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Collective bargaining and collective agreements in Africa

Comparative reflections on SADC

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**COLLECTIVE BARGAINING AND COLLECTIVE
AGREEMENTS IN AFRICA
COMPARATIVE REFLECTIONS ON SADC**

Tavonga Jordan Zvobga

Introduction

Every individual has the right to work with dignity, regardless of their gender or sex, race, tribe, geographical place of origin, socio-political, legal and/or economic status. To this end the international conventions and norms are of great significance in not only protecting this recognised basic human right but in the formulation of standards to ensure employees work with dignity.¹ It is axiomatic that being able to provide a balance to the demands of the worker while at work and finding new and better ways to manage people, time, space and workloads effectively is crucial. In order to not only protect the right to work with dignity but to find better ways to manage people's work effectively, several means, such as collective bargaining and the judiciary can be put into service.

The work of the judiciary is of paramount importance to the protection of labour rights. A competent, independent and impartial judiciary is important for the implementation of these rights and the proper administration of justice.² The judiciary aids in interpreting and applying national constitutions and legislation in harmony with International Labour Standards (ILS) and customary international law.³ It also clarifies ambiguity or uncertainty in domestic law and develops the common law in light of the values and principles enshrined in international human rights law.⁴ The judicial community, however, is often marred by demonstrably erroneous judgments cloaked in rationale based on either outdated or biased legal, political, moral and social principles. This has affected the nature and extent that people enjoy their rights and freedoms and has been a key interest of civil society groups such as Amnesty International,⁵ ActionAid⁶ and Save the Children⁷ amongst others. Due to this, the world of work cannot divorce itself from such precedent, rather it can learn and improve.

In recent years, there has been more movement of capital than labour across international borders. As a result the judicial community has had to turn more from what their respective domestic laws

¹ Labour rights are human rights. Thus any blatant disregard of one's labour rights is an infringement of their inherent human rights.

² The Bangalore Principles of Judicial Conduct, 2002 (*The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25–26, 2002*) https://www.unodc.org/pdf/crime/corruption/judicial.../Bangalore_principles.pdf (accessed 13th June, 2019)

³ Customary International Law refers to the body of law which is accepted as applying universally and is generally regarded as including the fundamental freedoms and human rights. It apply within a country regardless of whether there has been a ratification and/or incorporation of a convention.

⁴ Bangalore Principles of Judicial Conduct, 2002

⁵ See www.amnesty.org

⁶ See www.actionaid.org

⁷ See www.savethechildren.net

prescribe and consider using international human rights instruments and ILS⁸ in their *ratio decidendi* and in aiding/ guiding common law where local legislation is silent. Thus, increased awareness amongst the judiciary and within the legal fraternity has become crucial in order to strengthen the role of judges, lawyers and legal educators in promoting social change.⁹

Cheadle¹⁰ notes that, “Fundamental human rights, which include the core international labour standards, are inherent in all human beings and find expression in international human rights instruments, national constitutions and legal systems throughout the world.”¹¹ Continuing with this, Cheadle remarks:

*“The use of international labour standards in domestic law must however be based on the legal materials available to a court under its domestic law. Those legal materials are: international customary law and the possibility of common law incorporation; the constitution and the manner in which it articulates with international law, statute and the common law; and the common law itself, including principally its rules of interpretation. In whatever way international labour standards are applied, the standards provide a rich and authoritative source for the development of labour law at the municipal level, ensuring consistency between the different systems of law while at the same time ensuring state compliance with international obligations.”*¹²

The International Labour Organization (ILO) has three conventions linked to the right to bargain collectively.¹³ These are, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No.

⁸ International Labour Standards are legal instruments drawn up by the ILO's constituents (governments, employers and workers) and setting out basic principles and rights at work. They are either Conventions (or Protocols), which are legally binding international treaties that may be ratified by member states, or Recommendations, which serve as non-binding guidelines. In many cases, a Convention lays down the basic principles to be implemented by ratifying countries, while a related Recommendation supplements the Convention by providing more detailed guidelines on how it could be applied. Recommendations can also be autonomous, i.e. not linked to a Convention. See <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm> (accessed 16th June, 2019)

⁹ Thomas, C., Oelz, M., & Beudonnet, X., “*The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications*”, in *Les Normes Internationales Du Travail: Un Patrimoine Pour L'avenir: Melanges En L'honneur De Nicolas Valticos* [International Labour Norms: A Heritage For The Future: Essays In Honor Of Nicolas Valtcos] 249 (Jean-Claudejavillier & Bernard Gernigon Eds. 2004) (Fr.)

¹⁰ Cheadle, H. (2012). Reception of International Labour Standards in Common-Law Legal Systems. *Acta Juridica*, 2012, 348-364.

¹¹ *Ibid*, pg. 348

¹² *Ibid*, pg. 364

¹³ The ILO has eight core conventions. The eight ILO fundamental Conventions are: the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182). These core Conventions are binding on the member states irrespective of whether or not they have been ratified or not. <https://www.ilo.org> (accessed 16th June, 2019)

98) and Collective Bargaining Convention, 1981 (No. 154). There are however complex issues which arise from these three conventions linking the concept of collective bargaining with other conventions, such as equality and non-discrimination,¹⁴ the right to work and free choice of employment,¹⁵ minimum age for admission to employment and work,¹⁶ the worst forms of child labour,¹⁷ and decent work for domestic workers.¹⁸

In Africa, legal frameworks such as the African Charter on Human and Peoples' Rights¹⁹ also affirms the right to free association. Under Article 15²⁰ of the Charter, every individual has the right to "work under equitable and satisfactory conditions"²¹ which can be achieved through collective bargaining. Whilst most of the African countries have either legislation or Constitution that commit to collective bargaining, the levels of implementation differ as per the levels of political development or prevailing economic condition of the country and the involvement of the international donor community. The important thing to note, however, is that collective bargaining provides sufficient amplitude to compass all the facets of working with dignity under any economic conditions.

In addition to this, there are several issues that have become increasingly important over the past few years such as the rise in the informal workforce, technological advancement, occupational health and safety, training and skills development, migrant workers and the policies adopted by developing countries when dealing with emerging economies such as Brazil, China and India.²² These are among some of the issues that shall be discussed in this paper with particular bias being on their impact, in Southern Africa, to the rights of both workers on the one hand and employers on the other hand to bargain collectively. This paper will also manoeuvre on a human centred approach in a world fast advancing and replacing the human element in the field of work.

It is logical to presume, *prima facie*, that worker's rights are going to be encroached directly by the technological advancements the world of work will experience in the future. With regard to the possibility of mass retrenchments, or the closure of the business due to the assimilation of these

¹⁴ Article 2, Universal Declaration of Human Rights (UDHR), 1948

¹⁵ Article 23, Universal Declaration of Human Rights (UDHR), 1948

¹⁶ Minimum Age Convention, 1973 (No. 138)

¹⁷ Worst Forms of Child Labour Convention, 1999 (No. 182)

¹⁸ Domestic Workers Convention, 2011 (No. 189)

¹⁹ African Charter on Human and Peoples' Rights (also known as the Banjul Charter), 1981, Article 10

²⁰ African Charter on Human and Peoples' Rights, (1981)

²¹ *Ibid*, Article 15

²² Susan Hayter discusses five emerging economies - Brazil, China, India, South Africa and Turkey in, Hayter. S. and Lee, C. H. (2018) *Industrial Relations in Emerging Economies: The Quest for Inclusive Development*. Edward Elgar Publishing. Cheltenham, UK. ILO: Geneva.

technological advancements, the Committee on Freedom of Association stated that this “should not in itself result in the extinction of the obligations resulting from collective agreement, in particular as regards compensation in the case of dismissal.”²³ Whether or not this is true remains to be proved but it is beyond the scope of this paper. Its focus, regarding the future of work will be focused on southern Africa’s development and will show that other than a slight time lag, experiences in southern Africa, or Africa as a whole, parallel those of other countries.

This paper also limits its scope to country–level & regional collective bargaining developments and practices from southern African countries, namely Botswana, Malawi, South Africa and Zimbabwe all of which have ratified ILO Conventions No. 87 and No. 98 but not No. 154.²⁴ It will make use of Committee of Expert’s reports on these countries, decided judgments from these jurisdictions (both reported and unreported), current legislation and other sources as well. Reference is made to case law from these countries to aid the discussion and to also further demonstrate that impact of the judiciary as an essential element to the protection of human rights and labour rights.

In the next section, the nature and function of collective bargaining will be discussed as a useful background and context to key issues addressed in this paper. Reference will then be made to International Labour Standards (ILS), and in descending order to regional agreements in Africa and brief reflections of the same in the European Union. Additionally, reflections are made to corporations which operate in more than one country and to Transnational Company Agreements (TCAs). It has to be recognised that there is no legal enforcement mechanism in place for TCAs but they serve to promote key features of the respective national models of social dialogue and cooperative industrial relations in the countries they affect. Finally attention will shift to the particular countries within the SADC region that form the focus of this paper.

²³ *Freedom of Association – Sixth Edition*, (2018) para 1515

²⁴ Ratifications of C154 – Collective Bargaining Convention, 1981 (No. 154) https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312299 (accessed 11th June, 2019)

Part 1

What is Collective Bargaining?

Collective bargaining is a crucial form of social dialogue.²⁵ Its true nature recognizes “the desirability for joint decision making, joint problem solving and joint responsibility in conducting relations between employers and employees.”²⁶ In addition, it is a key method used to regulate the relationship between management and employees in the workplace and a means to settle disputes through joint decision making. The true value of collective bargaining is that it generally produces peace within the enterprise, provides a level playing field between parties and preserves the essence of freedom of association.²⁷ In other words, collective bargaining and freedom of association are mutually reinforcing such that neither is fully realized without the other.

