



LIMITATION ON FREEDOM OF ASSOCIATION: THE CASE OF PUBLIC OFFICERS IN LESOTHO

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DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly stated otherwise) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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LIST OF ACRONYMS

BOPEU	Botswana Public Employees Union
COLETU	Congress of Lesotho Trade Unions
COSATU	Congress of South African Trade Unions
FAWU	Food and Allied Workers Union
ICESCR	International Covenant of Economic, Social and Cultural Rights
ILO	International Labour Organisation
LUPE	Lesotho Union of Public Employees
NUMSA	National Union of Metalworkers of South Africa
POCRU	Police and Prisons Civil Rights Union
SATAWU	South African Transport and Allied Workers Union
UN	United Nations

Chapter One: Introduction

1.1 Introduction

The right to strike is a keystone of modern industrial society. No society which lacks that right can be democratic. Any society which seeks to become democratic must secure that right.¹

Freedom of association and its cornerstone, the right to strike, are integral to effective labour relations and a free and democratic society. Industrial action serves as a vital counterpoint to managerial prerogative and ensures a fair balance between employer and employee interests in the workplace. The International Labour Organisation (ILO) has promulgated a number of conventions and recommendations promoting the freedom of association,² including the Convention on Freedom and Protection of the Right to Organise³ (hereinafter referred to as Convention No. 87) and the Convention on the Right to Organise and Collective Bargaining⁴ (hereinafter referred to as Convention No. 98).⁵ Convention No. 87 protects the rights of workers and employers without differentiation to establish and join organisations for occupational purposes and guarantees their free functioning. Convention No. 98 regulates workers' protection against anti-union discrimination at the workplace and protects against employers' interference in the affairs of employees' organisations. These two conventions are amongst the most ratified

¹ L. MacFarlane, *The Right to Strike* (1981), p. 12.

²Freedom of Association and Protection of the Right to Organise (87 of 1948); Right to Organise and Collective Bargaining (98 of 1949); Workers Representatives (135 of 1971) (and accompanying Recommendation 143); Rural Workers and their role in Economic and Social Development (141 of 1975) (and accompanying Recommendation 149); Labour Relations (Public Service) (151 of 1978) (and accompanying Recommendation 159); Promotion of Collective Bargaining (154 of 1981) (and Recommendation 163); Right of Association and the Settlement of Labour Disputes in Non-Metropolitan Territories (84 of 1947); and Rights of Association and Combination of Agricultural Workers (11 of 1921).

³No. 87 of 1948.

⁴No.98 of 1949.

⁵ H.M Seady and P.S. Benjamin 'The Right to Strike and Freedom of Association: An International Perspective' (1990) 11 *ILJ* 439.

conventions of the ILO.⁶ By ratifying these conventions, member states undertake to extend the rights and freedoms contained in and/or created by the Conventions to their respective nationals.

In Southern Africa the countries of Botswana,⁷ Lesotho⁸ and South Africa,⁹ as members of the ILO, have ratified both Conventions No 87 and 98. In all three of these countries their respective Constitutions guarantee the freedom of association, subject to reasonable limitation. Nonetheless in Lesotho it is unlawful for public officers to embark on strike action, considerably inhibiting such employees' freedom of association. By contrast in Botswana and South Africa the right to strike is extended to public and private employees alike, without differentiation.

Lesotho is dualist state, which implies that a treaty does not automatically become part of the domestic law of Lesotho upon ratification.¹⁰ Instead, international treaties have to be incorporated into the municipal law, for their provisions to be legally binding. For a country that embraces dualism, an act of transformation by an appropriate state organ is needed before the provisions of the treaty can operate within the national legal system. Transformation may take various forms, such as Parliamentary enactment incorporating directly the treaty norms into domestic law or a statute copying all or part of the treaty.¹¹

In Lesotho, transformation of Conventions No. 87 and 98 was first done by entrenching freedom of association in the Constitution¹² and thereafter, by

⁶ http://www.ilo.org/Search3/search.do?searchWhat=most+ratified+conventions&locale=en_US

⁷ Ratified on 22 December 1997. The Labour Relations (Public Service) Convention No.151 of 1978 was also ratified.

⁸ Both Conventions were ratified by Lesotho on 30 October 1966.

⁹ Both Conventions were ratified by South Africa on 18 February 1996.

¹⁰ J. Dugard *International Law: South African Perspective* (2011) at p.42; Dualists see international law and as completely different systems of law, with the result that international law may be applied by domestic courts only if adopted by the courts or transformed into domestic law by the legislature. According to the dualist school of thoughts, international law and municipal law differs so radically in the matter of subjects of the law, sources and substance. A rule of international law can never *per se* be become part of the law of the land, it must be made so by an authority of the state. Thus some scholars (Lauterpacht) view dualism as a manifestation of the traditional legal positivism.

¹¹ *Botswana Public Employees Union and Others v Minister of Labour and Home Affairs and Another* MAHLB-000674-11 (unreported) at para 190.

¹² Section 16 of the Constitution of Lesotho 1993 and 15 of the Constitution of Lesotho 1966.

enactment of two pieces of legislation. These are the Labour Code,¹³ which regulates the employment relationship in the private sector, and the Public Service Act,¹⁴ which regulates the employment relationship in the public sector. Whilst both these statutes provide for employees' freedom of association, the Public Service Act, unlike the Labour Code, restricts public officers' freedom of association. The Public Service Act provides that it is unlawful for public officers to embark on strike action.¹⁵ In essence, therefore, the application of Conventions No. 87 and 98, in respect of public officers is limited and it is not clear whether such limitation is justified.

This paper considers whether the limitations imposed on the freedom and right to strike of public officers in Lesotho are in breach of international obligations and are reasonable and justifiable in a free and democratic society committed to the rule of law. In so doing a comparative analysis of the jurisdictions of South Africa and Botswana is undertaken.

1.2 Research Questions

This dissertation attempts to find answers to the following questions:

1. What is freedom of association and what are its advantages?
 - a. How is the freedom or right to strike part of freedom of association?
2. Is the right or freedom to strike an absolute right?
 - a. What is the position taken by the ILO Conventions on the issue of strikes?
 - b. What are the possible and justified limitations of freedom or right to strike?
 - c. What are essential services?
3. What is the law of Lesotho with regard to the freedom of association?
 - a. To what extent does the law of Lesotho provide for the freedom or right to strike?

¹³ Order No.24 of 1992; The Labour Code Order was passed by the military regime and it is now cited as the Labour Code Act No. 24 of 1992.

¹⁴ No. 1 of 2005.

¹⁵ Section 19(1).

- b. Is any limitation of the Public Officers' right or freedom to strike in Lesotho justified within a democratic society within which the rule of law prevails?
4. What is the position of the law in the jurisdictions of Botswana and South Africa with regard to the public officers' right or freedom to strike?
5. What can Lesotho learn from the positions in these jurisdictions?

1.3 Statement of Purpose

The purpose of this study is to evaluate whether the limitation imposed on the public officers' freedom of association in Lesotho is justified. Thus the focus will be on the jurisprudence of the Kingdom of Lesotho, with reference made, for comparative purposes, to some other jurisdictions. The study is divided into five chapters. Chapter one comprises of the introduction and literature review, Chapter two discusses the right to strike with the main focus being the jurisprudence of the ILO, Chapter three discusses the freedom of association in Lesotho with the main focus being the public officers freedom to strike while Chapter four is the comparative study discussing the public officers' freedom of association in two jurisdictions, namely, South Africa and Botswana.¹⁶ The central point of discussion is the public officers' right to strike in those jurisdictions and Chapter five is the conclusion and recommendations are made and discussed.

Before going into the main body of this study, it is important to briefly explain the relationship between freedom of association and the freedom and/or right to strike.

1.4 Deriving the Right or Freedom to Strike from Freedom of Association

To best explain the relationship between freedom of association and right or freedom to strike, one should start by first defining the two terms or phrases. Freedom of association may be defined as the freedom of 'individuals to join one another and to

¹⁶These two jurisdictions are chosen because of the similarities with and the influence they have on the laws of Lesotho, especially in the case of South Africa.

take action for a legal purpose and by use of legal means'.¹⁷ It has been suggested that freedom of association requires freedom to strike because the latter is a species of the former.¹⁸ This argument is well founded and in conformity with the ILO jurisprudence. This is so because the right to strike is a channel through which workers exercise their freedom of association, to which they have a fundamental entitlement. The most popular version of this argument is that the right to strike 'furthers the functions of an institution, the trade union.'¹⁹ It is common cause that the right to form or join a trade union of ones' choice is itself a species of the right to freedom of association. The right to strike is, therefore, a means to the better functioning of the trade union.

However, the right to strike is not inherent in the right to freedom of association.²⁰ In essence, the right to strike is not an essential element of the freedom of association without which it would be impossible for workers to enjoy the freedom of association. This is the main reason why limitations and/or restrictions of the right to strike in certain industries may be justified (for instance, in essential services). It must, however, be emphasised that the right to strike is an efficient channel through which the fundamental entitlement to freedom of association can be enjoyed. Denying workers the right to strike unduly (without legal justification) can be equated to disarming soldiers at the battle field.

1.5 Literature Review

There are a number of textbooks by legal scholars which deal with the basic concepts of the freedom of association and the right to strike. Of these, the work of B. Gernogon, A. Odero and H. Guido,²¹ discussing the principles of the right to strike as formulated by the ILO, will be very important in laying the foundation of the

¹⁷ S. Leader 'Can you Derive a Right to Strike from Freedom of Association?' (2009-2010) 15 *Canadian Labour and Employment Journal* 271 p272.

¹⁸ Ibid p273.

¹⁹ Ibid.

²⁰ The European Court of Human Rights in *Schmidt and Dahlstrom v Sweden* Eur HR Series A, No. 21 (1976) recognized that Article 11 European Convention contained a clear statement allowing trade union activity to exist. However, it stated that the right to strike was not inherent in the right to freedom of association so the State was free to limit the right to strike provided there was a justification for such limitation.

²¹ B. Gernogon *et al* ILO Principles Concerning the Right to Strike (2000).

arguments advanced in this study. These scholars discuss the concept of a strike, its objectives, who should enjoy this right, the notion of essential services and compensatory guarantees for those workers who do not enjoy the right to strike, as well as conditions for enjoying the right to strike. These arguments will be drawn on in the dissertation in order to reach a conclusion as to whether the limitation on the public officers' right or freedom to strike in Lesotho is justified or not. In addition, there is some discussion in the literature around issues that these principles give rise to.

These discussions mostly refer to the international labour jurisprudence and legislation in jurisdictions other than Lesotho. Thus Sheldon²² analyses the relationship of the right to strike and the freedom of association from the international perspective. He argues that the right to strike can be directly or indirectly derived from the freedom of association. The same argument is advanced with a focus on South African law, by Seady and Benjamin²³ and by Mthombeni.²⁴ Not only do these scholars not discuss the issue from the Lesotho perspective but they also do not discuss the limitations on the right to strike in a democratic society. This study will, therefore, take the issue further and discuss the limitation of the right to strike in a democratic society; in Lesotho.

Nevertheless, there are scholars from other jurisdictions who have published studies concerning the limitation of the right to strike. Thus, Okene²⁵ discusses the limitations on the freedom of the right to strike in Nigeria and he also discusses the balancing of the right to strike with the notion of essential services. He concludes that the right to strike may be regulated by law but should not be abolished or made impossible to exercise. Okene confines his arguments to the laws of Nigeria and not Lesotho. Although this study will pursue a similar argument, the argument in this study will be applied to the laws of Lesotho.

²² L. Sheldon 'Can you Derive a Right to Strike from the Right to Freedom of Association?' (2009-2010) 15 *Canadian Labour and Employment Law Journal* 271.

²³ Seady, H.M and P.S. Benjamin, 'The Right to Strike and Freedom of Association: An International Perspective' (1990) 11 *ILJ* 439

²⁴ R. Mthombeni, 'The Right or Freedom to Strike: an Analysis from an International and Comparative Perspective' (1990) 23 *Comp. Int'l LJ S. Afr.* 337.

²⁵ O.V.C. Okene, 'The Right of Workers to Strike in a Democratic Society: the Case of Nigeria', (2007) 19 (No.1) *Sri Lanka J Int'l L.* 193.

Freedom of association and the right to strike for public sector employees in South Africa is discussed by Budeli.²⁶ She analyses some cases dealing with the public sector employees' right to strike in South Africa.²⁷ She then compares the approach of the South African courts to the issue of public sector employees' freedom of association with that of the Lesotho courts²⁸ on the same issue. Her conclusion is that the South African approach, unlike that in Lesotho, is in line with international law. This study will advance the same argument but go even further to make suggestions as to how the laws of Lesotho may be aligned to international labour standards. This study will argue that if interpreted purposively, section 16 of the Constitution of Lesotho does not prohibit strikes in the public sector. Arguments for and against the public sector strikes are the focus of the articles by Cordova²⁹ and Ross.³⁰ These arguments will be applied to Lesotho and critically considered in balancing the possible advantages and disadvantages of public sector strikes in that country.

It is on the basis of this literature that this study will make an attempt to evaluate whether the limitation imposed on the public officers' freedom or right to strike in Lesotho is justified.

1.6 Conclusion

The discussion above provides a foundation for the discussion that follows in the next chapters. From the discussion in this chapter, it is important to highlight the following points; Lesotho is a democratic state with a written constitution; it has ratified the important ILO conventions on freedom of association. However, such conventions cannot be directly applied in Lesotho as it is a dualist state. Lastly, although there is no express mentioning of the right to strike in the ILO jurisprudence, the right to strike is derived from the express right to freedom of association. The following chapter discusses the right to strike in depth.

²⁶ M. Budeli, 'Freedom of Association for Public Sector Employees' (2003) 44 No.2 Cod 49.

²⁷ *SANDU v Minister of Defence and Another* (1999) 20 ILJ 2265 (CC); *Independent Municipal and Allied Trade Union and Others v Rustenburg Transitional Council* (2000) ILJ 377 (LC).

²⁸ In *LUPE v The Speaker of the National Assembly and Others* 1997 (11) BLLR 1485.

