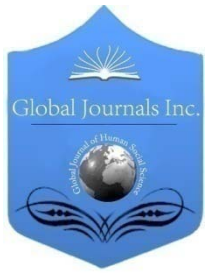
Volume 15 Issue 57
Originally issued as F7



Global Journal of human-social science: F
Political Science
Volume 15 Issue 7 Version 1.0 Year 2015
Type: Double Blind Peer Reviewed International Research Journal
Publisher: Global Journals Inc. (USA)
Online ISSN: 2249-460X & Print ISSN: 0975-587X

Emerging Trends in Employment Relations: The Case of Essential Service Employees in the Botswana Public Sector

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Furthermore, the paper also asserts that the impact of the actions of all these adjuncts of the state machinery on worker formations and their members including those employed in "essential services" has not been mutually beneficial.

Keywords: *essential services, discretionary authority, statutes, monist, stratification.*

GJHSS-F Classification : *FOR Code: 940501p*



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Emerging Trends in Employment Relations: The Case of Essential Service Employees in the Botswana Public Sector

Emmanuel Kodzo [α] & Bediaku Ntumy [σ]

Abstract- This paper is intended as an advocacy for a more pragmatic approach to employment relations particularly within the public sector. To do this, the paper uses the recent problems surrounding the issue of essential services in Botswana as a context. The paper acknowledges that such an exercise calls for an objective appreciation of the state as an employer, a prime mover in employment relations and the institution in control of both legislative authority and political power. The paper also recognises the apparently unfettered discretionary authority reposed in the upper echelons of the public bureaucracy not only to implement policies and laws but also to make rules and purport to apply such rules in a quasi-judicial manner.

Furthermore, the paper also asserts that the impact of the actions of all these adjuncts of the state machinery on worker formations and their members including those employed in "essential services" has not been mutually beneficial. The paper notes that, where the state appears to be weakening, the agencies created, including the coercive institutionalised structures, take over the functions of both the Executive and the Legislature.[1] An undesirable consequence of the state being held captive by these agencies in the field would be the deleterious impact on several spheres of social interaction.

These issues are discussed within the framework of labour law. To do this, the paper attempts to define the relationship between public service workers and the state as the employer. These issues are tested within the context of how "essential services" are determined. The paper concludes that the modalities by which workplace phenomena, such as "essential services" are prescribed will determine the sustainability of deliberative social partnering. In default, legislation and coercive authority will both be inefficient and ineffective simply because the legitimizing constituency will always be the final arbiter.

Keywords: essential services, discretionary authority, statutes, monist, stratification.

I. Introduction

Botswana is a society in transition, having emerged from colonialism not very long ago. Since independence, the political state seems to be in a continuous search for a pragmatic developmental path. This search may have inadvertently resulted in a web of legislation and policy whose effect, for now, conveys the impression of a concern for the sustenance of law and order. Some of the outcomes of such concern include the classification of workers generally as "public and private" sector employees (with different salary grades and working conditions) for which an Employment Act[1] on one hand is enacted and on the other, a Public Service Act.[2]

Within this environment is also captured avital component of employer- employee relations which is the ascribed characteristics of 'essential services' and by implication, 'non-essential' services. Another classification is the group designated as (general) "management"[3]. This ostensibly was intended under the Trade Unions and Employers Organizations Act to segment the more literate, informed and therefore vocal employees from the mainstream of employees for purposes of selective unionization.

There was yet another category referred to as 'industrial class' governed then under the Regulations For Industrial Employees (1988), made up of unskilled, semi-skilled artisans grounds men, janitors, messengers and drivers, "Industrial Class Employees" are actually public sector workers from grades A3 to B2 and are remunerated on a wage basis. In 1992, a decision was taken to convert this class to Permanent and Pensionable status. This category of workers has since then been declared 'employee' for the purposes of the Employment Act (as amended).

The Trade Disputes Act[4] as amended was essentially intended to re-visit, restructure and amend the procedures for dispute resolution, bringing in as many alternate and informal channels as functionally possible between the quasi-judicial and administrative roles of the state bureaucracy and the formal courts including the Industrial Court.

The main thrust of this paper therefore will be sections related to "essential services" under the Trade Disputes Act (TDA). As stated earlier, the evolutionary path of labour legislation and policy, both during the colonial era and the post-colonial Botswana, displays an

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[1] [Cap 47:01]
[2] [Cap 26:01] now No.30 of 2008
[3] Section 48 ss (2), (3) Trade Unions and Employers Organizations Act [Cap 48:01]
[4] [Cap 48:02]

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interventionist inclination by the state often translated in terms of legislative and administrative regulation. This has resulted in the fragmentation, marginalisation, confusion and discord among the various social formations, in particular labour. This parlous condition is also accompanied by subjective interpretations of various provisions of relevant statues. The problem is further compounded by some aspects of the constitution of Botswana[5] and, with due respect, some worrisome decisions by the senior court of the land.

In this environment, the judiciary would appear to have played a supportive role in its inability or reluctance to lead through teleological pronouncements regarding controversial executive actions such as widening the basket of essential services. It has also not reacted, as one would have expected, to attempts at circumventing the stipulations of the Statutory Instruments Act[6]. These developments dictate the focus of the paper.

Broadly, the paper undertakes an overview of labour legislation and policy formulation in Botswana and employment relations law in general. This involves the examination of specific aspect of the legislative regime as it has been unfolding. Using case studies, the paper also attempts to investigate the implications of these administrative *cum* legal interventions. By extension, the paper also examines key constitutional issues such fundamental freedoms. Finally, the paper answers the question as to whether both the judiciary and the executive are providing a framework for open and robust social discourse or are shaping up as potential obstacles along the path of emancipating nascent social formations such as labour.

This paper is grounded in the 'Law in Context' approach. Much as law may be a variable factor, thorough grounding in the dynamics of the context in which it is observed is crucial. As such there is the need to understand the chosen context such as Botswana. Such an understanding must cover the peculiarities, problems and conditions existing so as to make law more effective and responsive. This is the principle referred to as fidelity to context[7]. The rationale is that, an analysis of the institutions such as those created to deal with labour issues or the prevailing social environment should provide indicators for appropriate rules and procedures. This will facilitate the appreciation of the genuine needs so as to be able to respond to realistic circumstances without compromising the required standards of legality and morality. This however should not be misunderstood as diluting the general regulatory qualities of law.