The Interacting Parties

According to the ILO Collective Bargaining Convention, 1981 (No. 154), collective bargaining refers to “all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.”²⁸ The ILO defines social dialogue as “all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy.”²⁹ It can be among bipartite parties in the workplace (between labour and management) or industrial sector (between trade unions and employers' organizations) or by tripartite parties (with government as an official party to the dialogue) at national or regional levels. It is crucial to note that “collective bargaining is a fundamental right accepted by member States from the very fact of their membership in the ILO, and which they

²⁵ *Non – standard Workers: Good Practices of Social Dialogue and Collective Bargaining/ Minawa Ebisui. International Labour Office, Industrial and Employment Relations Department. – Geneva: ILO, 2012 (Working paper No. 36) https://www.ilo.org/ifpdial/information-resources/publications/WCMS_179448/lang-en/index.htm (accessed 13th June, 2019)*

²⁶ Collective Bargaining and Labour Disputes Resolution; is SADC Meeting the Challenge? /Fumane Malebona Khabo. ILO Sub-Regional Office for Southern Africa, Harare: ILO, 2008 (Issue Paper No. 30) https://www.ilo.org/africa/information-resources/publications/WCMS_228800/lang-en/index.htm (accessed 26th June, 2019)

²⁷ Freedom of association is “a basic human right with universal scope enabling the enjoyment of other rights, a process with substantive content, and opens the door to participatory actions against forced labour, the protection of children from abuses and responsive measures based on non – discriminatory and equality beneficial to all.” *Giving Globalization a Human Face*. International Labour Conference 101st Session, 2012. Report III (Part 1B). ILO: Geneva https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---/wcms_174846.pdf (accessed 13th June, 2019)

²⁸ Article 2, International Labour Organization Convention No. 154

²⁹ ILO, Areas of work – Social Dialogue <https://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang-en/index.htm> (accessed 13th June, 2019)

have an obligation to respect, to promote and to realize in good faith.”³⁰ Importantly, the ILO recognises social dialogue and/or collective bargaining as a standard which promotes social justice and peace, fair workplace relations and decent work, sustainable development, social and political stability.

Limitations

One of the objectives of workers in exercising their Convention No. 87 rights to organize is to bargain collectively, for instance through worker organisations, their terms and conditions of employment³¹– to the extent that these are not fixed by law – or improving on legal minimum standards.³² Limitations (or exceptions) of this right have only been acknowledged for certain groups of public servants such as armed forces, the police and public servants engaged in the administration of the State.³³ Whilst this may be so, this exception or limitation leaves intact the rights guaranteed to public servants under Convention No. 87.

It is agreed that, in practice, “priority should be given to collective bargaining as a means to settle disputes arising in connection with the determination of the terms and conditions of employment”³⁴ not only in the private sector but also where it concerns the public servants who are not engaged in the administration of the State. A distinction therefore needs to be made between public servants who by their functions are directly employed in the administration of the State and all other person employed by the government, public enterprises or by autonomous public institutions, who should benefit from the rights enshrined in Convention No.98.³⁵ Collective bargaining therefore applies to all workers, irrespective of their type of employment, including the following categories of workers: prison staff, fire service personnel, subcontracted workers, rural and agricultural workers, workers in export processing zones (EPZs), migrant workers, seafarers, apprentices and domestic workers.

Existing Formalities

Generally there are no formalities to how the negotiations should be conducted or what should be produced as a result of the same. It is for the parties negotiating to determine the subjects for

³⁰ ILO Declaration on Fundamental Principles and Rights at Work, 1998, para 2

³¹ *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association* / International Labour Office – Geneva: ILO, 6th edition, 2018. Para 1234

³² Fact sheet No. 1. (2015) *Collective Bargaining*. International Labour Office www.ilo.org/collectivebargaining (accessed 11th June, 2019)

³³ *Ibid*, para 1239

³⁴ *Ibid*, para 1241

³⁵ *Giving Globalization a Human Face*. ILC (2012), para 172

negotiation.³⁶ However, the subject for negotiations typically include “the type of agreement to be offered to the employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided in legislation.”³⁷ In so far as the duration of the collective agreement is concerned, this again will be a matter for the party’s involved³⁸ taking cognisance of issues such as the workers’ genuine interests and any statutory provisions.

At the end of the negotiation process, a collective bargaining agreement (also known as a collective agreement) is produced, outlining the conditions agreed to and any limitations with regards to time. In certain jurisdictions, such as South Africa (to be discussed below) the only formality for a collective agreement is that it should be reduced to writing.³⁹ This is in line with the Collective Agreements Recommendation, 1951 (No. 91) which states that collective agreements are, “all agreements **in writing**⁴⁰ regarding working conditions and terms of employment concluded between and employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more representative workers’ organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.”⁴¹ Absent of being in writing, both the Recommendation and South African authorities consider any agreed terms and conditions to be a mere gentleman’s agreement and therefore only persuasive (even with *ipsissima verba*), unless by operation of legislation – such as the *Labour Relations Act* (hereinafter also referred to as LRA).⁴² In addition to being in writing, some jurisdictions go further and require the collective agreement to be registered with the Minister responsible for labour or employment for it to be recognised.

In other words, the collective bargaining agreement (hereafter also referred to as the CBA) is the tail end or brainchild of collective bargaining and a direct result of the expression of an individual worker’s enjoyment of their freedom of association rights. It is the end result of open and friendly negotiations or when employers and employees meet together and talk over their common

³⁶ *Freedom of Association – Sixth Edition*, (2018) para 1289

³⁷ *Ibid*, para 1291

³⁸ *Ibid*, para 1502

³⁹ Bhoola U. (2002) *National Labour Law Profile: South Africa*. https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang-en/index.htm (accessed 10th June, 2019)

⁴⁰ *Labour Relations Act*, 66 of 1995 (s213)

⁴¹ *Freedom of Association – Sixth Edition*, (2018) para 1344

⁴² 66 of 1995

interests openly and freely. But for the success of such negotiations, the employers and employees would come to a stalemate which could often result in either strike action or employees working without a contract for a length of time.⁴³

It is important to associate collective bargaining and CBAs with the insight of the ILO Committee on Freedom of Association who states that the “collective agreements should be binding on the parties.”⁴⁴ This view is taken particularly because when parties bargain, it involves a process of give-and-take and “a reasonable certainty that negotiated commitments will be honoured, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members.”⁴⁵ It would therefore defeat the purpose if the agreements were not binding on the parties in the first instance, secondly, if the parties did not voluntarily enter negotiations,⁴⁶ and lastly if they did not bargain in good faith.⁴⁷

⁴³ What is Collective Bargaining? <http://www.masters-in-human-resources.org/faq/collective-bargaining/> (accessed 10th June, 2019)

⁴⁴ *Freedom of Association – Sixth Edition*, (2018) para 1334

⁴⁵ *Ibid*, para 1337

⁴⁶ *Ibid*, para 1313

⁴⁷ *Ibid*, para 1328

Part 2

Transnational Labour Relations: The Case of SADC

There are different levels upon which collective bargaining is undertaken that have an impact on labour relations, employers and employees and even the state. The determination of the bargaining level is essentially a matter to be left to the discretion of the parties.⁴⁸ In practice, it could either be at the level of the branch of activity or at the enterprise level, industry level, central or inter-occupational level, national level (with government as an employer & as a member of the Tripartite System), regional level (like EU or SADC) or at international level.⁴⁹ Undeniably, the use of international labour instruments / standards by courts in both monist and dualist legal systems in every jurisdiction around the world has the potential of strengthening domestic judicial decision-making⁵⁰ regardless of the level of negotiations.

It is important to note that the prevailing system of incorporation of international law in domestic law, either monist or dualist, influences the way in which international labour instruments can be used in and by domestic courts. It has been argued that dualist systems carry an advantage over monist systems due to their “application of common law not embodied in statute but instead evolved by interpretation in the courts.”⁵¹ This allows for international labour standards to be used and accepted by way of judicial precedent. Based on this analysis it is apparent that transnational labour relations will also be affected by the prevailing system of incorporation.

According to one school of thought, “the degree to which courts refer to international instruments is considerably determined by the prevailing legal culture with regards to openness and awareness of international law rather than the system of incorporation.”⁵² In many instances, awareness that the use of international standards in national courts will not circumvent the national legislation but will rather enrich and improve domestic judicial decision-making is *sine qua non*.

The current members of the Southern African Development Community (SADC) are: Angola, Botswana, Comoros, Democratic Republic of Congo, Kingdom of Eswatini (Swaziland), the Kingdom of Lesotho, Madagascar, Malawi, Republic of Mauritius, Mozambique, Namibia,

⁴⁸ Article 4 of Convention 98

⁴⁹ *Freedom of Association – Sixth Edition*, (2018) para 1404

⁵⁰ Thomas et al (2004) pg. 253

⁵¹ Layton, R. (2006). *When and how can Domestic Judges and Lawyers use International Law in Dualist Systems?* International Training Centre of the ILO – Turin: ITCILO, 2006 (accessed 28th May, 2019)

⁵² *Ibid*, pg. 283

Seychelles, Republic of South Africa, United Republic of Tanzania, Zambia and Zimbabwe.⁵³ SADC adopted a Social Charter⁵⁴ in 2003 whose overall objective is to facilitate through close and active consultations amongst social partners, a spirit conducive to harmonious labour relations within the region.⁵⁵ This is a bold move towards the establishment of minimum regional standards which are paramount when undertaking transnational collective bargaining with SADC-wide companies. If the European Union is taken as an example, one would note that an acceptable and mutually agreed upon regional system of transnational labour relations and standards can be of benefit to the people in the SADC region. However, there are scholars who believe that SADC is a toothless body and thus any such system within the SADC region in particular is but a fleeting dream.⁵⁶

Taking into account the foregoing, one way to create transnational or regional labour standards within SADC is to ensure the application or implementation of international labour standards set by the ILO.⁵⁷ Another measure argued by Smit⁵⁸ is the empowerment of local actors in the member states of the SADC. Whilst this may certainly contribute towards the establishment of regional labour standards for SADC, it does not take into account the different politico-economic climates within the member States. Such climate can hinder the operations or integration of the said standards. An example would be the politico-economic climate and ever growing “informal economy”⁵⁹ in Zimbabwe.

