THE RIGHT TO STRIKE IN ZIMBABWE IN THE CONTEXT OF THE 2013 CONSTITUTION AND INTERNATIONAL LAW

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Introduction

The right to strike is of cardinal importance in any labour law regime based on social justice and democracy in the workplace. It lies at the heart of the freedom of association, the right to organise and collective bargaining.[2] The right has received acclaim under international law.

For the first time in Zimbabwe, and following on recent international constitutional jurisprudence, the right to strike has become enshrined in the Constitution of Zimbabwe.[3]

However, historically the right to strike has often been watered down and rendered impotent by an interplay of factors and restrictions.[4] The purpose of this essay is to provide an update

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2 In the oft-quoted words Khan Freund - "there can be no equilibrium in industrial relations without a freedom to strike. In protecting that freedom, the law protects the legitimate expectations of the workers that they can make use of their collective power: it corresponds to the protection of the legitimate expectation of management that it can use the right of property for the same purpose on its side....." cited in P Davies and M Freedland *Khan Freund's Labour and The Law* 3rd (ed) (1983) 292 .

3 Under section 65 (3) Constitution of Zimbabwe Amendment (No. 20) Act 2013 (1/2013), gazetted on 22 May 2013.

4 See the seminal article by Professor L Madhuku discussing the law on strike in Zimbabwe and the attendant severe restrictions up to the Labour Relations Act, 1985: L Madhuku "The Right to Strike in Zimbabwe" *Zim. LR* (1995) 113 .

on the extent to which Zimbabwean law is in sync with the letter and spirit of the right to strike as provided under international law and in particular in view of the new constitutional provisions.

Historical survey

Up until the major reforms introduced by the Labour Relations Amendment Act,[5] the right to strike or collective job action, to use the Zimbabwean lexicon, remained a pie in the sky – nominally proclaimed but denied in substance.

Originally strikes were unlawful under common law and the early colonial labour statutes.

Common law considers strikes as a breach of the duties to provide service and good faith or as a repudiation of the contract of employment.[6] The common law position is based on the unitarist perspective of labour relations. In terms of the latter the employment relationship is perceived as an individual one and there is no need for collective regulation of the relationship through collective bargaining. The work place is a harmonious entity in which conflict is unnatural and dysfunctional. Strikes, if not the result of bad communication by management, are caused by agitators.[7]

The first colonial legislation, which was driven by the needs of primitive accumulation as the new capitalist society was being setup, was based on common law. Under the Masters and Servants Ordinance, strikes were both a breach of contract but also criminalised, attracting severe penalties, including imprisonment.[8]

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5 Act No. 17/2002.

6 Wholesale Centre (PVT) Ltd v Mehlo & Ors 1992 (1) ZLR 376; Zimbabwe Banking and Allied Workers Union & Anor v Beverley Building Society & Ors 2007 (2) ZLR 117 (H) per PATEL J. Generally, A Rycroft and B Jordaan A Guide to Labour Law in South Africa (1992) 274.

7 M Finnemore Introduction to Labour Relations in South Africa 10th ed (2009) 6.

8 Under section 1, Chapter IV of the Master and Servant Ordinance No. 5/1901 the penalties included a fine or in default imprisonment with or without hard labour and with or without spare diet.

The first recognition of the right to strike was under the 1934 Industrial Conciliation Act.[9] However the Act and subsequent amendments, only partially recognised the right to strike and encumbered it with innumerable substantive and procedural restrictions that rendered the right ineffective. For instance the Act applied only to white and mixed-race employees in the private sector, thereby excluding the vast bulk of employees who were black and public sector employees.[10]

Although subsequently extended to apply to black workers in the industrial and commercial sectors, the Act remained inapplicable to employees in the Public Service, agriculture, mining or those employed in areas deemed "essential services."[11] The right was excluded for unregistered trade unions or for political purposes.[12]

Severe procedural impediments were provided for under the Industrial Conciliation Acts. These included provisions such as: a requirement for a secret ballot before striking;[13] mandatory notice periods before going on strike;[14] strikes could only be done after a dispute had gone through arbitration or at the expiry of an industrial agreement.[15] Repressive legislation increased after the Unilateral Declaration of Independence (UDI) whereby strikes were virtually banned on the grounds of public emergency.[16]

The philosophical foundations of the colonial labour law regime was a racist autocratic state corporatist regime marked by extreme hostility to strikes and any collective mobilisation of the black working class, which was seen as a potential grave

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9 Under section 38 Industrial Conciliation Act 1934 (10/1934).

10 By virtue of the application clause of the Act in terms of section 2 Act 10/1934.

11 See section 4 Act No. 29 of 1959.

12 Section 40 (29/1959).

13 Section 47 (1)n (29/1959).

14 Section 122 (29/1959).

15 Ibid. See generally, M Gwisai M *Labour and Employment Law in Zimbabwe*: Relations of Production under Neo-Colonial Capitalism, (2006) 344 - 45.

16 Under legislation such as the Emergency Powers Act [*Chapter 83*] and the Law and Order (Maintenance) Act [*Chapter 65*] and Unlawful Organisations Act, [*Chapter 91*].

threat to the entire colonial superstructure.[17] A structure that was marked by the denial of the most basic political and civic rights to the majority of the population including the absence of a justiciable Declaration of Rights.

Despite Independence in 1980, the post-colonial state introduced further repressive legislation proscribing strikes in an ever-increasing definition of essential services, especially after the wave of strikes of the early 1980s.[18]

The Labour Relations Act of 1985 although nominally proclaiming the right of employees to engage in collective job action,[19] expanded on the restrictions inherited from the colonial legislation.[20] For instance the definition of "essential services" was expanded to cover virtually every sector. Lengthy and cumbersome procedures and labour injunctions, called show cause orders, were introduced.[21] Strikes were only permissible in defence of the existence of a workers committee or registered trade union or to deal with an immediate occupational hazard.[22] The above amply justified Madhuku's scathing attack that the restrictions "...made the law on strikes ridiculous."[23]

Following major working class struggles in the late 1990s protesting political autocracy and poverty, there was a sea-change shift in the labour relations paradigm with the adoption of a pluralist perspective. The declared purpose of the new Labour Relations Amendment Act, 2002[24] was, *inter alia*, to promote social justice and democracy in the workplace by promoting collective bargaining, introduction of the unfair

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17 I Phimister An Economic and Social History of Zimbabwe 1890-1948 (1988); ILO Labour Conditions and Discrimination in Southern Rhodesia (1978) 72 - 73.

18 These included the Emergency Powers (Maintenance of Essential Services) Regulations, S.I. 160A of 1989 and the Public Services (Maintenance of Services) Regulations S.I. 258 of 1990.

19 In s 120 (1) Labour Relations Act 1985 (16/1985).

20 See generally Part XIV. For judicial enforcement of these provisions see - *Lancashire Steel Ltd v Zvidzai & Ors* S- 29- 95.

21 See sections 118 and 120 (16/1985).

22 Section 120 (4)(16/1985).

23 See L Madhuku *op cit* at 121.

24 Act No. 17 of 2002.

dismissal doctrine and a more permissive legal regime in relation to strikes.

Subsequent judicial pronouncements showed that strikes were now in fact possible under the changed legal regime, albeit still with major but no longer insurmountable procedural impediments.[25] However, a major weakness remained the lack of a constitutional basis for the right to strike, as the courts remained steady-fast in refusing to recognise the right as implicit in the freedom of association and assembly under s 21 of the old Constitution.[26]

Radical implications of new Constitution

The 2013 Constitution marks a climax of the process that started with Act 17 of 2002. For the first time in Zimbabwean law, the Constitution now explicitly provides for a broadly worded right to collective job action and strike. Section 65 (3) reads:

> (3) Except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services.

The interpretation regime of the Constitution is also pertinent. In interpreting the Declaration of Rights, courts are required to give full effect to rights, to promote the values that underlie a democratic society based on, *inter alia,* justice and human dignity and generally to be guided by the spirit and objectives of the Declaration of Rights.[27] This is reinforced by s 46 (2) which states that when any court or tribunal is interpreting an enactment and when developing the common law, it must

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25 In the important Supreme Court decision of Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe & Anor 2007 (2) ZLR 103 (S) .

26 Zimbabwe Banking and Allied Workers Union & Anor v Beverly Building Society & Ors 2007 (2) ZLR 117 (H) at 127F-G; and Tel-One (Pvt) Ltd v Communications and Allied Services Workers Union 2006 (2) ZLR 136 (S) at 145A.