In sum, 'law in context" is not intended to take fidelity to context as an absolute. It should be seen as a process that needs to be subjected to and controlled within the confines of universal standards and ideals of freedom, fairness, rationality, justice, empowerment and growth among others.[8] The goal therefore is examining, observing and analysing of events in order to realize relevant and enriching ideals within a given context. For this paper, this would mean how to eliminate injustice and acrimony in the workplace and generate industrial peace and amity in the specific contexts of countries such as Botswana.[9]

As anobservation of the law in action within a given social context the paper's aim is to draw some lessons from events both past and present for the future. Being an academic exercise, any position taken by the paper is not intended as a critique of any governmental system or the ideological inclinations of the state.

The paper is divided into sections. Section one deals with the conceptual framework of the paper which mainly covers the traditional notions of labour law in particular the institutionalisation of the employment contract and the supposed prerogative of the employer. It deals with the functions of labour law within society and the perceived role of the state in this context, a role which extends beyond regulation to the maintenance of the *status quo*.

In section three, the paper retraces the legislative route over the years and examines in particular the labour legislation framework including the Trade Disputes Act and how this has impacted on labour formations. Section four examines the effects of some provisions relating to constitutional rights such as freedom of association and assembly. Inferentially, the paper also deals with the right to organize and withhold services and how these operate within the context of international norms and practices such as the conventions and principles of the International Labour Organisation (ILO). In section five, the paper examines some aspects of the domestic law in action. This is done relative to elements of contractual activity such as determination of "essential services." Judicial interpretation of relevant cases and how these, in their totality, affect worker rights are also examined. On the basis of the foregoing, an informed conclusion is drawn.

II. Conceptualising Labour Law

This section deals with the broad framework of labour law principally because the critical issues are based on divergent positions between the state as an employer and groups of employees. A defining characteristic of labour law is its "attention to conflicts

[5] [Cap 01:00]
[6] [Cap 01:05]
[7] Selznick, Phillip, *"Law in Context: Fidelity To Context"* Centre For JSP, 2002 Repositories.edlib.org/csls/fwp/21 bidp

[8] Selznick, Phillip *"Law in Context Revisited"* Journal of Law and Society Vol.30 No.2 June 2003 pp.177- 86 at p.185
[9] Ibid

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and co-operation between, among and within different economic and social interests" [10]. Secondly, modern labour law is an admixture of terms, principles, rules of common law and statute such as apply to labour dispute resolution and by extension, the protection of employees from the dominant economic power of the employer.[11]

Though legal rules may not directly re-define the employment relationship, they rationally change the legal content and effect of the relationship. In addition, the context of work determines the nature of the work relations that legal rules do or attempt to regulate[12]. Legal rules within labour law could thus oversee but not necessarily permeate the realities of the workplace. Under normal conditions, market forces may be allowed to determine the nature of the relationship between employer and employee rather than state's unilateral and regulatory intervention[13].

Labour law may also be defined more in terms of its localised, domestic nature rather than traditionally accepted commonalities such as "individual" and "collective" labour law. This then underscores the need to closely examine local contextual practices and rules as a reflection of local dynamics or comparatively as inter- territorial differentiation. Conceptually, functionally and also therefore contextually, labour dispute resolution is part of the broad field of labour law[14]. This is evident in the cases discussed hereafter.

It is argued that function of labour legislation is to transcend the boundaries of the mechanics of employment. This is because it deals with work in a manner in which work is and will be organized in today's world and the work world of the future. In a sense, a modern labour law should reflect the on-going dynamics of the workplace and the society in which it is located. The issue becomes one of a comparative distinction between what the labour law is, what it does or should do and how it has functioned in terms of the interrelationships between the power holders and the power addressees such as workers.

Given the nature of recent events in Botswana, labour law, depending on the environmental context in which it is actualised, should not overlook the trans-territorial approach to it holistic efficacy. Thus, the concept of legal formants and resultant benchmarking also comes into play. The premise is that unjustifiable adherence to a monist legal system that attempts to deny historical facts cannot assist in the development of such a legal system. This is particularly so when a country voluntarily ratifies international conventions, principles and treaties which it then informally denounces. The situation gets compounded when it appears the denunciation originates rather from the Judiciary. Watson deals with the concept of legal transplants where societies borrow models or domesticate foreign legal rules that are considered relevant to local needs.[15]

However it is also worthwhile to heed Teubner's advice that the import of legal rules should be seen in terms of a deliberate introduction of legal irritants whose objective is to trigger change within a given local legal system. However, since contexts differ, such borrowing and grafting may not be as simple as changing vehicle parts. In fact, according to Teubner, a completely unexpected mutant might be created by such a process.[16] Both writers thus provide a justification for looking beyond territorial confines for juridical guidance albeit cautiously and prudently. Given the discernible ambivalence towards international labour standards, this paper contends that Botswana is yet to reach beyond its immediate confines in the search for substantive changes in labour laws.

It is assumed that the true function of labour law is the preservation of the social and economic structures prevailing in society at any given moment. This view cannot endorse the need to restrain the conflicting relationship between employers and employees. In that case, the true purpose of labour law should rather be the judicious application of ground rules and regulations. This would also encompass how these rules are translated by administrators such as Commissioners of Labour, Industrial Courts and the Judiciary who superimpose administrative, quasi-judicial and judicial decisions on transactional demands by social role players.

In this regard, it must be assumed that laws and labour law in particular should also function as liberators of the creative energies of workers and employers in their search for mutual advantages. These are some of the issues that the facts on the ground in Botswana need to openly debate.

