 1273 (9th Circ) (1981), cited by du Toit et al. (1996) *The Labour Relations Act of 1995*, p 404.

When employees are discriminated against as a result of the adoption of affirmative action measures, the employer must be able to show that it acted in terms of the affirmative action policy. This has been clearly illustrated in the case of *PSA v Minister of Justice and others*<sup>544</sup> in which the criteria adopted by the Department of Justice to promote blacks and women before highly experienced white men were stigmatised by the Court as irrational. But where affirmative action policies are implemented with specific guidelines and not haphazardly but of standard, then it is not regarded as unfair discrimination.<sup>545</sup>

In the case of *MWU obo Van Coller/Eskom*<sup>546</sup> the grievant, a white woman, was overlooked for promotion in favour of a 'coloured woman' although she had been recommended as the top candidate by a selection committee. The arbitrator held that it was not enough for an employer to rely upon 'generalised intention' to advance or protect persons or groups or categories of persons; the employer must rely on standards that have been developed for that purpose. Those standards must not exceed the adequate protection and advancement of the favoured groups or categories of persons.

The implementation of affirmative action must not undermine other members of the community and where this has occurred, section 2(a) and (b) of the EEA cannot be used as a defence for affirmative action.<sup>547</sup> In the case of *Department of Correctional Service v Van Vuuren*,<sup>548</sup> a white female employee was recommended to be the best candidate, a black man was appointed in terms of an affirmative action policy. It was held that there was no unfair discrimination against the white female employee. It was also pointed out in this case that affirmative appointments must be made to achieve adequate protection and advancement of person's disadvantages by unfair discrimination.<sup>549</sup>

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<sup>544</sup> *Public Servant's Association of South Africa v Minister of Justice* 1997 (5) BCLR at 577(T).

<sup>545</sup> *Ibid.*

<sup>546</sup> [1999] 9 BLLR at 1089.

<sup>547</sup> *Ibid.*

<sup>548</sup> Grogan, J (2000) *Workplace Law* Cape Town: Juta & Co Ltd, p 205.

<sup>549</sup> Mboa, M L M (2008) Lecture notes on Government and the Legal Environment of Business (ADNM 812).

Another interesting case is that of *George v Liberty Life Association of Africa Ltd.*<sup>550</sup> In this case the applicant, a white male, complained that the company's refusal to promote him was unfair because, *inter alia*, it had appointed a 'coloured outsider' on affirmative action grounds.

The Court noted that the composition of the workplace in South Africa was shaped by the legacy of racial discrimination and that inequality would be perpetuated unless employers were permitted to act positively in order to correct them, thus justifying the affirmative action and it was not regarded as unfair discrimination.

However, the Court suggested that affirmative action programmes should be subjected to two limitations: first, membership of a disadvantaged group was not in itself enough to justify favouring a person over other claimants; the beneficiary must, in addition, be shown to have suffered some personal disadvantage along with other members of his or her group.

The second limitation suggested by the Court related to the time frame in which affirmative action could remain an acceptable defence. It was argued that since affirmative action was a response to artificial abnormalities in the labour market, it must follow that it would, once again, become discriminatory and unjustified when equality was achieved.

On the issue of the proof of discrimination, the onus lies with the applicant (plaintiff) to prove that discrimination has occurred on grounds specified in section 9(3). After this the onus shifts to the respondent to show that the discrimination was not unfair.<sup>551</sup>

From the above discussion, it can be argued that affirmative action is an instrument used by employees who were disadvantaged in the past to protect them and also used for their own advancement in their respective workplace.

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<sup>550</sup> (1996) 17 *ILJ* at 571 (IC).

<sup>551</sup> See the case of *Harksen v Lane NO 1998 (I) SA 300 (CC)* para 55 in which the Court held that, when determining whether discrimination is unfair, one of the factors that must be taken into account is whether the complainant suffered in the past from patterns of disadvantage. See also *Pretoria City Council v Walker 1998 (2) SA 363 (CC)*.

## 7.8 Unfair Discrimination and Inherent Requirements of the Job

Another possible defence derived from the complaint of unfair discrimination is that it is based on an 'inherent requirement of the particular job'. This is used by an employer to defend him or herself if accused of unfair discrimination. The word 'inherent' suggests that possession of a particular personal characteristic must be necessary for effectively carrying out the duties attached to a particular position.

In view of this, English courts have held that employment criteria that are discriminatory will be defensible or objectively determinable grounds which correlate with a 'real need of the enterprise' and be necessary to meet that need. This defensible ground notwithstanding, there are limits to the degree to which an employer can rely on such defence.

In a situation where an employer decides to limit a particular job to applicants from a group without a solid justification, for example, on the inherent requirements of the job, such action can be regarded as unfair discrimination. But in a situation where a particular skill is required for the job, it will not be regarded as unfair discrimination.

The limits of the plea that discrimination is related to the 'inherent requirements of the particular job' illustrated in the case of a *Whitehead v Woolworths*.<sup>552</sup> In this case the post to which Ms Whitehead was appointed had been created because of a proposed merger between companies. This resulted in about 100 new employees being integrated into the division.

The company contended that attendant problems (including the loss of staff) had to be addressed urgently and new operational policies had to be developed. Given this need, the company had imposed a general requirement that the incumbent should be able to remain in the post for at least a year. Ms Whitehead was unable to furnish such a guarantee. The Court held that her inability to do so was irrelevant. Since the requirement of uninterrupted job continuity applied to all applicants for the position. Furthermore, that requirement was 'rationally and commercially supportable'. In

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<sup>552</sup> [1999] 8 *BLLR* at (LL).

other words, the company's decision to withdraw the offer of permanent employment might have followed from the fact that she was pregnant. This was not the true reason, and the true reason was simply that she would not be able to work for the full period when her services would be urgently needed. The result of this requirement may have been discriminatory to Ms Whitehead.

The Court also pointed out that from the available facts, Ms Whitehead was not specifically employed to perform a finite task. She was employed as a Human Resources manager and that time can never be shown to be of the essence in an indefinite-period contract, however pressing the particular tasks are that the employee is assigned.

For this reason, the Court concluded that one cannot ever say that a person is not suited to a position because of the possibility, or in this case the certainty of a future absence. Conclusively, the Court was of the opinion that Woolworth's conscious decision to turn Ms Whitehead down for the permanent position for the sole reason that she was pregnant was accordingly nothing other than discrimination against her because she was pregnant.

The Court held that the first question was whether the requirement of continuous employment was objectively justifiable. In the Court's view, it was not. The Court summarised its views on Woolworth's defence that it had discriminated against Ms Whitehead because of the inherent requirements of her position in these words:

The provision of the Act only excuses discrimination based on 'an inherent requirement of the particular job'. This implies that the job itself must have some particular attribute. This indispensable attribute, however, must relate in an inescapable way to the performing of the job required. Getting a job done within a prescribed period could well be an inherent job requirement. But to succeed on this ground a party relying thereon must satisfy the Court that time was of the essence. In any event the concept of inherent job requirement implies that an indispensable attribute must be job related. If the job can be performed without this requirement, as it can in this case,

then it cannot be said that the requirement is inherent and therefore protected under item 2(2)(c) of schedule 7 to the Act.

## **7.9 The Tanzanian Experience of the Implementation of the International Labour Organisation Discrimination Convention of 1958 (No. III)**

Tanzania has ratified the ILO Convention III (the Discrimination on Employment and occupation) 1958. This ratification took place in February 2002.

In Tanzania, while the law provides for equality of women, in practice women's rights are often not respected.<sup>553</sup> The existence of strong traditional norms still divides labour along gender lines and places women in a subordinate position in Tanzania.<sup>554</sup> However, progress on women's rights is more noticeable in urban areas.<sup>555</sup> Discrimination against women is most acute in rural areas, where women are relegated to farming and raising children and have almost no opportunity for wage employment.<sup>556</sup>

In Tanzania women are generally not discouraged from seeking employment outside the home. However, in the public sector, which employs 80 per cent of the salaried labour force, certain statutes restrict women's access to some jobs or hours of employment.<sup>557</sup>

In the workplace environment, the law bans sexual harassment against women,<sup>558</sup> male workers often harass women and the authority very often ignores this

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<sup>553</sup> See the *Report for the WTO General Council Review of the Trade Policies of Tanzania* Geneva, 25.

<sup>554</sup> US Embassy – Dar es Salaam (2009) *Reporting* 30 January, para. 2.

<sup>555</sup> See US Department of Labour (USDOL) (2010), *Trip Report of Site Visit by U.S. Department of Labour Official to Tanzania: May 15–28*, Washington, DC.

<sup>556</sup> US Department of State (2009) 'Country Reports – 2009: Tanzania' section 6.

<sup>557</sup> World Bank Reports (2007), *Programmes, Experiences, Challenges and the Way Forward for Tanzania*. Also see ILO–IPEC (2009) *Support for the Timebound Programme Technical Progress Report* (March).

<sup>558</sup> Employment and Labour Relations Act No. 6 of 2004, sections 5–7.

practice<sup>559</sup>. Statistical records in Tanzania show that although there is no official discrimination against persons with disabilities, in practice, persons with physical disabilities are effectively restricted in employment, education, access to health care and other state services due to physical health care and other state services due to physical barriers and a very limited existing budget.<sup>560</sup> The government does not mandate access to public buildings, transportation, or government services for persons with disabilities, and the government provides only limited funding for special facilities and programmes.<sup>561</sup>

However, there are reports that discrimination in housing, health care and education continues to occur against the estimated 3.5 million people in the country living with HIV/AIDS.<sup>562</sup> There are cases of private employers firing or refusing to hire persons based on the perception that they had HIV/AIDS.<sup>563</sup>

Although the Government of Tanzania has ratified the two international labour conventions aimed at the elimination of discrimination in respect of employment and occupation, the reality in Tanzania is very different. Discrimination persists against women and thus they are prevented from equal access to many jobs.<sup>564</sup> Many women, particularly in rural areas, are relegated to a position where they have almost no possibility for wage employment.<sup>565</sup> People with disabilities and those infected with HIV/AIDS face employment discrimination as there are reports showing

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<sup>559</sup> US Department of State (2006) *Report of Human Rights Practices* Washington: US Department of State.

<sup>560</sup> *Ibid.*

<sup>561</sup> US Department of State *Report on Human Rights, Ibid.*

<sup>562</sup> US Department of State 'Country Report – 2009: Tanzania'.

<sup>563</sup> International Confederation of Free Trade Unions (ICFTU) (2006) *Internationally Recognised Core Labour Standards in Tanzania: Report for the WTO General Council Review of the Trade Policies of Tanzania*, Geneva, 25 and 27 October, p 8  
[www.icftu.org/www/pdf/corelabourstandards2006tanzania.pdf](http://www.icftu.org/www/pdf/corelabourstandards2006tanzania.pdf).

<sup>564</sup> ICFTU (2006) *Ibid.*

<sup>565</sup> USDoL (2010). See also Government of Tanzania (2009) *Key Findings on Discrimination in Tanzania: Based on the Analysis of Findings of the Integrated Labour Force Survey, 2006* Dar es Salaam: USDoL January, p 13.

that private employers have fired workers on the perception that they were HIV-positive.<sup>566</sup>

## 7.10 The Swaziland Experience of Discrimination

Section 51(1) of the Swaziland Labour Code (Codes of Good Practice) Notice 2003 states as follows-:

- (1) Not every difference in treatment is discrimination to occur, there must be:
  - (a) a difference in treatment;
  - (b) based on one or more of the prohibited grounds; and
  - (c) a lack of justification
  
- (2)
  - (a) A difference in treatment can be deliberate. For example a municipality may deliberately appoint a man to work as an attendant in the men's public toilets
  - (b) A difference in treatment does not have to be deliberate. This occurs when a criterion is used that appears to be neutral on the face of it but operates in a way that impacts unfairly on the kinds of person contemplated in the list of prohibited grounds. An example may be that only persons who are six foot tall may apply to be fire – fighters. Because women are generally shorter than men, that criterion would accordingly have the effect of differentiating between men and women. But this does not automatically amount to discrimination on the grounds of sex. It only becomes discrimination if the criteria cannot be justified.
  