Focusing any standards without incorporating those workers in the informal economy would tarnish the effectiveness of the system. The informal economy, amongst other things, is characterized by serious decent work⁶⁰ deficits which include absence of social protection coverage, poor health and safety, long working hours, weak labour inspection and lack of social

⁵³ Southern African Development Community (SADC), <https://www.sadc.int/member-states/> (accessed 16th June, 2019)

⁵⁴ Charter of the Fundamental Social Rights in SADC, 2003 (the Social Charter) https://www.sadc.int/files/6613/5292/8383/Charter_of_the_Fundamental_Social_Rights_in_SADC2003.pdf (accessed 16th June, 2019)

⁵⁵ *Ibid*, Article 2

⁵⁶ Smit, P. (2014) “*Transitional Labour Relations in SADC: A Dream or Possibility in SADC?*” In African Journal of International and Comparative Law 22 (3), 448 – 467. HeinOnline, <https://heinonline.org/HOI/P?h=hein.journals/afjincol22&i=446> (accessed 13th June, 2019)

⁵⁷ *Ibid*, pg. 465

⁵⁸ *Ibid*, pg. 465

⁵⁹ ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204). Article 2 defines the term informal economy as “all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements.” It however also excludes all illegal activities or services forbidden by law such as illicit production and trafficking of drugs, persons or firearms and money laundering as defined by respective international treaties.

⁶⁰ Decent work is part and parcel of the United Nations 2030 Agenda for Sustainable Development, as Sustainable Development Goal 8. <https://sustainabledevelopment.un.org/sdgs> (accessed 27th June, 2019)

dialogue mechanisms.⁶¹ All of these need to be taken into account in considering the influence of regional or international frameworks in the integration or application of domestic legislation and practices.

The SADC region has multiple labour law regimes and the industrial relations environment varies considerably from country to country. However, in the context of collective bargaining and labour dispute resolution, most SADC countries have embraced the concept of alternative dispute resolution forums. In South Africa, the Council for Conciliation, Mediation and Arbitration (CCMA) was established in terms of the *Labour Relations Act*.⁶² In Botswana and Malawi⁶³ mediation and arbitration services are undertaken by their respective Department of Labour. In Zimbabwe, there are National Employment Councils (NEC)⁶⁴ for each sector or industry that act as dispute resolution bodies.

Taking the example of Zimbabwe, trade unions that might aspire to ‘develop linkages find themselves beset by national laws and practices that either prohibit their activities or bedevil their attempts to organize transnationally.’⁶⁵ It is therefore imperative that any development of a system of regional labour standards for SADC consider the differences between the countries in terms of social, cultural and legal systems, significant income and economic disparities and political instability in some cases.

The lack of synthesis of local jurisprudence and international labour standards within the SADC region and harmony between member States and their attention to regional labour concerns, are key reasons why there exist significant income and economic disparities for individuals who work for transnational companies within the region. Furthermore, the lack of informal economy support structures, minimum levels of rights and social protections as well as recognition and support of national informal economy associations are other reasons for the said disparities.⁶⁶

⁶¹ ILO: Decent Work Country Programme for Zimbabwe 2012 - 2015 https://www.ilo.org/africa/countries-covered/zimbabwe/WCMS_226543/lang-en/index.htm (accessed 28th May, 2019)

⁶² 66 of 1995

⁶³ *Kamphoni v Malawi Telecommunications Ltd* (IRC 52 of 001) (52 of 001) [2006] MWIRC 66 (31 May 2006)

⁶⁴ The National Employment Councils (NEC) fall under the Ministry of Public Service, Labour and Social Welfare. They constitute a bipartite labour body specifically dealing with labour-related issues in a specific industry or sector. They are also constituted in terms of the Labour Act [Chapter 28:01] under Sections 56 and 57.

⁶⁵ Ramolotja, M. A., Mpedi, L. G. “Labour law in Southern Africa: A look at South Africa and. Swaziland” (2000) 12 SA *Mercantile Law Journal* 420.

⁶⁶ *World Employment and Social Outlook: Trends 2019*. Labour Market Trends and Policy Evaluation Unit of the ILO Research Department. International Labour Office: Geneva. https://www.ilo.org/global/research/global-reports/weso/2019/WCMS_670554/lang-en/index.htm (accessed 12th June, 2019).

The SADC region has a steadily growing poor population and high unemployment amongst those aged below 35 years of age (70%).⁶⁷ With this in mind, it has a rising need, not only to integrate international labour standards within the region but to adopting “holistic and modern approaches that will enable the youth to be employed and or be self-employed in a rapidly changing modern labour market.”⁶⁸ Furthermore, such holistic and modern approaches could encourage collective bargaining regardless of the level or labour market variables. However, this is not the only challenge the region is facing. In an effort to attract multinational businesses, countries such as Zimbabwe can be said to have lowered their labour standards in order to cut or suppress labour costs.⁶⁹ This has not only led to the growth of an impoverished youth and an exploited labour force, but has systematically resulted in high unemployment amongst the same.

Harmonisation of the labour systems within the SADC region to comply with certain standards can be seen as a way to level the playing field between countries and combat the negative effects of globalisation on workers in the region.⁷⁰ As in some other regions, within SADC, trade unions still operate mainly within their national boundaries and there are not many transnational trade unions.⁷¹ As a result, the privileges afforded to workers in one country will often not be extended to workers of the same enterprise in another country.⁷²

According to one school of thought, an important “point of departure for the harmonisation of the labour law systems of countries in Southern Africa is the Charter of Fundamental Social Rights in SADC which is based on the earlier Social Charter of SATUCC,⁷³ representing all the major trade unions federations in the Southern African region.”⁷⁴ The Charter emphasises the indivisibility of human rights, including worker rights, the importance of freedom of association and collective bargaining, equal treatment for men and women, and the promotion of labour policies which facilitate progressive harmonisation of labour standards.⁷⁵ It is in consonance with the international labour standards set by the ILO stating that its member States shall create an

⁶⁷ SADC (2018) Meeting of the SADC Ministers Of Employment & Labour And Social Partners, Cape Town International Conference Centre, Cape Town, South Africa. SADC/ELSM&SP/1/2018/1R
<https://www.tralac.org/images/docs/12814/2018-sadc-els-draft-record.pdf> (accessed 18th June, 2019)

⁶⁸ *Ibid*, pg.20

⁶⁹ Calitz, K. (2008). The Harmonisation of Labour Law in Southern Africa. *De Jure*, 41(2), 223-244.
<https://heinonline.org/HOL/P?h=hein.journals/dejur41&i=233> (accessed 14th June, 2019)

⁷⁰ *Ibid*, pg. 225

⁷¹ *Ibid*, pg. 226

⁷² See *supra* note 51

⁷³ Southern African Trade Union Co-ordinating Council (established in March 1983) <https://www.satucc.org>

⁷⁴ Calitz (2008), pg. 240

⁷⁵ *Ibid*, pg. 241

enabling environment consistent with the ILO Conventions on freedom of association and the right to collective bargaining.⁷⁶

It remains a matter of scholarly debate whether or not such harmonisation will lead to adoption of similar privileges between workers of the same enterprise within different countries. However, where this matters, another point of departure is the African Charter on Human and Peoples' Rights (ACHPR) discussed above.⁷⁷ Its provisions deal with the right to Freedom of Association⁷⁸ and the right to work under equitable and satisfactory conditions.⁷⁹

Transnational Company Agreements

Another point of departure is transnational company agreements (hereinafter referred to as TCAs) for enterprises within the region interested in promoting social dialogue as an option to establish standards at a group level. TCAs are made at regional or global level. According to one school of thought, TCAs are a 'specific collective agreement – a specific kind of framework arrangements whose objective is to establish autonomous regulation of industrial relations in the age of globalisation and increasingly important role of large multinational corporations.'⁸⁰ The European Commission has defined TCAs as "an agreement comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives."⁸¹

TCAs have both positive and negative impact on the companies that have signed them which stem from precise commitments by the companies and setting clear affirmations of rights within the company. According to the ILO, the positive reasons for engaging in TCAs include: 'giving more credit to company policies; regulating subsidiaries and providing more visibility and consistency throughout company subsidiaries; providing an addition platform for monitoring and reporting as well as a means of resolving disputes via social dialogue and; tackling significant changes to

⁷⁶ Charter of Fundamental Social Rights, Article 4

⁷⁷ ACHPR (Banjul Charter) 9187

⁷⁸ ACHPR, Article 10

⁷⁹ ACHPR, Article 15

⁸⁰ Czarzasty J. (2017), "European Works councils as a Platform of Support for Transnational Company Agreements (TCAs)" in The National Commission of NSZZ "Solidarność" Wąły Piastowskie 24, 80-855 Gdańsk

⁸¹ EC staff working document on "The role of transnational company agreements in the context of increasing international integration" (SEC 2008) <https://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214> (accessed 18th June, 2019)

companies for instance staff support in companies anticipating significant transformations.⁸² On the other hand, the reasons for not engaging in TCAs include: ‘companies feeling uncomfortable with the potential of being exposed due to doubts over the actual extent of their commitment; doubts over reduced leeway in situations where they lack efficient controls; levels of stakeholder commitment due to doubts over the value added by the TCA to complement existing corporate social responsibility policies in place and the risk of local industrial relations being compromised.’⁸³

It is however important to note that negotiations at this level affect global corporations which have voluntarily entered these agreements and not small businesses. In addition to this, only a handful of global corporations have operations within the SADC region. For instance, Volkswagen, BMW, Vodafone, the Standard Bank Group, Barclays Bank, Old Mutual and General Electric have a presence in South Africa. In Zimbabwe, Unilever, Nestlé, Anglo-American Corporation, Delta Corporation, Old Mutual and Bata are worth mentioning as having a presence in the country. This is not an exhaustive list of corporations that have a presence in these countries. However, there are other corporations which can be considered to be defunct due to the economic climate that has systematically caused so many corporations to shut down. Moreover, these figures are placed against a background of about “80,000 major multinational companies operating around the world”⁸⁴ and of this 320 transnational agreements concluded with around 180 companies.⁸⁵ This affects the wheels turning towards TCAs within the region as most medium-sized companies have a separate management and implementation structure from global corporations.