27 Section 46 (1) (a) (b) of the Constitution.

promote and be guided by the spirit and objectives of the Declaration of Rights.[28]

Further, courts and tribunals are required to "take into account international law and all treaties and conventions to which Zimbabwe is a party."[29] Section 327 (6) is also relevant. It reads:

> (6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

The 2013 Constitution permits limitations on fundamental human rights and freedoms by due regard to the rights and freedoms of other persons and only in terms of a law of general application and to the extent that the limitation "… is fair, reasonable, necessary and justifiable in a democratic society…"[30]

The concept of the right to strike and freedoms of association and assembly have received considerable treatment under international law and in particular International Labour Organisation (ILO) jurisprudence. It is pertinent therefore to analyse the Zimbabwean framework on strikes by reference to international law.

The right to strike and freedom of association under international law

The basis for the right to strike under international instruments may be direct or indirect. Some instruments provide for the right explicitly. The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, ratified by Zimbabwe, provides for a right to strike under art. 8(1.4). This reads:

> 1. The States Parties to the present Covenant undertake to ensure:
> 1. ...

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[28] Which is also reinforced in s 176 of the Constitution .

[29] Section 46 (1) (c) of the Constitution.

[30] Section 86 Constitution.

2. ...
3. ...
4. The right to strike, provided that it is exercised in conformity with the laws of the particular country.

The potential of the Convention as an important source is undermined by the fact that it subordinates the realisation of the right to national laws without any qualifications. Further the Covenant allows the imposition of restrictions on the exercise of the right by members of the armed forces or of the police or of the administration of the State.[31]

A broader basis for the right to strike is provided in the Charter of Fundamental Social Rights in SADC (2003), "SADC Charter." The right is provided as a facet of the freedom of association and collective bargaining under article 4. This reads:[32]

> Member States shall create an enabling environment consistent with ILO Conventions on freedom of association, the right to organise and collective bargaining so that:....
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> (e) the right to resort to collective action in the event of a dispute remaining unresolved shall:
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> (i) for workers, include the right to strike and to traditional collective bargaining; and
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> (ii) for employers, include traditional collective bargaining and remedies consistent with ILO instruments and other international laws;
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> (g) essential services and their parameters shall mutually be defined and agreed upon by governments, employers associations and trade unions;
>
> (h) due to the unique nature of essential services, appropriate and easily accessible machinery for quick resolution of disputes shall be put in place by governments, employers and trade unions; and
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> (i) freedom of association and collective bargaining rights shall apply to all areas, including export processing zones.

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31 Article 8.1 (2) ICESCR.
32 Article 4 SADC Charter.

Many recent constitutions in the region and internationally provide for the right to strike. Regionally examples include South Africa, Mozambique, Malawi, Botswana, Uganda and Ethiopia.[33] Internationally, examples include India and Venezuela.[34]

The comprehensive treatment of the content of the right to strike has been provided for in International Labour Organisation (ILO) jurisprudence. There is no ILO convention dealing specifically with the right to strike. The more obvious candidate conventions, C087,[35] C098,[36] and C154[37] do not make any specific reference to the right to strike. However, the absence of a specific right to strike in the ILO conventions, does not mean such a right does not exist in ILO labour jurisprudence.

ILO case law, developed by the Committee of Experts and the Committee on Freedom of Association holds that the right to strike is "an intrinsic corollary to the right to organise protected by Convention No. 87." The right to strike is "a legitimate means...through which workers may promote and defend their economic and social interests."[38]

The above reflects what is is known as the "functional approach." This has received judicial recognition in other jurisdictions. For instance in South Africa it was held that "the right to strike is an essential and integral element of collective bargaining" and the right to organise and freedom

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33 Examples of national constitutions that enshrine the right to strike include: Constitution of the Republic of South Africa [s 23 (2) (c)]; Constitution of Botswana [s 13]; Constitution of Uganda [art 40 (3)]; Constitution of Mozambique [art 91]; Constitution of Ethiopia [art 42 (1)] .

34 Constitution of India [art 19 (1)]; and Constitution of Venezuela (art 97).

35 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

36 Right to Organise and Collective Bargaining Convention, 1948 (No. 98).

37 Collective Bargaining Convention, 1981 (No.154).

38 Paras 362 and 363, ILO The Digest of Decisions and Principles (2006) Chapter 10. See also ILO General Survey by Committee of Experts (1983) para 2000; ILO General Survey by Committee of Experts (1994) para 148.

of association.[39] In the Canadian decision of *Re Tail Wholesale Union and Govt of Saskatchewan*[40] *Cameron* JA held:

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

Note however, that the logic of this case seems to have been subsequently overruled by the Canadian Supreme Court.[41]

In Zimbabwe, the *obiter dictum* of *CHIDYAUSIKU* CJ, in *Tel* One (Pvt) Ltd v Communications & Allied Services Workers Union,*[42] seems to support the logic underlying the functional approach as expressed in the above-cited South African decisions.

In *Zimbabwe Banking and Allied Workers Union & Anor v Beverly Building Society & Ors,*[43] though, *Patel J,* using the opposite unitarist approach, and citing subsequent superior court authorities from Canada and India, held that the freedom of association does not necessarily include the right to strike or collective bargaining.

Despite the unitarist approach adopted in *Zimbabwe Banking and Allied Workers Union & Anor v Beverly Building Society & Ors*, *supra*, the weight of international labour law as encompassed in the SADC Charter and the Digest of Decisions

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39 NUM v East Rand Gold Mine and Uranium Co Ltd (1991) 12 ILJ 1221 (A) at 1237 E; Black Allied Workers Union & Ors v Prestige Hotels CC t/a Blue Waters Hotel (1993) (14) ILJ 963 at 972; SACTWU & Ors v Novel Spinners (Pvt) Ltd 1999 (11) BLLR 1157.

40 (1985) 19 DLR (4th) 609, at 639.

41 In *Professional Institute of the Public Service of Canada v Commissioner of the Northwest Territories & Ors* (1990 2 SCR where it was held that the constitutional guarantee of the freedom of association does not include the right to bargain collectively.

42 2006 (2) ZLR 136 (S) at 145A.

43 2007 (2) ZLR 117 (H) at 127D-G. This decision was upheld in Zimbabwe Banking & Allied Workers Union & Anor v Beverly Building Society & Ors 2010 (1) ZLR 292 (S) per Malaba DCJ. See also National Security Guards and Allied Workers Union v The Registrar for Labour & Ors LC/H/71/2012 .

and Principles of the Freedom Association Committee of the Governing Body of the ILO, "the Digest," clearly endorses the functional approach whereby the right to strike is taken as a facet of the freedoms of association and collective bargaining.

Core content of the right to strike under ILO jurisprudence and international law

There are several principal features of the right to strike as espoused by the ILO Freedom of Association Committee. These include: the right is primarily for employees; wide definition and extent of the right; the centrality of trade unions in the exercise of the right; broad purposes for the exercise of the right; permissible substantive and procedural limitations on the right; and protection for strikers. We look at each of these in greater detail below.

A right primarily meant for employees

One of the fundamental facets of the right to strike is that it is primarily for the benefit of employees as a collective. It is a crucial tool or lifeline through which workers and their organisations may promote and defend their economic and social interests.[44]

The primary agent for the exercise of the right are trade unions and other forms of organised labour. Such bodies, should in the interest of effective collective bargaining, be allowed to call for strikes without undue prohibitions.[45] The right to strike is for employees and not employers. Neither is the lock-out the equivalent of the strike.

The explicit recognition of the right to strike for employees and its implied superiority over the right of lock out for employers is justified. This is proper, for as has been observed, the lock–out is "neither socially nor legally equivalent to the strike."[46] The strike is necessarily always a concerted act, whereas a lockout need not. A single employer can lockout whereas a single worker cannot go on strike. The lockout is

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[44] Para 521, 522 and 531 of the Digest .

[45] Para 525 .

[46] A Rycroft and B Jordaan *op cit* at 142 and Davies and Freedland *op cit* at 292.

not the most important power of the employers. The real equivalent to the strike, is the employer's right to own, manage or dispose of the business, to appropriate profits and to dismiss the employee.

The giving of primary, but not exclusive, responsibility to trade unions to call strikes does not offend against principles of freedom of association for on the part of employees, given the purpose of strikes. Strikes are an essential part of the collective bargaining process, which are seen as legitimate economic weapon at the hands of labour to advance its cause in the collective bargaining process. Collective bargaining, as its name implies, is always and inherently a collective exercise for the employees.[47] Without such collective agency the right loses its potency.