- (3) Prohibited grounds for discrimination.<sup>567</sup>
  - (a) trade union membership

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<sup>566</sup> *Reports for the WTO General Council Review of Trade Policies of Tanzania (25 and 27 October 2006)* Geneva: WTO.

<sup>567</sup> See details in s 51 (1) (2) (3) of the Swaziland Labour Code (Codes of Good Practice) 2003.



- (b) participation in the lawful activities of the trade union
  - (c) exercising a right conferred by the Labour Code
  - (d) the grounds set out in section 5 of the Labour Code
- (4) Justification for discrimination
- (a) Not every difference in treatment based on one or more of the prohibited grounds constitute discrimination.
  - (b) There may be good employment related reasons for treating people differently. There are two generally acceptable reasons for doing so. They are:–
    - (i) The inherent requirement of the job, for example the appointment of a male attendant in a men’s public toilet.
    - (ii) Positive action. It is generally regarded as fair to undo the effects of past discrimination by deliberately appointing members of the previously disadvantaged group over those who were the beneficiaries of the past discrimination.

In general terms, the law does not prohibit discrimination based on race, sex, disability, language, or social status, and women mixed-race citizens sometimes experienced governmental and societal discrimination. The labour law, however, forbids employers from discriminating on the basis of race, sex, or political affiliation.

Women occupy a subordinate role in Swaziland. In both civil and traditional marriages, wives are legally treated as minors, although those married under civil law may be accorded the legal status of adults if stipulated in a signed prenuptial agreement. A woman generally must have her husband’s permission to borrow money, open a bank account, obtain a passport, leave the country, gain access to land, and, in some cases, obtain a job.<sup>568</sup>

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<sup>568</sup> US Department of State (2009) ‘Swaziland’, in *Country Reports on Human Rights Practices* Washington, D.C: US Department of State. See also Integrated Regional Information Networks, ‘Swaziland: Hard times raise levels of abuse’ [www.irinnews.org/report](http://www.irinnews.org/report).

Unfortunately, the dualistic nature of the legal system has complicated the issue of women's rights. Since unwritten law and custom govern traditional marriage, women's rights are often unclear and change according to where and by whom they are interpreted.<sup>569</sup> Couples often marry in both civil and traditional ceremonies, creating problems in determining which set of rules apply to the marriage and to subsequent questions of child custody and inheritance in the event of divorce or death.<sup>570</sup>

It must be pointed out here that since Swaziland does not implement the Bill of Rights and it is not democratic, it has a bad human rights record and has not succeeded in eliminating discrimination when compared to the other SADC countries under investigation in this research.<sup>571</sup>

There is an urgent need for Swaziland to be more democratic and also to entrench the Bill of Rights. This call has been made in many quarters and it now time for the Swaziland Government to respond to these national and international calls.

### **7.11 Lesotho's Experience of the Implementation of the International Labour Organisation Discrimination Convention of 1958 (No. III)**

The Constitution of Lesotho prohibits discrimination based on race, colour, sex, language, political or other opinion, national or social origin, birth or other status, however, the Constitution also recognises customary law as a parallel legal system, and women's inheritance and property rights were severely restricted under the system.<sup>572</sup>

Unfortunately, domestic violence against women occurs frequently and is believed to be widespread. Traditionally, a wife may return to her 'maiden home' if physically abused by her husband. Under common law, wife beating is a criminal offence and

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<sup>569</sup> US Embassy – Mbabane (2008) *Reporting, January* paras e–f.

<sup>570</sup> US Department of State (2009) Report *Ibid.*

<sup>571</sup> *Ibid.*

<sup>572</sup> See s 5 of the Constitution which deals with discrimination, societal abuses and trafficking in persons.

defined as assault. However, few domestic violence cases are brought to trial. Punishment ranges from fines to incarceration. Judges have a wide degree of discretion in sentencing. Such behaviour is increasingly considered socially unacceptable due to advocacy and awareness programmes of the Gender and Child Protection Unit (hereinafter 'GCPU'), the Federation of Women Lawyers and other NGOs.<sup>573</sup>

The Constitution does not specifically prohibit sexual harassment, and there is a strong perception of widespread sexual harassment.

Both traditional law and custom discriminate against the right of women in areas such as property rights, inheritance, and contracts. Women have the legal and customary right to make a will and sue for divorce. However, under customary law, a married woman is considered a minor during the lifetime of her husband, and she cannot enter into legally binding contracts without her husband's consent.<sup>574</sup>

A woman married under customary law has no standing in a civil court. Government officials have publicly criticised this customary practice. The tradition of paying a bride price (*lobola*) is common. There is no evidence that *lobola* contributes to abuses against women's rights. *Lobola*, if not paid to the bride's family, allows the family the right to end marriage and the right to challenge custody of any offspring.<sup>575</sup>

In the workplace environment, the labour code prohibits civil servants from joining or forming unions, and only allows them to form staff association.<sup>576</sup> The government regards all civil servants as essential employees, therefore, labour rights, such as the right to strike or the right to negotiate do not exist.

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<sup>573</sup> <http://www.State.gov/g/drl/rls/hrrpt/2005> See the US Department of State *Country Report – 2005: Lesotho*.

<sup>574</sup> Labour Code Order 1992, s 132.

<sup>575</sup> See details in the indigenous law of Lesotho.

<sup>576</sup> Labour Code Order, 1992, Part XIII and also see the Civil Service rules and regulations.

The labour code prohibits anti union discrimination, and the government generally enforced this in practice.<sup>577</sup> There are reports that in 2004 some employers harassed union organisers intimidated and discriminated against union members, fired union activists, particularly in domestic industries. In 2004 unions referred 28 cases of unfair labour practices to the independent DDPR. In 13 of these cases agreement was reached, 2 of them were referred to the Labour Court for settlement, 1 of the cases was withdrawn and 16 were ongoing cases.<sup>578</sup>

From the above discussion, it can be argued that discrimination is still common in both the civil society and in the workplace environment in Lesotho. The Government of Lesotho needs to introduce new legislation that will eliminate the current rate of discrimination. The present labour code needs to be amended so as to increase the right of employees, thus minimising the current level of discrimination in the work environment. The Constitution needs to be amended so as to reflect a true democratic society.

#### **7.12 The Botswana Experience of the Implementation of the International Labour Organisation Discrimination Convention of 1958 (No. III)**

The Botswana Constitution prohibits governmental discrimination on the basis of ethnicity, race, nationality, creed, sex or social status, and the government generally respected these provisions in practice. However, the law does not prohibit discrimination by private persons or entities, and there was societal discrimination against women, person with disabilities, persons with HIV/AIDS, and minority ethnic groups, particularly the San.<sup>579</sup>

With regard to women, the law does not specifically prohibit domestic violence against women, and it remains a serious problem in Botswana. Under customary law

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<sup>577</sup> Labour Code Order 1992, section 196.

<sup>578</sup> Ministry of Labour and Employment (2005) *Annual Report of the Ministry of Labour and Employment*.

<sup>579</sup> See the Botswana Constitution s 152(2)(3)(4) and (5).

and in common law rural practice men still discriminate against women in that men have the right to chastise their wives.<sup>580</sup>

Greater public awareness and improved legal protection have resulted in increased reporting of domestic violence and sexual assault.<sup>581</sup> However, police are rarely called to intervene in such cases.

With regard to persons with disabilities, the law does not prohibit discrimination against persons with disabilities in education, employment, access to health care, or the provision of other state services. The government has a national policy that provides for integrating the needs of persons with disabilities into all aspects of government policy-making; however, the government does not mandate access to public buildings or transportation for persons with disabilities.<sup>582</sup>

There is some discrimination against persons with disabilities, and employment opportunities remain limited. Government-funded NGOs provide rehabilitation services and support small-scale work projects for workers with disabilities.<sup>583</sup>

In Botswana discrimination against persons with HIV/AIDS continues to be a problem, including in the workplace. The government-funded community organisations run programmes to reduce the stigma of HIV/AIDS. However, these community organisations are still in the embryonic stage.

The law also discriminates against and prohibits individuals who are homosexual, and there are instances of harassment of homosexuals.<sup>584</sup>

In terms of illegal immigrants, they are discriminated against in Botswana, especially those from poorer neighbouring countries such as Zimbabwe. They are also

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<sup>580</sup> See the US Department of State (2005) *Country Reports – 2005: Botswana*.

<sup>581</sup> *Ibid.*

<sup>582</sup> *Ibid.*

<sup>583</sup> US Department of State *Reports on Botswana on Human Right Practices 2005/2006*.

<sup>584</sup> US Embassy – Gaborone (2009) *Reporting 20 January 20*.

exploited in labour matters, since they would be subject to deportation if they filed grievances against their employers.<sup>585</sup>

It can also be argued conclusively that there is still discrimination in both the civil community and workplace environment. Many of the San ethnic group in Botswana are still being discriminated against by the other ethnic groups. The discrimination against women and people with disabilities is still rampant in Botswana. In view of this, there is an urgent need for the Botswana Government to revisit its labour laws and the constitution.

### **7.13 The Zambian Experience of the Implementation of the International Labour Organisation Discrimination Convention of 1958 (No. III)**

Article 23 of the Zambia Constitution of 1991 deals with the Protection from Discrimination in the following sections:<sup>586</sup>

- (1) Subjection to clauses (4), (5) and (7) no law shall make any provision that is discriminatory either of itself or its effect.
- (2) Subject to clauses (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this Article the expression 'discriminatory' means, affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinion. Colour or creed whereby persons of one such description are subjected or are accorded privileges or

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<sup>585</sup> The Botswana Centre for Human Rights, June 12, 2009; <http://ditswanelo.org/bw/press>.

<sup>586</sup> See the Zambia Constitution of 1991, Article 23.

advantages which are not accorded to persons of another such description.<sup>587</sup>

- (4) Clause (1) shall not apply to any law so far as that law makes provision –
- (a) for the appropriation of the general revenue of the Republic;
  - (b) with respect to persons who are not citizens of Zambia;
  - (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law
  - (d) for the application in the case of members of a particular race or tribe, of customary law with respect to that matter which is applicable in the case of other persons; or
  - (e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.<sup>588</sup>
- (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law. Clause (2) shall not apply to anything which is expressly or by necessary implication authorised

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<sup>587</sup> *Ibid.*

<sup>588</sup> *Ibid.*

to be done by any such provision or law as is referred to in clause (4) or (5).<sup>589</sup>

- (6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by Articles 17,19,20,21 and 22, being such a restriction as is authorised by clause (2) of Article 20 of the constitution.<sup>590</sup>
- (7) Nothing in clause (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

The law in Zambia actively discourages societal discrimination against those living with HIV/AIDS. However, there is strong societal discrimination against such individuals, and much of the population believe that persons infected with HIV/AIDS should not be allowed to work.<sup>591</sup>

There is also societal discrimination against homosexuals although the law does not specifically outlaw homosexuality.<sup>592</sup>

The Industrial and ILRA prohibits discrimination by employers against union members and organisers. However, the law is not always enforced.

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<sup>589</sup> *Ibid.*, see full discussion of the issues raised in this clause (4) and (5) in the *Country Self-Assessment Report, 2010* submitted to African Peer Review Mechanism.

<sup>590</sup> See detail in Article 20 of the Constitution.

<sup>591</sup> See Hüsken, S M C (2009) 'First Roundtable Meeting on Fisheries, HIV/AIDS and Social Development. Mongu, Western Province, Zambia. Meeting Report. Regional Programme Fisheries and HIV/AIDS in Africa: Investing in Sustainable Solutions' *The World Fish Centre Project Report 1973*.

<sup>592</sup> *Country Report on Human Rights* (2009). *Ibid.*



As regards the prohibition of child labour and minimum age of employment of children in any commercial, agricultural or domestic worksite, the Act also prohibits engaging a child in the worst forms of child labour as defined in international conventions.