It is important to note that promoting more inclusive social dialogue and collective bargaining is a key means of ensuring an equal voice for all workers, regardless of their race, sex, gender, legal status, and nurtures a fairer and more equitable society. One of the challenges going ahead is how to bring together, not only standard workers but non-standard workers, whose union representation and collective bargaining coverage⁸⁶ tend to be low, whilst manoeuvring a labour market vastly affected by technological innovation and globalization. To this end, regional

⁸² International Training Centre of the ILO (2018), Transnational Company Agreements: Issues, Approaches and Practices. A guide for employers’ organisations and companies. <https://www.itcilo.org/en/the-centre/.../employers-activities/.../2018TCAsKeyIssues.pdf> (accessed 13th June, 2019)

⁸³ *Ibid*, pg. 14 – 19

⁸⁴ *Ibid*, pg. 1

⁸⁵ *Ibid*, pg. 1

⁸⁶ Collective bargaining coverage means “the number of workers whose pay and/or conditions of employment is determined by one or more collective agreement(s). This number should include individuals whose pay and/or employment conditions are determined by collective bargaining agreements on the basis of the extension of those agreements, and refer to all agreements in force.” *Quick Guide on Sources and Uses of Collective Bargaining Statistics*. Department of Statistics, Data Production and Analysis Unit. International Labour Organization: Geneva. https://www.ilo.org/stat/Publications/WCMS_648799/lang-en/index.htm (accessed 12th June, 2019)

frameworks such as the ACPHR and the Charter of Fundamental Social Rights in SADC play a key role as they aim to facilitate a convergence of national regulatory frameworks and provide a floor for standards and practices within the region.

Part 3

The Example of Botswana

The evolution of collective bargaining in Botswana and the degree to which institutional trajectories have been shaped by economic and political transition has been one of the most peculiar in the region. It has been applauded in the past as a democratic, peaceful country which takes bold efforts to enhancing human rights and labour rights. Such reviews have impacted the development of collective bargaining within its borders and caused a myriad of challenges for union activities which are seen as counterproductive to governments aim to maintain peace and good governance.

In Botswana, a dualist⁸⁷ approach is used for international agreements and a monist-like approach is used for customary international law. This is the same with some other SADC countries. However, unlike other countries, Botswana is the only country whose patterns of transplantation of international standards follows what could be called a pick-and-drop like method. What this means is that rather than ratifying conventions and/or treaties Botswana's legislature in certain instances transplants only the standards it views are in line with its socio-cultural development and employs a *laissez-faire* attitude towards the rest.

Botswana's Ministry of Employment, Labour Productivity and Skills Development⁸⁸ (MELSD) has the prerogative to deal with the employment relationship issues, workplace safety and ethics across all sectors. It therefore plays a crucial role in the administration of collective bargaining and promotion of social justice and decent work in the country. In February 2011, Botswana adopted the ILO Decent Work Country program for the period ending in 2015. One of its goals was to improve the capacity of labour administration system to service collective bargaining and conciliation and arbitration mechanisms in the public sector. However, in the same year (2011), Botswana experienced its first mass public sector strike, which, it can be argued, had a negative effect on labour relations, the quality and decency of work amongst other things.

Following the historic 2011 industrial action, the relationship between parties, government and workers and worker organizations have been strained. The strikes also notably exposed the strain

⁸⁷ High Court of Botswana, 12 October 2012, Case No. Mahlb-000836-10. <http://compendium.itcilo.org/en/compendium-decisions/high-court-of-botswana-12-october-2012-case-no-mahlb-000836-10> (accessed 12th August, 2019).

⁸⁸ See <http://www.gov.bw/en/Ministries--Authorities/Ministries/ministry-of-employment-labour-productivity-and-skills-development/> (accessed 19th July, 2019)

that exists between these organisations in Botswana to the world. There have also been instances where anti-union behaviour has been demonstrated with the government refusing to enter into wage negotiations, unilateral withdrawal of benefits and the denial of the right to organise and bargain collectively.⁸⁹ Since then, there has also been a “lack of respect and utilization of platforms for social dialogue between the employers and employees.”⁹⁰ The country can thus be said to require a process of development not only in the area of systems such as collective bargaining but also on dispute resolution in line with the ILO standards.

The Industrial Court of Botswana is specifically designated to attend to labour matters. It was established by the *Trades Disputes Act*⁹¹ as a Court of law and equity.⁹² What this means is that it applies rules of natural justice or rules of equity when determining trade disputes. As a platform for the advancement of social justice and law, the Industrial court represents the final frontier in Botswana for redress of labour rights violations. Furthermore, the rules of equity, the Court has indicated, are derived from the common law as well as ILO conventions and recommendations.⁹³ The Court is not bound by the ordinary rules of evidence and can refer to ILS to resolve a gap in domestic law or take into account unratified conventions if this would be useful to assist it to settle a dispute.⁹⁴ The collective bargaining case of *First National Bank of Botswana Ltd v Botswana Bank Employees’ Union*⁹⁵ is exemplary of the above facts where it used ILS in order to reach its decision. The Court held that because it is a Court of equity, it can make “use of principles set out in unratified conventions, together with other principles when it has to decide whether a certain aspect is fair and reasonable.”⁹⁶

In another matter, *Botswana Postal Services Workers’ Union v Botswana Postal Services*, it endorsed the principle that ‘a union’s obligation in situations of collective bargaining derive from the principle of representative governance rather than principles of agency.’⁹⁷ This reinforces the mandate of the union to represent the interests of employees and merit their involvement during collective bargaining as a party to the negotiations. Furthermore, it confirms the fact that trade unions still

⁸⁹ Mpho Patience Mwatcha, (2015). Botswana’s Labour Relations System: Lessons from 2011 Public Sector Strike [Thesis]. University of Witwatersrand – Johannesburg, South Africa

⁹⁰ Kethlalefile Motshegwa, (2018). An Analysis of the Effectiveness of Alternative Dispute Resolution Systems in Botswana [Thesis]. ITCILO – Turin, Italy.

⁹¹ *Trades Disputes Act*, Ch. 48:02

⁹² Section 15 (1), *Trade Disputes Act*, Ch. 48:02. See also – *Lemo v Northern Air Maintenance (PTY) Ltd*. 2004 (2) BLR 317 (IC)

⁹³ *Monare v Botswana Ash (PTY)* 2004 (1) BLR 121 (IC)

⁹⁴ *Moeti and Others v Botswana Meat Commission* 2000 (1) BLR 153 (CA) 162 A–C

⁹⁵ *First National Bank of Botswana Ltd v Botswana Bank Employees’ Union* 1997 BLR 1177 (IC)

⁹⁶ *First National Bank of Botswana Ltd v Botswana Bank Employees’ Union* 1997 BLR 1177 (IC), 1188

⁹⁷ *Botswana Postal Services Workers’ Union v Botswana Postal Services* 2012 (1) BLR 57 (IC)

play a catalytic role in the struggle for obtaining better working conditions and in the battle for socio-economic transformation in society.

Having said this, it would seem that Botswana does not have an impressive industrial relations record. This is because its systems have been described by one scholar as biased in favour of the repression of labour.⁹⁸ Notably, the current legal framework in Botswana seems unable to adequately protect employees when a grievance arises related to the collective bargaining agreement. In terms of the *Trades Disputes Act*⁹⁹ any party to the CBA may repudiate the same agreement by way of written notice.¹⁰⁰ A dispute of interest arises when such occurs and the impressive economic performance that Botswana is known for gives way to its failure in workplace democracy and welfare. The trade union freedoms are restricted when there is a breach of the agreement or when one party elects to renounce the CBA. For instance, before the parties can strike legally, a long process starting with conciliation and ending in the Industrial Court needs to be followed.¹⁰¹ This long procedure often makes it difficult if not impossible to have a legal strike and in the end frustrates workers right to strike. During such period, after the expiry of the notice period, there is no provision as to whether or not the rights of workers are protected under the agreement being abandoned or not, whilst waiting for the resolution of the dispute. Thus, one can see that the restrictive labour laws in Botswana make it difficult for employees to organise confidently and freely in unions and lead a strike.

In the same breadth, there is no indication of rights afforded to employees after the expiry of a collective agreement and prior to the parties getting into a new one where no provision is made. This void makes presents an opportunity to employers to manipulate and also infringe on the worker's labour rights. According to Marobela,¹⁰² worker's representative are also to blame for the difficult labour relations in Botswana since they fail to represent the interests of their own members. Marobela argues further that the representatives are more interested in advancing their own agendas.¹⁰³ This situation however is one not peculiar to Botswana unions alone but is typical of unions across most African countries. Not only does it then weaken the effectiveness of

⁹⁸ Mpho Patience Mwachia, (2015). Botswana's Labour Relations System: Lessons from 2011 Public Sector Strike [Thesis]. University of Witwatersrand – Johannesburg, South Africa.

⁹⁹ Part: V *Collective Labour Agreements*

¹⁰⁰ s37 (2)

¹⁰¹ s39: *Trade Disputes Act*, Ch. 48:02

¹⁰² Marobela, M. N. (2014) "Industrial relations in Botswana – workplace conflict: behind the diamond sparkle." *Emerald Emerging Markets Case Studies*, Vol. 4 Iss 2 pp. 1 – 16 <http://dx.doi.org/10.1108/EEMCS-2014-5555> (accessed 9th August, 2019)

¹⁰³ *Ibid*, pg. 7

collective bargaining but also infringes on the rights of the workers and cripples the labour relations.

The Example of Malawi

Malawi is one African country that has remarkable influences from financial aid received from the international donor community such as the International Monetary Fund worth noting. It remains beyond the scope of this paper to discuss how far the influence of these donors has become institutionalized and thus indirectly affected the creation of the status quo in the role of the government in tripartite bargaining. However, it is clear that externally induced changes are symptomatic of the deep rooted problems which confront democracy, human rights and socio-economic development in Malawi and other African countries in a similar position.

In Malawi, a dualist approach is used for international agreements and a monist-like approach is used for customary international law. Following the constitutional transformation of Malawi between 1992 and 1995, several laws and aspects of its legal system have been undergoing review to meet the new constitutional standards. In terms of its Constitution,¹⁰⁴ “any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.”¹⁰⁵ This is the dualist approach. On the other hand, in terms of the same provision, unless it is inconsistent with the Constitution, customary international law shall form part of the law of the country.¹⁰⁶ This is the monist-like approach.