²⁹ E. Cordova, 'Strikes in the Public Sector: Some Determining Factors', (1985) 124 *Int'l Lab. Rev.* 163.

³⁰ A.M. Ross, 'Public Employee Unions and the Right to Strike' (1969) 92 *Monthly Lab. Rev.* 14.

Chapter 2: Freedom or Right to Strike in Context

2.1 Introduction

In a democratic society, there are certain rights and/or freedoms that are enjoyed by workers. The workers' right to withhold their labour as an attempt to compel the employer to accede to their demand is one of the fundamental rights and/or freedoms that workers in democratic societies enjoy. The act of withdrawal of labour by employees is commonly referred to as strike or industrial action. In this chapter, an attempt is made to define the concept of strike in the context of labour law. Two main types of strikes will be discussed.

It is common cause that in any democratic society, there are some grounds upon which any of the rights in the Bill of Rights may be limited. Therefore, this chapter will also discuss possible justifiable grounds upon which the right and/or freedom to strike may be limited. The most important ground of limitation that will be discussed extensively is the notion of essential services.

2.2 The Right or Freedom to Strike

Traditionally, the workers' ability to embark on strike action was viewed as an important factor in the maintenance of 'fair wages and reasonable working conditions, thereby improving the economic and social welfare' of the greater part of the population.³¹ This was and continues on the premise that there is an imbalance in the bargaining power between labour and capital, such that in the absence of the right to strike, collective bargaining would amount to 'collective begging'.³² This social justice argument has won recognition at international level and in most, if not all, countries.

³¹ B. Nkabinde 'The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy' (2009) 24 *Maryland Journal of International Law* 270 p.276.

³² Ibid.

The right or freedom to strike³³ has generally been classified amongst the second generation rights that concern socio-economic rights.³⁴ This category is basically divided into two: norms pertaining to goods meeting social needs (for example education, health care and shelter), and norms pertaining to the provision of goods meeting economic needs (for example work and fair wages, adequate living standard etc.).³⁵ The right and/or freedom to strike belong to the latter group.

However, it is axiomatic that there can be no meaning to freedom of association without the right or freedom to strike.³⁶ The right to strike is an essential tool that trade unions use all over the world for the defence and promotion of the rights and interests of their members.³⁷ Most importantly, the right to strike is a necessary counter-veiling force to the power of capital.³⁸ There can be no equilibrium in industrial relations without a right to strike.³⁹

There are a number of definitions of the right to strike.⁴⁰ In most jurisdictions, the right to strike is defined by a statutory instrument. Each definition reflects the position

³³ There is freedom to strike in countries where there is no express protection of the right to strike, however, strikes are not prohibited and strikers generally enjoy immunities from certain legal consequences. While the right to strike obtains in jurisdictions where strike action is expressly protected and given precedence over the performance of contractual and other civil obligations. However, for purposes of consistency in this work, the phrase 'right to strike' will be used to refer to both right and freedom to strike.

³⁴ Supra note 24 at 338; Human Rights are divided into three generations, civil-political rights, socio-economic rights and collective-developmental rights. This criteria was first proposed by a Czech jurist by the name of Karel Vasak in 1979 (available on <http://www.s-j-c.net/main/english/images/humanrightsfinal.pdf>).

³⁵ <http://www.globalization101.org/three-generations-of-rights> (last accessed on the 25th July 2013).

³⁶ R. Mthombeni 'The Right or Freedom to Strike: an International and Comparative Perspective' (1990) 23 *Comparative and International Law Journal of Southern Africa* 337 at 338.

³⁷ O.V.C. Okene 'The Right of Workers to Strike in a Democratic Society: the Case of Nigeria' (2007) 19 (No.1) *Sri Lanka JIL* 193 at 194.

³⁸ Ibid.

³⁹ P.Davies and M. Freedland *Kahn-Freun'ds Labour and the Law* (1983) p.292; Supra, note 10, p.194.

⁴⁰ For example, Knowles, K.G.J.C., *Strikes- A Study in Industrial Conflict* (New York: 2952), p. 1 defines a strike as "a collective stoppage of work undertaken in order to bring pressure on the entrepreneur who depend on the sale or use of the products of that work. The strike must involve a group of employed workers that is there must be a definite employer-employee relationship between the parties involved in the dispute"; E.T. Hiller, *The Strike: A Study in Collective Action* (Chicago, ILL. : A University of Chicago Press 1982), p. 12 states that "a strike is the simultaneous and coordinated withdrawal of labour by workers" ; H. Collins, K.D. Ewing andA. McColgan, *Labour Law: Text and Materials* (Oxford-Portland Oregon : Hart Publishing 2001), p.881, defines strike as "a withdrawal of labour by a group of workers who are in dispute with their employer, or perhaps with another party"; R.W. Rideout, *Rideout's Principles of Labour Law* p. 449 , defines a strike as "a deliberate and concerted withdrawal of labour"; Otto Kahn-Freund, *Labour and the Law* (London: Stevens and Sons, 1983), p.291, "a strike is a concerted stoppage of work."; Okene (supra) at p.194 defines strike as "a deliberate stoppage of work by workers in order to pressure on their employer to accede to their demands".

in one jurisdiction or another. In *Tramp Shipping Corporation v Greenwich Marine Incorp.*⁴¹ Lord Denning MR defined strike as:

A concerted stoppage of work by men, done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or sympathising with other workmen in such endeavour It is distinct from stoppage brought by an external event such as a bomb scare or by apprehension of danger.

There are three points from the above definition that are worth noting. Firstly, there should be stoppage of work. Secondly, the work stoppage must come as a result of concerted effort brought about by a group of people. Thirdly, the purpose of the work stoppage must be in connection with a dispute concerning terms of employment and physical conditions of work. The other important feature of the definition of Lord Denning MR is that a strike may either be primary or secondary in nature. The distinguishing feature between the two is that in the latter employees down their tools in support of fellow employees, while in the former participants' demands affects them directly.

2.3 Sources of the Right to Strike

One of the United Nations' (UN) treaties that enjoys high ratification rates, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), recognises the right to strike. The ICESCR provides that the state parties thereto undertake to guarantee the enjoyment of the right to strike to their nationals provided such right is exercised in terms of the municipal laws of each state party.⁴² Therefore, in terms of the covenant, member states are obliged to afford their nationals and those within their territorial boundaries the right to strike. However, the member states are allowed to enact laws prescribing how such right may be exercised; this may include limitation of the right.⁴³ It is worth noting that the ICESCR

⁴¹ [1975] 2 ALL E.R. 989 (C.A) at 990.

⁴² Article 8(1)(d).

⁴³ Supra, note 25, p.197.

does not provide the purpose or the extent of such legal restrictions and or limitations on the right to strike. However, article 2(1) provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

It follows therefore that in terms of the covenant, the limitations and/or restrictions that may be imposed on the exercise of the right to strike should not be permanent and more prohibitive in nature.

The UN Commission on Human Rights which was charged with safeguarding the right or freedom to strike stated that recognition of the freedom of association alone is not sufficient for purposes of protecting the interests of the workers.⁴⁴ The Commission submitted that the workers most effective means of protection is the guarantee of the right to strike. The Commission submitted further that although the right to freedom of association and the right or freedom to strike are two different things, there is, nonetheless, a close connection between them and to recognise the former without the latter would be tantamount to proclaiming a purely theoretical right.⁴⁵

The ILO is undoubtedly the pre-eminent authority and the most important source of all international labour law with a long established tradition and jurisprudence.⁴⁶ It is therefore surprising to note that nowhere in its numerous conventions and recommendations does the ILO make express reference to the right to strike. However, it has been argued that the absence of an explicit provision does not mean that the ILO disregards the right to strike or refuses to deal with the appropriate measures for safeguarding its protection.⁴⁷

⁴⁴ Supra, note 24, p.341.

⁴⁵ Ibid p.341.

⁴⁶ Supra, note 25, p.198.

⁴⁷ Ibid, p.198; the right to strike was mentioned several times in the report of the International Labour Conference, 30th Session, 1947, Report VII, Freedom of Association and Industrial Relations, pp.30, 3

There are at least two significant resolutions of the International Labour Conference which provides guidelines for the ILO policy,⁴⁸ which emphasises recognition of the right to strike in ILO member states. The first resolution, the 'Resolution concerning the Abolition of Anti-Trade Union Legislation in State Members of the International Labour Organisation', urged the member states to enact 'laws...to ensure the effective and unrestricted exercise of trade union rights, including the right to strike by workers'.⁴⁹ The second resolution, the Resolution concerning Trade Union Rights and their Relation to Civil Liberties, which emphasised the need for action in a number of ways with 'a view of considering further measures to ensure full and universal respect for trade union rights in their broadest sense paying particular attention, *inter alia*, on the right to strike'.⁵⁰

Decisions of the ILO's supervisory bodies, especially those of the committee on the Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations constitutes further proof of the ILO's support for the right to strike. The Committee on Freedom of Association ruled that strikes are part and parcel of trade union activities.⁵¹ The Committee regards the right to strike as 'one of the essential means available to workers' and their organisations for the promotion and protection of their economic and social interests'.⁵² The Committee of Experts also aligned itself with the same opinion and even added that the right to strike by workers is not only exercised to achieve better working conditions but also used as a tool to facilitate 'solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to workers'.⁵³

1,34,46,52,73-74, the part of the report describing the history of the problem of freedom of association and outlining the survey of legislation and practice.

⁴⁸ The Resolution Concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation adopted in 1957 and Resolution Concerning Trade Union Rights and their Relation to Civil Liberties adopted in 1970.

⁴⁹ ILO, 1957, p783.

⁵⁰ ILO, 1970, pp. 735-736; B. Gemigon, O. Odero, and H. Guido, 'ILO Principles Concerning the Right to Strike' (1996) 137 No. 4 *International Labour Review* p. 1; J Hodges-Aeberhard, and O. Odero, 'Principles of the Committee on Freedom of Association Concerning Strikes' (1987) 126 No. 5 *International Labour Review*, pp. 543 and 545; Supra, note 10, p.198.

⁵¹ Freedom of Association: 1985 Digest, para 360.

⁵² Ibid para 200.

⁵³ Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report 111 (4B), International Labour Conference 69 Session, Geneva 1983, para. 200; Supra, note 10, p.199.

These supervisory bodies have always made reference to the right to strike when considering applications made in terms of Articles 3⁵⁴ and 8⁵⁵ of Convention No. 87, lodged by several member states. The ILO, through these supervisory bodies, has always reaffirmed the principle of the right to strike subject to restrictions that are deemed reasonable in a free and democratic society.⁵⁶ These restrictions should be contained in a statutory instrument or an Act of Parliament depending of the laws of each member state.

2.4 The Purpose of Strike

Mere stoppage of work does not amount to a strike in labour law.⁵⁷ To qualify as a strike, the stoppage of work must be based on a particular reason or demand. Thus, the South African Labour Court in *Floraline v SASTAWU*⁵⁸ held that there was no strike since the stoppage of work was not for a particular reason or demand. The same finding was reached by the Court in *FAWU v Rainbow Chicken Farms*.⁵⁹ The ILO recognises that workers may embark on a strike for three different reasons, namely: employment interest, secondary strikes and protest action.

A strike action is in pursuit of employment interest if it relates to a dispute of an occupational nature. The ILO finds this reason legitimate, according to the Committee of Experts⁶⁰ and the Committee on Freedom of Association⁶¹ the right to strike could be used by workers to protect employment interests between employers

⁵⁴ Article 3 lays down the right of workers' organisations to organise their activities and to formulate their programmes freely and states that the public authorities shall 'refrain from any interference which would restrict this right or impede the lawful exercise thereof'.

⁵⁵ Article 8 provides that the law of the land which organisations and their members must respect, must not 'be such as to impede, nor shall it be applied as to impair, the guarantees provided for in this Convention'.

⁵⁶ ILO Freedom of Association and Collective Bargaining, Report 111, IL Conference, 69th Session, Geneva, 1983, Para 199-223.

⁵⁷ M.A. Chicktay 'Defining the Right to Strike: A Comparative Analysis of International Labour Organisation Standards and South African Law' (2012) *OBITER* 260, p.262.

⁵⁸ 1997 (9) BLLR 1223 (LC).

⁵⁹ (2000) 21 ILJ 611 (LC).

⁶⁰ Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 3rd Ed (1985) paras 362 – 364.

⁶¹ Case No 1018 (Morocco) 214th Report of the CFEA; Case No 1295(United Kingdom) 238th Report of the CFEA; Case No 1068 (Greece) 214th Report of the CFEA; Case No 1131 (Upper Volta) 22nd Report of the CFEA; Case No 772 (Spain) 139th Report of the CFEA.

and employees.⁶² In this kind of a strike, employees (strikers) often have a direct and substantial interest in the outcome of the strike (or dispute). For this reason, such strikes are referred to as primary strikes.

In *Education International and others v Canada*,⁶³ the employees were denied the right to strike during collective bargaining with their employer. The Committee on Freedom of Association held that the right to strike is one of the legitimate and essential means through which workers and their unions (or organisations) may defend their economic and social interests at work.⁶⁴ In a similar case⁶⁵ where public officers that went on a strike were dismissed, imprisoned and some injured by the police officers, the Committee on Freedom of Association expressed a similar point. It held that the right to strike constitutes one of the essential means that workers and workers' organisations must have at their disposal in order to promote and defend their occupational interests.⁶⁶

However, strikes are not restricted only to issues that are likely to be resolved by collective agreements.⁶⁷ In essence, the workers' right to strike is not restricted only to issues relating to better working conditions or collective claims of an occupational nature; they may also strike over economic and social policy issues that are of direct concern to them.⁶⁸ This kind of strike is normally referred to as protest action.⁶⁹ This includes strikes aimed at challenging the government's socio-economic policy. It does not, however, follow that where the right to strike is guaranteed protest action is also guaranteed. Most countries recognise the right to strike over occupational interest.⁷⁰

⁶² Supra, note 57.

⁶³ Case No. 2145 (Canada) 27th Report No. 327 of the CFEA.

⁶⁴ Supra, note 57 p.263.