Broad purpose of the right to strike

The second core attribute is that strikes are for a broad set of purposes. Legitimate objectives must not only be confined to disputes over traditional and mundane issues such as wages, working hours and claims of an occupational nature but the dragnet is wide enough to encompass a cocktail of social and economic policy questions that impact on employees.[48] Thus, so broadly defined, legitimate objectives of strikes encompass a wide range of issues, including economic and social issues. Solidarity with other strikers is also a permissible objective.[49] Strikes may thus be used as defensive shields to safeguard rights as well as offensive arrows to win new rights or used as solidarity tools.

Note however that the Digest supports the proscription of purely political and putative strikes.[50] This expresses the tension in bourgeois pluralist theories of labour relations. Whilst perfectly happy to accept strikes as a legitimate tool in collective bargaining, they brittle at the extension of this as a purely class political tool used by the working class, potentially against the entire capitalist mode of production

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47 Para 524. See also Kahn-Freund (1970).
48 Paras 526-527.
49 Paras 526-544.
50 Paras 528-529 Digest.

and state. Lenin captures this aptly.[51] Strikes of a political nature remain legitimate only to the extent that they relate to government economic and social policies which impact on the workers as workers, and not as general citizens.

Prohibition of excessive state interference

The state must not engage in undue and excessive interference with the right to strike, in particular abuse of its coercive and judicial power.

In tandem with the principles of fairness, the responsibility to declare strikes illegal, should not lie with the government as an interested party but should be the exclusive preserve of an independent and impartial body.[52]

The use of military or the police to ward off a strike militates against the conventions although the police are allowed to maintain peace and order without breaking the strike.[53] Violent strikes may similarly be proscribed.

Similarly forcing striking employees back to work or resort to military force to quell a strike gravely infringes upon the right to strike. The use of armed forces to take over the responsibility of striking employees is only permissible in exceptional circumstances motivated by the need to maintain core services.[54]

Permissible limitations on the right to strike

ILO jurisprudence does not provide for an absolute right to strike. Substantive and procedural restrictions on the right

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51 "A strike opens the eyes of the workers to the nature not only of the capitalist but of the government and laws as well. Just as factory owners try to pose as benefactors of workers, the government officials and their lackeys try to assure the workers that the government is equally solicitous of both the factory owners and the workers as justice requires. Then comes a strike. The public prosecutor, the factory inspector, the police and frequently the troops appear at the factory. The workers learn that they have violated the law." V I Lenin *Selected Works* 372. See also R Hyman "Pluralism, procedural consensus and collective bargaining" 16 *BJIR* (1978) 16 .

52 Paras 628-631.

53 Paras 642-647.

54 Paras 632-639.

are accepted in various situations, including: in relation to essential services, to members of the armed forces, employees of the State and pertaining to disputes of right or disputes covered by a current collective bargaining agreement or arbitration.

Permissible substantive limitations

There are several substantive limitations on the right to strike recognised under ILO jurisprudence. This effectively means the right to strike is excluded for these categories.

Essential services

The absolute restriction on the right to strike in the interests of peace or for the maintenance of essential service is legitimate under ILO jurisprudence.[55] Pluralist theories of labour relations justify this restriction on the need to strike a balance between the workers' right to strike on the one hand and the maintenance of minimum services essential for society, on the other. Marxist theories on the other hand point out to this as an expression of the class partisan character of labour law and the class limitations of pluralism, whereby the most potent forms of strikes that may hurt the bourgeois ruling class, economically or politically are prescribed.[56]

The above restriction though, is strictly applied and reciprocated by compensatory guarantees. The definition of essential service should not be too broad such as to create a blanket ban on the right to strike for a certain category of employees who ordinarily cannot be construed as essential service employees.[57] The SADC Charter provides that the definition of essential services is not left to the state alone but "mutually defined and agreed upon by governments, employers associations and trade unions."[58] An example is under s 70 of the South African Labour Relations Act, 1995[59]

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55 Paras 545-563 and paras 615-627 Digest.

56 I Kiseylov (1988) 95 - 114.

57 Article 4 (g) of the SADC Charter provides that: "essential services and their parameters shall mutually be defined and agreed upon by governments, employers associations and trade unions.".

58 Article 4 (g) SADC Charter.

59 Act 66 of 1995 (66/1995).

in terms of which the function of determining whether a service is an essential one lies with a tripartite committee deemed the "Essential Services Committee."

Where the right to strike is proscribed on the grounds of essential services, adequate compensatory provisions must be made including appropriate and easily accessible machinery for quick resolution of disputes, including arbitration.[60]

Employees of the State and members of the armed forces

The Digest recognises the proscription of the right to strike for various categories of employees of the State, including members of armed forces and members of the Public Service.[61]

Russian Marxist, VI Lenin argues that the State broken down to its essential "consists of special bodies of armed men...a 'special repressive force' for the suppression of the oppressed class."[62] Yet the bulk of these special bodies of armed forces are members of the lower classes – workers and peasants in uniform. In times of acute social conflict, strikes by soldiers could easily turn into revolutionary armed social and class conflicts, threatening the entire capitalist society. Not surprising therefore labour law, including under international labour standards, has historically excluded this section of the working class, from enjoying the right. It remains so under ILO jurisprudence, whose applicable conventions generally leave the discretion to national laws and practices to determine the extent of application of the rights to organise, collective bargaining and to strike.[63] And in general the practise in most nations is to exclude members of the armed forces.[64]

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60 Paras 570-603. See also article 4 (g) (h) of the SADC Charter viz essential services. The Charter does not proscribe strikes by members of the public service *per se*.

61 Paras 545 - 563.

62 V I Lenin *State and Revolution* (2002)10, 18.

63 For instance under ILO 087 Convention [art. 9 (1)]; ILO 098 Convention [art 5]; ILO 154 Convention [art 1(2)] .

64 In South Africa see s 2 as read with s 64 (1) Labour Relations Act, 1995; Malawi s 3 as read with s 46 Labour Relations Act, 1996 (16/1996).

On the other hand the situation in relation to the other employees of the State, in particular members of the Public Service has been more controversial and flexible. Earlier ILO and international and national instruments treated such employees in the same way as members of the armed forces, leaving the discretion to national laws.[65] The Labour Relations (Public Service) Convention, 1951 puts emphasis on alternative dispute resolution mechanisms like negotiations, conciliation, mediation and arbitration and does not specify a right to strike.[66] If anything potential restriction if not prohibition is implied in article 9, which reads:

> Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.

Over time, though, labour law has gradually conceded the right to strike to the ordinary employees of the State.[67] For instance the Labour Relations (Public Service) Convention potentially allows for the right to strike for employees whose status and the nature of their job may not be deemed to exclude them from such rights. These may include employees engaged in essential services or "high level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature."[68] The convention further stipulates that special modalities should be set up to facilitate the rights of civil servants to collective bargaining.[69] In any case the principal conventions do not contain an absolute bar on including civil servants but leaves it to the discretion of national laws. The SADC Charter does not proscribe the right to strike of members of the Public Service.

Depending on the strength of the working class in different countries, the right to organise for civil servants has been

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65 See articles referred to in Footnote 63, *ibid.*

66 Article 8 ILO 154 Convention .

67 ILO *General Survey* Report 111 (IB) [2013].

68 Article 1(2) ILO 154 Convention. See also art. 6, ILO 098 Convention.

69 See art 1 (3) ILO 154 Convention.

won in an increasing number of countries reflecting a growing convergence and harmonisation between private sector and public sector laws.[70]

Disputes of right, collective bargaining agreements and arbitration

The prohibition of the right to strike in a dispute where a solution can be provided by competent courts of law is accepted under ILO jurisprudence.[71] This is what is commonly referred to as a dispute of right, which pluralists argue can best be resolved through adjudication as opposed to power based resolution premised on a strike.

A class conflict perspective sees this though as an attempt by dominant elites to instutionalise and channel labour disputes into acceptable mechanisms which do not fundamentally threaten the prevailing capitalist mode of production.[72]

Strikes may also be prohibited in circumstances of the existence of a current collective bargaining agreement between the parties, and which prohibits the going on strike before the expiry of the agreement.[73] The existence of a collective agreement should not *per se*, preclude the right to strike for top ups but where a prohibition exists, there is need for workers to have access to an effective and expeditious dispute resolution mechanisms to deal with any impasse between the employer and the affected workers.[74] Protest strikes over prolonged non-payment of salaries by the Government are fully recognised.[75]

The use of compulsory arbitration as a moratorium to end a strike is permissible if done at the instance of both parties or in situations where the strike is outlawed.[76]

The rationale for a preceding agreement of the parties to submit to compulsory arbitration is to ensure that the voluntary

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70 See the constitutions of: South Africa [s 23 92)]; Kenya [art 41]; Uganda [art. 40 (3)].
71 Para 532 Digest.
72 I Kiselyov (1988) 57.
73 Para 533 Digest.
74 Ibid.
75 Para 537.
76 Paras 564-569.

autonomy of the parties is preserved to avoid a situation where parties feel that the arbitration process has been imposed on them thereby potentially creating a fertile ground for resentment and consequent escalation of the dispute.