The provisions on the application of international law have particular relevance in the field of labour law reforms or development within the example countries. This is because, the ILO Constitution and ratified Conventions by member countries have the status of treaties or international agreements in international law. In the example of Malawi, these Conventions are binding international agreements which form part of the law of the republic unless Parliament provides otherwise.¹⁰⁷ The *Labour Relations Act*¹⁰⁸ gives effect to the Constitution and standards or obligations in ILO conventions and instruments which Malawi had ratified or was yet to by the time the Constitution entered into force. This essentially means conventions such as the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Termination of Employment Convention, 1982 (No.

¹⁰⁴ *Republic of Malawi (Constitution) Act*, 11 of 2010. Section 211

¹⁰⁵ s211 (1)

¹⁰⁶ s211 (3)

¹⁰⁷ s211 (1)

¹⁰⁸ s2 (2)

158) and Minimum Wage–Fixing Machinery Convention, 1928 (No. 26) all form part of the domestic law of the country.¹⁰⁹ In light of this, the Constitution of Malawi has been described by one scholar¹¹⁰ as an “international law friendly” Constitution since it calls for consideration of international law and standards, ILS and foreign comparative law in the interpretation and application of human rights clauses and other constitutional provisions.¹¹¹

The Industrial Relations Court of Malawi is established through section 110 (2) of the Constitution with original jurisdiction over labour and employment disputes. It is a subordinate court to the High Court and cannot work in a manner that interferes with the operations of the High Court. All unresolved disputes concerning an essential service or the interpretation of a statutory provision, a collective agreement or a contract of employment are referred to this Court for determination.¹¹²

In the 1990s much like in the past few years, it is worth noting that collective bargaining in Malawi has been in the majority of cases occurred only after workers have gone on strike. Thus taking industrial action or striking has been found to be the precursor of collective bargaining by some scholars. The reason for this method has been argued to be on the basis that employers use delaying tactics in handling workers’ grievances and taking action often demonstrates the gravity of the workers grievance.¹¹³ This has affected the quality and effectiveness of the collective bargaining agreements. Furthermore, it appears that Trade Unions in Malawi focus so much on wage negotiation at the expense of other employment conditions hence working hours, skills development, job security and other conditions are jeopardized.¹¹⁴ Despite this, there has been a rise of collective bargaining leading to gains in terms of wages and better conditions of employment. In order to keep these gains and also further advance decent work and social justice in Malawi, it is essential for Trade Unions to get training on Collective bargaining agreements and to challenge erosion by government officials seeking support from business.¹¹⁵

¹⁰⁹ Ng'ong'ola, C. (2002). Recent Labour Law Reforms in Malawi: A Review. *Journal of African Law*, 46 (2) 167 – 196
<https://www.jstor.org/stable/4141332> (accessed 8th August, 2019)

¹¹⁰ Ibid

¹¹¹ Ibid, 193 – 194

¹¹² *Labour Relations Act*, 16 of 1996 [section 45]

¹¹³ Dzimbiri, L. (2013) Industrial Relations in Malawi. *Country Studies from East and Central Africa*. pg. 53 – 65

¹¹⁴ Chikondi, S. N. “Status of Wages, Labour Laws and Collective Bargaining Agreements and the Impact on Workers in Malawi.” Africa Labour, Research and Education Institute, Lome. <https://alrei.org/education/status-of-wages-labour-laws-and-collective-bargaining-agreements-and-the-impact-on-workers-in-malawi-by-semu-n-chikondi> (accessed 26th August, 2019)

¹¹⁵ Ibid

Shortly after 1995, the Malawi government hurriedly embraced several legal frameworks related to the labour relations. These included the *Employment Act* and the *Labour Relations Act* mentioned above. This may have been because the government was eager to impress its supporters as well as a sceptical international community of its good governance credentials. This meant that the law of collective bargaining was too complex for application in an environment in which none of the actors had previous useful experience. It would take some time before these advances became part of the accepted legal culture in Malawi. However, during the period 2011 – 2016 the Malawi government adopted the ILO Decent Work Country Programme.¹¹⁶ This was in partnership with its social partners and ILO support in order to build the capacity of the government and social partners in the country. This provided the platform for the modernization of the basic terms and conditions of employment and the law in a manner which suited the home-grown legal culture and its prevailing economic environment.

Malawi has a Tripartite Labour Advisory Council (TLAC) created in 1996, with the purpose of advising the Minister of Labour and Manpower Development on all issues relating to labour and employment including the labour market, promotion of collective bargaining, human resources development and the review of the operation and enforcement of the *Labour Relations Act* and any other legal framework relating to employment.¹¹⁷ It also serves to advise the Minister with respect to issues concerning the activities of the ILO. According to the Decent Work Country Program report, the TLAC has faced challenges particularly with regard to collective bargaining at enterprise level whilst its National Social Dialogue Forum has sustainability problems. There is therefore a need to strengthen collective bargaining structures in Malawi with the intent of promoting employment for vulnerable groups, improving the capacity of these platforms and most crucially, sustainable development.

The Example of South Africa

In South Africa, a dualist approach is used in dealing with treaties and a monist-like approach is used for international customary law.¹¹⁸ It therefore has a dualist system with monist elements. In terms of its Constitution, “every court must prefer any reasonable interpretation of the legislation that is consistent with international law”¹¹⁹ when interpreting any legislation but **must** consider

¹¹⁶ ILO: Malawi Decent Work Country Programme 2011 – 2016 https://www.ilo.org/africa/countries-covered/malawi/WCMS_312763/lang-en/index.htm (accessed 31st July, 2019)

¹¹⁷ See <http://www.aicesis.org/database/organization/177/print/> (accessed 22nd August, 2019)

¹¹⁸ *Constitution of the Republic of South Africa*, Act 108 of 1996. Sections 231 (4) & 232

¹¹⁹ s233

international law when interpreting the Constitution's Bill of Rights.¹²⁰ It would therefore be grounds for review¹²¹ and appeal¹²² if any court within South Africa failed to apply this constitutional prerogative.

The South African legal frameworks, the Constitution and its labour relations frameworks are amongst the most progressive institutions in the world. Its Constitution stands apart in the region having expressly entrenched the right of workers¹²³ and employers¹²⁴ to form trade unions and employers' organizations, guaranteeing the right of trade unions, employers' organizations and employers to engage in collective bargaining.¹²⁵ According to case law, the countries labour frameworks seek to fulfil South Africa's obligations as Member State of the ILO.¹²⁶ True to this purpose and like Botswana, judges in South Africa also establish jurisprudential principles based on both ratified and non-ratified international labour standards.¹²⁷ In addition, its progressive *Labour Relations Act* (LRA)¹²⁸ was enacted with the purpose of creating conditions for workers to act collectively in order to bargain with their employers effectively. It focuses on the promotion of collective bargaining, including bargaining in the public sector, the right to strike,¹²⁹ freedom of association and dispute resolution amongst other issues. The two frameworks assure that workers and employers alike are free and not duty bound to engage in collective bargaining.

Furthermore, South Africa stands as an ideal model for the region regarding strategies to address decent work deficits and strengthening social dialogue institutions, applying ILS, employment generation and enhanced social protection. In South Africa, 'social dialogue regarding labour market policy, and social and economic policy in general, takes place at the National Economic Development and Labour Council (NEDLAC),¹³⁰ which comprises the tripartite partners as well as a community constituency representing civil society.'¹³¹ Organized workers (through unions

¹²⁰ s39

¹²¹ A review is conducted by a superior court on the decision of a lower court to determine if there are legal errors or irregularities sufficient to require a reversal of the decision. It can be done automatically by operation of law (or in instances where the decision maker is recently qualified) or alternatively upon application by an interested party.

¹²² An appeal is initiated by an unsuccessful party (through notice of appeal) in a lawsuit or legal proceeding to an appropriate superior court usually on the ground that the decision was based upon an erroneous application of the law. There is no absolute right of appeal but the right to appeal a decision is limited to those parties to the proceeding who are aggrieved by the decision because it has a direct and adverse effect upon their persons or property.

¹²³ s23 (2)

¹²⁴ s23 (3)

¹²⁵ s23 (5)

¹²⁶ See *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT 14/02) [2002] ZACC 30

¹²⁷ See *Modise and others v Steve's Spar Blackbeath* (JA29/99) [2000] ZALAC 1

¹²⁸ No. 66 of 1995

¹²⁹ See *Chamber Of Mines Of South Africa obo Harmony Gold Mining Company Ltd and Others v Association Of Mineworkers Of SA and Others; In Re: Association Of Mineworkers And Construction Union and Others v Chamber Of Mines Of South Africa obo Harmony Gold Mining Company Ltd and Others* (J99/14) [2014] ZALCJHB 223

¹³⁰ NEDLAC was established in law through the *National Economic Development and Labour Council Act*, No. 35 of 1994

¹³¹ ILO: Ebisui (2012), pg. 21

such as Congress of South African Trade Unions) managed to influence the direction of change prior to independence in 1994. As a result, one of the post-apartheid visions of the country labour market policy targeted balancing economic and social policies through policy concertation in NEDLAC.¹³² The *Labour Relations Act*, South Africa, does not provide for the duty to bargain but merely facilitates collective bargaining, leaving the rest to the parties involved.¹³³ It however imposes a duty on the employer to disclose to a representative trade union all relevant information that will enable effective collective bargaining¹³⁴ thus indirectly adopting the duty to bargain into its framework. It can therefore be “described as a corporatist¹³⁵ in the government’s use of national institutional processes to integrate employers’ and workers’ collective interests into policy-making.”¹³⁶

Collective bargaining in South Africa much like in neighbouring Zimbabwe takes places at several levels. However, a distinction in South Africa can be seen between single-employer bargaining (branch, company or corporate level) and multi-employer bargaining (more than one employer represented by employers’ organization).¹³⁷ One key feature of “multi-employer bargaining arrangements is that the agreements reached will be extended to non-parties, that is, to employers and employees who are not members of the organizations that negotiated the agreement.”¹³⁸

Multi-employer bargaining takes place in the form of bargaining councils.¹³⁹ There are several bargaining councils whose function is to regulate the relationship between management and labour within their respective sectors. Similarly, in neighbouring Zimbabwe, there are National Employment Councils (NECs) which perform the same function at sectoral level.¹⁴⁰ In most instances, bargaining councils can apply for accreditation to the Commission for Conciliation, Mediation, and Arbitration (CCMA) and by this action will essentially get authorization to resolve disputes affecting parties falling within their council.¹⁴¹ It is important to note that the CCMA is