The minimum age for employment is 15 or, with the consent of a parent or guardian, a child may be employed at the age of 16. Nevertheless, child labour is a problem in subsistence agriculture, domestic service, and informal sectors, where children under the age of 16 often were employed, and the law was not enforced.<sup>593</sup>

From the above discussion and with particular reference to the Constitution, it can be seen that the Zambian Government does not neglect the implementation of ILO Discrimination Convention No. III of 1958. Similarly, with the ILRA serious efforts are being made to minimise discrimination in workplace environment. The implementation of the above Convention is much better than the situation in Swaziland and Lesotho as indicated in this research.

#### **7.14 The Namibian Experience of the Implementation of the International Labour Organisation Discrimination Convention of 1958 (No. III)**

Section 5(2) of the Namibia Labour Act of 2004 deals with the prohibition of discrimination and sexual harassment in employment. This section stipulates as follows:

- (1) A person must not discriminate in any employment practice, directly or indirectly, against any individual on one or more of the following grounds:<sup>594</sup>
  - (a) Race, colour, or ethnic origin
  - (b) Sex, marital status or family responsibilities;
  - (c) Religion, creed or political opinion

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<sup>593</sup> Constitution of Zambia, article 24. Also see Employment Act (Chapter 268) of the Laws Zambia, III 12 (1).

<sup>594</sup> The Namibia Labour Act of 2004 (1).

- (d) Social or economic status
- (e) Degree of physical or mental disability
- (f) AIDS or HIV status; or
- (g) Previous, current or future pregnancy

(2) For the purpose of subsection (2)<sup>595</sup>-

- (a) it is for discrimination to differentiate without justification in any employment practices between employees who do work of equal value, or between applicants for employment who seek work of equal value; but
- (b) It is not discrimination –
  - (i) to take any affirmative action measure to ensure that racially disadvantaged persons, women or persons with disabilities –
    - (aa) Enjoy employment opportunities at all levels of employment that are at least equal to those enjoyed by other employees of the same employer; and
    - (bb) Are equitably represented in the workforce of an employer; or
  - (ii) To distinguish, exclude or prefer any individual on the basis of an inherent requirement of job;
  - (iii) To take any measure that has been approved by the Employment Equity Commission in terms of the Affirmative Action (Employment) Act, 1998; or
  - (iv) In the case of a female employee who is pregnant, to temporarily reassign the employee duties or functions, which are suitable to that employee's pregnant condition, provided that the reassignment does not lead to a reduction of the employee's emolument or any other benefits in respect of the employer's employment.

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<sup>595</sup> *Ibid.*, (2).

- (3) A person must not, in any employment practice or in the course of an employee's employment, directly or indirectly sexually harass an employee
- (4) Where sexual harassment is perpetrated by an employer against an employee that conduct does, for the purpose of section 32, constitute unfair dismissal which entitles the employee to remedies available to an employee who has been unfairly dismissed.

In a dispute alleging discrimination in terms of subsection 7, it is a complete defence to the allegation if:–

- (a) The decision taken by the employer was in compliance with –
  - (I) an affirmative action plan approved by the Employment Equity Commission in terms of the Affirmative Action (Employment) Act, of 1998.
  - (II) section 19(1) and (2) of that Act; and
- (b) the dispute arises from a choice by an employer between or among individuals, each of whom is-
  - (I) a woman
  - (II) a person with a disability; or
  - (III) a radically disadvantaged person

Apart from section 5(2) of the Labour Act of Namibia, the Constitution also prohibits discrimination that is based on race, creed, gender, or religion, and specifically prohibits 'the practice and ideology of apartheid', but unfortunately this has not been effectively enforced.<sup>596</sup>

There is still a high rate of domestic violence against women, including beating and rape. Traditional attitudes regarding the subordination of women exacerbated problems of sexual and domestic violence. Domestic violence is against the law, and the law defines rape in broad terms and allows for the prosecution, of spousal rape.

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<sup>596</sup> US Department of State (2006) *Report on Human Rights Practices of Namibia*.

The law prohibits discrimination against women, including employment discrimination; however, men dominated positions in upper management. The Ministry of Labour and Social Welfare and the Employment Equity Commission which report to the Minister of Labour, were responsible for problems involving discrimination in employment.<sup>597</sup> The law prohibits discriminatory practices against women married under civil law, but women who married under customary law continue to face legal and cultural discrimination. Traditional practices that permit family members to confiscate the property of deceased men from their widows and children still exist. In 2003 the Legal Assistance Centre successfully litigated on behalf of several widows and orphans who were victims of property grabbing; most cases were settled out of court.<sup>598</sup>

In Namibia, although the law prohibits discrimination, there is still discrimination especially against women and people with HIV/AIDS and the San who are the earliest known inhabitants of Namibia.

The government recently took measures to end societal discrimination against the San, including seeking their advice about proposed legislation on community held lands and increasing their access to education. Despite these measures, many San children do not attend school.<sup>599</sup>

There is also discrimination against persons with disabilities, although the law does not allow this. Discrimination of homosexuals does occur and the human rights groups in Namibia have spoken vehemently against it. Similarly, the law prohibits anti-union discrimination and in most of the workplace environment, there are few

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<sup>597</sup> Government of Namibia (2005) *Namibia Child Activities Survey: Report of Analysis*, Ministry of Labour and Social Welfare, pp 51 and 62.

<sup>598</sup> US Embassy – Windhoek (2010) *Reporting*, 5 February s 1, para 2, s 2, para 3. See also ILO–IPEC *Implementation Plan of TECH, Phase 1 8–9*. See also US Embassy – Windhoek (2008) *Reporting* 16 January 2008, para 3.

<sup>599</sup> See Namibia Country Report based on UCW analysis of ILO SIMPOC, UNICEF MICS, and World Bank Surveys, *Child Economic Activity: School Attendance, and Combined Working and Studying Rates*, 2005–2010.

See also UNDP (2008) *Human Development Report*.

instances of companies failing to reinstate workers who were fired for union activities.<sup>600</sup>

The above discussion shows that to some extent, the Namibia Government has achieved some level of success in the implementation of ILO Discrimination Convention 1958 (No. III). But much needs to be done in terms of international standards as expected by the United Nations.

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<sup>600</sup> US Department of State (2009) 'Namibia' in *Country Reports on Human Rights Practices – 2009* Washington D.C. 11 March s 7.

Also see ILO–IPEC *Towards the Elimination of the Worst Forms of Child Labour (TECL)*, Phase 11.

## **CHAPTER EIGHT**

### **THE IMPLEMENTATION OF INTERNATIONAL LABOUR ORGANISATION CONVENTION AND RECOMMENDATION OF OCCUPATIONAL HEALTH AND SAFETY ENVIRONMENT IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY REGION**

#### **8.1 Introduction**

The purpose of this chapter is to evaluate to what extent the seven SADC countries under the study have implemented the ILO Convention and Recommendation on occupational health and safety environment.

Unlike in the previous chapters where each of the countries was discussed separately, in this chapter all the countries will be discussed together. The rationale for this is that some of the selected countries for this research do not have a separate Act or legislation on occupational health and safety environment. For example, in Lesotho, the Labour Code Order of 2003 deals with the issue of occupational health and safety. There is no separate Act dealing with Occupational health and safety as in South Africa where we have the Occupational Health and Safety Act 85 of 1993 which deals mainly with issues of occupational health and safety and not other labour issues.

In the case of Namibia, apart from the fact that the Namibia Occupational Health and Safety Act of 1995 exists, the Namibia Labour Act 6 of 1996 also deals with occupational health and safety issues.

In Swaziland, although the Factories, Machinery and Construction Works Act of 1972 exists and deals mainly with occupational health and safety issues, the Swaziland Industrial Relations Act as Amended 2005 also deals with occupational health and safety issues in addition to other labour issues. In view of these complexities, the researcher found it most convenient to use the holistic approach to discuss the issue of occupational health and safety environment in this chapter. To achieve this, the various clauses in the ILO Convention are first spelt out clearly in italics in each case and then followed by the national laws in the SADC region.

## 8.2 The nature of the International Labour Organisation Convention and Recommendation on Occupational Health and Safety Environment

The ILO's standard-setting activities with regard to occupational health and safety go as far back as the earliest sessions of the International Labour Conference when it adopted Recommendation No. 3 concerning the prevention of anthrax, and No. 4, concerning the protection of women and children against lead poisoning (at its First Session, in 1919), and Convention No. 13, concerning the use of white lead in painting (at its Third Session in 1921)).<sup>601</sup> However, the following Recommendations – the instruments adopted by the ILO on the subjects of health and safety – namely the Prevention of Industrial Accidents of 1929 (No. 31), the Protection of Health Services in Places of Employment of 1953 No. 97), and Occupational Health Services in places of employment of 1959 (No. 112) attempts to deal with specific subjects.

In 1991 the Conference adopted a Convention (No. 155) and Recommendation (No. 64) concerning the principles involved and the action needed (both at the national and the plant levels) to ensure greater occupational health and safety in the working environment. Following an initial Recommendation (No.112) in 1959, the Conference adopted Convention No.161 and Recommendation No.171 on occupational health services in, or near, places of employment.<sup>602</sup>

There are also a number of standards that are designed to protect workers against specific risks. Some relate to risk due to toxic substances, such as white lead (Convention of 1921 (No.131)) or benzene (Convention of 1971 (No. 136)), to carcinogenic substances and agents (Convention of 1974 (No. 139)), to exposure to ionising radiation (Convention of 1960 (No. 115)) or asbestos (Convention of 1986

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<sup>601</sup> See International Labour Office (1951) Preface, *International Labour Code* (1951), ix, vii.

Also see Webb, S and Webb, B (1914) *Industrial Democracy*, pp 327–330. Turner, T 1831 statement, quoted in Hutchins, B L and Harrison, A (1903) *A History of Factory Legislation*. Mahaim, E (1934) 'The Historical and Social Importance of International Labour Legislation' in Shotwell, J T (Ed.), *The Origins of the ILO* 1, pp 17–20.

<sup>602</sup> See Convention (No. 55) and Recommendation (No. 64) of 1991 which deals with occupational health and safety in the working environment.

(No.162)). In 1977 the Conference, adopted a Convention (No. 148) and Recommendation (No. 156) aimed at protecting workers in all branches of activity against occupational hazards in the working environment due to air pollution, noise and vibration. These two texts give details of the preventative and protective measures to be taken and the means of ensuring their application.

The Conference also adopted a Convention of 1963 (No. 119)) prohibiting the sale, hire and use of inadequate guarded machinery and laying down detailed prescriptions on the subject, and another of 1967 (No.127) dealing with the maximum permissible weight that may be carried by one worker.

Convention No.155 calls on Member States of the ILO to ‘formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.’<sup>603</sup> the aim of which would be ‘to prevent accidents and injury to health arising out of linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the cause of hazard inherent in the working environment.’<sup>604</sup> In the light of this Convention, an attempt will be made to examine how the seven SADC countries have conformed to the requirements of the Convention. The differences in the implementation will help us to argue on the need to harmonise the ILO standards on occupational health and safety regulations in the SADC countries. It has also been argued in academic circles that there is an urgent need for the national governments in the region to apply the core set of standards in the ILO Conventions as a means of guaranteeing the basic protection for workers. The application will also help the respective countries in the SADC region to develop common legal standards in respect of Convention 155 occupational, health and safety system.

To understand the extent and the differences in the implementation of the ILO Convention on occupational health and safety and the working environment in the SADC region, the research will examine the clauses in the Convention in respect of

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<sup>603</sup> *Ibid.*

<sup>604</sup> *Ibid.*



the national legislation on the occupational health and safety regulation process in some of the SADC countries discussed below.

Lesotho: The Labour Code Order of 2003

Botswana: The Factories Act, Chapter 44: 01  
Employment Act, Chapter 47.07 2002.

Namibia: The Labour Act 6 of 1992  
The Namibia Occupational Health and Safety Act of 1995

South Africa: The Occupational Health and Safety Act 85 of 1993  
The Hazardous Chemical Regulations 1995

Swaziland: The Factories, Machinery and Construction Works Act of 1972  
The Industrial Relations Act as Amended of 2005

Tanzania: The Tanzania Occupational Health and Safety Act of 1995

Zambia: The factories Act, Chapter 514  
The Zambia Occupational Safety and Health Act of 1996.