Procedural limitations

In addition to the above substantive limitations on the right to strike, ILO jurisprudence also recognises several procedural limitations or formalities that may be imposed on the exercise of the right, but subject to certain conditions.

Firstly authorities may impose formalities before exercise of the right such as a requirement of a notice period, the balloting of members or requiring parties to first undergo conciliation proceedings. However, the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations.[77]

The legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike.[78]

Mandatory secret ballots

ILO jurisprudence recognises the imposition of a requirement for secret ballots of employees before going on strikes including that a certain quorum be present.[79]

What may be problematic however, are requirements that an absolute majority of workers should be obtained for the calling of a strike. This may be inferred as involving the risk of seriously limiting the right to strike.[80]

Similarly a provision requiring the agreement of the majority of members of federations and confederations, or the approval by the absolute majority of the workers of the undertaking

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77 paras 547 Digest.
78 para 548.
79 para 559.
80 para 557 .

concerned for the calling of a strike, may constitute a serious limitation on the activities of trade union organizations.[81] .

Conciliation and arbitration requirements

In general a decision to suspend a strike for a reasonable period so as to allow parties to seek a negotiated solution through mediation or conciliation efforts, does not in itself constitute a violation of the principles of freedom of association.[82]

In as far as compulsory arbitration prevents strike action, it is contrary to the right of trade unions to organize freely their activities and could only be justified in the public service or essential services in the strict sense of the term.[83]

A provision which permits either party unilaterally to request the intervention of the labour authority to resolve a dispute may effectively undermine the right of workers to call a strike and does not promote voluntary collective bargaining.[84]

Protection of strikers

The right to strike encompasses various protections to be accorded strikers, in some circumstances extending to those participating in unlawful strikes.

Workers who participate in a lawful strike enjoy maximum protection from reprisals. Saddling striking employees or trade union with unduly burdensome sanctions consequent to a strike flies in the face of ILO principles.[85]

Except in circumstances of an essential service, gap filling to replace striking employees militates against the notions of the right to strike and is proscribed.[86]

Subtle punishment for striking employees which can take the form of dismissal, demotion or reduction of salaries is anathema to the Conventions.[87]

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81 para 561.
82 para 550.
83 para 565.
84 Para 566 Digest.
85 paras 658-666.
86 Para 632.
87 Paras 654,658,661 & 674 Digest.

To curb the effects of unruly elements, the conventions recognise that legal bridles can be put in place to punish those who abuse the right to strike but such punishment should not be unduly harsh and excessive but should be proportionate to the offence or fault committed and the drastic penalty of imprisonment should not be resorted to.[88]

Under the principle of "no work no pay", the deduction of wages for the duration of the strike is permissible,[89] with the caveat that such deductions should not be higher than the period of the strike. Pickets are recognised to the extent that they do not disturb public order.[90]

Right to strike under the Labour Act and Constitution

The new Constitution has profound implications on the right to strike as currently provided under the Labour Act. We critique the current regime under the Labour Act in the context of the provisions of the new Constitution and international law, in particular ILO jurisprudence.

Definition and extent of right

Under Zimbabwean law, the legal basis for the right to strike is provided for under statutes and the Constitution. Prior to the 2013 Constitution, the sole basis of the right was in terms of the Labour Act. The courts had adopted the unitarist approach and rejected the functional approach position that the freedom of association encompassed the right to strike.[91]

Under the Labour Act, a considerably restricted right to strike exists, compared to the new Constitution and international law. Section 104 (1) of the Labour Act provides for a right to collective job action, in the following terms:

> Subject to this Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest.

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88 Paras 667-670 .

89 paras 654-657.

90 paras 648-653.

91 Zimbabwe Banking and Allied Workers Union & Anor v Beverly Building Society & Ors 2007 (2) ZLR 117 (H).

The right is specified as for "employees, workers committee and trade unions." It does not mention employers and employer's organizations. This is consistent with the international paradigm discussed above. It is also consistent with s 65 (3) of the Constitution which extends the right to "every employee."

However, s 104 (1) of the Labour Act is restrictive compared to s 65 (3) of the Constitution and international labour standards. This is at several levels. Firstly the Act specifically conditions the right as being exercisable only in relation "to resolve disputes of interest." The constitutional provision is broader. It establishes a right to participate in collective job action without restricting the purpose for which the collective job action may be exercised for. The Constitution therefore potentially allows for a very broad range of lawful and legitimate purposes for which strikes and collective job action may be done for, including work, economic, social or even political objectives. This is consistent with ILO jurisprudence on the permissible objectives of the right to strike.[92]

To the above extent it can be strongly argued that s 101 (1) of the Labour Act is unduly restrictive and *ultra vires* s 65 (3) of the Constitution. The restriction of collective action to disputes of interest only is excessive and unlikely to be saved under s 86 of the Constitution. A comparable position is under the South African labour legislation, where the wording of the right is broader[93] and there is also inclusion of the right to protest action to protect socio-economic interests.[94]

The second level of difference is in relation to the definition of "collective job action." Under the Labour Act, collective job action is defined as:[95]

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

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92 Para 526 Digest.
93 See s 64 (1) Labour Relations Act, 1995 (SA).
94 Section 77 Labour Relations, 1995 (SA).
95 Section 2 Labour Act.

The above definition restricts the right to strike only to demands "related to employment" and in relation to "a party to an employment relationship." This means socio-economic or political demands which are not directly related to the employer are excluded, whereas the same are permissible under the ILO framework. Secondary strikes would also be excluded. In South Africa such secondary strikes are permissible.[96] The definition also excludes general protest action to promote or defend socio-economic interests of workers, such as the stayaways of the late 1990s or what is termed the right to protest action under South African labour legislation.[97]

Despite this limitation in the Labour Act, it can be strongly argued that Zimbabwean law now includes the right to secondary strike and to strike for socio-economic-political demands not directly related to an employer. This is because of the wide definition of the right to collective job action under s 65 (3) of the Constitution.[98] A protest action or stayaway or a secondary strike is a form of concerted action, as stated under s 65 (3) of the Constitution. Using the appropriate provisions of the Constitution[99], s 65 (3) of the Constitution may be interpreted in terms of relevant international law provisions that recognise secondary strikes and socio-economic strikes as legitimate expressions of the right to strike. Exclusion of these under the Labour Act can therefore be argued to be *ultra vires* the letter and spirit of the Constitution. Neither may such limitation be saved under s 86 of the Constitution as being inconsistent with the norms of a democratic society, as shown in applicable international law norms.

The final level relates to the scope of employees and trade unions covered. In terms of s 104 (3) (c) no collective job action may be recommended or engaged in by "any trade union, employer's organisation or federation unless the trade union, employers organisation or federation is registered."

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96 See s 66 (1) Labour Relations Act, 1995 (SA).

97 Section 77 (1) Labour Relations Act, 1995 (SA).

98 See section 65(3) of the Constitution .

99 Section 46 (1) (c) as read with s 327 (6) of the Constitution.

This provision is bolstered by s 30 (3) (a) which stipulates that no unregistered trade union may recommend collective job action.

This substantive restriction on unregistered trade unions is not provided for under s 65 (1) of the Constitution. The Constitution gives a very broad right to form and join trade unions and to participate in the lawful activities of those unions and organisations.[100] Neither the right to organise nor to engage in collective job action is subjected to the registration requirement under the Constitution.

When consideration is made to the very substantive infringements to the autonomy of unions and organisations to run their affairs under the guise of registration, the ominous character of the registration requirement becomes patently clear. Constitutions of registered unions are required to provide for the prohibition of union dues for political purposes.[101] The Minister is given excessive powers to regulate the use of union dues by registered trade unions[102] as well as the election of union officials.[103] The registration procedure has become a means through which the State has extended its intervention in the internal affairs of trade unions in a manner inconsistent with fundamental ILO conventions or the broad right given by the Constitution.[104]

The second consideration is that the right to strike is extended to all employees under s 65 (3) of the Constitution other than members of the security services, whereas the Labour Act does not apply to members of the Public Service and employees whose conditions of employment are provided for in the Constitution.[105]

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100 Section 65 (2) Constitution.