¹³² Hayter et al (2018), pg. 17

¹³³ Khabo (2008), pg. 8

¹³⁴ Section 16 (3), *Labour Relations Act (LRA)*, No. 66 of 1995

¹³⁵ Hayter, S. and Lee, C. H. (2018) *Industrial Relations in Emerging Economies: The Quest for Inclusive Development*. Edward Elgar Publishing, Cheltenham, UK. ILO: Geneva

¹³⁶ Hayter et al (2018), pg. 12

¹³⁷ Godfrey, S. (2018) Multi-employer Collective Bargaining in South Africa. Conditions of Work and Employment Series No. 97. International Labour Organization: Geneva. https://www.ilo.org/travail/whatwedo/publications/WCMS_632263/lang-en/index.htm (accessed 26th June, 2019)

¹³⁸ *Ibid*, pg. 1

¹³⁹ Trade unions and employers’ organisations may apply to form bargaining councils. This establishment and their registration is governed by sections 27 – 38 of the LRA. Bargaining councils deal with collective agreements, solve labour disputes, establish various schemes and comment on labour policies and laws. <https://www.gov.za/services/trade-unions/register-bargaining-council> (accessed 12th July, 2019)

¹⁴⁰ Khabo (2008), pg. 19

¹⁴¹ *Ibid*, pg. 20

an independent body thus its services are not run as part of the Department of Employment and Labour. It also does not belong to and is not controlled by any political party, trade union or business.¹⁴²

From at least 2005, employment in informal firms has been growing steadily in South Africa. This has been made possible by an increase in sub-contracting, use of temporary employment services, outsourcing and work-from-home arrangements.¹⁴³ Arguably, it has indirectly led to a rising number of vulnerable workers who are not protected by bargaining councils since some work arrangements or firms are not registering with the councils.¹⁴⁴ This seems to have been addressed by the *Labour Relations Amendment Act*¹⁴⁵ which came into effect on the 1st January 2019.¹⁴⁶

A recent development in South Africa has been the coming into effect of the unified *National Minimum Wage Act* (NMWA) on the 1st January, 2019.¹⁴⁷ This Act applies to **all** employers and workers¹⁴⁸ and regulates leave, working hours, employment contract, deductions, pay slips and termination of agreements.¹⁴⁹ The Act provides for a national minimum wage;¹⁵⁰ the establishment of a National Minimum Wage Commission;¹⁵¹ the provision of an exemption from paying the national minimum wage¹⁵² and a review and annual adjustment¹⁵³ of the national minimum wage¹⁵⁴ among others. There still remains little or no empirical data regarding its effects on the bargaining council systems and collective bargaining to date. What is certain is that sectoral agreements, collective agreements, bargaining council agreements and employment contracts now need to comply and align with the NMWA. Furthermore, its application brings minimum wages to the forefront and also provides a floor for conditions of employment which will apply to all competitors within any industry and the country at large.

¹⁴² See www.ccma.org.za (accessed 24th August, 2019)

¹⁴³ Godfrey (2018), pg. 11

¹⁴⁴ *Ibid*, pg. 11

¹⁴⁵ *Labour Relations Amendment Act*, 8 of 2018

¹⁴⁶ The date represented here is the anticipated date of commencement unless indicated otherwise. Please see <https://www.gilesfiles.co.za/labour-laws-promulgated/> (accessed 24th July, 2019)

¹⁴⁷ *National Minimum Wage Act*, 9 of 2018

¹⁴⁸ With exception to members of the South African National Defence Force, The National Intelligence Agency, the South African Secret Service [s3 (1)] and volunteers [s3 (2)]

¹⁴⁹ s3

¹⁵⁰ s4

¹⁵¹ Chapter 3, s8 – s14

¹⁵² S15

¹⁵³ s6 and s7

¹⁵⁴ Introductory Statement, *National Minimum Wage Act*, 9 of 2018

Another recent development is the *Labour Law Amendment Act*¹⁵⁵ (LLAA) whose commencement date is 1st March 2019.¹⁵⁶ This Act amends the *Basic Conditions of Employment Act*¹⁵⁷ (BCEA) by introducing parental leave, adoption leave and commissioning parental leave to employees. Essentially, fathers are now entitled to at least 10 days of parental leave.¹⁵⁸ In the same breadth, one adoptive parent of a child less than two years of age will be entitled to adoption leave (at least 10 days) whilst the other adoptive parent is entitled to 10 consecutive weeks of adoption leave.¹⁵⁹ As the Act¹⁶⁰ is gender neutral, the same will apply to Gay, Bisexual, Transgender, Queer and Intersex (LGBTQI) couples, one partner being entitled to at least 10 days of parental leave and the other to 10 consecutive weeks of parental leave. This again is important as sectoral agreements, collective agreements, bargaining council agreements and employment contracts now need to comply and align with the LLAA.

Labour legislation in South Africa states that collective agreements alter the terms of any contract or employment relationship between an employee and employer who are both bound by the collective agreement.¹⁶¹ Additionally, the terms and conditions of a collective agreement will take precedence over statutory provisions when the agreement offers the worker (employee) better conditions of employment (i.e. favourability principle).¹⁶² The amendments to the *Basic Conditions of Employment Act* and the introduction of the *National Minimum Wage Act* affect the employment relationship between employer and employee which essentially ties to the collective agreements which will be reached providing a floor for the terms of the contract and leverage for employees during collective bargaining.

The Example of Zimbabwe

In Zimbabwe, much like in neighbouring South Africa, a monist-like approach is used for international customary law as it is *erga omnes*. In terms of Section 326 of the Zimbabwean Constitution, customary international law is part of the law of Zimbabwe unless it is inconsistent with the Constitution or an Act of parliament.¹⁶³ However, unlike its neighbour South Africa, Zimbabwe does not have a growing population of low-wage workers who are predominantly

¹⁵⁵ *Labour Law Amendment Act*, 10 of 2018

¹⁵⁶ The date represented here is the anticipated date of commencement unless indicated otherwise. Please see <https://www.gilesfiles.co.za/labour-laws-promulgated/> (accessed 24th July, 2019)

¹⁵⁷ *Basic Conditions of Employment Act*, 75 of 1997 (as amended by *Basic Conditions of Employment Amendment Act*, 7 of 2018)

¹⁵⁸ Article 3, amending section 25 of the BCEA, 1997

¹⁵⁹ *Ibid*

¹⁶⁰ *Labour Law Amendment Act*, 10 of 2018

¹⁶¹ *Labour Relations Act*, 66 of 1995 [s24 (3) & s199]

¹⁶² *Basic Conditions of Employment Act*, 75 of 1997 (s49)

¹⁶³ Constitution of Zimbabwe Amendment (No. 20) Act, 2013

immigrants. Labour market information is fragmented across several departments and stakeholders within government and the quality of information, as with other statistics is not readily available in up to date formats.

The current politico-economic instability within Zimbabwe has led to a non-standard employment relationship not only with the informal workers but those engaged in traditional direct employment relationships. This has caused reluctance by employees to effectively exercise rights to organize and bargain collectively due to fear of job losses. In addition to this, there are also instances where the actual contractual employers are not necessarily the appropriate and influential negotiating parties with the ultimate decision-making power in negotiating terms and conditions of work.¹⁶⁴ Such an erosion often makes negotiating better terms and conditions of work difficult since the legal standards are often unable to influence the environment for workers to exercise their collective rights. As Ebisui correctly argues, “a fragmented workforce implies that there are different segments of workers in the same workplaces with diverse interests and different contractual status.”¹⁶⁵ Add this to a volatile politico-economic environment and you have a cocktail hindering solidarity among workers, the community at large and working counter productively against Goal 8¹⁶⁶ of United Nations Sustainable Development Goals (SDGs).¹⁶⁷

Some employees/workers in Zimbabwe have experienced low wages, long working hours with no overtime payment, going for months without pay and loss of income as a result of termination of employment or taking home wages which are not sufficient to meet monthly household expenses. These are some of the challenges faced due to economic distress and vulnerability currently bedevilling the Zimbabwean economy. Moreover, the difficulties that the Zimbabwean workers face in exercising their rights to organize and bargain collectively also include: (1) the fear of job losses in an already unpredictable job market, (2) legal uncertainty and the ambiguity about trade union and bargaining arrangements’ effectiveness caused by fragmented workforce, and (3) limited attachment to single workplaces/employers due to economic pressure to make ends meet, and (4) state interference through irregular sanctions within certain sectors.¹⁶⁸ This is however not an

¹⁶⁴ Ebisui (2012), pg. 5

¹⁶⁵ *Ibid*, pg. 5

¹⁶⁶ United Nations, Sustainable Development Goals (2015) <https://sustainabledevelopment.un.org/sdgs> (accessed 27th June, 2019)

¹⁶⁷ “The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the seventeen (17) Sustainable Development Goals (SDGs), which are an urgent call for action by all countries - developed and developing - in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.” <https://sustainabledevelopment.un.org/sdgs> (accessed 27th June, 2019).

¹⁶⁸ Ebisui (2012), pg. 6

exhaustive list since the country lacks a mechanism to monitor the labour markets and work organization effectively.

Zimbabwe's ILO Decent Work Country Programme seeks to address the need to overcome obstacles to collective bargaining and national tripartite social dialogue practices, the rise in informal workforce within the nation and the lack of effective mechanisms. To date Zimbabwe has had three generations of the same programme notable being adopted on the 14th December 2005, 15th January 2009 and 2012 – 2015 respectively. One can say the goal of each of these has been to ultimately improve working conditions for employees, promote workers' rights and advance equality at work with the hope that this will result in sustainable development and social justice.

In addition, recognising that a significant portion of the population in Zimbabwe works in the informal economy, the role played by the informal economy cannot be understated. As noted earlier, this informal economy is characterized by serious decent work¹⁶⁹ deficits and disguised employment relationships. A disguised employment relationship can be described as one where the employer treats the individual in a manner that hides his or her true legal status as an employee effectively depriving the individual of protections due to them as a worker.¹⁷⁰ Formalising this group of people or this portion of the economy will, amongst other things, create sustainable jobs, and address problems such as unemployment, underemployment, poverty, gender inequality, the lack of representation and precarious work.¹⁷¹ This will in essence also allow for the growth and development of concrete policy actions which take into account the SADC priorities and action plan.