⁶⁵ *The Local United Trade Unions of Casablanca v Morocco Report No. 214(vol. LXV, Series B No.1).*

⁶⁶ Supra, note 57 p263.

⁶⁷ Case No 913 (Sri Lanka) 190th Report of the CFEA.

⁶⁸ ILO Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, para 368; Defining the right to strike p.264.

⁶⁹ Supra, note 57 p263; legal status of political protests.

⁷⁰ However, in some jurisdictions, protest action enjoys the protection of labour law. See for instance, the discussion in chapter three on the position of the law in South Africa.

Thus, in a case⁷¹ where the Peruvian government had prohibited protest actions, the Committee on Freedom of Association held that strikes are one of the essential means available to workers and their organisations for the promotion and protection of their occupational and economic interests in the broad sense of the term. It held further that these interests do not only have to do with obtaining better working conditions but also with seeking solutions to economic and social policy questions, to labour problems of any kind which are of direct concern to workers.⁷²

According to the ILO standards, employees have a right to embark on a protest action against a wide range of socio-economic issues adopted by the government.⁷³ Thus, the Committee on Freedom of Association declared a 24-hour general strike, forcing the government in Ecuador to change its economic policy by reducing prices and unemployment, permissible.⁷⁴ In compliance with the same principle, the Committee held that a protest action demanding an end to killing of trade union members was permissible and in compliance with the principles of freedom of association.⁷⁵ However, it is worth noting that ILO standards do not extend protection to purely political strikes. The ILO supervisory bodies have held that strikes that are purely political in nature do not fall within the ambit of the principle of freedom of association.⁷⁶

Moreover, employees may embark on a strike merely for purposes of assisting other employees on a strike against another employer. This kind of a strike is known as a secondary strike.⁷⁷ It is secondary because employees working for an employer who is not a party to the primary strike engage in a strike against this employer in order to

⁷¹ Case No. 1081 (Peru) 214 Report of the CFEA.

⁷² Supra note 57, p264.

⁷³ Ibid.

⁷⁴ Case No 1381 (Ecuador) 248th Report of the CFEA.

⁷⁵ Case No 1434 (Colombia) 265th Report of the CFEA.

⁷⁶ Case No. 1830 (Turkey) 303rd Report of the CFEA.

⁷⁷ Secondary strike must always support a primary strike against another employer. Strikes by employees in another branch from those who are on strike are not partaking in a secondary strike, but a primary strike since they are striking against the same employer; In *Afrox Ltd v SACWU (1) (1997) 18 ILJ 399 (LAC)* the Labour Appeal Court held that employees who went on strike in support of their colleagues were not partaking in a secondary strike since there was only one employer involved. It found that in order for these employees to partake in a protected strike they had to comply with a s 64 procedure (for primary strikes) and not a s 66 procedure which is only applicable to secondary strikes. A similar viewpoint was adopted in *CWIU v Plascon Decorative Inland (Pty) Ltd (1999) 20 ILJ 321 (LAC)*.

show their support for the primary strike.⁷⁸ In such cases employees does not have a direct and substantial interest in the outcome of the dispute.⁷⁹

The ILO standards protect secondary strikes. This was demonstrated by the decision of the Committee on Freedom of Association in a case where the Turkish government had declared a ban on secondary strikes; the committee held that that was a violation of freedom of association and the right to organise.⁸⁰ The Committee held further that the general banning of secondary strikes is abusive and that workers should be able to carry out such actions.⁸¹

2.5 Conditions for Exercising the Right to Strike

Employees cannot just withhold their labour. Like any other right, there are conditions or requirements that compliance with is a prerequisite of lawfully exercising the right to strike. The Committee on Freedom of Association has specified that although each member state is entitled to enact laws laying down conditions to be met in order to render a strike lawful, such conditions should be 'reasonable and in any event not such as to place substantial limitation'⁸² on the right.

The Committee on Freedom of Association has accepted and recognised the following conditions as reasonable:

- 'the obligation to give prior notice';⁸³

⁷⁸ Supra, note 21, p.268.

⁷⁹ Note, however, that secondary strikes differ from sympathy strikes. With a sympathy strike employees strike against their own employer in order to benefit their colleagues. With a secondary strike employees strike against their employer in order to benefit other employees who do not work for their employer. The same rules that apply to primary strikes apply to sympathy strikes, while secondary strikes have different requirements; *Afrox Ltd v SACWU (1) (1997) 18 ILJ 399 (LC)*.

⁸⁰ Supra, note 76.

⁸¹ Supra, note 57 p.267.

⁸² B. Gernigon *et al* ILO Principles Concerning the Right to Strike (2000) p.25.

⁸³ ILO (1996) Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (4th Revised Ed) paras 502-504.

- ‘the obligation to have recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage’;⁸⁴
- ‘the obligation to observe a certain quorum and to obtain the agreement of a specified majority’;⁸⁵
- ‘the obligation to take strike decisions by secret ballot’;⁸⁶
- ‘the adoption of measures to comply with safety requirements and for the prevention of accidents’;⁸⁷
- ‘the establishment of a minimum service in particular cases’;⁸⁸ and
- ‘the guarantee of the freedom to work for non-strikers’.⁸⁹

These factors are briefly discussed below.

2.5.1 Conciliation, Mediation and Voluntary Arbitration

As indicated above, the Committee on Freedom of Association accepts that industrial disputes may first be subjected to conciliation, arbitration and (voluntary) arbitration⁹⁰ before one of the parties may call a strike, provided that such procedures are ‘adequate’ and not merely a formality or a delay tactic on the part of the other party.⁹¹ The Committee of Experts stated that:

⁸⁴ Ibid., paras. 500 and 501.

⁸⁵ Ibid., paras. 506-513.

⁸⁶ Ibid., paras. 503 and 510.

⁸⁷ Ibid., paras. 554 and 555.

⁸⁸ Ibid., paras. 556-558.

⁸⁹ Ibid., para. 586.

⁹⁰ Note, however, that in some cases arbitration may be compulsory, for instance, in a case of dispute of interest involving workers in essential services in the strict meaning of the term.

⁹¹ Supra, note 83, p.26.

In a large number of countries legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called. The spirit of these provisions is compatible with Article 4 of Convention No. 98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective agreements. Such machinery must, however, have the sole purpose of facilitating bargaining: it should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness.⁹²

In terms of Voluntary Conciliation and Arbitration Recommendation,⁹³ during conciliation, mediation and arbitration, none of the parties should resort to calling a strike and/or lockout as the case may be and both parties to the dispute are expected to accept the arbitration award.⁹⁴ However, it is worth noting that except in those cases where compulsory arbitration is acceptable, 'it would be contrary to the workers' organisations right to organise their activities and formulate their programs as laid down in Article 3 of Convention No. 87'⁹⁵ to subject all labour disputes to compulsory arbitration.⁹⁶

2.5.2 Quorum and Majority for Declaring Strikes

With regard to the quorum and majority (of the workers' organisation) for declaring a strike, the Committee on Freedom of Association has stated that the standard should not be too high (e.g. two third majority), especially where the organisation has a huge membership. The Committee stated that:

The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises. The requirement that an absolute

⁹² Freedom of association and collective bargaining. General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, para 171.

⁹³ No. 92 of 1951.

⁹⁴ International Labour Conventions and Recommendations, 1919-1951. Vol. I. Geneva, p.660; Supra, note 51.

⁹⁵ Reports of the Committee on Freedom of Association", in Official Bulletin (Geneva), Vol. LXVII, Series B, No. 3, 236th Report, Case No. 1140, para 144.

⁹⁶ Unless compulsory arbitration is provided for in the Collective Agreement entered into by and between the parties.

majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a large number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike.⁹⁷

The Committee of Experts then confirmed that:

In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principle, raise problems of compatibility with the Convention, the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice.⁹⁸

In essence therefore, the member state may enact pieces of legislation to the effect that only a certain number or percentage of workers involved in the dispute may call a strike. However, such thresholds should not be unreasonable, or have an effect of undermining the workers' right to strike.

2.5.3 Freedom to Work for Non-Strikers

As much as the Committee on Freedom of Association recognises the workers' right to strike, the Committee also recognises that those employees who do not wish to engage in strike action still maintain their freedom to work despite the strike.⁹⁹ The workers on strike should not in any way hinder the enjoyment of this freedom. The Committee of Experts also endorsed this principle when, 'in connection with strike picketing, it emphasised that such action should be peaceful and should not lead to acts of violence against persons'.¹⁰⁰ It is worth noting however, that in some cases, the Committee recognises that there may be a need for imposing the requirement of

⁹⁷ Supra, note 92, paras 507-508.

⁹⁸ Ibid para 170.

⁹⁹ Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, paras 496-497.

¹⁰⁰ Freedom of association and collective bargaining. General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, para 174.

‘minimum safety services’ in cases of a strike so as to protect people, prevent accidents and safeguard machinery and equipment.¹⁰¹

Where ‘minimum operational services’ are concerned, that is, workers intended to maintain certain level of production or services of their employer whom the strike action is against, the Committee on Freedom of Association has stated that:

The establishment of minimum services in the case of strike should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) public services of fundamental importance.¹⁰²

Moreover, the Committee has emphasised the need to engage both the employer and employees’ or their associations and/or organisations together with some public authorities in determining the criteria to be followed in selecting workers to maintain the minimum operations.¹⁰³

2.6 Exceptions to the Right or Freedom to Strike

Like any other right, the right or freedom to strike is not an absolute right. Therefore, the ILO recognises some exceptions may operate against the right to strike. Outside these exceptions, the prohibition and/or restriction imposed on the right to strike will be contrary to international labour standards.¹⁰⁴ General prohibition against the enjoyment of the right to strike may generally be justifiable in the event of ‘an acute national emergency’.¹⁰⁵ However, even in such situations, it should only be for a limited period of time. It is important to note that in times of ‘national emergency’, the responsibility of suspending the strike on grounds of national security or public health

¹⁰¹ Supra note 99, paras 554-555; Supra, note 82, p30.

¹⁰² Supra, note 99, para 556.

¹⁰³ Supra, note 83, p30.

¹⁰⁴ Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th (Revised Ed) 2006, para 525.

¹⁰⁵ Ibid, para 570.

should not lie with the government, but with an independent body which enjoys confidence of all parties concerned.¹⁰⁶

Apart from the general exemption discussed above, there are three groups of workers that ILO recognises that their right to strike may legitimately be limited or restricted and even prohibited. These are members of the police and armed forces, certain public officers 'exercising authority'¹⁰⁷ in the name of the state (this limitation is discussed further in chapter 3) and workers in essential services properly so called.¹⁰⁸ Members of the police and armed forces are excluded from the operation of Convention No. 87 from which the right to strike is derived. This, however, does not deprive the member states of the discretion to extend the rights under the convention to these categories of workers.

2.7 The Notion of Essential Services

The phrase 'essential services' has been defined as those services 'whose interruption would endanger the life, personal safety or health of the whole or part of the population'.¹⁰⁹ What is essential depends on the particular circumstances of each country.¹¹⁰ However, in designating services as essential, ILO urges member states to follow the objective criteria of the 'existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population'.¹¹¹ Furthermore, this concept is not absolute, in the sense that non-essential services may become essential if the strike lasts beyond a certain period of time 'thus endangering the life, personal safety or health of the whole or part of the population'.¹¹²

The Committee on Freedom of Association noted specifically that the principle regarding the prohibition of strikes in essential services might lose its meaning if the strike action were to be declared illegal in one or more undertakings which are not

¹⁰⁶ Ibid, para 570.

¹⁰⁷ ILO Freedom of Association and Collective Bargaining: Report of the Committee of Experts on the Application of Recommendations, Report 111 (Part 4B), International Labour Conference, 81st Session, 1994, Geneva, p.68 para 158.

¹⁰⁸ Supra, note 25, p. 200.

¹⁰⁹ Freedom of Association: 1985 Digest, para 540-564; Supra, note 10, p.200; Convention No.98.

¹¹⁰ See the discussion of the notion of essential services in Botswana and the comments of the Committee on Freedom of Association in Chapter 4.

¹¹¹ Supra, note 104, para 581.

¹¹² Ibid, para 582.

performing essential services in the strict meaning of the term. The Committee stated that it would not be appropriate if all state owned undertakings were to be treated as essential without distinguishing between those which are genuinely essential and those that are not.¹¹³ The Committee then accepted the following as essential services: the hospital sector, electricity services, water supply, telecommunications services, police and armed forces, fire fighting services, prison services, provision of food to pupil in schools and cleaning of schools and air traffic control services.¹¹⁴

It is worth noting that while the Committee has found that the education sector does not constitute an essential service, it has held that principals and vice-principals can have their right to strike restricted or even prohibited.¹¹⁵ The Committee has not been persuaded by a number of arguments advanced before it in support of the prohibition of strikes in the teaching sector. In a number of cases referred to it, the Committee has constantly held that even the possible long-term consequences of strikes in the teaching sector does not justify a prohibition of strikes in that sector.¹¹⁶

However, where the right to strike has been limited, restricted or prohibited in the essential services, adequate protection should be given to workers to compensate for the limitation.¹¹⁷ In essence, workers in essential services should not be left without a proper channel of addressing disputes of interest with their employer. There should be adequate, impartial and speedy conciliation and arbitration proceedings to which parties to the dispute can resort to at any stage of the dispute, and the award, once issued should be fully and promptly implemented.¹¹⁸

¹¹³ Ibid, para 584.

¹¹⁴ Ibid, para 586.

¹¹⁵ In Case No. 1951 against the Government of Ontario, legislation (Education Quality Improvement Act) was enacted in terms of which the government was empowered to regulate terms and conditions of employment for teachers and removed cost items, including preparation time and class size, from collective bargaining. In terms of the legislation education was categorised as an essential service. The Canadian Labour Congress (CLC) and the Ontario Secondary School Teachers' Federation (OSSTF) submitted a case to the ILO in February 1998. This legislation was found not to comply with the principles of freedom of association

¹¹⁶ Supra, note 74, para 590.

¹¹⁷ Ibid, para 595.

¹¹⁸ Ibid, para 595.