101 Section 35 (c) Labour Act.

102 Sections 52, 54 and 55 Labour Act.

103 Section 51 Labour Act.

104 The right to independence of trade unions and workers organisations to run their affairs, establish their own rules and constitutions and to protection from interference by the state and employers, including arbitrary suspension or dissolution, is sacrosanct under the ILO conventions. See articles 2, 3, 4 and 5 ILO 087 Convention; art. 5 ILO 151 Convention, and articles 6 and 9 ILO 151 Convention.

105 Section 3 Labour Act.

Substantive Limitations on the Right to Strike

There are similarities as well as differences on the substantive restrictions placed on the right to strike under the Labour Act and the new Constitution and international law.

Restrictions on essential services

Under the Labour Act, strikes are prohibited in essential services.[106] Essential services means any service -

> ... the interpretation of which endangers immediately the life, personal safety or health of the whole or any part of the public; and …that is declared by notice in the Gazette made by the Minister, after consultation with the appropriate advisory council, if any, appointed under s 19, to be an essential service.[107]

The following services are designated as essential: [108]

> ... services relating to fire brigade; distribution of water; veterinary services; revenue specialists involved in the performance of security and health checks at airports; certain areas in health and electricity services and a public broadcaster during a state of disaster.

The above framework under the Labour Act is substantially consistent with s 65 (3) of the Constitution which provides that a law may restrict the exercise of the right in order to maintain essential services. It is also generally consistent with the parameters set under international law.[109]

There are still some areas of contention. Under international law, the declaration of a service as an essential service should not be the sole prerogative of the State, but of a body representing the State, labour and business. The Labour Act reposes the power to do so on the Minister of Labour. There is

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[106] Section 104 (3) (a)(i) Labour Act. See also Tel-One (PVT) Ltd v Communications & Allied Services Workers Union 2006 (2) ZLR 136 (S) at 149C; and Rutunga & Ors v Chiredzi Town Council & Anor S-117-02.

[107] Section 102 Labour Act.

[108] s 2 Labour (Declaration of Essential Services) Notice S I 137/ 2003.

[109] See para 596 Digest.

no independent committee to determine what constitutes an essential service as the Minister is given an open cheque to do so. At most she or he is required to consult an advisory council.

Further the Notice gives the Minister sole authority to declare any non-essential service as an essential service, "if a strike in a sector ... persists to the point that the lives, personal safety or health of the whole or part of the population is endangered."[110] An interpretation of s 65 (3) of the Constitution, using the international and regional framework, indicates that the authority to declare a service an essential one, should not rest with the State alone.

Consistent with international law standards, where a dispute pertains to a dispute of interest and the parties are engaged in an essential service and a labour officer or designated agent has failed to successfully settle the dispute by conciliation, it is peremptory that the dispute should be referred to compulsory arbitration.[111] This jells with the ILO Experts' recommendation that employees in essential services who are deprived the right to strike be afforded impartial and speedy conciliation and arbitration.[112] Note that a similar provision applies in relation to a deadlock in negotiations in the Public Service, wherein the dispute should be referred for compulsory arbitration. [113] However, in view of the fact that members of the Public Service now enjoy the right to collective job action,

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[110] Section 3 S I 137/2003.

[111] See section 93(5) of the Labour Act; After a labour officer has issued a certificate of no settlement, the labour officer upon consulting any labour officer who is senior to him and to whom he is responsible in the area in which he attempted to settle the dispute or unfair labour practice-.

(a) shall refer the dispute to compulsory arbitration if the dispute is a dispute of interest and the a parties are engaged in an essential service; or.

(b) may, with the agreement of the parties, refer the dispute or unfair labour practice to arbitration; or.

(c) may refer the dispute or unfair labour practice to compulsory arbitration if the dispute or unfair labour practice is a dispute of right.

[112] Para 596 Digest.

[113] Public Service (Public Service Joint Negotiations Council) Regulations, S I 141/1997.

it may well be argued that this provision has become *ultra vires* s 65 (3) of the new Constitution.

The restriction to strike in essential services is not absolute. Section 65 (3) of the Constitution merely provides for a law that may restrict the exercise of the right in essential services. As currently formulated the Labour Act broadly restricts the right in relation to essential services, but explicitly provides an exception under s 104 (4). In terms of this a partial strike is permissible in an essential service, where there is an occupational hazard which presents an impending threat to the health or safety of workers[114] and in defence of an immediate threat to the existence of a workers committee or registered trade union.[115]

Employees of the State and members of armed forces

The artificial divide between public and private sector employees has been demolished by the Constitutional provisions that extend the right to strike to both private and public sector employees. Section 65 (3) of the Constitution excludes only members of the security services from enjoyment of the right to collective job action.

This position is reinforced by other provisions of the Constitution establishing the right to organise and collective bargaining for every employee, including members of the Public Service, with the only excluded group of workers being members of the security services.[116] To bring the Labour Act into conformity with the Constitution, section 3 has to be amended to remove the provisions excluding members of the Public Service.

The provisions of the Labour Act excluding application of the Act to members of a disciplined force, including in the

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114 See section 104(4)(a) of the Labour Act.

115 See section 104(4)(b) of the Labour Act, see also the Supreme Court of Zimbabwe decision in *First Mutual Life Assurance v Muzivi* S-62-03 wherein the court upheld the strike as lawful due to not only a direct threat to the existence of a workers committee but a direct attack on the workers committee after the employer demoted members of the concerned workers committee.

116 Section 65 (5) as read with section 203 (1) (b) of the Constitution.

enjoyment of the right to strike, therefore remain *intra vires* the new Constitution. As already pointed out the same restriction is permissible under ILO jurisprudence.

Disputes of right and disputes of interest

Under the Labour Act, the most remarkable substantive limitation on the right to strike finds its fullest expression in the dichotomy between disputes of right and disputes of interest. The right to strike only exists in respect of disputes of interest which fall to be determined by power games but it does not exist for disputes of right which should be resolved by formal disputes resolution systems.[117]

A dispute of interest, sometimes called "economic dispute," concerns the creation of fresh rights, such as higher wages or modification of existing collective bargaining agreements.[118] On the other hand, a dispute of right entails a determination on the existence or otherwise of a legal right or obligation flowing from legislation, collective agreements, contracts of employment or any other recognised source of law.[119]

The distinction between disputes of right and disputes of interest and the requirement that disputes of right be resolved via adjudication does not violate ILO principles.[120] The same trend is observed in other jurisdictions, for instance under South African legislation. [121]

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[117] See section 104(3)(a)(ii) of the Labour Act. See CSWUZ v Tel-One (Pvt) Ltd HH-91-05; Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe & Anor 2007 (2) ZLR 103 (S).

[118] A Rycroft and B Jordaan (1992) 169 and cited with approval in *Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe & Anor* 2007 92) ZLR 103 (S) at 109F-H.

[119] Section 2 of the Labour Act defines a dispute of right as meaning: . "any dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of this Act or of any regulations made under this Act, or a breach or alleged breach of any of the terms of a collective bargaining agreement or contract of employment.".

[120] Para 532 Digest.

[121] This seems implied in section 65 (1) Labour Relations Act 1995 (SA) which prohibits the going on strike if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court.

The question remains nonetheless of the validity of this restriction, given that it is not expressly provided for in s 65 (3) of the Constitution. Those in favour of such limitation may possibly justify it as a limitation reasonably justifiable in a democratic society.[122] Reference can be made to the ILO jurisprudence providing for the same as well as provisions in other jurisdictions, notably that of South Africa. Perhaps the underlying theoretical basis being that the right to strike is not an end in itself but a means to an end of achieving effective collective bargaining. If effective mechanisms for achieving rights exist why not allow those.

However, we submit that this is an unduly restrictive view of the right to strike, in particular given the broad objectives that underlie the right. It is both an offensive arrow, necessary in creating fresh rights, as well as a defensive shield to protect and enforce rights. This is recognised to a limited extent in section 104 (4) providing the fullest right to strike in defence of the right to organise or in the face of an immediate occupational hazard. Given that there is no constitutional basis for the distinction between disputes of right and disputes of interest, it is not legitimate to maintain this distinction under the Labour Act. Moreover, the distinction was only explicitly brought into the law by Act No. 17 of 2002.