The differences in the above national occupational health and safety Acts will be analysed against the background of selected clauses of the ILO Convention 155 on occupational health and safety and the working environment.

In view of the differences in the national occupational health and safety regulations in the SADC region, an attempt will be made in this chapter to analyse the need to harmonise the occupational health and safety regulations in the SADC region. In this analysis the clause in the ILO Convention is given first in italics in each case and then followed by the national laws in the SADC region.

- *Coverage of health and safety law to apply to all branches of economic activity and to all workers in branches of activity covered. Exclusion of specific sectors and of specific categories of workers and employers may be allowed after tripartite consultation. These exclusions shall be specifically noted and reported together with the steps being taken to include them.*

The health and safety regulations in Zambia, Tanzania, Botswana and Swaziland often refer to factories as the target of coverage in respect of health and safety regulations. The factories are also defined as premises where two or more people are employed in manual labour work by an employer for purposes of gain or trade and where the employer has control of or access to the workplace. The health and safety regulations or laws cover state workplaces that fit this definition. However, there are specific inclusions and exemptions provided in the laws in coverage under this definition of workplace:

In Botswana the government may exempt the workplace in the event of a 'public emergency',<sup>605</sup> and the Act excludes building, energy, water and sewerage plants. In Tanzania the government may exempt workplaces in special circumstances,<sup>606</sup> in Zambia the Minister may extend the Act to cover specified premises such as docks, warehouses, electricity stations and application to mines is in terms of the Mines and Minerals Act.<sup>607</sup> In Swaziland the Act does not apply to the railways and any other exemption the Labour Commissioner considers appropriate if compliance would not be 'reasonable or if the workplace already complies with standards set in industrialised countries'.<sup>608</sup>

The laws in South Africa, Lesotho and Namibia are different from the countries discussed above. As a matter of fact, the laws in South Africa, Lesotho and Namibia are more comprehensive and cover larger areas in respect of health and safety. They include any workplace where there is a contract of employment, including the State, unless such workplaces are already covered by another law. The latter include mines under the Minerals Act in South Africa and the Mine Safety Act in Lesotho and shipping vessels under the Shipping Act of South Africa. In the case of Namibia, the Minister may also exempt other workplaces.<sup>609</sup>

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<sup>605</sup> See s 6 of the Factory Act Chap 44.01 of Botswana.

<sup>606</sup> Section 5 of the Factory Act Chap 514 of Tanzania.

<sup>607</sup> Sections 83 and 84 of the Factory Act of Zambia Chap 514.

<sup>608</sup> *Ibid.*

<sup>609</sup> *Ibid.*

In South Africa not only employees are protected by the Compensation for Occupational Injuries and Diseases Act 130 of 1993, other workers hired from the labour brokers or independent contractors are also protected by the above Act and this is clearly illustrated in the case of *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*.<sup>610</sup>

The facts of this case are as follows: The respondent in this case is the employee of a labour broker assigned to work at the appellant's factory. Unfortunately, it happened that one day, while the respondent was on duty, armed robbers invaded the factory and the respondent was shot at the appellant's premises by the appellant's security guards. The robbers had taken the respondent hostage and later abandoned the respondent after completing their mission. In view of the wounds the respondent received from the security guards, the respondent later sued the appellant for damages arising from the injury. The court a quo held that the appellant was vicariously liable.<sup>611</sup>

At the end of the trial, the appellant sought to amend its plea to introduce a special defence that the respondent was precluded by section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 from suing for damages by civil action. The application to amend the plea was refused by the trial court.<sup>612</sup>

The court observed that the main reason for the appeal by the appellant was that the employees (the security guards) had fired on the vehicle in an effort to prevent the robbers from killing or injuring the respondent and their action was accordingly neither wrongful nor negligent. The Court argued that as a general principle, it is wrongful to cause bodily harm to another. However, the law also recognises that to do so will not in certain circumstances attract liability. According to the court, one of these circumstances is where the defendant acts under circumstances of necessity, with conduct directed at an innocent person to protect a third party (including the

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<sup>610</sup> *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* (2007) 1 BLLR 1 (SCA).

<sup>611</sup> Para 4, E–F.

<sup>612</sup> Para 5, G–H.

innocent person) in a dangerous situation. In such circumstances, the question is whether the conduct which caused the harm was reasonable.<sup>613</sup>

As a matter of fact, the Court observed that the nature of the defence of necessity had not been established in South African law.<sup>614</sup> Necessity has sometimes been taken to exclude wrongfulness; it has also been suggested that it might serve to avoid a finding of negligence. The Court argued further that whatever the basis for the defence, the test remains the same: was the harm foreseeable and would a reasonable person have guarded against its occurrence? This in turn entails establishing whether a reasonable person would have acted in the manner which gave rise to the harm. In dangerous situations, the gravity of the risk must be weighed against the utility of the conduct.<sup>615</sup> The greater the threatened harm and the fewer the options available to avoid it, the greater the risk that a reasonable person would be justified in taking. The Court argued that there was no direct evidence *in casu* that the appellant would be killed or injured; that possibility was based only on the supposition that armed robbers have been known to kill their hostages<sup>616</sup>. Against that possibility had to be weighed the immediate risk of firing on the vehicle. Considering other defence issues raised by the appellant and the logic of the defence, the Court found no valid arguments from the appellant. In view of this, the Court accordingly agreed with the trial court's finding that a reasonable person would not in the circumstances have fired on the getaway car, and that, as their employer, the appellant was vicariously liable for the damage caused.

The appeal was therefore dismissed with costs.<sup>617</sup>

In view of the differences in the implementation in the SADC region of the ILO clause on health and safety regulations discussed above, there is a need to harmonise the health and safety laws in the region. It is important for all countries in the SADC region to implement a uniform law on health and safety that conform to ILO standards.

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<sup>613</sup> *Ibid*, para 10, E–F

<sup>614</sup> *Ibid*, para 10, E–F

<sup>615</sup> Para 11, F–H

<sup>616</sup> *Ibid*.

<sup>617</sup> Para 29, D–F

- *Tripartite consultation to develop a national policy on occupational health and safety and work environment to prevent accidents and injury out of work by minimising causes of hazards in the work environment. Establishment of a central occupational health and safety body to co-ordinate occupational health and safety work.*

In Namibia,<sup>618</sup> South Africa,<sup>619</sup> Lesotho<sup>620</sup> and Swaziland<sup>621</sup> there are tripartite occupational health and safety councils that exist as independent bodies or as general labour advisory councils. Zambia, Tanzania and Botswana do not have specific legal provisions for these councils, although they may exist de facto. The Botswana Mines, Quarries Works and Machinery Act establishes a tripartite Mine Safety Committee with no legal provision for a more general national tripartite Occupational Health and Safety Committee. The constituents and functions of these councils are not the same. In Namibia the Council is specifically tasked to formulate health and safety policy, while in South Africa they have further specified functions, including research, advising on formulation and publication of occupational health and safety standards, education and training.<sup>622</sup>

From the analysis above it is clear that the establishment of a national tripartite Occupational Health and Safety Council in terms of ILO standards has not been achieved and for this reason, there is a need to harmonise occupational health and safety Acts in the SADC region.

- *Policy and laws to provide for protection of workers and their representatives from disciplinary measures for Occupational Health and Safety steps taken.*

Unfortunately, only two countries in the SADC region, namely; South Africa and Namibia have expressly provided comprehensive protection in their occupational

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<sup>618</sup> Labour Act section 7

<sup>619</sup> Occupational Health and Safety Act section 2.

<sup>620</sup> Lesotho Labour Code s 100.

<sup>621</sup> *Ibid.*

<sup>622</sup> *Ibid.*

health and safety laws. Section 26 of the South African Occupational Health and Safety Act provides that no employer shall dismiss an employee, reduce his or her pay or alter his or her employment conditions because the employer believes that the employee has given information to the State, complied with a lawful prohibition or acted in terms of the health and safety law.<sup>623</sup>

Section 98 of the Namibian Labour Act states that an employer shall not dismiss or in any way discipline an employee for exercising his other health and safety rights, and makes this an unfair labour practice.

Section 11 states that employees shall receive full pay if they stop doing a dangerous work.

It is argued conclusively here that this general protection of employees in South Africa and Namibia should be extended to other SADC countries such as Lesotho, Zambia, Tanzania. Of course, this can only be achieved through the process of harmonisation of the ILO standards in the SADC region.

- *Workers to have the right to remove themselves from situations that present an imminent and serious danger to health without victimisation, to report this danger to employers and not to be required to return to work until remedial action is taken.*

This ILO clause on occupational safety and health is not covered in all SADC countries. It is covered and fully implemented in only three SADC countries, namely; Namibia, Zambia and Zimbabwe.<sup>624</sup>

The Namibia Labour Act (s 42) states that an employee shall have the right to remove himself or herself from work where there is reasonable cause to believe that his or her life is endangered until adequate measures are taken to protect their

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<sup>623</sup> Loewenson, R (1996) 'Occupational Health and Safety Legislation in Southern Africa: Current trends' *Labour Monographs* Cape Town: Institute of Development and Labour Law, University of Cape Town.

<sup>624</sup> *Ibid.*

health and safety, and that they shall report their action and their reasons for it to the employer.<sup>625</sup>

All other laws in the SADC region provide only indirectly for removal from unsafe work in that they give the right to stop dangerous work and to report to an inspector.

For example, the South African Occupational Health and Safety Act, in respect of section 21, provides that the minister may by notice declare that no employees should carry out work that threatens their health and safety other than under conditions prescribed for by notice, while section 30 provides for an inspector to prohibit work that threatens a person's health and safety. The Botswana and Tanzania Acts provide that if an inspector makes a complaint to a court about dangerous work and the court is satisfied that the risk exists, it may require the occupier to remedy the danger and prohibit use until the remedy is implemented.

The Lesotho Labour Code (s 99) follows the same procedure but only requires the Labour Commissioner to make the prohibition and not a court order. In the Botswana Factory Act provision is made for an immediate prohibition by an inspector on the unsafe work until a court hearing takes place. The current legal provision implies lengthy procedures under circumstances of immediate risk and do not give the worker the right to as intended in the ILO Convention 155 on occupational safety and the Health Act. In the light of this discussion, it is necessary to protect and harmonise the right of workers as provided for in the ILO Convention 155.

- *Occupational Health and Safety organisation to enable co-operation between management and/or their representatives.*

The above ILO clause has not been implemented uniformly in the SADC region. Section 5 of the Botswana Mines, Quarries, Works and Machinery Act provides for a national tripartite Safety Committee in the mining sector, but the Factories Act is silent on other forms of safety committee. In the same vein, the Tanzanian Factories Act is also silent on this issue. Section 6 of the Building Operations Regulation

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<sup>625</sup> Namibian Labour Act No. 11 of 2007, Section 39, 40 and 42 (Chapter 4).

provides that where there are more than 20 people employed, a Safety Supervisor shall be appointed and arrangements made for employer–employee co-operations in health and safety.

Swaziland legislation and other national laws in the SADC region are silent on this issue. In view of this non-uniformity in the application of the above clause, it is fully recommended that, again, there is a need to harmonise the ILO OHS regulation in the SADC region.

### **8.3 Conclusion**

Chapters 4, 5, 6 and 7, identified the six core labour law areas that need to be harmonised in the SADC region. These areas are (1) freedom of association; (2) forced labour; (3) elimination of discrimination; (4) collective bargaining; (5) child labour; and (6) occupational health and safety law.

The chapters above have shown that the core labour law areas are implemented differently, thus there is no uniform interpretation and application in respect of ILO standards. For example, freedom of association is greatly influenced by union activities in South Africa, whereas in Botswana it is not. In the case of Lesotho the values and procedures in the implementation of freedom of association is strictly followed and public servants are prohibited from joining trade unions. By contrast, in Swaziland the rules and procedures are not strictly followed, especially in the informed sectors and public servants are not prohibited from joining unions.

All the differences observed in the implementation of the core labour laws in the SADC region are fully highlighted in Table 8.1.