2.8 Conclusion

This chapter defined and discussed the concept of strike, the sources of the right or freedom to strike, the purpose which is served by strikes in modern day labour law and the conditions that must be complied with before labour may be withdrawn from the workplace. Most importantly, this chapter highlighted that the right to strike is not an absolute right, there are some limitations recognised at international level and each state is at liberty to pass legislations limiting and/or prohibiting the exercise of the right to strike, provided that such legislation complies with international labour standards. Further, in this chapter, the notion of 'essential services' was defined and discussed. The next chapter considers the freedom to strike with specific reference to the law of Lesotho.

Chapter Three: Freedom of Association in Lesotho

3.1 Introduction

In previous chapters, the discussions flowed from an international perspective. In this chapter, the discussion will concentrate on the jurisprudence of Lesotho; the laws relating to freedom of association and the freedom to strike. The discussions in this chapter will dwell specifically on the independent Kingdom of Lesotho, that is, post-independence.

3.2 Historical Development of Freedom of Association in Lesotho

The modern day Kingdom of Lesotho; the former Basutoland, attained its independence on the 4th day of October 1966.¹¹⁹ Thereafter, Lesotho ceased to exist as a colony; it became a sovereign state. As a sovereign state, it adopted its first Constitution, the Lesotho Independence Order.¹²⁰ The Independence Order provided for freedom of association for a number of purposes, including, for labour purposes¹²¹.

Upon attaining sovereignty, the first parliament of Lesotho acceded to all international obligations of Basutoland. Thus, Lesotho acceded to the obligations of Basutoland under the ILO Constitution and ratified the two important conventions; the Convention on Freedom of Association and Protection of the Right to Organise¹²² and the Convention on the Right to Organise and Collective Bargaining.¹²³

Not only did Lesotho accede to the international obligations of Basutoland, it also acceded to all other laws that operated within Basutoland. These included, *inter alia*,

¹¹⁹<http://www.lesothoemb-usa.gov.ls/about/independence.php> accessed on the 14th May 2013.

¹²⁰1966, printed in supplement to gazette No. 4.

¹²¹Section 15 (1) of the Order provided that 'every person shall be entitled to and (without his own consent) shall not be hindered in his enjoyment, of freedom of assembly and association, that is to say, freedom to assemble and associate with other persons and in particular to form and belong to trade unions...'

¹²²No. 87 of 1948.

¹²³No. 98 of 1979; Both Conventions were ratified on 30 October 1966.

the Trade Unions and Trade Dispute Law¹²⁴ which had been repealed by the Trade Unions and Trade Disputes Proclamation.¹²⁵ Section 2 (2) of the former Act provided that:

This law shall apply to all government and local authorities and all persons in service of the Crown in Basutoland, in the same manner as if they were private employers or employees as the case may be.

The other important piece of legislation that was acceded to by Lesotho was the Public Service Proclamation¹²⁶. This proclamation regulated the then public officers of Lesotho and it allowed them participation in trade unions and trade unions' activities.¹²⁷ This proclamation was repealed by the Public Service Act.¹²⁸

The Public Service Act *prima facie* complied with Lesotho's obligations under the ILO Constitution and conventions ratified; it upheld the importance of the freedom of association without distinction whatsoever.¹²⁹ However, the Essential Services Act,¹³⁰ enacted in 1975, listed virtually all public officers as 'essential services providers',¹³¹ and as such, prohibited them from engaging in industrial action or strike. This limitation attracted the ILO's attention,¹³² resulting in the call for an update of the labour laws of the country to facilitate compliance with international labour standards.

¹²⁴No. 11 of 1964.

¹²⁵No. 17 of 1942.

¹²⁶No. 25 of 1952.

¹²⁷M. Maema, 'Unionism and Public Service Reform in Lesotho: Between Legislative Constraints and Apathy', (March 2010) Rhodes University (unpublished Masters thesis).

¹²⁸No. 12 of 1968; the 1968 Act was later repealed by the Public Service Act No. 8 of 1973 which was also repealed by the Public Service Act No. 3 of 1979.

¹²⁹It is submitted that the compliance was *prima facie* because, though the 1979 Act was enacted after the enactment of the Essential Services Act, the literal reading thereof suggested that the public officers' freedom of association was still intact.

¹³⁰No. 34 of 1975.

¹³¹Section 17.

¹³²L.A. Lethobane, *The Tripartite Conference on the Labour Code Order No. 24 of 1992: Its Impact on Industrial Relations in the Public and Private Sector* (1993), a paper presented by L.A. Lethobane (the former President of the Labour Court) at a conference held at Maseru.

Thus, through the assistance of the ILO, the Labour Code¹³³ was enacted, which, in effect repealed all other labour laws which were in place prior to its enactment. Section 6 of the Code provides that all employees and employers have equally guaranteed freedom of association. In support of this, section 168 confers upon all employers and employees, the right to join and/or establish organisations of their own choice without prior authorization of the government.¹³⁴

Despite the enactment of the Labour Code, a different piece of legislation was subsequently enacted to regulate the public officers; the Public Service Act.¹³⁵ This Act expressly excluded public officers from the scope of application of the Labour Code; with section 35 of the Act expressly providing that 'the Labour Code Order 1992 shall not apply to public officers'. Over and above this provision, section 31 of the Act provided that:

31. (1) Public officers may form and establish a staff association or staff associations under the provisions of the Societies Act 1966.
- (2) Notwithstanding any other law, public officers shall not become members of any trade union registered under the Labour Code Order 1992.

Following the enactment of the Public Service Act 1995, all public officers' trade unions registered in terms of the Labour Code then ceased to exist.¹³⁶ Thus the Lesotho Union of Public Employees (LUPE) challenged the constitutionality of the two section of the Act referred to above. In *LUPE v the Speaker of the National Assembly and Others*,¹³⁷ LUPE contended that sections 31 (2) and 35 of the Public Service Act 1995 were unconstitutional because they were inconsistent with section 16 of the Constitution.

¹³³Order No. 24 of 1992.

¹³⁴It was necessary to include this provision because prior to the enactment of the Code, the government had a tendency of unduly adding to the essential services list, for instance, the banking services were declared as essential following the strike of the Standard and Barclays Banks employees in 1981.

¹³⁵No. 13 of 1995.

¹³⁶*LUPE v the Speaker of the National Assembly and Others 1997 (11) BLLR 1485 (Les).*

¹³⁷1997 (11) BLLR 1485 (Les).

In that case, the applicants (LUPE) argued that the two sections being challenged infringed the state's obligations under international law.¹³⁸ They argued that the limitation imposed by sections 31 (2) and 35 on the public officers' freedom of association was not justified and as such violated their rights as protected by section 16 (1) of the Constitution.¹³⁹ They argued further that this limitation could not be justified under section 16 (2) (c)¹⁴⁰ of the Constitution as the limitation was not necessary and could not be justifiable in a democratic society, therefore, they argued that section 16 (3) of the Constitution was not satisfied.¹⁴¹

The respondents (government of Lesotho) argued that trade unions are inherently confrontational in nature. Therefore, allowing trade unions in the public sector would amount to bringing the government services to a standstill, because there will be no money to meet the union's high demands for higher wages (see annexure 1 for the wage distribution per sector). It was further argued that trade unions are best placed in the private sector since, unlike the public sector, the private sector is profit oriented.

The Court held that the government is, in terms of section 16 (2) of the Constitution, entitled to impose restrictions on public officers, however, such restrictions should be justifiable under section 16 (3). The Court then found that the sections challenged by the applicants pursued a legitimate aim, the preservation of a sound economy which is a pressing social need. The Court concluded that the sections challenged were

¹³⁸Here, the applicants referred the Court to article 23(4) of the Universal Declaration of Human Rights which provides that everyone has a right to join and form trade unions for purposes of protecting interests at the workplace.

¹³⁹ Section 16 (1) provides as follows 'Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes'.

¹⁴⁰ Section 16(2) (c) limits this right as discussed above, it provides that: 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any law to the extent that the law in question makes provision –(c) for the purpose of imposing restrictions upon public officers'.

¹⁴¹Section 16 (3) of the Constitution provides that: 'A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the Court that that provision or as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater extent that is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) of for any of the purposes specified in subsection (2)(b) or (c).

justifiable under section 16 (3) and did not abridge the rights protected by section 16 (1) to a greater extent than is necessary in a democratic society. Thus the application was dismissed.

The Congress of Lesotho Trade Unions (COLETU) then took up the matter with the ILO. Before the Governing Body Committee on Freedom of Association, COLETU alleged that by promulgating the Public Service Act 1995 the government of Lesotho failed to comply with the conventions ratified by Lesotho, especially Convention No. 87 of 1948 and Convention No. 98 of 1949.¹⁴² In response to this, the ILO summoned the government to submit comments in relation to COLETU's complaint and to make appropriate changes to the legislation.¹⁴³

The Public Service Act of 2005¹⁴⁴ was thereafter enacted, which is, to date, used and applied in the regulation of public officers while the Labour Code regulates employees in the private sector. However, the provisions of this Act do not depart much from those of the 1995 Act. Public officers cannot form and/or join trade unions¹⁴⁵ and it is illegal for public officers to embark on a strike action.¹⁴⁶ Therefore, for public officers in Lesotho, the ILO promises of indiscriminate protection of worker's right to freedom of association and the right to organise, remains an aspiration.

3.3 Freedom of Association in the Public Sector

It is a trite principle of law that, where a state has a written constitution, the constitution is the supreme law of the land.¹⁴⁷ It is in line with this principle of

¹⁴²Communication dated December 2000 addressed to the Governing Body, Committee on Freedom of Association, ILO, and Geneva.

¹⁴³Supra note 127, p36.

¹⁴⁴No. 1 of 2005.

¹⁴⁵Section 21 of the Act provides that 'public officers shall be entitled to freedom of association in accordance with section 16 (1) of the Constitution'. Section 22 (1) then provides that pursuant to section 21, public officers may form and/or join public officers' association (in terms of the Society's Act 1966) for purposes of collective bargaining and ethical conduct of the public officers. Note, however that the section 168 of the Labour Code provides that employees may form and/or join trade unions which should be registered in terms of the Code. In essence therefore, public officers are not allowed to form and/or join trade unions.

¹⁴⁶Section 19 (1) of the Public Service Act 2005 provides that 'public officers shall not engage in a strike'.

¹⁴⁷*Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247.

constitutional supremacy that the Constitution of the Kingdom of Lesotho¹⁴⁸ (the Constitution) provides that ‘the Constitution is the supreme law and if any other law is inconsistent with it that law shall to the extent of its inconsistency be void’.¹⁴⁹

Chapter two of the Constitution provides for the protection of fundamental human rights and freedoms. Section 16 in this chapter of the Constitution provides in no uncertain terms that everyone is entitled to freedom to associate freely with others for a number of purposes, *inter alia* labour purposes. It is worth noting at this stage that rights and freedoms entrenched in chapter two of the Constitution are justiciable; unlike those in chapter three entitled ‘Principles of State Policy’. These include *inter alia*, ‘Just and Favorable Conditions of Work’¹⁵⁰ and ‘Protection of Workers’ Rights and Interests’.¹⁵¹

As noted, however, these principles of state policy are not justiciable, as they are subject to section 25¹⁵² of the Constitution. However, upon enactment of an Act of Parliament recognizing these principles as fundamental rights, they may be justiciable in the same manner as the fundamental human rights and freedoms contained in chapter two of the Constitution.¹⁵³

As discussed above, there is no single piece of legislation regulating both public and private sector employees in Lesotho. For the private sector employees, there is the Labour Code with its amendments and for public sector employees, the Public Service Act with its amendments. Both these pieces of legislation recognize the workers’ freedom of association. However, as noted above, unlike the situation with

¹⁴⁸Published as Government Notice No. 12 of 1993 on the 5th February 1993.

¹⁴⁹ Section 2 of the Constitution.

¹⁵⁰Section 30 of the Constitution.

¹⁵¹Section 31 of the Constitution.

¹⁵² This section provides that the principles contained in chapter three of the Constitution shall form part of the public policy of Lesotho and as such, shall not be enforceable by any court but, subject to limits of economic capacity, shall guide authorities in performance of their functions with the view of achieving full realization of these principles.

¹⁵³ Section 28 of the Constitution for instance, provides for ‘provision for education’. Section 28 is part of the principles of the state policy in chapter three of the Constitution and as such, can not be enforced by the courts of law. However, the Education Act No. 3 of 2010 provides that education is a fundamental right and as such, the Act has made the right to education enforceable.

private sector employees, it is illegal for civil servants in Lesotho to form and/or join trade unions¹⁵⁴ and to embark on industrial action.¹⁵⁵

It is worth noting that freedom of association in Lesotho is not an absolute right; there are some constitutionally recognised limitations to section 16 (1) of the Constitution. These are; interest of defence, public safety, public order, public morality, public health and protection of rights and freedoms of others. Lastly, but most importantly for public sector employees, freedom of association may also be limited for purposes of imposing restrictions upon public officers.¹⁵⁶

It is on this ground that the High Court in *LUPE v The Speaker of the National Assembly and Others* dismissed LUPE's application. While in that case, the court was interpreting a limitation under the Public Service Act of 1995 it is not different in substance from the limitation currently imposed by the Public Service Act of 2005. Kheola CJ (as he then was) held that:

It seems to me that although the Government has completely banned trade unions as far as public officers are concerned, the freedom of association has not been banned. Section 31 (1) of the Public Service Act, 1995 provides that 'Public officers may form and establish a staff association or staff associations under the provisions of the Societies Act 1966.'...¹⁵⁷

His Lordship went on and held that:

I have come to the conclusion that the impugned legislation pursues the legitimate aim listed in section 16 (2) (c) of The Constitution. It seems to me that there is a proper balance between the applicant's interests of establishing staff association or staff associations in order to enjoy the fundamental human right of freedom of

¹⁵⁴ Section 22 of the Act public officers may form and/or join the public service staff association, however, section 30 provides that the Labour Code which provides for forming, joining and registration of trade unions shall not apply to the public officers.

¹⁵⁵ Section 19 (1) of the Public Service Act provides that 'a public officer shall not engage in a strike'; see annexure two for the recent statistics on what percentage of the work force is affected.

¹⁵⁶ Section 16 (2) (c).