One would also have to take notice of the working poor in Zimbabwe particularly and region-wide by extension. According to the ILO, these consist of workers who have so low an income that they are unable to escape poverty despite being in employment.¹⁷² Domestic workers for instance fall within this category since in most countries either by statute, status or ignorance, they are denied the right to establish trade union. There is very little to no effort on the part of Zimbabwean trade unions to reach out to domestic workers. This may be due to the lack of

¹⁶⁹ Smit (2014), pg. 465

¹⁷⁰ Ebisui (2012), pg. 6

¹⁷¹ SADC (2018), pg. 20

¹⁷² *World Employment and Social Outlook: Trends 2019*. Labour Market Trends and Policy Evaluation Unit of the ILO Research Department. International Labour Office: Geneva. https://www.ilo.org/global/research/global-reports/weso/2019/WCMS_670554/lang-en/index.htm (accessed 12th June, 2019). pg. 15

capacity on the part of domestic workers to organize themselves, lack of labour inspection or enforcement institutions in the country to effectively cover and benefit domestic workers and labour legislation to cover this category of workers.

In this respect, the Committee on Freedom of Association considers that during long periods of prolonged and widespread economic stagnation, the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment where this is not possible measures should be taken to protect the standard of living of the workers who are the most affected.¹⁷³ Zimbabwe undoubtedly falls into this dimension of a country under a prolonged economic stagnation or country-wide collapse.

The Kadoma Declaration¹⁷⁴ of 2009 brought to light, amongst other things, the truth that social dialogue process in Zimbabwe has several shortcoming and has failed appallingly to address the issue of collective bargaining. Government and social partners in attendance also resolved to take urgent steps to address the country's risk factor.¹⁷⁵ Whilst being attributed to lack of political commitment on the part of government, widespread corruption and the blatant lack of respect for human rights, it also shows that social dialogue process is ineffective in serving its mandate across the country. As such, even where collective bargaining has been successful, it has not necessarily resulted in the protection of the standard of living of workers but enabled contracting parties to remain engaged. The limits, however, to the effectiveness of collective bargaining within this country facing various socio-economic and political turmoil should not cast doubt on the ILO's principles on collective bargaining.

A recent development in Zimbabwe has been the coming into effect of the *Tripartite Negotiating Forum Act* (TNFA) on the 4th June 2019.¹⁷⁶ The *Act* has institutionalized the tripartite social dialogue process in Zimbabwe. The purpose or functions of the Tripartite Negotiating Forum (TNF) include: consulting and negotiation over socio-economic issues and to submit recommendations to Cabinet;¹⁷⁷ negotiating a social contract;¹⁷⁸ encouraging and promoting

¹⁷³ Gernigon, B.; Odero, A.; Guido, H. (2000). ILO principles concerning collective bargaining. *International Labour Review*, 139(1), 33-56. <https://www.ilo.org/public/english/revue/download/pdf/gernigon.pdf> (accessed 28th May, 2019)

¹⁷⁴ The Kadoma Declaration – Towards a Shared National Economic and Social Vision, 04 September 2009. https://www.ilo.org/africa/information-resources/publications/WCMS_226957/lang-en/index.htm (accessed 31st July, 2019)

¹⁷⁵ Country risk factor refers to the premium that is attached by nationals, residents, foreigners and international bodies on residing in, visiting and/or doing business with a particular country. See https://www.ilo.org/africa/information-resources/publications/WCMS_226957/lang-en/index.htm (accessed 31st July, 2019).

¹⁷⁶ *Tripartite Negotiating Forum Act*, No. 3 of 2019

¹⁷⁷ s3 (a) – *Tripartite Negotiating Forum Act*, 2019

¹⁷⁸ s3 (b) – *Tripartite Negotiating Forum Act*, 2019

cooperation of government, workers' and employers' organizations, and consult other key stakeholders so as to contribute to the formulation and implementation of social and economic policies;¹⁷⁹ consult and negotiate Zimbabwe labour laws in line with the constitution and ILS;¹⁸⁰ and to generate and promote shared national socio-economic vision. The main body of the TNF is to be composed of seven members each from Government (appointed by the President), organised labour (appointed by the Minister) and organised business (appointed by the Minister) and two observers from the Consumer Council of Zimbabwe and the National Economic Consultative Forum (appointed by the Minister).¹⁸¹

Other than being a body corporate, capable of suing and being sued in its own name, it is still at a teething stage and the powers accorded to the Minister make the TNF subjective. The problem is that all the benefits of the TNF seem to come from the government and not the collective bargaining process by tripartite parties. It renders not the re-introduced TNF irrelevant, impotent, ineffective and somewhat useless, without proper ILO guidance. As noted earlier, collective bargaining interlinks with all other fundamental rights such as freedom of expression and of association which are essential to sustained progress. Thus, the desire for free collective bargaining at any level is crucial. Too much intervention by government in the process of the TNF is likely to affect collective bargaining or negotiations, the terms and conditions or recommendations arrived at. Furthermore, it will be difficult for an organisation whose ancillary powers are embedded in government to *bite the hand that feeds it*.

However, institutionalization of the TNF through the *Act* recognises the invaluable contribution that can be made to the country's socio-economic development when collective bargaining or terms and conditions of employment are preceded by free and frank negotiations with trade unions, employer organizations with a view to ensuring sustainable development. Where it is effective, it can lead to socio-economic progress, social security, advancing decent work and sustainable development. The ILO notes that tripartite social dialogue can advance "democracy, social justice and a productive and competitive economy."¹⁸² Additionally, "it provides the best possible scenario for the effective and sustainable implementation of the policies concerned, minimising the risk of industrial and social conflict."¹⁸³

¹⁷⁹ s3 (c) – *Tripartite Negotiating Forum Act, 2019*

¹⁸⁰ s3 (f) – *Tripartite Negotiating Forum Act, 2019*

¹⁸¹ s5 – *Tripartite Negotiating Forum Act, 2019*

¹⁸² Ishikawa, J. (2003). Key Features of National Social Dialogue: A Social Dialogue Resource Book. ILO: Geneva

¹⁸³ Ishikawa, (2003). pg.1

Social dialogue is a form of good governance which has advantages towards realizing sustainable development.¹⁸⁴ It requires not only an enabling environment but parties willing to engage in dialogue and promoting the socio-economic development of the country. However, in Zimbabwe the tripartite structures have been rather dormant over the past two decades, thus the success for the TNF will require a government that is not hostile towards organised labour or the right to strike. As noted by Peter Mutasa, the president of the Zimbabwe Congress of Trade Unions (ZCTU), social dialogue and collective bargaining builds “consensus on broad issues”¹⁸⁵ which the country is facing and ideally resolve some of its crisis.

The legislature ought to adopt a participatory collective bargaining approach, where traditional tripartite members and representatives from the informal economy are vigorously and enthusiastically involved from the initial stages of issues, independent appointment to positions, throughout the course of arguments. This allows the membership to control the negotiating forum to control the organizations agenda and actions answerable to each party’s membership. The independence of the trade union movement can effectively challenge the *status quo* balance of power; trade unions controlled by, or subservient to, the State will support the *status quo* from which they derive their existence.¹⁸⁶ This, ideally, will allow the recommendations reached at top level to be translated subsequently in policy initiatives of the trade unions and informal workforce, to either broaden the scope of collective bargaining, or to better involve their grassroots and to support freedom of association processes. It is one thing to be locked into the collective bargaining machinery but it is another to be able to yield fruitful results from it.

As noted earlier, collective bargaining is a crucial form of social dialogue. As such, having effective, capable social dialogue institutions benefits the collective bargaining structure. Thus, the need for political will and commitment, sound respect for fundamental human rights & labour rights, freedom of association and collective bargaining is crucial to the success of the TNF in Zimbabwe. It inevitably advances social justice and builds a future with decent work.

In Zimbabwe, once a collective bargaining agreement has been reached, the same is registered in terms of sections 80 and 81 of the *Labour Act*.¹⁸⁷ When registered, it is published as a statutory

¹⁸⁴ Hermans, M., Huyse, H., & Van Ongevalle, J (2016). *Social Dialogue as a Driver and Governance Instrument for Sustainable Development*. ILO-ITUC Discussion Note. KU Leuven Hiva Research Institute for Work and Society – Belgium.

¹⁸⁵ See <https://www.iol.co.za/business-report/international/zimbabwe-trade-union-calls-for-social-dialogue-to-resolve-the-countrys-ongoing-crisis-22890656> (accessed 22nd August, 2019)

¹⁸⁶ Bellin, E (2000) *Contingent Democrats: Industrialists, Labor, and Democratization in Late-Developing Countries*, 52 World Politics 175

¹⁸⁷ *Labour Act* [Chapter 28:01]

instrument,¹⁸⁸ which means it becomes law. Due to such a nature, it supersedes any other provision that may have been applicable to the parties prior to its registration and also creates obligations on the parties to comply. It also means that parties need to take care when they are following the processes of collective bargaining because once it has been registered, it cannot be challenged on the count of an error of understanding or calculation.¹⁸⁹ In addition to that, in another High Court case, *NetOne Cellular (Pvt) Ltd v Minister of Public Service, Labour and Social Welfare & Another*¹⁹⁰ the Court confirmed that whilst collective bargaining legislation imposes obligations to adhere to the terms of the agreement, freedom of assembly and association includes the right not to be compelled, against one's will, to be bound by the provisions of the CBA. This reflects the influence an informed judiciary can have on the labour market by supporting social justice and helping create better terms and conditions for employees.