In respect of the occupational health and safety legislation in the SADC region there is also no uniformity in its application in the SADC region. The ILO Convention 155 on occupational health and safety regulation has not been successfully implemented in the SADC countries. For instance, in respect of the workers' right to remove themselves from a situation that is dangerous to their health, and to report the danger to the employers and not to return to work until the danger is removed, there



are only have three countries, namely (1) Namibia, (2) Zambia and (3) Zimbabwe that have fully complied with these ILO standards. It is for this reason that the researcher argues that there is an urgent need to harmonise all ILO core areas of the labour laws in the SADC region.

Apart from harmonising the ILO labour standards; there is also the need for regional information sharing on occupational health and safety. In view of the potential cross-border flow of hazardous substances waste, pollution and major accident risks, there should be corresponding cross-border liability for information on, and management of, these occupational health risks. Hence, it would be useful to have a data base that supports regional prevention of OHS risk associated with major hazard installations, registered and prohibited chemicals, and the transport of hazardous material.

To be able to maintain a healthy and safe region, it is important that the health and safety legislation is harmonised in terms of ILO standards.

**Table 8.1: A summary of the differences in the implementation of the core areas of the International Labour Organisation labour standards in the Southern African Development Community region**

<b>The core areas of ILO labour standards: Freedom of association</b>	<b>South Africa</b>	<b>Botswana</b>	<b>Lesotho</b>	<b>Swaziland</b>	<b>Namibia</b>	<b>Zambia</b>	<b>Tanzania</b>
Freedom of Association	This is greatly influenced by union activities	This is not influenced by union activities	The rules and procedures are not strictly followed and public servants are prohibited from joining trade unions	The rules and procedures are not strictly followed on freedom of association especially in the informal sector	It is not influenced by union activities	The government placed many limits on freedom of association in practice	In the private sectors employers have adopted anti union policies that hinders freedom of association

<b>The core areas of ILO labour standards: Labour</b>	<b>South Africa</b>	<b>Botswana</b>	<b>Lesotho</b>	<b>Swaziland</b>	<b>Namibia</b>	<b>Zambia</b>	<b>Tanzania</b>
Forced labour	Forced labour is strictly prohibited by the labour law and the Constitution of South Africa	Forced labour is also strictly prohibited In Botswana and a high degree of ILO standards have been maintained	There are still few cases of forced labour in the rural traditional areas by local chiefs and traditional leaders	There is still forced labour, especially with the enactment of the administrative order which reinforced the tradition of residents working for chiefs without payment	Farm workers, including some children on commercial farms, still experience forced labour domestic workers are often subject to strict control by their employers	Forced labour is still used by government officials in respect of national emergencies and also by traditional leaders.	Prisoners are still used for forced labour on project outside the prisons. Children are also used for forced labour in Tanzania.

The core areas of ILO labour standards: Elimination of discrimination	South Africa	Botswana	Lesotho	Swaziland	Namibia	Zambia	Tanzania
Elimination of discrimination	The elimination of discrimination is pursued vigorously through the Constitution of 1996, the LRA of 1995 and the Employment Equity Act of 1998. However, after 1994 in respect of employment, the Government of South Africa still discriminates against those citizens who have naturalised	Discrimination against persons with HIV/AIDS continues to be a problem in the workplace. The law prohibits homosexuality	Discrimination is still a common phenomenon in both civil society and workplace. Women are still discriminated against.	There is still discrimination against people with disability and the non-ethnic Swazis, namely white persons and persons of mixed race.	People with disabilities are still discriminated against by employers in both the public and private sectors. The San and the Mafure are still discriminated against.	People with disabilities and homosexuals are still discriminated against.	Strong traditional norms still divide labour along gender lines and women are still discriminated against, especially in rural areas.

<b>The core areas of ILO labour standards</b>	<b>South Africa</b>	<b>Botswana</b>	<b>Lesotho</b>	<b>Swaziland</b>	<b>Namibia</b>	<b>Zambia</b>	<b>Tanzania</b>
Collective bargaining	Much recognition has been given to the collective bargaining process in ILO standards, but the LRA is silent about how employers should bargain and over what issues in respect of ILO standards	Collective bargaining process does not exist in many of the organisation because of the requirements.	Management is not included in bargaining unit and collective bargaining unit and collective bargaining process is not extended to all organisations	Collective bargaining process is not fully implemented in respect of ILO standards.	Collective bargaining process is not included in matters affecting the legal regulations of the labour market and work relations. It is not widely practice.	It is implemented differently at different sectors and plant levels.	The required formalities implementation of a collective agreement is very mechanistic.

<b>The core areas of ILO labour standards</b>	<b>South Africa</b>	<b>Botswana</b>	<b>Lesotho</b>	<b>Swaziland</b>	<b>Namibia</b>	<b>Zambia</b>	<b>Tanzania</b>
Child labour	In the informal sectors in the rural areas, there is still child labour despite the various labour laws and the constitution that prohibit child labour	There is no law that specifically prohibits child abuse and child labour is still common in the informal sector	Although the Labour Code Order of 1992 prohibits child labour, many children are still employed in the informal sectors	Child labour is a problem with a large growing number of street children in Mbabane and Manzini, and child-headed household is on the increase because of HIV/AIDS	Although there are laws to protect children labour it continues to be a problem especially among farm workers.	Child labour is still a problem with many street children who are abused.	Child labour is a problem in Tanzania and girls are mostly affected since they are often subjective to sexual exploitation

## **CHAPTER NINE**

### **AN EMPIRICAL INVESTIGATION INTO THE BENEFITS OF HARMONISING LABOUR LAW IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY REGION**

#### **9.1 Introduction**

The purpose of this chapter is to analyse some of the benefits to be derived from the harmonisation of labour laws in the SADC region. In the previous chapters an attempt was made to show how SADC countries have been subjected to a range of regional and international influences that have particular effects on labour laws and labour markets.

At the regional level, SADC countries are involved in some regional economic integration and this has promoted the spirit of co-operation, economic integration and the liberalisation of trade unions in the region.

In Chapter Two of this thesis, the researcher argues that the harmonisation of labour laws will help SADC countries to increase labour mobility in the region so as to afford similar benefits for migrant labour. It is also argued that harmonisation of labour laws will help to reduce the degree of duplication required of businesses that operate within different labour law frameworks and industrial relations practices.

Furthermore, it is argued in the literature review that the harmonisation of labour laws in the SADC region will help in the implementation of ILO standards.

In view of the discussion above, the three main hypotheses to be investigated in this research is as follows:

##### **9.1.1 Hypothesis One**

The harmonisation of labour laws in the SADC region will help to maintain similar benefits for the migrants labour in SADC countries.

### **9.1.2 Hypothesis Two**

The harmonisation of labour laws in the SADC region will help with the implementation of ILO standards in the region.

### **9.1.3 Hypothesis Three**

The harmonisation of labour laws in the SADC region will help in the protection of workers against the greater economic power of employers in the workplace.

## **9.2 Research Methodology**

In this research, both qualitative and quantitative research techniques are used to solicit the necessary information from the respondents. In respect of the quantitative research technique, a questionnaire was the main instrument used to collect information from the respondents. In analysing the information collected, the statistical tools used include chi-square and coefficient contingency analysis. This was very useful in testing the hypothesis, thus finding out the relationship between the independent and dependent variables.

In terms of the qualitative technique, we had oral interviews and discussions with our respondents where this was possible. This was a very useful technique, since the respondents were able to give their own views on the harmonisation of labour laws in the SADC region. This qualitative interview allows for direct interaction between the interviewer and the respondent. This enabled me to ask general questions around the harmonisation of labour laws. This was essentially a conversation in which the researcher established a general direction for the conversation and pursued specific issues raised by the respondent. The respondents did most of the talking while the researcher listened carefully.

This is the primary source of information and it includes labour law lawyers, trade union leaders, human resource practitioner and officials in labour offices.



As regards secondary sources of information, library material that included case law, ILO Conventions and Recommendations, and the different labour legislation in the region were used.

### **9.2.1 Population of the study**

The discussions in the previous chapters indicate that the SADC region consists of developed, developing and least developed countries.

The 14 countries in the SADC region can be classified as follows:

- (a) Developed countries
  - South Africa.
  
- (b) Developing countries
  - Botswana
  - Mauritius
  - Namibia
  - Seychelles
  - Swaziland
  - Zimbabwe.
  
- (c) Least-developed countries
  - Angola
  - DRC
  - Lesotho
  - Malawi
  - Tanzania
  - Zambia.

Out of the 14 SADC countries 7 countries were selected. The purposive sampling technique was used to select the seven countries and the respondents to be interviewed in this research. *Purposive sampling* is also referred to as *judgemental*

*sampling* mainly because the selection of the respondents is based on the interviewer's knowledge of the population. However, in this research, the reasons for using purposive sampling technique are as follows:

1. Since all the respondents cannot be located in one place as in the case of total institutions, the best method to locate them was to meet them in their offices.
2. There is no frame of reference that can be used to locate the respondents in one place
3. Purposive sampling saves time and cost
4. Purposive sampling is not as complex and mechanistic as a systematic sampling, multi-stage sampling and cluster sampling techniques.

In respect of the countries chosen for the purposes of the research, only South Africa, Namibia and Lesotho are not members of the frontline states that formed SADC in 1992. South Africa joined SADC in August 1994. Mauritius joined in 1995, while the DRC and Seychelles joined in 1997. Today the total membership of SADC stands at 14.

**Table 9.1: Sex distributions of the respondents in the seven selected SADC countries**

<b>Country</b>	<b>Male</b>	<b>Female</b>	<b>Total</b>
South Africa	20	12	32
Botswana	25	7	32
Swaziland	23	9	32
Tanzania	22	10	32
Zambia	23	9	32
Namibia	24	8	32
Lesotho	25	7	32
<b>Total</b>	<b>162</b>	<b>62</b>	<b>224</b>

Table 9.1 shows the sex distribution of the respondents in the seven SADC countries selected for this research. The table shows that there were more males than females as respondents in this research. This is not surprising, since there are more males

than female trade union leaders, labour lawyers, labour officials and human resources practitioners. These professions are still male-dominated.

A total number of 224 respondents were interviewed in the seven SADC countries selected.

The numbers of respondents in their respective clusters are as shown in Table 9.2.

**Table 9.2: The distribution of the respondents by cluster in the seven SADC countries**

<b>Total number of respondents</b>	<b>Number of respondents interviewed</b>
Trade union leaders	55
Labour lawyers	51
Labour officials (Ministry of Labour)	55
Human resources practitioners	63
<b>Total</b>	<b>224</b>

### **9.3 Field Experience**

The interview process in the seven countries was not an easy task. It took more than six months to cover all seven countries. Since the researcher lives in South Africa, it was easy for him to work with research assistants in Botswana, Namibia, Lesotho and Swaziland. The research assistants in these countries helped to administer the questionnaire and, at the same time, collected all the necessary information needed for this research. The researcher was able to monitor the research assistants effectively. In the case of Tanzania and Zambia their respective embassies in Pretoria were very helpful in assisting the researcher with sending the questionnaire to their respect home office to administer. The embassy officials were extremely enthusiastic about helping not only in the distribution of the questionnaire in their home countries, but providing the researcher with more information on the problems and prospect of the harmonisation of labour laws in the SADC region.

In South Africa the soliciting of information from the members of the various clusters was not easy. The researcher had to pay several visits to union leaders before they

would respond to the questionnaire. All efforts to establish a good rapport with the union leaders so that they could complete the questionnaire timeously were quite challenging. They complained about the time factor and said that they were busy with other burning issues in their organisations.

However, the response from members of the other clusters was more positive than that of the union leaders. Generally, the response rate was quite encouraging and the research findings are based on the information collected from the field work.

## 9.4 Hypotheses

### 9.4.1 Hypothesis One

Ho: The harmonisation of labour laws in the SADC region will not help to maintain similar benefits for the migrant labour in the SADC region.

H<sub>i</sub>: The harmonisation of labour laws in SADC region will help to maintain similar benefits for the migrants in the region.