Arbitration and collective bargaining agreements restrictions

Another level of restriction pertains to arbitration. Once a dispute is referred to arbitration, the door for the right to strike is firmly shut, as the Labour Act prohibits the going on collective job action in such circumstances.[123] The autonomy of the parties is eroded by an Arbitrator who is imposed to adjudicate over the dispute by the State under the guise of compulsory arbitration and this is undesirable.

Zimbabwean law does not expressly provide for peace obligations but allows parties to graft in an exclusive dispute

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[122] Under s 86 (2) Constitution.

[123] Section 104(3)(a)(iii) of the Labour Act. The same is stipulated in relation to compulsory arbitration — s 98 of the Act. Also - *Chisvo and Ors v Aurex (Pvt) Ltd* 1999 (2) ZLR 334.

resolution mechanism in their collective bargaining agreement and once that is agreed, it precludes the right to strike.[124]

Procedural limitations on the right to strike

The exercise of the right to strike under the Labour Act, is encumbered by various procedural limitations, some of which may run afoul of the broad right granted under s 65 (3) of the Constitution and the precepts of ILO standards.

Some of the main procedural limitations include the requirements for: notice; a conciliation certificate of no settlement; a secret ballot, and union approval before employees or a workers committee engage in collective job action. Failure to comply with these formalities has been held to render a strike unlawful and thereby depriving the employees of the statutory protection.[125]

Notice requirement

The major procedural barriers to the right to strike include the requirement to give fourteen days written notice to the party against whom the action is taken, to the employment council and the appropriate trade union or employers organisation or federation.[126] The courts have held that failure to reduce the notice into writing and to give it to the appropriate party is fatal to the validity of the strike.[127] Where a notice is issued and the union does not embark on the strike within a reasonable period, the union may have to issue a

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[124] Section 82(4) of the Labour Act which states: "if a registered collective bargaining agreement provides a procedure for the conciliation and arbitration of any category of dispute, that procedure is the exclusive procedure for the determination of disputes within that category.".

[125] See ZimPost (Pvt) Ltd v Communications and Allied Workers Union 2009 (1) ZLR 334 (S) at 338C; and Net* One Cellular (Pvt) Ltd v Communications and Allied Workers Union S 89/05.

[126] Section 104(2) of the Labour Act.

[127] See Moyo v Central African Batteries(Pvt) Ltd 2002 (1) ZLR 615(S); Rutunga & Ors v Chiredzi Town Council & Anor S-117-02; Mukundwi and 42 Others v Chikomba Rural District Council LC/H/01/05; Cole Chandler Agencies (Pvt) Ltd v Twenty-five named employees S-161-98.

fresh notice otherwise the strike may be also be held to be unlawful.[128]

The fourteen days written notice to go on strike is too excessive and will only serve to deflect and deflate the right to strike which is granted under s 65 (3) of the Constitution. These procedural hindrances in the form of an unreasonably long notice to engage on a strike run counter to the ILO requirements on the right to strike.[129] Comparatively the period in South Africa is 48 hours,[130] and seven days in the UK.[131]

The Labour Act provides for the precondition that an attempt should have been made to resolve the dispute via conciliation and a certificate of no settlement issued before parties engage in collective job action.[132] The need for conciliation to precede resort to strike effectively renders the right to strike difficult to assert because in practice, the conciliation process can last for a period ranging from 30 days[133] to a period *ad infinitum* if the conciliation is extended.[134]

In terms of the Digest a decision to suspend a strike for a reasonable period so as to allow parties to seek a negotiated solution through mediation or conciliation efforts, does not in itself constitute a violation of the principles of freedom of association.[135] The requirement under the Labour Act compelling conciliation before a party can engage in a strike, is therefore not *per se* in violation of the ILO jurisprudence. However, the 30 days long period of conciliation potentially may be unduly long and problematic. It means the momentum

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128 Cole Chandler Agencies (Pvt) Ltd v Twenty-five named employees S-161-98; Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe and Anor 2007 (2) ZLR 103 (S) at 114D-E.

129 Paras 547-548 Digest.

130 Section 64 (1) (b) Labour Relations Act, 1995 (South Africa).

131 Trade Union and Labour Relations (Consolidation) Act 1992, s 238; S Deakin & G S Morris *Labour Law* 4th (ed) (2005) 1006.

132 Section 104(2)(b) of the Labour Act; Zimbabwe Graphical Workers Union v Federation of Master Printers of Zimbabwe and Anor 2007 (2) ZLR 103 (S).

133 Section 93(3) Labour Act.

134 Section 93(4) Labour Act.

135 Para 550 Digest.

for a strike falls away, the longer the period from the initial time when the workers went on strike. The thirty days conciliation period in Zimbabwean law is a copy-cat of the South African provision,[136] but one that may still nonetheless be held to be unconstitutional because of its effect of unduly diluting the right to strike granted under s 65 (3) of the Constitution.

Secret ballot by majority of employees

No collective job action may be recommended or engaged in by "any workers committee, trade union or employers organisation, except with the agreement of the majority of the employees or employers, as the case may be, voting by secret ballot."[137] The provision therefore entails two requirements, namely a secret ballot and secondly approval by a majority of employees, thereby rendering a strike by a minority of employees illegal. The secret ballot must be conducted before the expiry of the notice, done at the workplace and there must be a letter by the chairperson and secretary of the workers committee or trade union secretary general to the employees detailing the reasons for the ballot and strike.[138] The voting must be done in the presence of a labour officer or designated agent, who shall count and record the results.[139]

The secret ballot requirement is one which is not provided for in s 65 of the Constitution. The question is whether such requirement or limitation may be held to "fair, reasonable, necessary and justifiable in a democratic society ..." per s 86 of the Constitution. Note is taken that under ILO jurisprudence the obligation to observe a certain quorum and to take strike decisions by secret ballot may be considered acceptable.[140] However, a provision requiring the agreement of the majority of members of federations and confederations, or the approval by the absolute majority of the workers of the undertaking

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136 Section 64 (2) Labour Relations Act (SA) .
137 Section 104 (3) (e).
138 Section 8 Labour (Settlement of Disputes) Regulations S I 217/2003.
139 *Ibid* s 8 (5) .
140 para 559.

concerned for the calling of a strike, may constitute a serious limitation on the activities of trade union organizations.[141]

The requirement under s 104 (3) (e) of the Labour Act for a majority mandate by secret ballot therefore goes beyond what is acceptable under ILO conventions. Given that s 65 of the Constitution does not provide such restrictions, these provisions my therefore be held overbroad and unacceptable in a democratic society.

In any case the history of the secret ballot provision in our law lies in repressive colonial ethos that sought to suppress the rising black working class.[142] Further the imposition of the labour officer or designated agent as effectively the presiding officers of the secret ballot is too intrusive and potentially gives such officials too much power to influence the course of events in their preferred direction.

A better scenario consistent with the broad right guaranteed under the Constitution is one whereby the requirement for a secret ballot especially with such intrusive state intervention is held to be *ultra vires* the Constitution. There is nothing inherent about the need for a secret ballot before exercise of the right to strike and in many democratic jurisdictions indeed there is no such requirement in labour legislation for instance South Africa.

We also submit that the requirement for majority approval of a strike can no longer stand in the face of s 65(3) of the Constitution which expressly confers the right to strike to "every employee..." This would seem to grant any collective of employees the right to strike, even if it is a minority. The fact that that the right to strike is now conferred as a fundamental right under the national constitution shows that the Zimbabwean position is now one based on the "individualist' right" approach. This is whereby the right to strike is seen as an inherent human right exercisable by individuals, albeit exercised on a collective basis.[143]

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[141] para 561.

[142] It was first introduced in terms of s 47 (1)n Industrial Conciliation Act, 1959.

[143] S Deakin & G Morris *op cit* at 966. The authors cite France and Italy as examples of countries following such approach.

This is opposed to the "organic" approach whereby the right is seen as an essential ancillary to collective bargaining and the right therefore essentially located in trade unions. It may be argued that this was the position under the Labour Relations Act, thereby giving registered unions the power to approve strikes by employees and workers committees.[144] In view of the new constitutional basis of the right, the provisions of the Act may well be argued to be too excessive and intrusive and inconsistent with the broad right granted under the Constitution. Such a provision was consistent with the state corporatist basis of previous legislation which favoured the one industry one union model, but is hardly workable in the pluralist based model of the Labour Act and s 65 of the Constitution, both of which provide for a multiplicity of unions.