Having examined what Labour law ought to be in order to sustain a claim to relevance, its critics should also be acknowledged. Labour law is considered as flawed due to certain observable shortcomings. First, there is the claim that labour law impedes efficiency, flexibility and development.[17] Further, it is criticised as reducing employment and being partial to those forming

[10] Arthurs, H, W *Labour Without The State* University of Toronto Law Journal, Vol.1 (Winter) 1996.
[11] Creighton, Breen, Stewart, Andrew *Labour Law: An Introduction* The Federation Press, 2000.
[12] Ezzy, D *''Subjectivity and The Labour Process: Conceptualising 'Good Work'* '' Sociology Vol. 31 No.3 pp 427-444.
[13] Ibid p.7.
[14] Paul, Haveman "*Law In Context Taking Context Seriously* "Waikato Law Review Vol.8 1995.
[15] Watson, A *"Legal Transplants: An Approach To Comparative Law*" Edinburgh Scottish Academy Press 1974.
[16] Gunther,Teubner *"Legal Irritants: Good Faith In English Law Or How Unifying Law Ends Up In New Divergencies"* Modern Law Review Vol,61 11998.
[17] Davidov, Guy, Langille, Brian *The Idea Of Labour Law*Oxford University Press 2011.

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the labour aristocracy while leaving the informal sector and other categories of workers unprotected from predatory labour contractors and unscrupulous employers[18]. Further, traditional labour law has enabled labour law practitioners to question the coherence of the discipline, its relevance to new empirical realities in the world of work and its normative resilience in the current world order.[19] Further, traditional labour law has enabled labour law practitioners to question the coherence of the discipline, its relevance to new empirical realities in the world of work and its normative resilience in the current world order. [20]

It is also observed that there is a decline in and transformation of the founding paradigms of labour law particularly in the developed countries. From a socio-legal perspective, this shift is said to be due principally to the impact of trans-nationalisation on productive processes and the attendant employment relations. These views therefore dictate a rethinking about labour law's purpose and context.[21] Worker aspirations have, in the past, been defined in terms of the polarisation of relations between capital and labour. This is what Kahn-Freund referred to as "relations of power." [22] Regarding countervailing power, modern trade unions emerged as the vibrant successors to the vocational, craft and trade guilds. Their roles included winning concessions and making gains from the employer but in a regulated manner.

Objectively, labour legislation could be said to have moved beyond the notion of conferring rights on workers. This is because it has also effected the regulation of the business environment through balancing management autonomy and worker protection. Irrespective of this, even though the regulatory mechanism leaves a scope for common law principles and judicial decisions. Regrettably, none of these has prevented labour disputes from festering until the conflict explodes into industrial action.

In effect, legislative intervention, common law principles and judicial rulings have neither assuaged the anxieties nor lessened the aspirations of workers. This is because workplace arrangements cannot always be justified as grounded in consent. As such, insecurity is often engendered by the individualisation of the contract of employment and the unilateral rights of termination earlier referred to. From the foregoing, draconian regulation of labour relations ironically admits the perceived capacity of organized labour to destabilize not the industrial environment, in the event of unresolved disputes.

Taken to its logical conclusion, labour disputes do indeed have the capacity to also destabilise the state and social structures. However, procedurally and substantively, the role of labour legislation should not be to shackle or deal with labour disputes perfunctorily. Rather, it should also generate mediatory policies aimed at ensuring that socio-economic activity is based on *a quid pro quo* arrangement. Whether this has been the case in Botswana is the subject of this paper.

III. A Brief Overview of the Legislative Terrain

Legally and historically, the Protectorate of Bechuanaland came into existence mainly through the Foreign Jurisdiction Act of 1890 and the Bechuanaland Protectorate Order in Council of 1891. The enactment of these laws heralded the importation of whole regimes of law into a pre-capitalist, agrarian environment. The laws included those intended to regulate employment and labour relations. Over the years, the socio-economic effects of the regime of laws together with policies so formulated have not been exactly positive, given that the driving philosophy was command and control.

Contemporary indigenous literature in this regard does not appear to provide this historical linkage as it seems to focus on issues regarding post– colonial labour legislation, market regulation and relations. Such literature is also not focused on any particular doctrinal issue. Such literature concerns itself with largely academic polemics, substantive law, statutory regulations, law reports and commentaries on judicial decisions. However, they help point the way around statutory provisions and state policy.

From the foregoing, the role of legislation and policy over the years, the effects and the prospects for effective employment relations all deserve careful examination. This is because these impact on social progress. They are also seen through the prism of society at large as social actors and are therefore perceived as *bona fide* agents of democratic governance in Botswana. This paper is not assessing regulatory mechanisms in terms of abuse or effect. The point is that by entrusting the state with such discretionary authority and power over preventive and pre-emptive legislation, the most visible consequence of what might be called the social contract is the consolidation of the dominance of the state. The constitution itself defers to the authority of the state with regard to fundamental rights and freedoms[23].

[18] *Ibid*
[19] Ibid
[20] Ibid
[21] Moreau Marie- Ange "*The Reconceptualization of The Employment Relationship and Labour Rights Through Trans-nationality*" Comparative Labour Law and Policy Journal Vol.34 No.3 2013
[22] Kahn-Freund, O.*Labour and The Law* Stevens and Sons, London p.8 1972
[23] Chapter 11 Constitution of Botswana [Cap 01:00]

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IV. The Contract of Service

This sub-section is based on the following premise. Law plays different roles in society. Ideologically, the law justifies existing power relations to both rulers and the ruled so as to induce willed compliance. The law also confers legitimacy on regulatory and institutional mechanisms that define social conduct. Politically, the state provides the institutional framework for the law. As a result, the state, through the instrumentality of law, may, for example, assume sovereign ownership of land while erecting structures for the political economy[24]. One such area is the structural differentiation between owners of capital and those who expend their labour power.