¹⁵⁷ At p23 of CIV/APN/341/95.

association and the general public interest of preserving a sound economy of the country.¹⁵⁸

In essence, the provision (of the Public Service Act of 1995) limiting the public officers' freedom of association just like sections 19 and 30 of the Public Service Act of 2005, was rendered justifiable under section 16 (2) (c) of the Constitution.¹⁵⁹ The judgment of Kheola CJ in *LUPE*, thus, begs the question; how can the public officers efficiently address issues and/or disputes of interest in the workplace?

3.4 Right or Freedom to Strike: Public Officers

As discussed in the previous chapter, the ILO standards set out in Convention 87 require that all workers 'without distinction whatsoever' be entitled to establish and join organisations of their choosing without prior authorisation. However, the members of the military and the police force are excluded from the operation of this provision.¹⁶⁰ In most industrialised countries, this right has been extended to the public officials.¹⁶¹

On the other hand, due to the fact that strike action is one of the fundamental means for rendering effective the rights and freedoms of workers' organisations and/or unions to 'organise their...activities',¹⁶² the freedom to strike has been recognised by the ILO.¹⁶³ There is, however, no express mention of the right to strike in the ILO

¹⁵⁸ At p25 of CIV/APN/341/95.

¹⁵⁹ Freedom of association may be limited for purposes of 'imposing restrictions' upon public officers.

¹⁶⁰ Articles 2 and 9 of the Freedom of Association and Protection of the Right to Organize Convention No. 87 of 1948; E. Yemin, *Industrial Relations in the Public Service: A comparative Overview*, (1993) 469 *International Labour Review* 469, p471.

¹⁶¹ *Ibid*; ILO *Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 69th Session (1983) Report III (4B) (Geneva, ILO, 1983) paras. 81-88.

¹⁶² Article 3 of the Freedom of Association and Protection of the Right to Organize Convention No. 87 of 1948.

¹⁶³ It should be noted that there is no express mentioning of the right to strike for public servants in the international instruments; including Convention No. 151 and Recommendations No. 159 on Labour Relations in the Public Service adopted in 1978 (Lesotho is not a signatory to these instruments). It is worth noting that during the preparatory discussions leading to the adoption of Convention No. 87, both supervisory bodies of the ILO were cognisant of the consensus reached that the recognition of the freedom of association of public officials does not in any way prejudices their right to strike. (see in this regard ILO Principles Concerning Strikes, note 167 below and ILO, 1947, p109)

Conventions.¹⁶⁴ This does not suggest that the ILO disregards this right. There are at least two resolutions of the International Labour Conference (which provide guidelines for ILO policy) that emphasise the importance of the freedom to strike.

The first is the resolution concerning the Abolition of Anti-Trade Union Legislation in the State Members of the ILO that called for the adoption of 'laws...to ensure the effective and unrestricted exercise of trade union rights, including freedom and/or right to strike by workers'.¹⁶⁵ The second is the Resolution Concerning Trade Union Rights and their Relation to Civil Liberties that called for action in a number of ways 'with a view to considering further measures to ensure full universal respect for trade union rights in the broadest sense', with particular attention, *inter alia*, on the freedom to strike.¹⁶⁶

Despite the fact that the ILO recognises the freedom to strike, it also recognises three limitations, *viz*: in the military and police service, public service and essential services in the strict meaning of the word.¹⁶⁷ However, public officers' are not left without protection at international level. The Committee on Freedom of Association and the Committee of Experts both agree that where public officers' freedom to strike has been limited and/or prohibited, they should enjoy sufficient guarantees to protect their interests at the workplace.¹⁶⁸ This may include but not limited to appropriate, impartial and prompt conciliation and arbitration of interest disputes, provided that the arbitration award will be binding on both parties and are fully and promptly applied.¹⁶⁹

¹⁶⁴ O.V.C. Okene, 'The Right of Workers to Strike in a Democratic Society: the Case of Nigeria', (2007) 19 (No.1) *Sri LankaJ Int'l L.* 193, p198.

¹⁶⁵ *Ibid*; *ILO Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1957, p783.

¹⁶⁶ *Supra* note 162; ILO, 1970, pp 735-736; J. Hodges-Aeberhard and O. Odero, 'Principles of the Committee on Freedom of Association Concerning Strikes' (1978) 126 No. 5 *International Labour Review*, pp 543 and 545; B. Gernigon, O. Odero and H. Guido 'ILO Principles Concerning the Right to Strike' (1996) 134 No. 4 *International Labour Review*, p1.

¹⁶⁷ B. Gernigon, A. Odero and H. Guido, *ILO Principles Concerning the Right to Strike* (1998), p.19; O.V.C. Okene, 'The Right of Workers to Strike in a Democratic Society: the Case of Nigeria', (2007) 19 (No.1) *Sri LankaJ Int'l L.* 193.p200.

¹⁶⁸ *Supra* note 162.

¹⁶⁹ *Ibid*.

The ILO has observed that too broad a definition of the concept of public servant or in the case of Lesotho, public officer, is likely to result in a very wide restriction or even prohibition of the freedom to strike in the public sector.¹⁷⁰ For this reason, the Committee of experts has endeavoured to establish fairly uniform criterion in order to examine compatibility of legislation with the provisions of Convention No. 87. The Committee has therefore found it justifiable that public officers exercising authority in the name of the state may have their freedom to strike limited and/or prohibited.¹⁷¹

The Committee was aware that except for those groups of public officers whose duties are clearly defined, in most cases the issue will frequently be the degree to which one's duty or duties reflect on the state. For this reason, the Committee has suggested that, in borderline cases, a solution might be 'not to impose a total prohibition of strikes, but rather to provide for a negotiated minimum service by a defined and limited category of staff, when a total and prolonged stoppage might result in serious consequences for the public'.¹⁷²

As discussed above, despite the international support for the freedom to strike in the public sector¹⁷³, in Lesotho (a member of ILO) the freedom to strike is totally prohibited in the public sector. As discussed above, freedom of association is provided for by section 16 of the Constitution. Section 16 (1) provides as follows:

Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes.

Nevertheless, section 16(2) (c) limits this right by providing that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any law to the extent that the law in question makes provision –

¹⁷⁰ Freedom of Association: Digest of Decisions and Principles of the Freedom of Association of the Governing Body of the ILO, 5th (Revised) Edition, p118 para 575.

¹⁷¹B. Gernigon, A. Odero and H. Guido, ILO Principles Concerning the Right to Strike (1998), p19; Freedom of Association: Digest of Decisions and Principles of the Freedom of Association of the Governing Body of the ILO, 5th (Revised) Edition, p118, para 575.

¹⁷² ILO, 1994a, para 158; B. Gernigon, A. Odero and H. Guido, ILO Principles Concerning the Right to Strike (1998), p19.

¹⁷³ Where limited or prohibited, as discussed above, there is a measure put in place for the resolution of the dispute of interest in the public sector.

- (a) ...
- (b) ...
- (c) for the purpose of imposing restrictions upon public officers.

It is on the basis of this provision that section 19 of the Public Service Act provides that it is unlawful for public officers to embark on a strike. However, there is no mechanism put in place by the Public Service Act and its Amendments for resolution of disputes of interest that may arise in the public sector. Section 17 of the Public Service Act establishes a Conciliation Board, providing that its main duty is to conciliate over disputes of interest.¹⁷⁴ However, despite the fact that from conciliation, public officers cannot call a strike, the award of the Conciliation Board is merely advisory in nature, thus not binding on parties.¹⁷⁵

The question, therefore, is whether this limitation on the public officers' freedom to strike is justifiable in a democratic society in which the rule of law is embraced. To answer this question, the principle of proportionality must be applied.¹⁷⁶ This principle provides that a limitation of the Bill of Rights will be justifiable 'only when it is necessary in the light of the interests advanced as weighed against the requirements of a democratic society'.¹⁷⁷ It requires striking a balance between competing interests by weighing the advantages and disadvantages of the measure.¹⁷⁸

The Canadian Supreme Court in *Regina v Oakes*¹⁷⁹ held that, in determining whether a limitation clause (limiting the Bill of Rights) is justified or not, there is a need to engage in a two-stage process. The first stage requires the applicant to show how the legislation in question infringes upon the rights and freedoms enshrined in the Bill of Rights, both as a matter of interpretation and as a matter of

¹⁷⁴ Section 17 (1).

¹⁷⁵ Section 17 (4).

¹⁷⁶ Sunday Times Case 30 EUR. Ct. H.R. (Ser. A) 1 (1979); Limitation of the Bill of Rights, p187.

¹⁷⁷ J. Sarkin, The Effect of Constitutional Borrowing on the Drafting of South African Bill of Rights and Interpretation of Human Rights Provisions, (1998-1999) 1 *Journal of Constitutional Law* 176, p188.

¹⁷⁸ Ibid.

¹⁷⁹ [1986] 1 S.C.R. 103.

fact.¹⁸⁰ The second stage requires the court to determine whether the law adopted is reasonable and demonstrably justifiable.¹⁸¹

The two-stage process allows the state to justify the law by reference to its purpose and to the three-tier proportionality test:¹⁸²

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair as little as possible" the right or freedom in question. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom [Bill of Rights], and the objective which has been identified as of sufficient importance.¹⁸³

The above limitation test echoes the limitation clause in section 16 (3) of the Constitution.¹⁸⁴ Thus the same standard has been applied by the High Court of Lesotho in *Ts'epe v IEC and Others*¹⁸⁵ in limiting the right enshrined in section 20 (1) of the Constitution.¹⁸⁶

The term democratic society denotes that government's action or law must be proportional to interests protected and a balance should be struck between societal interests and the state.¹⁸⁷ For section 19 of the Public Service Act to be justifiable, there should be a pressing need to protect the government against the exercise of

¹⁸⁰ Ibid, p135.

¹⁸¹ Ibid, p136.

¹⁸² Supra note 177, p187.

¹⁸³ Supra note 179, p139.

¹⁸⁴ This section provides that: 'A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the Court that that provision or as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater extent that is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) or for any of the purposes specified in subsection (2)(b) or (c).

¹⁸⁵ (2005) AHRLR 136 (LeCA 2005).

¹⁸⁶ In this case, the applicant was not allowed to contest local government elections in his constituency because of his gender. The Court held that the limitation was justified since it aimed at protecting women who were previously disadvantaged. As a result IEC was allowed to mark certain constituencies as female constituencies and only women were allowed to contest elections in such constituencies.

¹⁸⁷ Supra note 136, p6 of the original judgement.

organisational rights in accordance with the international labour standards that the state subscribes to.

In *LUPE*¹⁸⁸ the government of Lesotho justified the prohibition of the freedom to strike in the public sector by arguing that ‘the object of parliament is to fight strikers in the public service or to cultivate harmonious relationship between the public officers and the government of Lesotho’.¹⁸⁹ Dr. Ntsu Mokhehle, the then prime minister of Lesotho, in his answering affidavit in *LUPE* deposed that the public officers are denied the freedom to strike so as ‘to prevent a situation whereby untenable claims for remuneration may be made by public officers when the government has no means to meet them’.¹⁹⁰

This argument undermines the importance of the freedom to strike and should not be upheld. The Committee on Freedom of Association observed that ‘strikes are part and parcel of the union activities; it is one of the essential means available to workers...for the promotion and protection of their economic and social interests’.¹⁹¹ The Committee of Experts on the Application of Conventions and Recommendations observed that ‘these interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature, but also seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to workers’.¹⁹²

3.5 Conclusion

In Lesotho, at the present time, there is no enjoyment of the freedom to strike by the public officers. In this regard, Lesotho lags far behind most developing and developed countries. This clearly infringes its obligations under international law by failing to comply with the international labour standards. The continued suppression

¹⁸⁸ Ibid.

¹⁸⁹ *LUPE v The Speaker of the National Assembly* Civ/Apn/341/95, p11; reported in 1997 (11) BLLR 1485.

¹⁹⁰ Ibid, p18.

¹⁹¹ Freedom of Association Digest 1985, para 360; Okene p199.

¹⁹² Freedom of Association and Collective Bargaining: General Survey by Committee of Experts on the Application of Conventions and Recommendations, Report 111 (4B), International Labour Conference, 69th Session, ILO Geneva, 1983, para 200; O.V.C. Okene, ‘The Right of Workers to Strike in a Democratic Society: the Case of Nigeria’, (2007) 19 (No.1) *Sri LankaJ Int’l L.* 193, p 199.

of public officers' freedom to strike must be seriously addressed. As discussed above, Lesotho has ratified the entire core of the ILO Conventions, particularly No.87 and No.98. It is a signatory to the International Covenant of Economic, Social and Cultural Rights. As such, it is bound by article 2(1) to provide the positive right enshrined in article 8(1)(d) through legislative or other measure. The freedom to strike may be regulated by law but not curbed.¹⁹³ The need to reform the Lesotho public service laws cannot be over emphasised.

¹⁹³ O.V.C. Okene, 'The Right of Workers to Strike in a Democratic Society: the Case of Nigeria', (2007) 19 (No.1) *Sri LankaJ Int'l L.* 193, p.221.

Chapter Four: Comparative Study

4.1 Introduction

This chapter focuses on the public officers' right and/or freedom to strike¹⁹⁴ in two jurisdictions, *viz.* the Republic of South Africa and the Republic of Botswana. The two countries are chosen because of the influence they have on the laws of Lesotho and the similarities that their laws have with the laws of Lesotho.¹⁹⁵

4.2 The Right to Strike: the Republic of South Africa

As early as 1924, the South African jurisprudence recognised that for there to be industrial peace, industrial conflicts must be permitted but regulated by law.¹⁹⁶ Thus, South Africa ratified Conventions number 87 and 98 on the 18th February 1996.¹⁹⁷ Over and above this, South Africa is one of the three southern African countries where the right to strike enjoys constitutional protection.¹⁹⁸

The constitutional protection offered by South African law on the right to strike implies that unlike in Lesotho, it is possible to challenge the constitutionality of a legislative provision that proves inhibitive of the right.¹⁹⁹ Section 23 of the Constitution of South Africa enshrines the right to strike in the South African Bill of Rights, it provides that:

¹⁹⁴ There is freedom to strike in countries where there is no express protection of the right to strike, however, strikes are not prohibited and strikers generally enjoy immunities from certain legal consequences. While the right to strike obtains in jurisdictions where strike action is expressly protected and given precedence over the performance of contractual and other civil obligations.