So far no test cases have been taken to the Constitutional Court of Zimbabwe to impugn the various procedural humps to a strike provided under the Labour Act and regulations, but if that is done, the Court should be guided by the interpretation provisions of the new Constitution which *inter alia* call on the courts to give full effect to the rights and freedoms enshrined in the Declaration of Rights.[145]

Protection and privileges of lawful strikers

A central issue in strike law is the dual-laced one of the protection granted to employees who engage in lawful strikes and the sanctions against those who engage in unlawful strikes. Currently Zimbabwean law provides various protections and privileges to the former,[146] and simultaneously, severe and harsh sanctions, against those who engage in unlawful strikes. The validity of the sanctions against unlawful strikers is an area that needs to be quizzed in terms of international law and the new constitution.

Employees who engage in a lawful strike are accorded several protections and privileges. First the employees enjoy immunity from dismissal or other disciplinary action.[147] In the same vein,

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144 Section 104 (3) (b) Labour Act.

145 Section 46 (1) Constitution .

146 See section 108 Labour Act.

147 Section 108(3) Labour Act. *Tel-One (Pvt) Ltd v CASWUZ* 2006 (2) ZLR 136 (S) at 145A-B.

the law protects both individuals and organisations from civil liability consequent to a lawful strike, including the right not to be interdicted or be subjected to a show cause order.[148] However, it is important to note that an employee who participates in a lawful strike loses an entitlement to get remuneration from the employer,[149] other than remuneration in the form of accommodation, food and other basic amenities which the employee is entitled to continue receiving during the strike, subject to the right of the employer to recover the costs of the same by action in the Labour Court.[150]

If an employer locks out an employee, that employer is barred from employing another person to perform the duties of an employee who falls prey to a lockout.[151]

Employees in a lawful strike are allowed to picket in support of their action at the premises of the employer or any other public place.[152] The right to picket under the Labour Act overrides "any other law regulating the right of assembly", such that the strikers do not for instance require to get prior police approval for a picket, as would be otherwise required under the Public Order and Security Act.[153] The requirement for a picket to be done peacefully bodes well with ILO requirements.[154] The only area of contention may be the current limitation that the right to picket is reserved only for a registered trade union or workers committee,[155] which may be inconsistent with the broad right to strike guaranteed under s 65 (3) of the Constitution.

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148 Section 108(2) Labour Act. Mpumela v Cargo Carriers International (Pvt) Ltd LC/H/206/2009.

149 Section 108(4) Labour Act.

150 Section 108 (4) Labour Act; and Communication and Allied Services Workers Union of Zimbabwe v ZIMPOST & Anor LC/H/68/2004.

151 Section 108(5) Labour Act.

152 Section 104A(3) Labour Act.

153 Section 24 (5) as read with Item (j) of the Schedule to the Public Order and Security Act [*Chapter 11:17*] as affirmed in *ZCTU v Officer Commanding, Police Kwe Kwe & Ors* HB-90-10*; ZCTU v Officer Commanding, ZRP, Harare* 2002 (1) ZLR 323 (H).

154 Para 667 Digest.

155 See s 104A(2) Labour Act, which states: "A registered trade union or workers committee may authorise a picket.".

Sanctions, discipline and dismissal for unlawful strikes

Historically, there was very little protection of employees engaged in unlawful strikes. Such act constituted gross misconduct under the common law and the employees and their organisations incurred both civil and criminal liability for their actions.

Under the common law, in terms of the "contractual approach", participation in an unlawful strike amounts to gross violation of the contract or repudiation of the same, justifying summary dismissal.[156] The duration of the strike is immaterial with the courts sanctioning dismissal even for strikes of a few hours duration.[157] The Labour Act only extends protection from dismissal to employees who engage in lawful collective job action, thereby leaving those engaged in unlawful collective job action to the mercy of the common law.[158] In any case dismissal may be ordered by the Labour Court in terms of a disposal order.[159]

In terms of statutes, participation in an unlawful strike attracted severe penal sanctions, from the colonial period through to the post-colonial period.[160] The Labour Act still provides for draconian criminal and civil sanctions against employees and trade unions who engage in unlawful collective job actions and even third parties who support such actions.

Firstly is civil liability. The Act authorises the imposition of punitive damages against a party or every "responsible person", who recommends, encourages, threatens, incites,

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156 Wholesale Centre v Mehlo and Others 1992 (10 ZLR 376; Kadoma Magnesite v RHO 1991 (1) ZLR 283; Masiyiwa v TM Supermarkets 1990 (1) ZLR 283; ZIMPOST v Communication and Allied Workers Union S-23/09.

157 Wholesale Centre v Mehlo and Others; and ZB Financial Holdings v Manyarara SC 03-12.

158 Section 108 (3) Labour Act .

159 Section 107(3) (a)(iv), Labour Act.

160 M Gwisai *op cit* at 344-345. See legislation such as the Emergency Powers (Maintenance of Essential Services) Regulations, S I 160A of 1989 and the Public Services (Maintenance of Services) Regulations S I 258 of 1990 .

or participates in an unlawful collective job action. The provisions are widely couched:[161]

- The liability is for "any injury to or death of a person, loss of or damage to property or other economic loss, including the perishing of goods caused by employees' absence from work, caused by or arising out of occurring during such collective action."
- The liability is joint and several and applies to every official or office bearer of the responsible person and every individual employee. The only defence would be to show that such person did not realize or lacked the subjective intention, to participate in the unlawful collective job action. Thus the normal burden of proof is reversed. There is in fact a presumption of guilty for all office bearers and officials of the trade union.[162]
- It is further provided that a criminal court that convicts a person for engagement in an unlawful collective job action, "shall forthwith award compensation to any person who has suffered personal injury or whose right or interest in any property of any description has been lost or diminished as a direct result of the offence."[163]

Besides the above punitive civil sanctions, an organisation that engages in an unlawful collective job action stands to face further crippling financial sanctions. The Minister may issue against it an order suspending for up to twelve months, the right of the trade union to levy, collect or recover union dues by means of a check-off scheme, or the right of an employers' organization to collect membership fees.[164]

The third level of punitive measures are the criminal sanctions. Any employee or person is liable for criminal conviction if they "recommend, advise, encourage, threaten, incite, command, aid, procure, organize or engage" in unlawful collective job action.[165] The penalties for involvement in an

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161 Section 109 (6) Labour Act.
162 Section 109 (2) Labour Act.
163 Section 109 (7) Labour Act.
164 Section 109 (3) Labour Act.
165 Section 109 (1) Labour Act.

unlawful collective job action are severe, and include a fine not exceeding level fourteen (the maximum) or imprisonment for a period not exceeding five years or both. The criminal court convicting a person for involvement in an unlawful collective job action is also required to make a compensation award to "any person who has suffered personal injury or whose right or interest in property of any description has been lost or diminished as a direct result of the offence"[166].

Fourthly, a trade union that engages in an unlawful collective job action stands in danger of being de-registered. Deregistered status comes with very severe handicaps that make it virtually impossible for the union to operate such as prohibition from collecting union dues by check-off, participation in the statutory collective bargaining frame-work under Part X of the Act, access to the statutory framework of dispute resolution such as conciliation and arbitration.

Extensive interlocutory and other remedies are available to an employer or any other person aggrieved by an unlawful collective job action, including threat thereof. Such party may apply to the Minster for issuance of a statutory interdict called a show cause order, in terms of which the offending party may be ordered to cease the unlawful collective job action forthwith, pending disposal of the dispute by the Labour Court.[167] The Labour Court is given extensive powers to dispose of unlawful collective job actions. This may include orders providing for: the prohibition of collection of union dues for a specified period, suspension or rescission of the registration of the trade union, refer the dispute underlying the strike to another authority for determination, the lay off or suspension of employees, dismissal and or taking of disciplinary action against specified employees.[168]

The courts have also held that an employer may side-step the entire Part XIII machinery and discipline the employees in terms of its employment code. Or even if a disposal order has

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166 Section 109 (7) Labour Act.