Thus the modern concept of the contract of employment has become an institutionalised component of this differentiation and eventual stratification. The concept traces its roots to the traditional Roman law "*locatioconditiooperarum*" or the letting and hiring of services which had initially applied to only the unskilled, menial worker. [25] In essence, moving away from the Roman and English common law roots, the modern definition of the contract of employment has come to acquire an increasingly legislative definition intended to address the perceived shortcomings of both the Roman– Dutch and English common law approaches. The employment contract, as per legislative definition, has now been clothed in a spurious notion of mutuality of consent and reciprocity. In this ensuing relationship between equals, the servant or employee (*locator operarum*) avails the employer or master his personal service (generally undefined but legally circumscribed) for hire under given conditions, over a specified period of time in return for remuneration.[26]

The Employment Act [27]of Botswana provides the prescriptive environment underpinning employment relations. The scope of the Act suggests that, within the framework of formal employment, there is ample statutory protection even if implementation and enforcement may be lacking. [28] This Act defines an employee as a person who voluntarily enters into a contract of employment for the hire of his labour. A casual employee is defined as an employee whose terms of contract are for a period of not more than twelve months and limiting working time to three days or twenty two and a half hours a week.[29]

Labour legislation in Botswana has demonstrably continued to be skewed towards the notion of contractual obligations. This notion is not grounded in a conscious desire for equity in the absence of equality between the parties. This is because, realistically, the notion of voluntarism in the context of employment is a myth in and of itself. Even in the event of state intervention, the premise is generally the supposed private contract between two consenting adults. As a result, both labour peace and stability in Botswana are now subject to the intersection between the old school of labour law and emerging trends that seek to acknowledge the limitations of such legalised definitions. Such trends as indicated, include ideas of labour market flexibility and deregulation. Deregulation in this context is not the demise of regulation in its totality but the loosening of current limitations so as to offer protection and security to other players in the world of work.

The next sub-section examines the question of the implications of the concept of Freedom of Association and the role of the state and the Judiciary in resolving any ambiguities there may be. This is because given the scope of the paper, it is necessary to examine possible conflicts between statutes and constitutions. Freedom of association is also the context within which "essential services'' could be best understood.

V. Understanding "Essential" Service

The notion of essential services in labour law presumes terms and conditions of employment which include areas of human endeavour whose retraction may pose dangers to the safety, health and security of a society or segments of it[30]. The International Labour Organization (ILO) defines this as service "the interruption of which would endanger the life, personal safety or health of the whole or part of the society.''[31] It further stipulates that, much as the restriction on the right to strike may depend on the peculiar circumstances of each country, even a legal strike over a protracted period could become restrictive and an issue of life and safety.[32]

Given the dynamics of the world of work, technological and socialisation processes at work, the determination of what is essential can only be a continuing process undertaken by those attuned to the exigencies of the workplace and the value of such essential service to the society at large. From the foregoing therefore, the ILO provided certain categories which, strictly considered, should *not* be classified as "essential". These include: *agricultural activities, the*

[24] Rubin, G, Sugarman, D Law, Economy and Society: Essays in The History of English Law 1750-1914 Professional Books 1984
[25] Grogan, J *Workplace Law* Juta Law, Juta& Co Ltd seventh Edition 2003
[26] *Smitv Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) p. 56-57
[27] [Cap 47:01]
[28] No. 23 of 1998
[29] Part 1 Preliminary Cap 47:01
[30] ILO Guidelines Mmegi Blogs http://www.mmegi,bw/blogs.plp?-sid=10&aid of 11/10/2012 [ILO 1983]b par.214 as subsequently adopted by the Committee on Freedom Of Association
[31]
[32] ILO 1996 par.545

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education sector, transport generally, banking and mining, postal services and construction among others.[33] The Committee on Freedom of Association therefore recommended that in particular where member states are prone to using discretionary powers to effect amendments to prohibit strikes in essential services, such must be restricted in terms of the ILO's strict definition only.[34]

The terminology of the ILO in this respect emanates from issues of fundamental importance on one hand and matters of public utility. However, both the Committee of Experts and the Committee on Freedom of Association agree that essential services must be those whose interruption would endanger life, personal safety and health for which restrictions or even prohibition are justifiable. In such instances, *a minimum service force must be operational to allow the majority to actualize the freedom to organize and participate in lawful industrial action.* (my emphasis) As observed by the Committee of Experts, the principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner.[35]

In 1998, the International Labour Conference (ILC) in its Declaration on Fundamental Principles and Rights at Work reaffirmed the commitment of the international community "to respect, to promote and to realize in good faith" the rights of workers and employers to freedom of association, effective right to collective bargaining and to promote the elimination of discrimination in respect of employment and occupation. Convention Number 87 of the International Labour Organisation (ILO) deals with the freedom of association and the protection of the right to organize. This basic right enjoins all stakeholders to enable all workers and employers to form and join organisations of their own choosing without prior authorisation and provides guarantees for the free functioning of organisations without interference by public authorities. This core Convention was ratified by Botswana in 1997, thirty one years after independence.

The implication is that, in principle, Botswana has therefore undertaken to provide unfettered freedom to workers and employers in their quest to organize and join organizations which shall have the right to draw up their own programmes, constitutions and rules and elect representatives in full freedom. Furthermore, in keeping with the principle of *pactasuntservanda*, every treaty in force is binding upon the signatories to it and must be performed in good faith[36]. Such organizations shall not be dissolved or suspended by any administrative authority and *shall be free to establish and join* (my emphasis) federations or confederations and have the right to affiliate with international organisations of workers and employers. The concern of this paper is the extent to which these provisions actually accommodate "essential services".

The Convention on Freedom of Association is generally coupled with the Right to Organize and Collectively Bargain Convention. The Labour Relations (Public Service) Convention[37] deals with the right to organize in the public service. Its provisions expand on Convention 98 which, unlike 87, does not cover public servants engaged in the administration of the state. Even then, the logical reaction would be the meaning of 'administration of the state". If this process is undertaken by those in "management," the role of a grounds man for example should then be excluded. The United Nation's Universal Declaration of Human Rights provides that "everyone has the right to form and join trade unions for the protection of his interests" It also recognizes that" no one may be compelled to belong to any association"[38]. By extension also, no one should be compelled not to join any association of his choice.

a) How Essential is Essential?