**Table 9.3: Harmonisation of labour laws and the maintenance of similar benefits for the migrant labour in the SADC region**

Nature of response			
Respondents	Yes, harmonisation of labour laws will help to maintain similar benefits for migrant labour in the SADC region	No, harmonisation of labour laws will not help to maintain similar benefits for migrant labour in the SADC region	Total
Trade union leaders	40 (48)	15 (7)	55
Labour lawyers	50 (44)	01 (7)	51
Labour officials (in Ministry of Labour)	50 (48)	05(7)	55
Human resource practitioners	55 (15)	08(8)	63
<b>Total</b>	<b>195</b>	<b>29</b>	<b>224</b>

Observed chi-square ( $\chi^2$ ) = 16.38

Critical value at a level of significance of 0.01 = 11.34

Degree of freedom = 3

Since the observed  $\chi^2$  of 16.38 is larger than the critical value of 11.34, the Null hypothesis ( $H_0$ ) is rejected, which says that the harmonisation of labour laws in the SADC region will not help to maintain similar benefits for the migrant labour in the SADC region.

The above empirical investigation reveals that there is a need to harmonise labour laws in the SADC region. Migrant labour and society as a whole will benefit from it. This analysis supports the researcher's earlier discussion in the literature review (Chapter Three) of this thesis. In this chapter he pointed out that the variation of labour law in southern Africa makes the formulation of uniform labour law and policies on labour law difficult. It was further argued that this plurality of labour law systems in the region results in migrant workers losing their rights and obligations, and acquiring new ones as they move across national frontiers. A good example of this in recent times is the Zimbabweans migrants now living in South Africa.

In view of the fact that labour laws in SADC are not harmonised, Zimbabwean migrant workers are poorly treated, especially those doing menial jobs in South Africa. If the labour laws in the SADC region were to be harmonised, thus regulating how all migrant workers are to be treated in the region, the Zimbabwean and other migrant workers in the region would not have suffered at the hands of some unscrupulous locals who treat migrants differently in respect of employment and poor conditions of service offered to the migrant workers.

This problem of the exploitation of migrant workers has long been realised by the ILO and several efforts have been made to discourage it.<sup>626</sup> The ILO was considered

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<sup>626</sup> See the second recital of the Preamble to the revised ILO Constitution: 'Whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of persons as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement in these conditions is urgently required; as for example, the protection of the interest of workers when employed in other countries other than their own.'

the principal organisation concerned with the benefits and welfare of migrant workers. The organisation is constitutionally mandated to concern itself with the problems facing migrant workers.

In view of this mandate, the ILO has adopted specific instruments concerning migrant workers, for example, all ILO standards; with very few exceptions applying to all workers regardless of nationality. Moreover, the eight fundamental ILO Conventions<sup>627</sup> have special importance, as recognised by the ILO Declaration on fundamental principles and rights at work adopted by the international labour conference held in June 1998.<sup>628</sup> The Declaration imposes obligations on all Member States, including those that had not ratified the instruments in question, by virtue of their membership in the organisation to respect, promote and realise in good faith the principles concerning the fundamental rights that were the subject of those Conventions.

It must also be considered that the two legally binding instruments relating to migrant workers are Convention of 1949 (No. 97), Chapter 97 and Convention of 1975 (No.143) (Chapter 143), which are both buttressed by non-binding recommendations. These conventions are concerned not only with the protection of migrant workers while in the country of employment but also apply to the whole labour migration continuum from entry to return. C97 covers the conditions governing

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<sup>627</sup> A significant exception is Convention No. III of 1958 Concerning Discrimination in respect of Employment and Occupation, which does not delineate nationality as a prohibited ground of discrimination (Article I(I)(a). Indeed, Article I(I)(b) provides expressly that additional grounds of discrimination may be determined by the Member State concerned in consultation with the social partners and other appropriate bodies. See also Nielsen, H K (1994) 'The Concept of Discrimination in ILO Convention No. III' *International and Comparative Law Quarterly* 43 827, p 840. However, it is well known that discrimination between nationals and migrant workers on the basis of other listed grounds, such as race, sex or religion, would not be permissible without an objective justification.

<sup>628</sup> Convention No. 29 of 1930 Concerning Forced or Compulsory Labour and No. 105 of 1957 Concerning Minimum Age for Admission to Employment and No. 182 of 1999 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; No. 87 of 1948 Concerning Freedom of Association and Protection of the Right to Organise; No. 98 of 1949 Concerning the Application of the Principles of the Right to Organise and Bargain.

the orderly recruitment of migrant workers and also enunciates the principle of their equal treatment with national workers in respect of working conditions, trade union membership and enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes and legal proceedings relating to matters outlined in the Convention.<sup>629</sup> The principal objective of this convention is to ensure the orderly flow of migrants from countries with labour surpluses to countries with labour shortages is reflected in a number of provisions.

From this discussion, it can be argued that there is an urgent need for countries in SADC region to adopt the ILO Conventions on migrant workers and to harmonise their labour laws so that migrant workers in the region will enjoy similar benefits entrenched in the ILO conventions. Both the sending and receiving of migrant labour can benefit from one another if the ILO conventions are adopted and harmonised among SADC countries.

Having analysed the first hypothesis, an attempt will now be made to examine the second hypothesis.

The second hypothesis holds the view that the harmonisation of labour law in the SADC region will help in the implementation of ILO standards.

#### **9.4.2 Hypothesis Two**

H<sub>0</sub>: The harmonisation of labour law in the SADC region will not help in the implementation of ILO standards.

H<sub>1</sub>: The harmonisation of labour law in the SADC region will help in the implementation of ILO standards.

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<sup>629</sup> The equal treatment provision is Article 6 of C97.

**Table 9.4: Harmonisation of labour laws and the implementation of ILO standards**

Nature of response			
Respondents	Yes, harmonisation of labour laws will help in the implementation of ILO standards	No, harmonisation of labour laws will not help in the implementation of ILO standards	Total
Trade union leaders	41 (46)	14 (8)	55
Labour lawyers	49 (43)	2(7)	51
Labour officials (in Ministry of Labour)	48 (46)	7(8)	55
Human resources practitioners	52 (53)	11(10)	63
<b>Total</b>	<b>190</b>	<b>34</b>	<b>224</b>

Observed chi-square ( $\chi^2$ ) = 10.19

Critical value at a level of significance of 0.02 = 9.84 under the degree of freedom (df) of 3.

Since the observed chi-square ( $\chi^2$ ) of 10.19 is larger than the critical value of 9.84, the Null hypothesis ( $H_0$ ) is rejected and the alternative hypothesis  $H_1$  is accepted. This therefore confirms that the harmonisation of labour laws in the SADC region will help with the implementation of ILO standards.

This point is also supported in the literature review where the researcher argued that in the implementation of the core areas of ILO labour standards in the SADC region, different countries implement the core areas differently without much bearing on ILO standards.

For example, in respect of the freedom of association, its implementation in South Africa is greatly influenced by union activities, while in Botswana it is not influenced by union activities. In Lesotho and Swaziland the ILO rules and procedures are not strictly followed in the implementation of freedom of association.



This analysis shows that ILO policies on freedom of association are implemented differently in SADC region.

The argument here is that the harmonisation of labour laws will make it easy to implement ILO standard since the respective countries will be speaking with one voice in the implementation of ILO standards.

Apart from freedom of association, the elimination of discrimination in the workplace is also examined. This is also one of the core areas of ILO labour standards.

In South Africa the elimination of discrimination in all workplaces is vigorously pursued through the Constitution of 1996 and the other labour legislative frameworks, such as the LRA of 1995, the Employment Equity Act of 1998 and the Basic Conditions of Employment Act of 1997.

The elimination of discrimination is not vigorously pursued in other SADC countries as it is in South Africa. For example, in Botswana there is still some element of discrimination against persons with HIV/AIDS and the Botswana law prohibits homosexuality. In Lesotho discrimination is a common phenomenon in both civil society and the workplace. Women are also discriminated against. In Swaziland and Namibia there is discrimination against non-ethnic Swazis, while the San and the Mafure are greatly discriminated against in Namibia. In Zambia people with disabilities and homosexuals are discriminated against. In Tanzania strong traditional norms divide labour along gender lines and women are discriminated against, especially in rural areas.

It is argued here that harmonisation of labour laws is one of the best methods that can be used to eliminate the element of discrimination that still lingers in some of these SADC countries. This is also one of the feasible ways in which to establish uniformity in the implementation of ILO standards.

The third core element of the ILO labour standards to be considered here is that of forced labour. In South Africa efforts have been made to eliminate forced labour in all circumstances. Forced labour is strictly prohibited by the South African labour law

and the Constitution. In Lesotho there are a few cases of forced labour perpetrated in the rural traditional areas by local chiefs and traditional leaders.

In Swaziland forced labour exists, especially with the enactment of the administrative order, which reinforced the tradition of residents working for chiefs without payment. In Namibia farm workers, including some children on commercial farms, experience forced labour and domestic workers are at the mercy of their employers in terms of their conditions of service. In Zambia forced labour is used by government officials in respect of national emergencies and also by traditional leaders. In Tanzania, prisoners are used as forced labour on projects outside the prison.

This discussion on forced labour also highlights the fact that different SADC countries define and implement different policies on the concept of forced labour. However, the researcher's submission here is that the harmonisation of labour laws will help to eliminate all forms of forced labour and it will enable different SADC countries to implement one single policy against the background of the ILO standards.

It is also interesting to note that in the past years the EC has harmonised its labour laws and this has made it easy to implement ILO standards through various Directives and Articles. According to Hepple,<sup>630</sup> Directive 75/117 has helped with harmonising provisions in the application of the principle of equal pay for men and women, while Directive 76/207 deals with equal treatment of men and women. Hepple argues that these two Directives have helped not only to harmonise the law on discrimination among EC members; it has also made it possible for EC to conform to ILO Convention No. 111 of 1958 in respect of discrimination.

This is a good lesson from which SADC countries can learn from if they are to meet up with ILO standards.

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<sup>630</sup> *Ibid.* Hepple (1983).

The third and last hypothesis to be examined in this thesis is the harmonisation of labour laws and the protection of workers against the economic power of employers in the workplace.

### 9.4.3 Hypothesis Three

H<sub>0</sub>: Harmonisation of labour laws will not protect workers against the economic power of employers.

H<sub>1</sub>: Harmonisation of labour laws will protect workers against the economic power of employers.

**Table 9.5: Harmonisation of labour laws and the protection of workers against employers**

Respondents	Nature of response		
	Yes, harmonisation of labour laws will help to protect workers against the economic power of employers	No, harmonisation of labour laws will not help to protect workers against the economic power of employers	Total
Trade union leaders	45 (48)	10 (7)	55
Labour lawyers	50 (44)	1 (6)	51
Labour officials (in Ministry of Labour)	51 (48)	4 (6)	55
Human resources practitioners	51 (55)	12 (8)	63
<b>Total</b>	<b>197</b>	<b>27</b>	<b>224</b>

Observed chi-square ( $\chi^2$ ) = 8.8

Critical value at a level of significance of 0.05 = 7.82 with a degree of freedom (df) of 3. Since the observed chi-square ( $\chi^2$ ) of 8.8 is larger than the critical value of 7.8, the Null hypothesis (H<sub>0</sub>) is rejected and the alternative hypothesis (H<sub>1</sub>): is accepted.

This study therefore confirms that the harmonisation of labour laws in SADC countries will protect the workers against the economic power of the employers.

In this analysis an attempt will be made to determine to what extent employees are protected against their employers in respect of the following issues in SADC countries:

1. Protection of employees against a poor and unhealthy work environment/ health and safety risks
2. Protection of workers' claims in the event of insolvency
3. Protection of female workers against discrimination.

As regards the protection of employees against a poor and unhealthy work environment or health and safety risks, it is only in South Africa, Namibia, Zambia and Tanzania that workers and their representatives are protected from disciplinary measures for complaining or refusing to work in an environment they feel is not safe among the seven selected countries in this study. In respect of the other three countries, namely, Botswana, Lesotho and Swaziland, the workers and their representatives are not protected against disciplinary measures for occupational health and safety steps taken. In view of these differences in the implementation of the ILO clause on health and safety regulations in the SADC countries, there is a need to harmonise the health and safety laws in the SADC region. It is important, as indicated earlier in this thesis, that all necessary steps should be taken in the SADC region to implement a uniform law on health and safety that conforms to ILO standards. This can be achieved through the process of harmonisation of SADC labour laws.