¹⁸⁸ A statutory instrument means any proclamation, rule, regulation, by – law, order, notice or other instrument having the force of law, made by the President or any other person or body under an enactment. See *Interpretation Act* [Chapter 1:01]

¹⁸⁹ See *Zimbabwe Textile Manufacturers Association v Zimbabwe Textile workers Union & Another* (HC 995/2012) [2013] ZWHHC 7 (08 January 2013)

¹⁹⁰ (HC2961/12) [2015] ZWHHC 211 (24 February 2015)

Part 4

Final Observations

The ILO Declaration on Fundamental Principles and Rights at Work (1998) institutionalizes collective bargaining as a fundamental right accepted by member States from the very fact of their membership in the ILO, and which they have an obligation to respect, to promote and to realize in good faith. Collective bargaining, and all legal frameworks at large, is faced with challenges in adapting to the vastly changing conditions within each of the countries discussed and the world at large due to globalization and technological advances. In light of this, domestic legal frameworks and courts should protect the institution of collective bargaining as a social imperative but autonomy should remain with workers and employers as to the bargaining process itself. Collective bargaining has proven to be the only democratic tool at the disposal of workers to negotiate their terms and conditions of employment effectively without imbalance with their employers. With the exception of workers who may be excluded from the scope of Convention No. 98 – namely the armed forces, police and public servants directly engaged in the administration of the State, the right to collective bargaining covers all other workers in public and private sectors who must benefit from it.

The socio-economic dynamics prevalent in countries importing international and regional collective bargaining frameworks into domestic law differ with each country as observed above. Not only has this resulted in characteristics such as massive poverty, income inequality, large-scale labour migration, a vast informal (or non-standard) sector within the labour markets of Southern Africa but has resulted in a lack of effective enforcement or diluted impact of collective bargaining. As mentioned above, the different dynamics in the socio-economic and political climate in each SADC country affects the development not only of local jurisprudence but the effectiveness of integrated standards. Furthermore, the lack of up-to-date information about the legislative provisions of many countries, together with their interaction with ILS in domestic courts, with respect to collective bargaining makes it very difficult for international mechanisms to review the extent to which the law provides a permissive climate for collective bargaining.

In most African countries dispute resolution and collective bargaining processes have been dominated by the State through its respective Ministry responsible for labour and/or employment affairs. This is usually through its conciliation and mediation services, such as the National Employment Councils of Zimbabwe, Labour Office of Malawi, Ministry of Employment

(MELSD) of Botswana and also prior to the matter being attended to by the judicial services. Where this is concerned, the only exception of the examples dealt with is South Africa which has an independent system, the Commission for Conciliation, Mediation and Arbitration (CCMA).

In light of each countries collective bargaining processes, an employer's commitment to respect the human rights of workers and to the right to work with dignity will provide a relatively conducive environment for exercising the right to freedom of association and the right to engage in collective bargaining across all levels. More so, legal frameworks in SADC countries will need to respond to employers and workers by taking into account the ever changing global environment with its emerging trends and values. All in all, while the dynamism of social dialogue is uneven across the SADC countries, investing in effective and inclusive dialogue is in the best interests of all.

The ILO 'decent work' country programs, implemented in all the countries mentioned above, institutionalize the importance of sustainable enterprises in creating greater employment and income opportunities for all workers within the region. With an emphasis on the examples discussed, the concept highlights workers' right to pursue both their material well-being in conditions of freedom and dignity, of economic security and equal opportunity.¹⁹¹

The example of Zimbabwe shows how equal opportunity without the guarantee of economic security cannot exist, since both are mutually symbiotic. It also shows the need for effective mechanisms for good governance in addressing socio-economic issues. The capacity to negotiate collectively between bipartite parties at enterprise or sectoral level and tripartite parties at national level is vital to combatting the socio-political and economic challenges. Recent legislation such as the *Tripartite Negotiating Forum Act* will aid in promoting tripartite and bipartite consultations in the country. However, training of the social partners on social dialogue and collective bargaining needs to be prioritized so that the best possible results can be attained in the near future. This will ensure that the TNF becomes an effective forum and not another government lapdog.

In the example of South Africa, the recent legal framework developments such as the *National Minimum Wage Act*, the *Labour Relations Amendment Act*, the *Labour Law Amendment Act*, the *Basic Conditions of Employment Amendment Act* and the *Unemployment Insurance Amendment Act*¹⁹² affect

¹⁹¹ The Declaration of Philadelphia, 1944

¹⁹² 10 of 2016

collective agreements as any collective agreement between parties will have to align itself with their provisions. The *Labour Law Amendment Act* in particular now affords fathers or other partner parental leave which will apply not only to traditional relationships but also minority groups. The goal of these changes to the legislation is to protect the South African workers through increased minimum wages, more rights in terms of paternal leave, protection during violent strikes and access to unemployment insurance. It therefore speaks volumes of South Africa which is known for setting standards within the region, its progressive legal system and of the potential of other African countries.

The example of Malawi, and Zimbabwe alike, illustrated the fact that legal frameworks on employment conditions depend on the state of economic development of each country. But for the unstable economic conditions in these countries, where the fundamental rights of workers have been defined and respected, collective bargaining functions in such a way as to enable real improvement in employment conditions, fair distribution of resources and socio-economic development. This leads to the promotion and realization of ILO core labour standards, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of discrimination in respect of employment and occupation; (c) the elimination of all forms of forced or compulsory labour and; (d) the effective abolition of child labour.

As aforementioned, the influence of emerging economies such as Brazil, China, India, South Africa and Turkey on freedom of association rights and the effective recognition of the right to collective bargaining within Southern African countries cannot be understated. This is because any serious analysis of the relationship between labour and capital in Africa cannot ignore the role played by foreign direct investors and the global economy. We have to understand that foreign political and economic history has profoundly shaped Africa's pattern of underdevelopment. Agencies such as the International Monetary Fund (IMF) and the World Bank have a dominant agenda in Africa. In certain cases countries restructure their economies to adopt neoliberal reforms. However, Africans themselves are also to blame for their economic problems. One will find that in several countries the ruling local *bourgeoisie* work closely with foreign investors to facilitate accumulation to secure their own interests at the expense of their own people. Thus, one cannot discard the influence of emerging economies and agencies on the profound changes and policies adopted in the labour market in Southern Africa.

The central role played by collective bargaining in the world of work cannot be overemphasized. Historical events show that the relative weakness of collective bargaining structures in a country contribute to dilapidated society and an exploited labour. Its future thus rests in the link between democratic government and the role played by trade union movement in building democratic societies as acknowledged in several international instruments. Where collective bargaining is effective, it contributes to social justice, respect for fundamental human rights and labour rights and advances decent work for all. This paper does not suggest that collective bargaining is the answer to all of society's challenges and inequalities. However, collective bargaining plays a key role in helping to create sustainable development, protection of fundamental human rights and labour rights and maintain democratic societies.

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List of Acronyms

ACHPR	African Charter on Human and People's Rights
CC	Constitutional Court
COSATU	Congress of South African Trade Unions
DWCP	Decent Work Country Programme
EU	European Union
ELP	SADC Employment and Labour Protocol
ILC	International Labour Conference
ILO	International Labour Organization
ILS	International Labour Standards
IMF	International Monetary Fund
ITCILO	International Training Centre of the International Labour Organization
NEC	National Employment Council
NEDLAC	National Economic Development and Labour Council
NGO	Non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
SADC	Southern African Development Community
SATUCC	Southern African Trade Union Co-ordinating Council
SDG	Sustainable Development Goals
TCA	Transnational Company Agreement
TLP	Transnational Legal Process
TNF	Tripartite Negotiating Forum
UDHR	Universal Declaration of Human Rights
UN	United Nations
ZCTU	Zimbabwe Congress of Trade Unions

Synthesis Table

	Botswana	Malawi	South Africa	Zimbabwe
ILO Membership since	27 th February 1978	22 nd March 1965	1919 – 1966 26 th May 1994	6 th June 1980
Application of International Law	Dualist for International Agreements Monist-like for Customary International Law	Dualist for International Agreements Monist-like for Customary International Law	Dualist for International Agreements Monist-like for Customary International Law	Dualist for International Agreements Monist-like for Customary International Law
Collective Bargaining Parties	Trade Unions Employer Organisations Government as an employer & as a member of the Tripartite system	Trade Unions Employer Organizations Government as an employer & as a member of the Tripartite System	Trade Unions Employer Organizations Government as an employer & as a member of the Tripartite System	Trade Unions Employer Organizations Government as an employer & as a member of the Tripartite system
Dominant Level of Collective Bargaining	Enterprise	Enterprise	Sectoral	Sectoral
Social Dialogue Institutions		Tripartite Labour Advisory Council National Social Dialogue Forum	National Economic Development & Labour Council	Tripartite Negotiating Forum

	Botswana	Malawi	South Africa	Zimbabwe
Dispute resolution mechanisms	Industrial Court (Court of law & equity) Ministry of Employment, Labour Productivity and Skills Development	Industrial Relations Court (subordinate court to the High Court) Ministry of Labour and Vocational Training	Commission for Conciliation Mediation & Arbitration (CCMA) Labour Court (specialized division of High Court)	National Employment Councils (NEC) Ministry of Public Service, Labour & Social Welfare Labour Court (specialized division of High Court)
Latest Ratifications since 2010			Domestic Workers Convention, 2011 (No. 189) – 20 th June 2013 Work in Fishing Convention, 2007 (No. 188) – 20 th June 2013 Maritime Labour Convention, 2006 (MLC, 2006) – 20 th June 2013	Protocol of 2014 to the Forced Labour Convention, 1930 – 22 May 2019
Latest Labour Legislation since 2010	Employment (Amendment) Act, 10 of 2010	Labour Relations (Amendment) Act, 2012 Employment (Amendment) Act, 27 of 2010 Employment (Prohibition of Hazardous work for Children) Order 2012	Basic Conditions of Employment Amendment Act, 7 of 2018 Labour Relations Amendment Act, 8 of 2018 National Minimum Wage Act, 9 of 2018	Tripartite Negotiating Forum Act, 3 of 2019 Labour Amendment Act, 5 of 2015 The Constitution of Zimbabwe Amendment (No. 20) Act, 2013

	Botswana	Malawi	South Africa	Zimbabwe
			Labour Law Amendment Act, 10 of 2018 Unemployment Insurance Amendment Act, 10 of 2016 Employment Equity (Amendment) Act, 47 of 2013	
ILO Decent Work Country Program	2011 – 2015	2011 – 2016	2010 – 2014	2006 – 2007 2009 – 2011 2012 – 2015