This sub-section of the paper deals with the concept of 'essential services' within the overall context of ILO Conventions 87 and 98 because this is the main plank of the paper. ILO Convention 87 states that public authorities shall refrain from any interference which would restrict the right or impede the lawful exercise of the freedom of association. Further the law of the land shall not be such as to impair guarantees provided by the Convention[39] However, the Convention also recognises the primacy of domestic legislation as contained in laws, awards, custom and agreements over which the Convention may assert only an oversight in order to safeguard the guarantees subsumed in the Convention[40].

Convention 98 accepts the right of the state to restrict the police and armed forces with regard to the formation of and joining trade unions of their choice. These apparently contradictory statements raise important issues. The first is the sheer moral and persuasive authority of ILO Conventions and Principles. Secondly, the symbolic gestures of willingness to domesticate the ILO provisions coupled to an overt disregard and hostility towards the integration of these provisions by signatory states into domestic legislation. Thirdly, the overall effect of selective incorporationas a compromise.[41] Fourthly, as part of "soft" international law, these Conventions as ratified, do not carry the

[33] ILO 1994 a pars 159,160
[34] See Article s1-5
[35] Vienna Convention Article. 26 *Law of Treaties*
[36] No.98
[37] No. 151 of 1978
[38] 1948 see Arts. 20-23
[39] Art.3 (3) Part 1 Convention87-Freedom of Association
[40] Art 8 (2)Part 1 Convention 87 Freedom of Association
[41] Art 9 (2) Ibid

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enforcement or coercive authority in relation to municipal legislation. Comparatively therefore, their role requires unambiguous clarification whether from a 'monist' or 'dualist' perspective[42]. The paper suggests that subsequent events demonstrate the judicial confusion over (a) outright rejection or (b) occasional reference and reliance on these same Conventions or(c) clear endorsement of all relevant and ratified provisions as part of domestic law.

The International Covenant on Economic, Social and Cultural Rights requires that ratifying States must ensure the right of everyone to form trade unions of his choice and for unions to function freely[43]. This Article acknowledges the right to strike subject to compliance with domestic laws. The International Covenant on Civil and Political Rights also in its Article 22 provides for the inclusion of those in the "administration of the state" in the basket of beneficiaries of the freedom to form and join trade unions. Having stipulated this, Convention 98 then specifically defers to municipal discretionary authority with regard to the position of public servants engaged in the administration of the state, while contending paradoxically that this profound and deferent position adopted by the ILO is without prejudice to those affected[44].

At this point, though one sees a dominant trajectory of convergence between the principles enunciated by different international institutions, the conclusion of subordination to domestic rule-making is inevitable. The paper contends that, if indeed 'freedom of association' provides the nexus between civil, political, economic, social and cultural aspects of human rights, then this should include the right to join trade unions and membership must come with a legitimate expectation to actualise the right to put pressure on employers during negotiations through the instrumentality of the strike[45]. Assuming this is so, the issue then is what validates and legalises the discretionary authority of the state to exclude or restrict segments of society from full actualisation of these rights.

It is at such times that a more robust teleological role by the Judiciary could have helped. An example could be by questioning and thus diluting the restrictive impact of legislation as compared to constitutionally guaranteed rights. In Britain, the passage of the Human Rights Act of 1999 which came into effect in 2000 gave statutory effect to the European Convention on Human Rights. It also provided that the most direct method of upholding the Convention rights is by allowing the courts to enforce them directly against public authorities including the state.

However, in the *GCHQ* case, the European Court of Human Rights (ECHR) rejected a complaint by members of the General Communications Headquarters in the UK (GCHQ) that restrictions on their union membership had breached Article 11 of the European Convention. The court said the measures were not arbitrary and thus did not violate any rights simply because restrictions on grounds of state security or public safety were permissible irrespective of whose subjective definition of "state security" and" public safety" is being applied.[46]

At another level, the dichotomy between the individual and the collective with regard to freedom of association is played out in the Webster case regarding whether it also implies freedom to dissociate. In *Young, James and Webster* v *UK* the dissenting judges considered the right to associate as concerning "the individual as an active participant in social activities" while at the same time it is "a collective right in so far as it can only be exercised by a plurality of individuals". The right to dissociate "aims at protecting the individual against being grouped together with other individuals with whom he does not agree or for purposes which he does not approve"[47].

However, such protection of the individual is not the implication of the positive freedom of association.[48] Hepple and Leader therefore argue that the argument above is fallacious[49]. Firstly, as a paid worker, one ceases to have that liberty in terms of who to work with, in which unit or on which shift. Secondly, the freedom not to associate is not a celebration of the 'closed shop' membership recruitment approach. Most importantly, this negative freedom seeks to remove the possessors of the freedom of association from the point at which the freedom is decidedly actualised[50] . One cannot realise the freedom of association practically as a lone individual. This is because, assuming one consciously excludes himself from union membership, it should still be expected that the person would enjoy any benefits won through collective bargaining, while that individual retains the right not to be forced to subscribe to a check-off system.[51]

Both the Human Rights Act and the pronouncements of the courts in the UK would suggest an unwillingness to question the primary duty of the employee to their contractual obligations rather than to a post-contractual creature such as a trade union. The

[42] *Moatsi and Another v Fencing Enterprises (Pty) Ltd* 2002 BLR 286 per Ebrahim Carsten J
[43] *Botswana Land Boards and Local Authorities V The Director of Public Service Management* CA/242004
[44] *Art. 22*
[45] Art. 6 Convention98
[46] Art.11 European Convention on Human Rights
[47] *Council of Civil Service Unions v UK (*1988) 10 EHRR 38
[48] *Young,James & Webster* (1982) 4 EHRR 38
[49] Hepple ,B *Freedom to Form and Join or not to Join Trade* Unions Freedom of Association 1993
[50] Leader ,S *Freedom of Association: A Studyin Labour Law and Political Theory* Yale University Press pp. 33-34 1992
[51] [Cap 48:01]

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problem here is a) at point of entry, the new employee undertakes to conform to certain ground rules. b) He subsequently joins a union. How is fidelity to union reconcilable with obligations under contract? The Act does not deal with this. It also does not prevent derogation from the rights of individual workers regarding disclosure of information and parameters of business and commercial transactions even after the termination of the contract.