It must also be pointed out that the ILO has adopted a large number of Conventions and Recommendations dealing with the protection of workers' health in general and with regard to more specific dangers. Of the total number of 128 ILO Conventions and 132 Recommendations adopted in the first 50 years, no fewer than 54 Conventions and 52 Recommendations are concerned with health and safety.<sup>12</sup> The most important general instrument is the 1981 Occupational Safety and Health Convention (No. 155), accompanied by Recommendation No. 64 with the same title.

Employers are required by the Convention and Recommendation to ensure that workplace, machinery, equipment and processes, chemical, and physical and biological substance and agents are safe and without health risks when the appropriate measures of protection are taken; and to provide adequate protective clothing and equipment to prevent risk of accident or adverse effect on health (Art. 17). Employers must also provide for measures to deal with emergencies and accidents (Art. 18). Arrangements should be made at undertaking level to ensure co-operation in respect of the protection of workers' claims in the event of insolvency. Not much has been achieved in this direction.

Most of the seven SADC countries in this study have only established the substantive issues and the procedural processes to be followed in dismissing an employee when an employer is found to be insolvent. This is usually considered as operational requirements for dismissal. In South Africa, Botswana and Namibia the procedure to be followed and the substantive reasons to be given are well spelt out in their labour legislation instruments between workers (representatives) and the employer in this area (Art. 19).

However, the only major benefit an employee enjoys on dismissal based on the insolvency of an employer is the severance pay. This is contrary to ILO Convention and Recommendation (No. 166) and the 1992 Protection of Workers Claims (Employers Insolvency) Convention (No. 180). Parts I and III of this Convention and Recommendation outlined other privileges that an employee must enjoy in the case of dismissal based on insolvency of the employer. Part II aims at protection of workers claims by means of a privilege so that the employees are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share (Art. 5). The privilege must cover at least (a) the worker's claims for wages for a period of no less than three months prior to insolvency or termination of the employment; (b) the workers' claim for holiday pay due as a result of work performed during the year in which the insolvency or termination of employment occurred, and in the preceding year; (c) the workers claim for amounts due in respect of other types

of paid absence relating to a period no less than three months prior to insolvency or termination of their employment (Art. 6).<sup>631</sup>

The rank of privilege of the workers' claims is supposed to be higher than most other privileges claims, and in particular those of the State and the social security system.<sup>632</sup>

All the privileges and benefits highlighted are not implemented by all the SADC countries in this study. In view of this, there is an urgent need to harmonise the labour laws so as to comply with ILO standards.

As regards the protection of female workers against discrimination, much needs to be done in the SADC region.

In South Africa, Botswana and Namibia the discrimination against the female sex has been eliminated to a great extent when compared to the situation in Swaziland, Lesotho, Zambia and Tanzania, where strong traditional norms still divide labour along gender lines and women are still discriminated against especially in rural areas. These differences call for the harmonisation of labour laws in the SADC countries. South Africa has greatly eliminated this discrimination through the Constitution of 1996, the LRA of 1995, the Basic Conditions of Employment Act of 1997 and the Employment Equity Act of 1998. However, the only ground on which South Africa, Botswana, Namibia and other few SADC countries still discriminate is where the discrimination is based on the inherent requirements of the job.

This discrimination in respect of inherent requirements of the job is supported by Article 1, paragraph 2 of the ILO Discrimination (Employment and Occupation) Convention of 1958 (No. III).

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<sup>631</sup> Robert, M and Parmeggiani, L (1969) 'Fifty Years of International Collaboration in Occupational Safety and Health' *ILR* 99 (1), pp 85–136 at p 86.

<sup>632</sup> Betten, L (1993) *International Labour Laws: Selected Issues* The Hague: Deventer.

This Convention is also aimed at protecting women against abuses in their conditions of work, particularly in the case of maternity and in the same vein to secure for women workers the same rights and treatment as those enjoyed by men.

In terms of maternity protection, the maternity protection Conventions (No. 3 of 1919 and 103 of 1952) provide for social security benefits and medical care. In addition, however, they establish the right to maternity leave of not less than 12 weeks.

Thus Convention No. 3, which applies only to industry, provides that six weeks of leave must be taken before childbirth and six weeks after. Convention No. 103, which is of general application, is more flexible and merely specifies that at least six of the 12 weeks' leave must be taken after childbirth.<sup>633</sup> Under both Conventions the post-confinement leave is obligatory and must be extended in certain cases. These instruments also provide that an employer may not dismiss a woman while she is on maternity leave or give her notice of dismissal at such a time that it would expire while she is on leave.

In respect of the night work, three Conventions that prohibit the employment of women at night have been adopted: No. 4 of 1919 was revised by No.41, of 1934, and again by No.89, of 1948. This last Convention, which is more flexible than the earlier ones, prohibits night work by women in industrial undertakings during a period of 11 consecutive hours.

In addition to night work, the Underground Work Convention (No.45) adopted in 1935 prohibits employment of women on underground work in mines of all kinds.

Most of the issues raised above in respect of the protection of women have not been implemented by majority of SADC countries and even where some of the Conventions have been implemented, this implementation has not been successful mainly because of some national interest and the fact that some countries still

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<sup>633</sup> See details in ILO Convention 103 of 1952.

operate in silos. To overcome this problem, there is a need for SADC countries to harmonise their labour laws and conform to ILO standards.



## CHAPTER TEN

### CONCLUSION AND RECOMMENDATIONS

This chapter summarises the major findings of this research and at the same time gives some recommendations on how labour law should be harmonised in the SADC region.

Chapter One of this thesis highlighted a number of factors that call for the harmonisation of labour laws in the SADC region. One of them is the fact that harmonisation of labour laws will assist in the process of economic integration and development.<sup>634</sup> Second, it will help to reduce the degree of duplication required of businesses that operate in SADC countries which operates different labour law frameworks and industrial relations practices.<sup>635</sup> It was also argued in Chapter One that harmonisation of labour will help in respect of labour mobility since different labour law regimes affect mobility adversely. It was also discussed in Chapter One that although the above advantages of harmonisation have been indicated, not much progress on harmonisation has been made to date.

The introductory part of this thesis discusses at length some of the reasons why labour laws are not well developed in the SADC region. One of the reasons for this is the ways in which labour laws in SADC have been subjected to political demand. For instance, in most African countries the ruling governments do not only impose their labour laws without consultation, but also control trade union activities.

The thesis also discusses at length the influence of globalisation of labour standards in southern Africa. Furthermore, the influence of regionalism on the harmonisation of labour laws is also discussed in this thesis. The inference that can be drawn from this discussion is that for the regionalisation process in southern Africa to be successful, there is an urgent need to harmonise the region's labour law system.<sup>636</sup> It

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<sup>634</sup> See par 1.1 of Chap 1.

<sup>635</sup> See par 1.1 of Chap 1.

<sup>636</sup> See par 3.3 of Chap 3.

is also argued in this thesis that southern Africa has many lessons to learn from the regional harmonisation of labour laws in the EEC.

At the initial stage of harmonisation of labour laws in the EEC, it encountered stiff opposition from the ideology of the deregulated market. A cardinal pillar of this ideology was the pressure for labour market flexibility expressed in the conviction that a more rational utilisation of existing manpower is necessary and that this can be achieved through, *inter alia*, the easing of legal and collective bargaining restrictions on working time and on working practices such as part-time work, temporary work and sub-contracting. The argument here is that the SADC countries have to learn from the EEC experience if it is to succeed in its process of harmonisation of its labour laws. Apart from the above discussion, this thesis also highlights the legal basis of harmonisation of labour laws in the EC, which will also serve as a good lesson for SADC region.

The thesis examined the implementation of international labour standards in southern Africa. The main areas examined in this thesis include (1) freedom of association (2) collective bargaining (3) forced labour (4) discrimination. In respect of freedom of association, its implementation in terms of ILO standards varies from one country to another within the SADC region. For example in South Africa, the LRA of 1995 conforms to Article 2 of the ILO international labour standard Convention which states that every worker or employee has the right to establish and subject only to the rules of the organisation concerned, to join the organisation of their own choice without previous organisation. The implementation of this clause is confirmed and supported by section 4, 5 and 6 of the LRA. In the case of Lesotho, freedom of association in terms of the ILO standards is not fully respected and implemented. For example, public servants are not allowed to join trade unions and this was clearly illustrated in the case of *Lesotho Union of Public Employees v The Speaker for the National Assembly and Others*.<sup>637</sup>

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<sup>637</sup> *Lesotho Union of Public Employees v The Speaker of the National Assembly and Others* (1997) 11 BLLR.

The bone of contention in this case was to find out if the provisions of the Lesotho Public Service Act of 1995, prohibiting public officers from joining trade unions and excluding them from the provisions of the Labour Code Order of 1992 were fair to public servants.

The applicants (public servants) contended that the prohibition was not legitimate as there was no pressing need to protect the government against a trade union that was regulated by law. The respondent contended that trade unions were confrontational and only suited to the private sector in which enterprises were profit-oriented. Unions and industrial action, by contrast, had no place in the public sector. The ruling judge in this case encouraged public servants to join staff association which has no power like trade union and the Judge also argued that trade unions are confrontational and also unreasonable in their demands.

It was quite clear that the Judge was not in support of the public servants joining a trade union of their choice to fight for their rights. Article 2 of the ILO Convention on freedom of association and section 23 of the Universal Declaration of Human Rights sub-section 4 clearly state that 'everyone has the right to form and join trade unions for the protection of their rights'. This clause, as pointed out in Chapter 4 of this thesis, specifically referred to 'trade union' and not 'staff association'. The conclusion that can be reached from this case is that the Lesotho Government has not implemented freedom of association in terms of ILO standards. However, this problem of non-compliance with ILO standards in Lesotho and other SADC countries can be rectified by the harmonisation of labour laws in the SADC countries in respect of ILO standards.

Collective bargaining has not only been poorly implemented in the SADC region, but its implementation in respect of ILO standards is not uniform. For example, in Botswana the implementation of the collective bargaining process in terms of ILO standards remains a difficult task for many organisations in Botswana. This difficulty has been attributed to both the substantive issues and the procedural process required for the implementation of collective bargaining process.

In the case of *Botswana Mining Workers Union v Botswana Diamond Company (Pty) Ltd*,<sup>638</sup> which was discussed in Chapter Four of this thesis, it was observed that the Botswana Mining Workers Union could not fulfil all the conditions required to carry out a protected strike action. Although the conditions were negotiated through a collective bargaining process, it was still difficult to be fully complied with. It should also be noted that the Botswana Constitution also provides for collective bargaining for unions that have the organisational strength to engage in collective bargaining and because of the requirements, only unions that have enrolled 25 per cent of its labour force can engage in collective bargaining. This requirement was a hindrance and has contributed greatly to the non-existence of collective bargaining in most other sectors. This requirement needs to be rectified if Botswana is to meet the ILO standards in terms of collective bargaining Conventions and Recommendations.

In the case of Tanzania, the process of collective bargaining has not been successful in respect of ILO standards because the process required to negotiate collective agreements is very mechanistic. Any issue agreed upon as a result of collective agreement must be submitted to the Industrial Court for approval and may be refused registration if they do not comply with the government established economic policy. Collective bargaining does not exist in the public sector. Unions and government representatives make recommendations on the basis of these, which have to be adopted by Parliament. It is also stated in the Public Service Act of 2002 that workers in the public services do not have the right to collective bargaining. In view of this, the Tanzania Government sets wages for employees in the government and state-owned enterprises.

There is also a minimum membership requirement of 30 people for unions to be registered which is more than what is required by ILO standards.

In view of this non-uniformity in the implementation of ILO standards in the SADC region, it can therefore be argued that there is an urgent need to harmonise labour laws in terms of ILO standards in the region.

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<sup>638</sup> 2004 BWCA 9. Also see [www.saflii.org/bw/cases/BWCA/2004/9.html](http://www.saflii.org/bw/cases/BWCA/2004/9.html).

This research also found that with regard to forced labour, ILO standards have not been implemented in the SADC region. For example, in Swaziland forced labour exists, especially with the enactment of the administrative order which reinforced the tradition of local residents working for chief without payment.