¹⁹⁵ This came as a result of the Proclamation 2B of 1884 which was passed by the British High Commissioner in the Cape of Good Hope (the present day Cape Town) applicable in the High Commission Territories including the then Bechuanaland (the present Republic of Botswana) and the then Basutoland (the present Kingdom of Lesotho).

¹⁹⁶ This is evidenced by the enactment of Industrial Conciliation Act of 1924 which regulated industrial conflict and gave certain class of workers (white) the right to strike.

¹⁹⁷ http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO::P11200_COUNTRY_ID:102888 (last accessed on the 5th day of July 2013).

¹⁹⁸ The other two are Malawi and Namibia (see section s31(4) and 21(1) of their Constitutions respectively).

¹⁹⁹ Madhuku. L, 'The Right to Strike in Southern Africa' (1997) 136 (No.4) *International Labour Review* 509, p515.

23. (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right-
- (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.

Thus the South African Constitutional Court in the *Certification of the Constitution of the Republic of South Africa, 1996*²⁰⁰ (the first certification case) held that strike action is 'the primary mechanism through which workers exercise collective power and the right to strike enables workers to bargain effectively with their employers'.²⁰¹ Furthermore, the Constitutional Court in *NUMSA v Bader Bop (Pty) Ltd and Others*²⁰² held that:

This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, **it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations.** The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood.²⁰³ [Emphasis added]

In the above quote, the Constitutional Court expresses the importance of the South African workers' right to strike and how it is embraced by the Bill of Rights. The Interim Constitution granted workers the right to strike for purposes of collective bargaining.²⁰⁴ This implies that the right to strike under the Interim Constitution was not an individual right, it was a right to be exercised by workers collectively.²⁰⁵ However, the current Constitution, the final Constitution, grants the right to strike as an individual right and is not linked to any purpose.

²⁰⁰ 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

²⁰¹ at para 66.

²⁰² 2003 (2) BCLR 182 (CC); 2003 (3) SA 503 (CC); [2003] 2 BLR 105 (CC).

²⁰³ at para 13.

²⁰⁴ Section 27(4) of the Interim Constitution.

²⁰⁵ Woolman *et al Constitutional Law of South Africa* (2009) Vol.4 p53-46.

The Labour Relations Act²⁰⁶ was enacted to give effect to the constitutional labour rights contained *inter alia* in section 23 of the Constitution.²⁰⁷ Section one of the Act provides *inter alia* that:

1. The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-
 - (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
 - (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.

In essence, over and above giving effect to the constitutional labour rights, the Act was enacted to ensure that South Africa complies with international labour standards. Thus the Act protects the right to strike for all employees in South Africa.²⁰⁸ The Act provides that the right to strike may only be exercised in respect of disputes of interest provided there has been an attempt to conciliate the dispute which attempt has failed, or a period of 30 days has elapsed from the date of the referral of the dispute to conciliation and 48 hours (or at least 7 days where the State is the employer) notice has been given prior to the commencement of the strike action.²⁰⁹

However, the Act prohibits strikes where there is a collective agreement binding on parties to the employment relationship, which agreement prohibits strikes in respect of the dispute in issue.²¹⁰ The same prohibition extends to the situation where the

²⁰⁶ No. 66 of 1995.

²⁰⁷ However, the Act makes reference to Section 27 of the Constitution of South Africa 1993 (the Interim Constitution) which was repealed the Constitution of South Africa 1996, the same rights are covered by section 23 of the Constitution of South Africa 1996.

²⁰⁸ Section 64 thereof.

²⁰⁹ Section 64.

²¹⁰ Section 65(1)(a).

collective agreement prescribes compulsory arbitration over the dispute in issue²¹¹ or the dispute in issue may be referred to the Labour Court in terms of the Act.²¹²

The Act, however, affords the strikes that comply with the provisions of the Act special protection. Strikes in conformity with the Act will not have delictual or contractual implications.²¹³ Dismissal of lawful strikers is prohibited.²¹⁴ However, dismissal may be justified if it is for misconduct committed during the strike or if the strike was unprocedural.²¹⁵

It can be argued that the Act extends the same protection afforded to procedural strikes to protest action.²¹⁶ The Act provides that 'every employee who is not engaged in essential or maintenance services has the right to partake in protest action' organised by their trade union or federation of trade unions.²¹⁷ However, the employees will only be protected if the protest is not purely political, for the protection in section 67 of the Act to extend to the participation in a protest, the purpose of such protest should be to pursue socio economic interests of the workers. Put differently, the purpose of the protest should be to attain from persons and institutions other than the employer, an advantage of a social economic nature for the workers.²¹⁸

The phrase 'socio economic interest of workers' is not defined. However, the Labour Court in *Government of the Western Cape Province v COSATU*²¹⁹ held that it is not possible to give an all-embracing definition of the phrase. The Court observed that the phrase is capable of a range of interpretations, ranging from restrictive to more liberal ones.²²⁰ Relying on section one of the Labour Relations Act Mlambo J then adopted a liberal approach and held that it is generally sufficient for a party to place

²¹¹ Section 65(1)(b).

²¹² Section 65(1)(c).

²¹³ Section 67.

²¹⁴ Section 67(4).

²¹⁵ Section 67(5).

²¹⁶ Cassim. R, 'Legal Status of Political Protest Action Under the Labour Relations Act 66 of 1995' (2008) 29 *ILJ* 2349, p2350.

²¹⁷ Section 77(1)(a).

²¹⁸ Supra note 216, p2353.

²¹⁹ (1999) 20 *ILJ* 151 (LC); [1998] 12 *BLLR* 1286 (LC).

²²⁰ Para 17.

the demand or the matter giving rise to the protest 'squarely within the ambit of the social status and economic position of workers in general'.²²¹

It is submitted that the liberal approach adopted by Mlambo J is the most preferred as it does not only uphold the purpose of the Labour Relations Act,²²² but it also is in line with the international labour standards. The Freedom of Association Committee recognises that objectives of a strike action do not only concern better working conditions, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.²²³

4.2.1 Right to Strike for Public Officers in South Africa

Historically, the South African labour law, like the present day labour jurisprudence of Lesotho, drew a distinction between the private and public sector.²²⁴ There was the Labour Relations Act of 1956²²⁵ for the private sector and the Public Service Act²²⁶ for the public sector.²²⁷ However, the Labour Relations Act of 1995²²⁸ was enacted to give effect to the labour rights enshrined in the Constitution of South Africa and extends to all sectors. In essence, for all practical purposes, there is now a uniform labour legislation which does not differentiate between employees.²²⁹

However, there are certain provisions of the Labour Relations Act that are applicable only to the public sector employees.²³⁰ None of these specific provisions of the Act deal with the right to strike. In essence therefore, the provisions of the Labour Relations Act dealing with strikes apply to the public officers *mutatis mutandis*.²³¹ There are some provisions that specify that the operation of such provisions differs

²²¹ Ibid.

²²² Supra note 216, p2354.

²²³ Committee on Freedom of Association Digest para526; Supra note 24, p2359.

²²⁴ Steward. A, 'The Characteristics of a State as Employer: Implications for Labour Law' (1995) 16 *ILJ* 15, p15.

²²⁵ No. 28 of 1956.

²²⁶ No. 111 of 1984 which was repealed by the Public Service Act of 1994.

²²⁷ Supra note 224, p15.

²²⁸ No. 66 of 1995.

²²⁹ Rycroft. A, 'Labour' (1996) 7 *South African Human Rights Year Book* 138, p141.

²³⁰ Sections 35 – 38, Schedule 1 and Part D of Schedule 7.

²³¹ Sections 64-77.

where the state is the employer as compared to where the employer is a private proprietor.²³²

Thus, in *SAPS v POPCRU and Another*²³³ the State and some trade unions in the public service were engaged in wage negotiations which reached a deadlock, as a result of which the general public service strike ensued. Some of the participants in that strike were members of the South African Police Service (SAPS), employed in terms of the SAPS Act,²³⁴ while others were employed in terms of the Public Service Act²³⁵. The SAPS lodged an application for a strike interdict, arguing that both officers engaged in terms of the SAPS Act and those employed in terms of the Public Service Act were prohibited from striking as they discharge essential services. The Constitutional Court held that not all employees of the SAPS are engaged in essential services, only 'personnel' employed in the SAPS who have been designated as members in terms of section 29 of the SAPS Act are covered by the essential services strike prohibition.²³⁶

Therefore, it follows that public officers in South Africa do have the right to strike provided that the provisions of the Labour Relations Act have been followed. However, those public officers engaged in essential services do not enjoy the right to strike.²³⁷ Prior to the enactment of the Labour Relations Act, workers in the essential services were seen as having no real alternative dispute resolution mechanisms at their disposal.²³⁸ The introduction of the Labour Relations Act, however, remedied this situation.

The Labour Relations Act establishes the Essential Services Committee which decides whether some services are really essential and is empowered to designate services as essential.²³⁹ Whenever there is a dispute of interest in the essential

²³² For instance section 64(1)(d) provides that where the State is the employer, at least seven days' notice of strike should be given while section 64(1)(b) provides for a 48 hours' notice of strike to be given to the private employers.

²³³ [2011]JOL 27328 (CC)

²³⁴ No. 68 of 1995.

²³⁵ No. 101 of 1994.

²³⁶ At para 39.

²³⁷ Section 65(1)(d).

²³⁸ Supra note 133, p148.

²³⁹ Section 70.

services, the Labour Relations Act provides that such dispute should first be conciliated and if unresolved, to be arbitrated and the arbitration award will be binding on both parties unless parliament resolves otherwise.²⁴⁰

4.2.2 Conclusion: South Africa

From the discussion above, it is evident that South Africa, unlike Lesotho, maintains uniform labour laws with the same application to workers irrespective of whether one is employed in the private or public sector. This in essence gives the public officers the right to strike provided they comply with the requirements for a lawful strike as per the provisions of the Labour Relations Act. The Act does not only extend protection to the strike action conducted for purposes of collective bargaining, but also protest action for purposes of pursuing the socio economic interests of the workers.

Workers who are involved in 'essential services', in South Africa, cannot embark on a strike action. However, unlike the public officers in Lesotho, they are not left without an effective alternative dispute resolution mechanism. As discussed above, the Labour Relations Act provides a procedure for resolution of disputes of interest in the essential services. Unlike in Lesotho, the essential service employees in South Africa have a dispute resolution mechanism that results in a final and binding award. Furthermore, the Labour Relations Act establishes the Essential Services Committee which decides whether such services are indeed essential and which is empowered to designate services as essential. It follows therefore that since the Committee is a creature of statute, in discharging its duties. The committee performs administrative actions which are subjected to rules of natural justice. Therefore, services cannot, without a reasonable basis be designated as essential.

²⁴⁰ Section 74; where Parliament resolves that the award is not binding on the State on terms of section 74(5)(b), the matter will be remitted to the bargaining council or CCMA as the case may be to be heard *de novo*, both in conciliation and arbitration if necessary, i.e. the matter remains unresolved after conciliation.

4.3 The Freedom to Strike: the Republic of Botswana

Like Lesotho, Botswana (as Bechuanaland Protectorate) is a former protectorate of Great Britain.²⁴¹ It is therefore not surprising that the current Constitution of Botswana 1966 is almost identical to the Constitution of Lesotho 1966. Chapter two of the Constitution of Botswana entitled 'Protection of Fundamental Rights and Freedoms of Individuals' contains the Bill of Rights.

Section 13, in chapter two of the Constitution, provides for freedom of assembly and association. Section 13(1) provides that:

13. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, **his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.** [emphasis added]

The question, therefore, is whether section 13(1) provides a constitutional basis for the freedom to strike in Botswana. The Canadian Supreme Court in *Professional Institute of the Public Service of Canada v Northwest Territories*²⁴² held that the right to associate in the Canadian Charter of Rights and Freedoms does not entrench the right to bargain collectively or even strike. This decision, however, is inappropriate in so far as the interpretation of section 13 of the Constitution of Botswana is concerned. Unlike section 13(1) of the Constitution of Botswana, the Canadian Charter guarantees 'freedom of association' without expressly mentioning that individuals have the right to freely join and/or form trade unions for purposes of for protection of their interests.²⁴³ The purpose of being in association is not covered by the Canadian Charter, but, section 13(1) covers it i.e. for protection of interests of individuals.

²⁴¹ Bechuanaland protectorate was established on the 31st March 1885 and upon gaining independence on the 30th September 1966, it became the Republic of Botswana as it is known today.

²⁴² (1990) 72 DLR (4th) (Commissioner).

²⁴³ Molatlhegi. B, 'Workers' Freedom of Association in Botswana' (1998) 42 *Journal of African Law* 64, p65.

Interests of individual employees includes, though not limited to, collective bargaining which has as its integral part, the right or freedom to strike.²⁴⁴ It follows therefore that section 13(1) of the Constitution of Botswana allows workers to embark on strike action. This purposive approach not only complies with international labour standards, it also accords with the liberal interpretation of the Constitution of Botswana in general, which the Courts of Botswana has on several occasions held should be adopted when interpreting constitutional provisions.²⁴⁵

Before 2003, the Botswana law on strikes was, in most respects, similar to that of the United Kingdom.²⁴⁶ There was no express legislative reference to a right to strike, reference was made only to 'unlawful industrial action'²⁴⁷. Strike was lawful unless declared otherwise. In theory, this approach provided the widest possible protection to strike action because, with exception of the essential service providers, there were no set procedures or preconditions to be satisfied before workers could embark on a strike.²⁴⁸ In practice, however, the government's power to declare any industrial action as unlawful potentially amounted to the severest restriction on the right to strike in the whole of Southern Africa.²⁴⁹

In 2003 the new Trade Dispute Act²⁵⁰ was enacted and it provided that every party to a dispute of interest has the right to strike or lock-out provided the procedure for a lawful strike set out by the Act has been followed.²⁵¹ As a result, the right to strike is legally protected in Botswana, this is more so in light of the fact that the government of Botswana has ratified ILO Conventions No. 87, 98 and one other convention which is not ratified by both South Africa and Lesotho; the Labour Relations (Public Service) Convention No.151 of 1978.²⁵²

²⁴⁴ In *Retail Wholesalers v Government of Saskatchewan* (1985) 19 DLR 609, 613-629, the Saskatchewan Court of Appeal held that 'the freedom to bargain collectively of which the right to withdraw services is integral, lies at the very centre of the existence of an association of workers. To remove their freedom to withhold their labour is to sterilise their association'.