Once more, the primacy of the common law notion of contract is extolled, forgetting that the employment contract though institutionalized, is not a basis for any normal exchange of rights and obligations. The underlying issue here is whether there is any degree of authority to unilaterally and arbitrarily derogate from fundamental rights such as that of the freedom of association. In effect, statutory provisions must not be seen as being or operating in direct contravention of rights provided for by the Constitution of Botswana.

Essential service workers like other employees should not be denied their associational rights coupled with alternatives to industrial action. Such alternatives could include compulsory arbitration. This process allows one party to refer a dispute in essential services to arbitration with or without the agreement of other parties. An arbitrator then has to determine the dispute as it would have been determined if strike action were permissible. As stated earlier, collective bargaining without leverage for both sides robs the process of the equilibrium which is essential for its success and that is why it is conventional, when the right to strike is taken away, to substitute it with compulsory arbitration. In this way equilibrium is maintained at the bargaining table.

In other words, whether administrative and managerial institutions as created are dysfunctional or function from a different ideological orientation is a contributory factor to any friction that can arise between essential service employees and those the state as the employer, refers to as " management".

VI. The Constitution, Fundamental Rights Versus Statutory Provisions

Section 13(1) of the Constitution of Botswana guarantees the protection of freedom of assembly and association and, by extension, the right to organize and collectively bargain. To this extent, it provides, inter alia, that except with this own consent, ostensibly voluntarily given, no one shall be hindered in the enjoyment of these freedoms. Translated further, it means the right to assemble freely and associate with others, to form or to belong to trade unions or other associations for the protection of their interests.

This provision captures the spirit of all the international instruments hitherto cited. To that extent therefore, there is nothing iniquitous about it. However, in sub-section 2 of Section 13, it stipulates that *nothing contained or effected under the authority of any law (duly enacted) shall be held to be inconsistent with or in contravention of the Constitution* if the purpose includes defence, safety, public order, health or morality (as shall be defined for that purpose).The same sub-section also condones and legitimises restrictions (without form or content) upon public officers and others.

However, the same sub-section of Section 13 of the Constitution of Botswana could be said to be within the expectations of Article 9 of ILO Convention 87 but not in agreement with the United Nations' Universal Declaration of Human Rights. The restrictions in this context mean those regarding assembly and association, but it is not apparent that, in Botswana, these restrictions are specifically in relation to formation and joining of trade unions as they could emanate from anything subjectively related to law, order, security and other perceived threats.

A cursory examination of this group as defined includes supervisory staff literally of all levels within an enterprise. [52]Employers, in this instance represented by the Botswana Confederation of commerce, Industry and Manpower (BOCCIM), being affiliates of the state, could, in response, welcome such developments. They, in their turn would advocate for new forms of regulation or mechanisms ensuring that their prerogatives are not unduly diluted. The state then mediates between employers and employees using legislation and structures thus created. This mediation could then assume a conscious, selective symbolic, accommodation of exogenous influences such as international labour standards. However, for these standards to take root successfully certain social preconditions must exist that are allowed or tolerated by the state and patently legitimised by the judiciary.

From December 2008 to 2012, the following are the pieces of labour related legislation in Botswana. These are, the Employment Act,[53] the Employment of Non-Citizens Act, [54] the Factories Act, [55] the Trade Disputes Act [56], the Trade Unions and Employers Organizations Act (TUEOA) [57], the Industrial Relations Code, the Workers Compensation Act[58] and the Public Service Act.[59] As indicated earlier, the germane sections of the Trade Disputes Act will be Part VI, Section 49 and the Schedule of the Act.

Section 13 of the Constitution of Botswana could be said to be within the expectations of Article 9 of ILO Convention 87 but not in agreement with the

[52] Section 14 (3) of TDA[Cap 48:02]
[53] [Cap 47:01]
[54] [Cap47:02
[55] [Cap 44:01]
[56] [Cap 48:02]
[57] [Cap 48:01]
[58] [Cap 47:03]
[59] No. 30 of 2008 [Cap 26:01]

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United Nations' Universal Declaration of Human Rights.[60] The restrictions in this context mean those regarding assembly and association, but it is not apparent that, in Botswana, these restrictions are specifically in relation to formation and joining of trade unions as they could emanate from anything subjectively related to law, order, security and other perceived threats. A prison officer in Botswana is not only excluded from membership of trade unions but associations not established exclusively for members of the Service alone[61]. With regard to the Police Service, the restrictions expressly include association that wishes to control or influence work terms and conditions within the Service[62].

These and others apply equally to members of the Botswana Defence Force. Within these contexts, it has been assumed that acceding to the terms and conditions of employment imply voluntary consent to have one's constitutional rights restricted. This, the paper contends, raises again the question about the fallacy of the freedom of contract which supposedly underpins employment relations. The legislative and practical effects given to the subjective and unrestricted interpretation of restrictions has so far yielded the following results that transcend the issue of trade unions. The question with respect to the constitution is whether any statutory body should be visited with the consequence of being absolutely hamstrung by a prejudicial exclusion from the enjoyment of the freedom of association and assembly.

In South Africa, while the NDF, NIA and SASS[63] are excluded from the scope of the LRA and BCEA,[64] the SANDF has been given the right to form and join trade unions. This was the position of the Constitutional Court in *SA National Defence Union v Minister of Defence and Another.*[65] Naturally, soldiers in the SANDF are not permitted to strike but that has not diminished their rights to associate, not as a union in the conventional sense, but to be able to collectively fight for their common welfare.

It should be noted that it has taken the Botswana Legislature almost four decades after independence to include all public sector workers, tribal administration staff and teachers under the ambit of 'employee' so as to enable them form and join unions. Hitherto, this large but extremely fragmented categories of workers, had, as per the Constitution, been excluded from forming and joining trade unions of their choice.. The relaxation of the restrictions under the 2004 amendments to the TUAEOA could be interpreted as either the latent intention of the Constitution or in its prescient wisdom, the Constitution had anticipated such developments for the future that has come[66].