In Zambia, forced labour is used by government officials in respect of national emergencies and also by traditional leaders.

In Lesotho, there are a few cases of forced labour exercised by local chiefs and traditional leaders in the rural traditional areas, while in Tanzania, prisoners are used as forced labour on projects outside the prisons. Children are also used for forced labour. However, in South Africa, forced labour is strictly prohibited by labour laws and the Constitution of South Africa.

In view of this discussion, the researcher strongly suggests or recommends the need for SADC countries to adopt ILO standards. This will help to eliminate the use of forced labour that is still common in the SADC region.

In terms of the issue of discrimination, the ILO standard is not implemented in most of the SADC countries. For example, in Botswana there is discrimination against persons with HIV/AIDS in the workplace and the law also prohibits homosexuality. In Lesotho discrimination is a common phenomenon in both civil society and workplace. Women are also discriminated against.

In Namibia people with disabilities are discriminated against by employers in both the public and private sectors. The San and the Mafure are discriminated against.

In Tanzania the presence of traditional norms divides labour along gender lines and there is discrimination against women in the rural areas.

It is interesting to note that South Africa is taking the lead in the SADC countries to eliminate discrimination. Today, the elimination of discrimination in South Africa is vigorously pursued through the Constitution and the various labour legislative frameworks, which include the LRA of 1995, the Basic Employment Act of 1997 and

the Employment Equity Act of 1998. In view of the differences in the level of discrimination in the workplace in the SADC region, there is a need to harmonise the labour law in terms of ILO standards; this will help to eliminate the various types of discrimination in the workplace.

With regard to occupational health and safety issues in the workplace, this research has shown that the majority of SADC countries researched here have not provided comprehensive protection in their occupational health and safety laws. In terms of ILO standards only two countries, namely South Africa and Namibia, have expressly provided comprehensive protection in their occupational health and safety laws. For example, section 26 of the South Africa Occupational Health and Safety Act provides that no employer shall dismiss an employee, reduce his or her pay or alter his or her conditions of employment because he or she believes that the employee has given information to the State, complied with a lawful prohibition or acted in terms of the health and safety law.

Section 98 of the Namibia Labour Act states that an employer shall not dismiss or in any way discipline an employee for exercising their health and safety rights, and makes this an unfair labour practice. Section 11 states that employees shall receive full pay if they stop doing a dangerous work.

This protection of employees in South Africa and Namibia can only be extended to other SADC countries by harmonising the labour laws in terms of ILO standards.

It was clearly argued in Chapter Five of this thesis that apart from the harmonisation ILO labour standards; there is also the need for regional information sharing on occupational health and safety. In view of the potential cross-border flow of hazardous substances waste, pollution and major accident risks, there should be corresponding cross border liability for information on and management of these OH risks. It was for this reason that it was recommended in Chapter Five of this thesis the need to establish a data base that would support regional prevention of OHS risk associated with major hazard installations, registered and prohibited chemicals and

transport of hazardous material. Rene Loewenson<sup>639</sup> has also indicated in his study that it is important for SADC countries to have common standards on the management of OHS risks associated with production and trade in the SADC region.

Unfortunately, this type of data base does not exist at present. Thus, coupled with the differences of the reporting system of issues related to occupational health and safety in the region, it is difficult to have one regional policy on the issues. However, with harmonisation of labour laws in terms of ILO standards, it will be easy to compile a regional data base or comparison of data between countries in the SADC region. Thus it becomes easy to establish a minimum common and comparable set of HHS information which will be useful in planning and in the formulation of health policies in the region.

It was also observed in this research that the low penalties applied in many SADC countries for the non-compliance with occupational health and safety laws in the work environment is one of the impediments to the effective implementation of occupational health and safety standards. Within the SADC countries the maximum penalty ranges from about US\$200 to US\$30 000. In many countries in the region promotion has been preferred to penalty as a means to improve work environments, and there has been a problem in the desire to take court action due to lengthy legal proceedings, lack of skill in prosecutions in respect of dealing with occupational health and safety cases, low success rates and also resistance to court action where the workplace are owned by government or by politically influential employers. Coupled with this problem, is the issue of inflation or devaluation which has led to the existing penalty fines to lose their values compared to the cost of new machinery or equipment.<sup>640</sup>

In the light of this discussion, it would be useful to harmonise to some degree the serenity and scope of the occupational health and safety penalties in the SADC region as the movement of companies and labour in the region increases. It is also

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<sup>639</sup> Loewenson (1996).

<sup>640</sup> *Ibid.*

recommended that SADC find a means to maintain penalties in future that will prevent unsafe practices, especially in the face of inflation. The researcher fully supports the implementation of the Zambian penalty strategy, which is gazetted from time to time to reflect the present value of its currency in the face or the devaluation of its currency.

The researcher believes that with this strategy and measures, the SADC countries would have a common basic legal standard of occupational health and safety which will conform with ILO standards.

Finally, the researcher also conducted an empirical investigation into the benefits of the harmonisation of labour laws in the SADC region. In the light of this investigation, the following three main hypotheses were tested:

### **10.1 Hypothesis One**

The harmonisation of labour laws in the SADC region will maintain similar benefits for the migrants in the region.

### **10.2 Hypothesis Two**

The harmonisation of labour laws in the SADC region will help in the implementation of ILO standards in the region.

### **10.3 Hypothesis Three**

The harmonisation of labour laws in the SADC region will help in the protection of workers against the greater economic power of employers in the workplace.

In respect of Hypothesis One above, the researcher found that harmonisation of labour laws in the SADC region will help to maintain similar benefits for the migrant labour in the SADC region. This confirms that migrant labour and the SADC region as a whole will benefit from the harmonisation of labour laws in the region. This finding is discussed at length in Chapter Six of this thesis and it reflects how current



migrant workers, especially those from Zimbabwe, are suffering at the hands of unscrupulous employers in the region as a result of the current plurality of labour laws in the SADC region. The harmonisation of labour laws will minimise the exploitation and poor conditions of service offered to migrant workers.

In respect of the second hypothesis, the researcher found that harmonisation of labour laws in the SADC region will help in the implementation of ILO standards. This research confirms the fact that the implementation of ILO standards will be made easier through harmonisation of labour laws since the different countries in the SADC region implements the core areas of ILO labour standards differently. For example, in respect of Freedom of Association, its implementation in South Africa is greatly influenced by Union activities while in Botswana this is not influenced by Union activities. In Zambia, the government placed more limits on Freedom of Association when compared with other SADC countries. In Tanzania, the private sector employers have adopted anti-union policies that hinder Freedom of Association. However, all these differences can be rectified through harmonisation of labour laws in terms of ILO standards.

With regard to the third hypothesis, the researcher found that harmonisation of labour laws in SADC countries will protect the workers against the economic power of the employers in respect of

- (a) protection of workers against poor and unhealthy work environment; and
- (b) protection of workers claims in the event of insolvency and lastly the protection of female workers against discrimination.

All these benefits have already been discussed at length in Chapter Six of this thesis. Finally, the researcher fully recommends that there is an urgent need to harmonise labour laws in the SADC region if the ILO labour standards are to be achieved and maintained in the region.

The achievement of ILO labour standard in the SADC region will challenge other regional bodies in Africa continent such ECOWAS, Maghreb, East Africa Community and COMESA to harmonise their labour laws. The long-run effects of harmonising the labour laws in the Africa region will eventually lead to the integration of one

labour law in Africa just as it is in EU in recent time. It is the researcher's hope that this will be the dream of Africa, however much research is needed on how this can be achieved in future.

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*Worringham v Lloyds Bank* (1980) 1 CMLR case 69/80

*WUSA v Crouse NO and Another* (2005)11 BLLR 1156 (LC)

*Young James and Webster v UK* (1981) IRLR 408

## **STATUTES**

### **INTERNATIONAL LABOUR ORGANISATION**

Convention on Freedom of Association of 1948

Convention on Collective Bargaining 98 of 1949

### **SOUTHERN AFRICAN DEVELOPMENT COMMUNITY STATUTES**

SADC Charter on Fundamental Social Rights of Workers of 2001.

#### **Botswana**

Botswana Constitution

Factories Act, Chapter 44: 01

Trade Dispute Act 15 of 2006

Trade Unions and Employers' Organisation Act 16 of 2004

Interpretation Act Cap 01:04.

Factories Act of 1950,

Mines, Quarries, Works and Machinery Act of

Employment Act, Chapter 47:07 2002

#### **Lesotho**

Labour Code Order of 1992

Labour Code Order of 2003

#### **Malawi**

Factories Act, chapter 55:07

Health and Welfare Bill of 1996

## **Mauritius**

Occupational Health, Safety and Welfare Act 34 of 1988

## **Namibia**

Namibia Labour Act 6 of 1992

Namibia Labour Act 15 of 2004

Labour Act 6 of 1992

Namibian Draft Regulations on Occupational Health and Safety of 1995

Employees Compensation Amendment Act of 1995

Public Service Act of 1995

Social Security Act of 1994

Export Processing Zone Act of 1995

Affirmative Action (Employment) Act of 1998.

Labour Act 6 of 1992

Namibia Occupational Health and Safety Act of 1995

## **South Africa**

Basic Conditions of Employment Act of 1997

Employment Equity Act 55 of 1998

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Government of South Africa *Constitution of the Republic of South Africa*

(10 December 1996) Chap 2 ss 28(3) and 28 (1)(e) and (f).

Occupational Health and Safety Act 85 of 1993

Hazardous Chemical Regulations of 1995

Labour Relations Act 66 of 1995

Local Government Transition Act 209 of 1993

Employment Equity Act 55 of 1998

Occupational Health and Safety Act 85 of 1993

Hazardous Chemical Regulations 1995

## **Swaziland**

Industrial Relations Act as Amended 2005  
Employment Act of 1980  
Factories, Machinery and Construction Works Act of 1972  
Factories, Machinery and Construction Works Act of 1972  
Industrial Relations Act as Amended of 2005

## **Tanzania**

Employment and Labour Relations Act 2004  
Factories Ordinance of 1950, chapter 297  
Building Regulations of 1955  
Tanzania Occupational Health and Safety Act of 1995

## **Zambia**

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Factories Act, chapter 514  
The Zambia Draft Occupational Safety and Health Bill of 1996

## **Zimbabwe**

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Factories and Works Act  
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## ABBREVIATIONS

AEC	African Economic Community
AP	Action Programme
BESSIP	<i>Basic Education Subsector Investment Programme</i>
CCFCLL	Child Care and Family Care Leave Law
CCMA	Commission for Conciliation Mediation and Arbitration
CLIG	Child Labour Intersectoral Group
COMESA	Common Market for Eastern and Southern Africa
CPA	Community Programme of Action
CPU	Child Protection Unit
DDPR	Directorate of Dispute Prevention and Resolution
DRC	Democratic Republic of Congo
EC	European Community
ECOWAS	Economic Community of West African States
EEA	Employment Equity Act
EEC	European Economic Community
EEDL	Equal Employment Opportunity Law
EEOL	Equal Employment Opportunity Law
EIL	Employment Insurance Law
ETSIP	Education and Training Sector Improvement Programme
EU	European Union
FAL	Final Act of Lagos
GCPU	Gender and Child Protection Unit
ICM	Integrated Committee of Ministers
ILO	International Labour Organisation
IMF	International Monetary Fund
IPECL	International Programme for the elimination of Child Labour
LIFO	last in first out
LRA	Labour Relations Act
LSL	Labour Standards Law
MLSS	Ministry of Labour and Social Security
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organisation

NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
NUTW	National Union of Tanganyika Workers
OAU	Organisation of African Unity
OHS	occupational health and safety
PTA	Preferential Trade Areas [of Eastern and Southern Africa]
RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SIPO	Strategic Indicative Plan for the Organ
UK	United Kingdom
UN	United Nations
Unicef	United Nations International Children's Emergency Fund
US	United State of America
USAID	United States Agency for International Development

## **GLOSSARY**

the Council	Council of Ministers
the Registrar	Registrar of Labour
the Social Charter	Community Charter of Fundamental Social Rights