²⁴⁵ *Attorney General v Unity Dow* [1992] LRC; *Attorney General v Moagi* [1981] BLR 1, 32.

²⁴⁶ *Supra* note 99, p515.

²⁴⁷ Trade Dispute Act Cap. 48:02.

²⁴⁸ *Supra* note 99, p515

²⁴⁹ *Ibid*.

²⁵⁰ Cap 48:02.

²⁵¹ Section 39; *Botswana Land Board and Local Authorities Workers Union and Others v Attorney General* MAHLB-000631-11 (unreported) para 10.

²⁵² All these conventions were ratified on the 22nd December 1997.

4.3.1 Right to Strike for Public Officers in Botswana

As discussed above, the proper liberal interpretation of the Constitution of Botswana suggests that the Constitution does recognise the right/or freedom to strike. However, the importance of section 13(1) of the Constitution is, in respect of public officers, vitiated by section 13(2)(c) of the same. The said section provides that the right protected by section 13(1) may be limited *inter alia* for purposes of imposing restrictions on the public officers, local government officers and teachers.

It is on the basis of section 13(2) that for a long time public officers in Botswana were denied a right to join or form a trade union and ultimately to strike. In terms of section 2(1) of the then Trade Unions and Employers' Association Act,²⁵³ it was illegal for the public officers to join and/or form trade unions.²⁵⁴ The Act defined an employee as any individual 'who has entered into a contract of employment for the hire of his labour provided that such individual is not a public officer or somebody employed by a local authority unless he belongs to the industrial class or workers for the public corporation or parastatal'.²⁵⁵

Therefore, public officers, not being employees in terms of the law, were excluded from the operation of section 13(1) of the Constitution (freedom of association).²⁵⁶ However, under the current labour dispensation²⁵⁷ in Botswana, the position is different. The Trade Dispute Act defines an employee as 'any person who has entered into a contract of employment for the hire of his labour' excluding members of the disciplined forces²⁵⁸ and prison services.²⁵⁹ In essence, therefore, the definition of the term 'employee' in terms of the law of Botswana today encompasses public officers. In *Attorney General obo Director of Public Service Management v*

²⁵³ Act of 1984; In *Attorney General obo Director of Public Service Management v Botswana Landboards & Local Authorities Workers' Union and Others [2013] 6 BLLR 533 (BWCA)*, Kirby JP held that 'unionism was not permitted by section 13(2)(c) of the Constitution, which exempts laws which impose restrictions upon public officers, employees of local government bodies, or teachers from being held to breach the right to freedom of assembly.'

²⁵⁴ *Supra* note 244, p.67.

²⁵⁵ Section 2(2).

²⁵⁶ *Supra*, note 244 at 67.

²⁵⁷ The Trade Unions and Employers Organisations Act 2003.

²⁵⁸ Botswana Defence Force, Botswana Police Service and Local Police Service.

²⁵⁹ Section 2.

*Botswana Landboards & Local Authorities Workers' Union and Others*²⁶⁰ the Court held that following Botswana's ratification of the two key conventions (Conventions No. 87 and 98), the public officers in Botswana were, for the first time, accorded the right to strike.

Thus, the operation of section 39²⁶¹ of the Trade Dispute Act covers, *inter alia*, the public officers. It therefore follows that public officers have the right to withhold their labour. Thus, in 2011, public officers in Botswana embarked on unprecedented industrial action.²⁶² The industrial action lasted for almost two months.²⁶³ On the 17th June 2011, (seven days after the last day of the strike) the Minister of Labour and Home Affairs passed Statutory Instrument,²⁶⁴ amending the Trade Dispute Act.

The effect of the Statutory Instrument was to designate some services as essential. The newly designated services were; the veterinary services, teaching services, transport services, telecommunications services, diamond sorting, cutting and selling services and all support services in connection therewith. The main reason for this amendment was to ensure that those employees engaged in these services, which are regarded as anchors to the economy, do not engage in a strike action.

The National Assembly, however, on the 7th July 2011, resolved to annul Statutory Instrument No. 49 of 2011.²⁶⁵ The annulment of this statutory instrument meant that the newly designated services were no longer, in law, essential. However, a day after the annulment of the Statutory Instrument, the government expressed its disappointment in the annulment of the Statutory Instrument and announced that the Minister would shortly be re issuing the same.

Thus on the 14th July 2011, the Minister through another Statutory Instrument²⁶⁶ re-enacted the Statutory Instrument No. 49 of 2011. The ILO Committee of Experts on

²⁶⁰ [2013] 6 BLLR 533 (BWCA), 544.

²⁶¹ This section gives employees who are a party to a dispute of interest a right to strike, provided that the procedure for a lawful strike laid down by the Act has been followed.

²⁶² Baakile. M and T.T. Tshukudu, 'Deep Rooted Conflicts and Industrial Relations Interface in Botswana' (2012) 2 *Journal of Public Administration and Governance* (No.3) 118, p127.

²⁶³ From 18th April 2011 and was suspended on the 10 June 2011.

²⁶⁴ No. 49 of 2011.

²⁶⁵ *Botswana Public Service Employers' Union and Others v The Minister of Labour and Home Affairs and Another* MAHLO-000674-11, para 22.

²⁶⁶ No. 57 of 2011.

Application of Conventions and Recommendations expressed its opinion on the Statutory Instrument No. 57 of 2011 as follows:²⁶⁷

The Committee was informed that the Government has adopted the Trade Disputes (Amendment of Schedule) Order 2011, on 15 July 2011, adding the veterinary services, teaching services and diamond sorting, cutting and selling services, and all support services in connection therewith to the existing essential services. The Committee once again recalls that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population (see General Survey of 1994 on freedom of association and collective bargaining, paragraph 159). **The Committee considers that the new categories added to the Schedule do not constitute essential services in the strict sense of the term and therefore requests the Government to amend the Schedule accordingly.** [emphasis added]

The Statutory Instrument was, however, not repealed. The application in *Botswana Public Employees Union and Others v The Minister of Labour and Home Affairs*²⁶⁸ was then instituted in the High Court of Botswana (Lobatse Division). In that application, the applicants sought an order nullifying Statutory Instrument No. 57 of 2011 (amending section 49 of the Trade Dispute Act 2003) on a total of eight grounds,²⁶⁹ the essence of which is that the amendment was *ultra vires*. The government argued that what constitute essential services depends on the circumstances of each country.

²⁶⁷ In the Observation Report of 2011, International Labour Conference, 101st Session.

²⁶⁸ MAHLO-000674-11 (unreported).

²⁶⁹ The applicants argued that the amendment was promulgated by the Minister in exercise of his powers purportedly conferred by section 49 of the Trade Dispute Act, but that section was itself *ultra vires* section 86 of the Constitution of Botswana (it amounted to unconstitutional delegation of legislative powers by Parliament). Secondly, the applicants argued that the Minister failed to consult with the Labour Advisory Board prior to the enactment of the amendment, therefore the amendment was *ultra vires*. The third argument of the applicants was that in terms of the Statutory Instruments Act (Cap 01:04) the Minister is not allowed to reissue a statutory instrument which has been annulled by the National Assembly. The fourth ground was that section 49 of the Trade Dispute Act does not allow the Minister to issue an order incompatible with the Botswana's ILO obligations. The fifth ground was that by placing a limitation to the workers right to strike, which limitation is not justifiable in a democratic society, the amendment was *ultra vires* section 13 of the Constitution. The other argument was that the amendment was an unreasonable exercise of delegated power, in so far as the minister took into account irrelevant considerations. The last argument was that Botswana's membership to the ILO and ratification of conventions gave rise to a legitimate expectation on the part of the applicants that the Minister would not include as 'essential' services that did not meet the ILO standards. The Ministers' failure to consult them then rendered the amendment susceptible to review. [para 28]

Dingake J held that the Constitution of Botswana and all other statutory provisions must be construed to uphold international law.²⁷⁰ The learned judge observed that Botswana, like Lesotho, is a dualist state, therefore, treaties that it has ratified are not automatically binding on it, however, such treaties should be used as aids to interpretation.²⁷¹ The learned judge then concluded that as a member of the ILO, Botswana is bound by its Constitution.²⁷² Therefore, Statutory Instrument No. 57 of 2011 was held to be null and void to the extent that it introduces restrictions to workers' rights, which are incompatible with Convention 87.²⁷³ The learned judge held that:

On a plain reading of Section 49, it does not authorise a Minister to pass a statutory instrument that violates international law or Botswana's international law obligations. In the premises, I hold that SI 57 being inconsistent with international law is hereby declared invalid and of no force and effect.²⁷⁴

The government of Botswana has, however, appealed against this decision and the appeal is still pending before the Court of Appeal of Botswana.

4.3.2 Conclusion: Botswana

As it has been discussed above, the Constitution of Botswana, just like that of Lesotho recognises the freedom to strike. That same freedom is then viewed as a positive right²⁷⁵ that all workers excluding those in essential services are entitled to. It is worth noting that unlike in Lesotho, public officers in Botswana, have the right to strike. However, unlike in South Africa where there is a committee established by the statute to designate some services as essential, there is no such committee in Botswana. As a result thereof, the worker's right to strike is easily undermined by designating some services as essential. This is easily done by a minister publishing a gazette designating any services as essential.

²⁷⁰ Para 192.

²⁷¹ At para 205.

²⁷² Para 220.

²⁷³ Para 227.

²⁷⁴ Para 228.

²⁷⁵ By the Trade Dispute Act of 2003.

4.4 Conclusion

This chapter discussed the law of strikes in two other jurisdictions, namely, South Africa and Botswana. In both these countries, unlike in Lesotho, public officers have a right to strike (though there are some limitations imposed by law). However, the main difference between the two jurisdictions with regard to the right to strike is that in South Africa, unlike in Botswana, the right to strike is enshrined in the Constitution. The discussion in the next chapter, therefore, will be on the lessons that Lesotho can draw from the position of the law of strikes in these countries. Recommendations for legislative intervention will be made.

Chapter 5: Conclusions and Recommendations

5.1 Introduction

The purpose of this research is to investigate whether the limitation on the public officers' freedom of association in Lesotho is justified. As discussed in chapter three, Lesotho as a member of the ILO and a signatory to the Conventions No. 87 and 98 is obliged to guarantee the freedom of association of all employees in compliance with the two conventions and the international labour standards as set by the ILO. Nonetheless, the limitation of the right to strike of public officers falls short of this. The previous chapters discussed the freedom of association, with particular attention to the right or freedom to strike, first, at an international level, dealing with the international labour standards on the issue of public officers' right to strike, and then, at a local level dealing with the position of the law on the same issue in Lesotho. A comparative study followed, where South Africa and Botswana were used as the comparators. The purpose of this chapter is to suggest some legislative reforms that may result in an effective and efficient guarantee of the freedom of association in Lesotho. In making recommendations in this chapter, lessons taken from these two jurisdictions will inform the discussion.

5.2 Recommendations

Having concluded that the limitation of the public officers' freedom of association is not justifiable to the extent that strikes are prohibited in the public sector, the following legislative reforms are recommended and discussed below: enactment of uniform labour laws (5.2.1), redefining the phrase 'public officer' for purposes of strike (5.2.1), establishment of an essential services committee (5.2.3), reform of dispute resolution processes in the public sector (5.2.4) and protection against protest action (5.2.5).

5.2.1 Uniform Labour Laws

As discussed in the previous chapters, there is no single legislation regulating both public and private sector employees in Lesotho. For the private sector employees, the Labour Code as amended applies and for public sector employees, the Public Service Act with its amendments. It follows therefore that workers in the public sector do not enjoy the same legal protection as their counterparts in the private sector, with the law favouring employees in the private sector over those in the public sector. In essence, workers in Lesotho do not enjoy equal protection of the law.

There is no ILO requirement that public and private sector employees should be afforded the same or different treatment. However, all workers should be treated equally with any differences in treatment between the two sectors being well justified.²⁷⁶ The public officers in Lesotho suffer prejudice as a result of the unequal treatment that they are subjected to. Specifically, the application of sections 19 and 21 of the Public Service Act. Read together, these provisions prohibit strikes in the public sector. When a dispute of interest arises, parties are required to refer such dispute to the Conciliation Board for compulsory arbitration. However, the arbitration award issued by the board is not binding.

The non-binding nature of the award defeats the purpose of compulsory arbitration as an alternative to strikes in the public sector. This is so because unlike their counterparts in the private sector, public officers do not have an effective mechanism for addressing and resolving disputes of interest. In the private sector, employees are allowed to embark on a strike over dispute of interest and those that are not allowed to embark on a strike go through compulsory arbitration, which unlike the Conciliation Board arbitration will result in an award binding on both the employer and employee. This unequal treatment amounts to an injustice to the public officers.

This injustice can simply be remedied by enactment of uniform labour legislation to regulate employment relationships in both private and public sector. This piece of legislation should have the same effect for all workers irrespective of sector.

²⁷⁶ A. Steward 'The Characteristics of State as Employer: Implications for Labour Law' (1995) 16 *ILJ* 15, p24.

However, like the South African Labour Relations Act, the legislation may have certain provisions that are applicable only to the workers in public or private sector, as the case may be,²⁷⁷ provided that no category of workers will be unjustifiably deprived of any right that is enjoyed by the other category of workers. This piece of legislation should guarantee the right to strike to all employees with some justifiable exceptions. This will help avoid unnecessary preferential treatment being given only to a certain category of employees.