On the other hand, this development, albeit in keeping with emerging international trends, calls into question what informed the provisions of the Constitution at the time. This is particularly so when one also considers the provisions under the Act dealing with restrictions on registration, membership thresholds, eligibility for office and others. This should also take into account the apparently stifling legislative environment of the past from which the country was supposed to have emerged at independence.

In the European Union, one could see, from the Government Communications Headquarters (*GCHQ)* in Britain case among others, the stand of the European Court of Human Rights(ECHR) on the position ceded to the state on how and how far to impose restrictions on segments of the society. In Botswana, there has been no direct challenge regarding the constitutionality of the exclusion from union membership per se until now. Rather, certain other sections have been challenged as unconstitutional. For example, in the *BPCWU v BPC*[67] case, the union wanted the then section 61 of the TUEOA to be declared contrary to section 13 of the Constitution of Botswana.

This section (61), now Section 48 and still intact, excluded and in effect still does, all 'members of management' from forming or belonging to the same union as other employees. The relevant provision in the current amended law, Section 48) (2) excludes 'members of management' from being represented by the same negotiating body for the other employees. It also stipulates that they may form their own negotiating body if they so wish. In interpretation, the effect is the same because, strictly speaking, within the context of unfettered rights, this is selective exclusion from unions of one's choice.

In the instant case, the union also wanted a re-categorisation of some employees out of "management" for purposes of union membership and representation. In its ruling, the Court of Appeal explained that:

- "Management" as an organizational term implies the prerogative of the employer to determine who fall into this group. Otherwise, for collective bargaining purposes, it would be between only the operating group (employees) on one hand, and stock and bond holders (owners) on the other.

[60] 1948 Articles20(2),23(4)
[61] Section 35 Prisons Act[Cap 21:03]
[62] Section 24 (1) Police Service Act Cap 21:01]
[63] National Defence Force (NDF) National Intelligence Agency(NIA), South African Secret Service(SASS)
[64] Labour Relations Act(LRA) ,Basic Conditions Of Employment Act (BCEA)
[65] SA National Defence Union vMinister of Defence and Another (1999) 20 ILJ2265
[66] See Section 13 (2)© of the Botswana Constitution
[67] Botswana Power Corporation Workers Union v Botswana Power Corporation [1999] 1 BLR 73 CA

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- The decision as to who belonged to "management" is not for the organization to make as it has already been defined within the Act.

In that case, the Judge President stated "Section 61(2) defines the expression *'member of management' for the purpose of section 61 of Cap 48:01. If any person wishes to understand the meaning of the expression ,it is to that definition that he should turn and that is so irrespective of what the Botswana Corporation Act says.''* In terms of precedent therefore, this ruling ought to have been sufficient guideline for subsequent decisions.

It is submitted that even then, the Court of Appeal missed the opportunity of examining the scope of the definition provided in the Act as at that time to test it against the spirit and letter of Section 13 (1) (2) of the constitution. By this act of omission, it deferred to the Legislature. Indeed, in organizational usage, if "member of management" as per the current but same provision [section 48 (3)] were to be fully applied, there would be few employees at any subordinate level who did not require the use of their discretion or whose work is neither routine nor clerical in nature.

VII. Statutory and Judicial Determination of a Service as 'Essential'

In South Africa, the Essential Services Committee (ESC) has, over the past fifteen years, carried out its mandate and in doing so, has, after due notice and public investigation, designated a large number of services as essential services. Among these are:

Municipal health, Municipal security , The supply and distribution of water, The security services of the Department of Water Affairs and Forestry, Fire - fighting, The services required for the functioning of Courts, Blood transfusion services provided by the South African Blood Transfusion Service,

The following services in the public sector are part of those determined as essential services:

Emergency health services and the provision of emergency health facilities to the community or part thereof , All electrical services, All safety services , All security services, and the maintenance and operation of water borne sewerage systems, including pumping stations and the control of discharge of industrial effluent into the system and the maintenance and operation of sewerage purification works

What this suggests is a transparent, on-going process openly discussed and not arbitrarily and strategically imposed measures intended to coral and harness labour formations.

In South Africa, the starting point is not notification but a determination of whether the essential services workers have or should have a right to strike at all. The right to strike for the purposes of collective bargaining is one of the fundamental rights enshrined in Section 27 of The South African Constitution. It is an extremely important right because *'If workers could not, in the last resort, collectively refuse to work, they could not bargain collectively. The power of management to shut down the plant (which is inherent in the right of property) would not be matched by corresponding power on the side of labour. These are the ultimate sanctions without which the bargaining power of the two sides would lack "credibility". There can be no equilibrium in industrial relations without a freedom to strike.'* [68]

The rationale behind collective bargaining is to maintain industrial peace and as Cheadle says: "it is one of the ironies of collective bargaining that its very object, industrial peace, should depend on the threat of conflict." The protection given to this fundamental right to strike is thus based on the functional importance of strikes to collective bargaining. As it is sometimes simply put "collective bargaining without the right to strike amounts to collective begging".[69]

The Labour Relations Act ("LRA") recognises this constitutional right to strike but subjects the right to a number of limitations. Among those limitations is a limitation which provides that no person may take part in a strike if that person is engaged in an essential service. Because the right to strike is so important, a limitation of this kind needs to be justified. To be justified it needs, among other things, to be limited. The essential services limitation on the right to strike in the LRA has not been subject to constitutional challenge and it is unlikely that it will be.

This is because it is clearly justified and properly circumscribed in its scope. The Constitution permits rights in the Bill of Rights to be limited in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[70] There is thus a need to balance the right to strike with other fundamental rights such as those to health care, food, water and social security which are also enshrined in the Bill of Rights. From the South African point of view, in order to achieve an appropriate balance, workers in essential services are conventionally excluded from the right to strike in open democracies. The position is based on the hitherto discussion of ILO provisions but from a different perspective. In this regard, the interpretation is that, though this exclusion has been sanctioned by the International Labour Organisation, it is only to a limited extent.