167 See section 106 of the Labour Act.

168 Section 107 (3) (a) Labour Act. ZESA v ZESA Employees 2005 (1) ZLR 127 (S); Safeguard Security, Guard Alert & Fawcetts v Employees LC/MC/45/2003.

been issued and is silent on the disciplining of the employees, the employer can still proceed to enforce employment code measures on the employees, including dismissal where appropriate. It has been strongly argued but rejected by the courts that this is inappropriate. Firstly is the existence of the very specific, clear and extensive machinery under Part XIII of the Labour Act to deal with strikes including the very extensive powers of the Labour Court when issuing a disposal order. Secondly the fact that employment codes are generally designed to deal with individual disputes and usually unsuitable for large-scale disputes in particular strikes which more often than not paralyse the code infrastructure as workers representatives are also likely to be involved in the strike.[169] The above would seem to point out to one conclusion, namely that the application of the employment code / and or national code becomes ousted by implied necessity, once the Labour Court has become seized or has dealt with the matter.[170]

The above sanctions on employees, organisations and persons who engage in or support an unlawful collective job action are truly draconian. The provisions have their origins in repressive colonial legislation based on colonial state corporatism and retained in the first decade of independence. Such systems, although nominally recognising the right to strike, in fact virtually prohibited strikes.[171]

The sanctions on unregistered trade unions virtually make it impossible for such organisations to exist, in contravention of the constitutionally guaranteed right to organise and assemble. It is arguable that such sanctions and provisions are inconsistent with a legal system or constitutional order based

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[169] As was the case in Chikonye & Ors v Standard Chartered Bank SC-152-98, and Cargo Carriers (PVT) Ltd v Zambezi & Ors 1996 (1) ZLR 613.

[170] The court seemed to have been going in such direction in *Cargo Carriers (PVT) Ltd v Zambezi & Ors* 1996 (1) ZLR 613; and *Communications & Allied Workers Union of Zimbabwe & Ors v Tel-One (Pvt) Ltd* ZLR (H) per Makarau JP. However, this promising direction was ruthlessly cut short in subsequent decisions including: *ZISCOSTEEL CO. LTD v Dube & Ors* 1997 (2) ZLR 172 (S); *Tel-One (Pvt) Ltd v CASWUZ* 2006 (2) ZLR 136 (S) at 144; *Net-One Cellular (Pvt) Ltd v Communications & Allied Workers Union of Zimbabwe & Ors* S-89-05; and *CABS v Rugwete* 2009 (2) ZLR 26 (S) .

[171] L Madhuku *op cit* at 115.

on the right of employees to collective job action, to fair labour standards and to collective bargaining.

There is no equilibrium in the treatment between employers and employees. The true and real target of the above provisions are workers and trade unions and workers, as the comparative impact on employers who engage in unlawful collective job action is negligible. As has been persuasively argued, strikes are not the equivalent of lock-outs. The real comparable power of employers viz workers in collective bargaining lies not in the power of lock-out but in their powers ad prerogatives in ownership and control of the business property, their power to hire and dismiss labour. Nowhere does the Labour Act or criminal law impose equally draconian sanctions for unlawful acts by employers for acts such unlawful dismissal, retrenchment or constraints on their rights of ownership. The severe sanctions under sections 109 and 107 of the Labour Act in effect therefore amount to a very crude and blunt tool against the right to strike, especially when considering that the courts hitherto have treated in the same manner all forms of unlawful strikes, regardless of duration or impact. We humbly submit that such provisions are inconsistent with the broad right to collective job action and to organise and collective bargaining guaranteed under s 65 of the Constitution.

Finally we argue that the Labour Act and new Constitution have immense impact on the issue of discipline and dismissal of employees engaged in unlawful collective job action. Whereas the common law position has been one in which dismissal is the automatic penalty for involvement in an unlawful strike, regardless of the duration, impact or cause of the strike, this is not sustainable under the provisions of the Labour Act and new Constitution.

The requirements under the Labour Act of a just and expeditious dispute settlement process, and the right of employees to protection from unfair dismissal as read with the provisions of the Constitution granting every employee the right to fair labour standards, the right to collective job action and to collective bargaining, mean that the dismissal of unlawful strikers must comply with the requirements of substantive and procedural fairness that apply to all other forms of misconduct. As observed in one case –

> [t]he illegality of the strike is not a 'magic wand which when waved renders the dismissal of strikers fair.[172]

Under the Functional Approach "… *strikes are regarded as an essential and integral part of collective bargaining*", and the dismissal of strikers would be considered unfair, "for so long as the strike is and remains conducive to collective bargaining." This approach was followed in the pioneering case of *Jiah & Ors v PSC & Anor*[173] where, relying on developments in other jurisdictions especially South Africa, the court held that the selective dismissal of the leaders of the illegal 1996 government general strike was unlawful because, despite the illegality of the strike, the dismissals violated the parity principle and the principles of natural justice.

Procedural fairness means that an employee can only be dismissed for involvement in an unlawful collective job action after the conducting of fair hearing either in terms of the employment code, or national code or in terms of a disposal order of the Labour Court. The factual inquiry is necessary before dismissal to determine whether the workers in question actually participated in the alleged strike and to consider mitigation factors in view of the import of the protection from unfair dismissal doctrine under s12B(1) (4) of the Labour Act. Consequently the dismissal of strikers, without a hearing under a code that provided for "instant dismissal," was held unlawful.[174]

Dismissal must also be substantively fair. This may involve various considerations. First, the seriousness of the contraventions of the requirements under the Act, or the attempts made to comply with such requirements. Dismissal would be inappropriate where there is substantial compliance.[175] Second, the conduct of the employer. Dismissal is inappropriate where the strike was in response to unjustified

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[172] *National Union of Metalworkers of SA v VRN Steel* (1995) 16 ILJ 128 (IC). See generally J Grogan *op cit* at 270 .

[173] 1999 (1) ZLR 17 (S).

[174] Design Incorporated (PVT) Ltd v Chapangura & Ors S-23-03. Also Muparangande & Ors v Blue Line Dry Cleaners LC/H/175/2009.

[175] *Smart Petro v POSB* LC/H/143/05. See also J Grogan J *op cit* at 271 and Le Roux & Van Niekerk *op cit* at 306.

conduct by the employer such as bad faith bargaining, victimization of union or workers committee members or workers representatives,[176] or breach of an essential term of the contract like failure to pay remuneration,[177] or breach of a fundamental right of employees under the Labour Act or Constitution. Third, *the conduct and moral blameworthiness of the strikers*, with violent strikes described as an 'abuse of the right to strike.' For instance employees may have participated due to intimidation in which case dismissal would be inappropriate.[178] Forth, reference must be made to any applicable mitigation factors as specified in the Labour Act[179] and national code.[180] The Labour Court has held, correctly in our view, that where the unlawful strike was only for a short duration and with minimum adverse impact on the employer, that dismissal would be unlawful.[181] Other factors that have been taken into account include: (i) the degree of economic harm suffered by the employer noting that the exertion of economic pressure, which inevitably causes some harm, is the *raison d'etre*, of any strike;[182] and (ii) the timing and form of the strike with the courts taking a sterner view of strikes that take place without any notice or 'wild cat' strikes.

However, the Supreme Court has been slow to recognise the implications of these new standards on the law of strikes, as shown in *ZB Financial Holdings v Manyarara*.[183] But the express

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176 As in First Mutual Life Assurance v Muzivi; Jiah & Ors v Chairman, Public Service Commission, supra.

177 Mukandi & Ors v Hwedza Rural District Council LC/H/89/2004.

178 As in *Safeguard Security (PVT) Ltd v Tiyayi* LC/MC/08/04. See also - *Securitas (PVT) Ltd v Dangirwa and Matara*; and *Chisvo & Ors v AUREX (PVT) Ltd & Anor* 1999 (2) ZLR 334 (H).

179 Section 12B(4) Labour Act.

180 Section 7 Labour (National Employment Code of Conduct) Regulations 2006 (S I 15/2006).

181 Securitas (PVT) Ltd v Dangirwa and Matara LC/H/184/05; and ZB Financial Holdings v Manyarara LC/H/94/2009.

182 BAWU & Ors v Prestige Hotels CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC): "The Act contemplates that the right to strike should trump concerns for the economic losses which the exercise of that right causes. That is because collective bargaining is necessarily a sham and a chimera if it is not bolstered by the ultimate threat of economic force by one or other of the parties, or indeed by both.".

183 ZB Financial Holdings v Manyarara LC/H/94/2009.

provisions of the new Constitution providing explicitly for the rights to fair labour standards and a broad right to collective job action, has affirmed the pioneering position taken in *Jiah & Ors v Public Service Commission* case whereby principles of procedural and substantive fairness apply to unlawful collective job action.

Conclusion

With the new constitutional dispensation, Zimbabwean law is poised to give life and meaning to the right to strike as the impetus and the tone has already been set. There is need for a paradigm shift to ensure that action speak louder than words expressed in legislation so that the right to strike ceases to be a pipeline dream but a reality. Undoubtedly full compliance with ILO requirements on the right to strike requires more proactive action by the courts and the State and other social partners but there is beaming light at the end of the tunnel.