5.2.2 Redefining ‘Public Officer’ for Purposes of Strike

As discussed in the previous chapters, the Public Service Act of 2005 read with the Constitution defines the phrase ‘public officer’ as ‘any person holding or acting in any public office’ and the phrase ‘public office’ has been defined as ‘any office in the public service’ while ‘public service’ has been defined as ‘the service of the King in respect of the government of Lesotho’. In essence, therefore, anyone serving in ‘His Majesty’s’ service or the government of Lesotho is a public officer. This definition is too wide and as such, it leads to absurd consequences, especially in relation with the operation to the limitation of the freedom of association in terms of section 19 of the Public Service Act.²⁷⁸

These absurd consequences may be avoided by redefining the phrase ‘public officer’, for purposes of exercising the right to strike. The term should be defined in such a way that it draws a distinction between, on the one hand, officers who by their official functions are directly engaged in the administration of the state, and on the other, those officials acting as supporting elements in these activities, namely, persons just employed by the government, by public undertakings and by autonomous public institutions. Only the former category may have their freedom of association justifiably limited to the effect that they may not embark on a strike.²⁷⁹ An alternative to this may be the use of the phrase ‘bargaining unit’ in section 19 of the Public Service Act instead of ‘public officers’.

²⁷⁷ For instance, see section 64(1)(d) of the LRA regulating the notice period in cases of strike in public and private sector.

²⁷⁸ See the discussion in 3.3 and 3.4 above.

²⁷⁹ See the discussion in 3.4 above.

Bargaining unit is defined in the Act as 'all public officers on Grade H and below'.²⁸⁰ It is worth noting that, despite the fact that the Act defines a phrase 'bargaining unit', the Act does not go on to use the phrase at all. This category (the bargaining unit) may best be defined as the junior public officers. In other words, these are those public officers that by the nature of their official functions are not directly engaged in the administration of the state, for instance, office clerks, drivers, messengers and secretaries. Since this group does not exercise authority in the name of the state, there is really no justification for denying them the right to strike. As discussed in the previous chapters, denying this category of public officers the right to strike amounts to a violation of international labour standards.

Therefore, it is submitted that section 19 should be repealed and replaced with a different provision to the effect that only public officers within a specified bargaining unit may embark on a strike. Having a provision of this nature will ensure compliance with the international labour standards.

5.2.3 The Essential Services Committee

In chapter four, it was indicated that the South African Labour Relations Act establishes the Essential Services Committee by virtue of section 70.²⁸¹ It was also noted that such committee does not exist in Botswana;²⁸² the same is true about Lesotho. However, it is worth noting that in terms of the laws of Botswana, the Labour Advisory Board should be consulted prior to designation of certain services as essential through secondary legislation.²⁸³ The Advisory Board of Botswana, unlike the South African Essential Services Committee does not have powers to designate some services as essential. The Chairman of the Board is also the Commissioner of Labour, who reports to the minister. As such, the impartiality of the Advisory Board may be questioned. On the other hand, members of the Essential Services Committee in South Africa are appointed on merit and the portfolio of the

²⁸⁰ Section 4.

²⁸¹ See the discussion in 4.2.1 above.

²⁸² See the discussion in 4.3.1 above.

²⁸³ *Supra* notes 268 and 269; *Botswana Public Employees Union and Others v The Minister of Labour and Home Affairs and Another MAHLO-000674-11*(unreported).

chairperson of the Committee is not an *ex officio* portfolio, the chairperson being appointed from the members.²⁸⁴ It follows, therefore, that the Essential Services Committee is more likely to be objective and impartial in discharging its duties.

In the light of the above discussion, it is submitted that there is a need for the establishment of an Essential Services Committee in Lesotho. Just like the South African Committee, the Committee in Lesotho should be composed of experts in labour law with integrity. None of the Committee members should be appointed or serve in any office in the public service during his term of service as a member of the Committee. The Committee should have powers to designate some services as essential. Therefore, if the Committee will designate some of the services offered by some public officers' as essential, such officers right to strike will be justifiably restricted as they will then qualify as essential service providers, as discussed above. However, there should be an effective mechanism through which officers designated as essential services providers may effectively address their disputes of interests.

5.2.4 Reform of Dispute Resolution Processes in the Public Service

As noted from the previous chapters, there is no efficient dispute resolution mechanisms put in place in the public service to resolve disputes of interest. This is problematic, and more so in light of the fact that public officers cannot embark on a strike. As discussed in chapter three, the Public Service Act²⁸⁵ establishes a Conciliation Board to handle disputes of interest. However, awards of the Board are not binding on the parties. This calls for immediate attention of the legislature as it amounts to violation of the workers' rights. To avoid this violation, there should be a compulsory conciliation and arbitration procedure put in place for those public officers whose right to strike has been restricted for any reason. The outcome of conciliation may be an advisory award, but then parties should reserve the right to refer the matter for arbitration despite the outcome of conciliation. The outcome of arbitration should be an award binding on all parties.

²⁸⁴ Section 70(1)(a) and (b) of the LRA.

²⁸⁵ Section 17 thereof.

5.2.5 Protection Against Protest Action

The discussion in chapter four established that South African labour law extends protection to workers participating in protest action.²⁸⁶ In South Africa every worker not engaged in essential services is entitled to participate in protest action organised by their trade union or a federation of trade unions.²⁸⁷ However, the protection is not afforded to the protest actions which are political in nature, the employees participating in the protest action will only be protected by labour law if the protest action is intended to promote and protect the socio economic interests of the workers. This approach is in line with international standards. The ILO recognises that objectives of strike action in the context of labour law do not only concern better working conditions, but also, the seeking of solutions to social and economic problems which are of direct concern to the workers.²⁸⁸

The need to extend legal protection to protest action should be balanced with the need to maintain a stable economy. It is common cause that a stable economy is a fundamental requirement for positive investment climate which is one of the factors considered by investors before investing in a given economy. It is also common cause that protest actions have the potential of negatively affecting individual businesses and eventually the entire economy. Therefore, in light of the fact that Lesotho is a small economy with a desire for economic growth and development, it is submitted that while employees should be allowed to embark on strikes over disputes of interest, protest action should not be protected so as to avoid restricting economic growth and development.

²⁸⁶ See the discussion in 4.2 above.

²⁸⁷ Section 77(1)(a) of the South African Labour Relations Act of 1995; see the discussion in 4.2 above.

²⁸⁸ Committee on Freedom of Association Digest para 528; see also the discussion in 4.2 above.

5.3 Conclusions

As this dissertation has revealed, public officers in Lesotho do not enjoy the freedom to strike. Without a guarantee of the freedom to strike, public officers are left vulnerable and open to abuse by the employer as arbitration awards issued by the Conciliation Board are not binding.²⁸⁹ The public officers are left without effective dispute resolution mechanisms, especially with regard to disputes of interest. This shortcoming may best be corrected by legislative recognition of the public officers' freedom to strike.

A strike is the most valuable weapon available for employees in enforcing their rights. Thus strikes constitute an integral part of the activities of employees' associations as it is through such actions that workers promote and protect their economic and sometimes social interests. However, public officers in Lesotho have no channel for addressing their disputes of interest. They cannot strike and they do not have the benefit of having a binding award. This is in direct violation of international labour standards,²⁹⁰ which provide that where workers (as in the case of Lesotho, public officers) are denied the right or freedom to strike, there should be an alternative remedy guaranteed to them to ensure protection of their interests at the workplace.²⁹¹ In essence therefore, the limitation on the public officers' freedom of association in Lesotho is not justifiable. This is more so because the prohibition of strikes in the public sector puts such workers at the mercy of their employer and leaves them without an avenue to enforce and protect their interests. It is high time that the government of Lesotho considers a redress to the prolonged injustice that the public officers have been subjected to. As Kahn-Freund admirably noted:

No country I know of suppresses freedom to strike in peace time, except dictatorships and countries practicing racial discrimination...a legal system which suppresses the freedom to strike puts the workers at the mercy of the employers.²⁹²

²⁸⁹ See the discussions in 3.4 above.

²⁹⁰ See the discussion in 3.5 above.

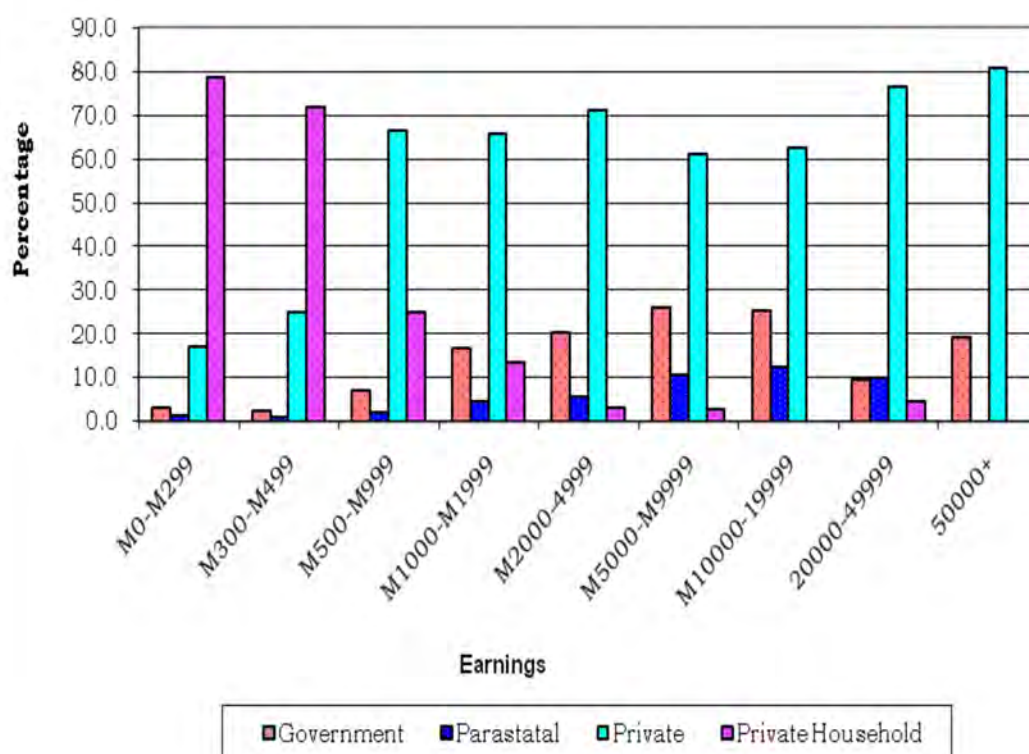
²⁹¹ See the discussion in 3.4 above.

²⁹² O. Khan-Freund *Labour and the Law*, p234.

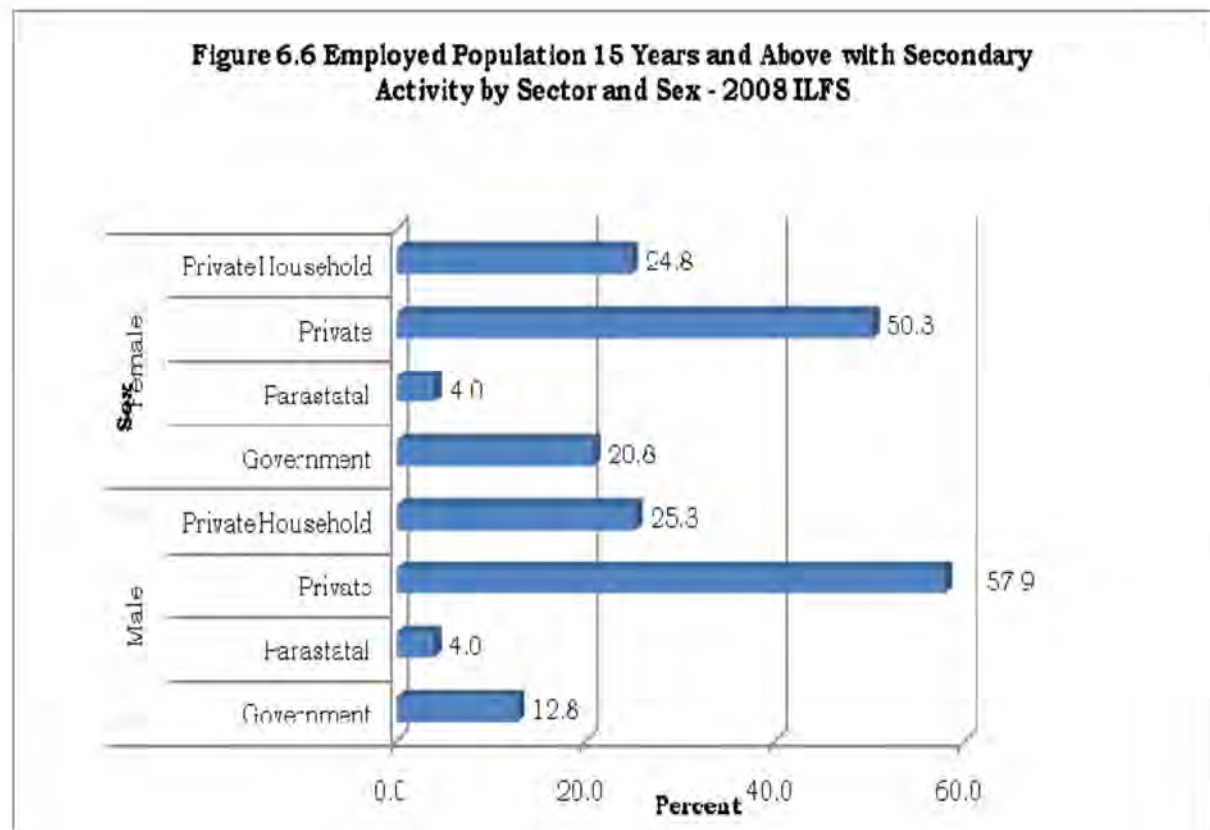
Annexures

Annexure 1²⁹³

Figure 5.5. Percentage Distribution of the Population 15 Years and Above Employed for Wages by Earnings and Sector-2008 ILFS



²⁹³ 2008 Lesotho Intergrated Labour Force Survey a report of the Bureau of Statistics, Ministry of Finance and Development Planning available at http://www.bos.gov.ls/New%20Folder/Copy%20of%20Demography/2008_ILFS_report.pdf (last accessed on 5th November 2013).



²⁹⁴ Ibid.

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