[68] Davie, P, Freedland, *Khan Freund's Labour and The Law* 3rd Edition 1983 p 292

[69] Brassey, M Cameron, E, Cheadle and Olivier M *The New Labour Law*Juta

[70] Section 36 (1) LRA

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The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organisation (CEACR) recommends that the right to strike should only be restricted in relation to public servants *exercising authority in the name of the State and in relation to genuinely essential services,* namely: "those the interruption of which would endanger the life, personal safety or health of the whole or part of the population"[71] As said earlier, there is the element of arbitration to determine whether a service contemplating a strike is essential. Some countries have codified this common law of interest arbitration into a statute. An important subsidiary principle which applies in such arbitration is that public sector employees should not be expected to subsidise public services. They are not second class working citizens. If the reasonable wages they should receive are such as to render the public authority unable to continue to provide the service, then that is a political problem, not one that should be reflected in an arbitral award.[72]

It would appear then that one advantage of compulsory interest arbitration is that, with a good body of arbitrators, outcomes become predictable and parties are for this reason discouraged from taking up unreasonable positions in negotiation. This in turn actually encourages negotiated settlements. Evidence from Canada and the United States shows that the outcomes determined in compulsory arbitration are very similar to comparable negotiated outcomes.[73]

Consequences of an unprotected strike include those that have potentially serious consequences for parties who take part in an unprotected strike or in any conduct in contemplation or in furtherance of such a strike. Such persons do not fall within the protection provided by the LRA of South Africa or the TDA of Botswana both of which state that persons who take part in a protected strike or in any conduct in contemplation or in furtherance of a protected strike do not commit a delict or a breach of contract by doing so.

The result is that any person who suffers a civil harm as a consequence of an unprotected strike may claim damages from a union and or workers who participated in or furthered the strike. This may be done in terms of the common law or in terms of the relevant legislation. In such instances, in appropriate contexts and as per their jurisdictions, the law gives the Labour Court or the Industrial Court or the High Court the power to order the payment of just and equitable compensation for any loss attributable to the strike.

According to Brand, actions of this kind are uncommon because once the dust has settled after a strike, employers are reluctant to "rock the boat" with court actions and the average person on the street is reluctant to take on a union in court because of the cost and delay involved.[74] In South Africa, the LRA also empowers the Labour Court to grant an interdict or order to restrain any person from participating in a strike or any conduct in contemplation or in furtherance of a strike if the strike does not comply with the provisions of the LRA.

Failure to comply with such an interdict or order is a factor which the Labour Court may take into account in ordering just and equitable compensation. The Court frequently grants such interdicts and trade unions have sometimes flouted these interdicts in contemptuous terms. Union organisers are, however, seldom summoned before Court to explain their contempt. These scopes afforded by the requisite law need revisiting in terms of the Botswana situation.

a) Definition of Essential Services under The LRA

In South Africa, unlike Botswana, labour legislation widely and clearly defines essential services in Section 213 of the Labour Relations Act (LRA) as follows:

- "A service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) the South African Police Service" This definition is openly acknowledged as being in line with International Labour Organization (ILO) recommenddations and not just a reference to nebulous principles in the name of monist legal theory.[75]

If that was all that the LRA did to define essential services there would be much uncertainty about which workers fell within the definition and which did not. In order to limit such uncertainty the LRA provides for the establishment of an Essential Services Committee (ESC) which must determine which services fall within the definition.[76] The LRA provides that the minister, after consulting the National Economic Development and Labour Advisory Council (NEDLAC) and in consultation with the minister for the Public Service and Administration must establish an ESC under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). Members of the Committee are required to have knowledge and experience of labour law and labour relations[77].

The functions of the ESC are to conduct investigations as to whether or not the whole or a part of any service is an essential service and then to decide

[71] General Survey (1983) Pars. 213-14 Also *Freedom Of Association and Collective Bargaining* ILO 1994 *par.158-159*
[72] Brand, John, *Strikes in Essential Services* Institute For Accountability in South Africa :///C./Users/ntumy/Development/Essential% 20services%20htm of 2014/06/24
[73] Ibid
[74] Ibid
[75] Par.9 P.8 per Judge President, CA Civil Appeal Case No.CACLB-043-11 IC CASE NO.IC UR 13-11 of13/03/2013
[76] Section 70 (1) a
[77] Section 70(2) b

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whether or not to designate the whole or a part of that service as an essential service. The ESC is also required to determine disputes as to whether or not the whole or a part of any service is an essential service. In addition, at the request of a bargaining council, the ESC must conduct an investigation as to whether or not the whole or a part of any service is an essential service.[78]

The LRA also prescribes the process which the ESC must follow in designating a service as an essential service[79]. In essence the ESC must give notice of an investigation and invite interested parties to submit written representations and to indicate whether they require an opportunity to make oral representations. Interested parties are then given a right to make oral representations in public. The ESC is then charged, after having considered any written or oral representations, to decide whether or not to designate the whole or a part of the service that was subject to an investigation, as an essential service.

If the ESC designates the whole or a part of the service as an essential service, then the ESC must publish a notice to that effect in the Government Gazette. Importantly, the Parliamentary Service and the South African Police Service are deemed to have been designated an essential service. The effect of this is that no investigation and determination by the Essential Services Committee is required in respect of those services. In a recent judgment of the Labour Appeal Court, the South African Police Service has been held to be confined to the service performed by members of the South African Police Service excluding other employees employed in the Service.

To date, there is no such provision in the Botswana statutes and this critical lack has been responsible for a lot of misconceptions. This state of affairs has resulted in the unilateral arrogation of a supposed right by the state to determine labour matters which, ordinarily, would have been a collective, deliberative and democratic process.

b) Essential Services under The Trade Disputes Act of Botswana

The Trade Disputes Act provides very elaborate procedures for the settlement of trade disputes generally, and of trade disputes in essential services in particular. It distinguishes between disputes of right and of interests for the purposes of what can trigger a strike and which disputes must ultimately be resolved by the Industrial Court. The labour laws of Botswana do not prohibit industrial action in any form once it is procedurally lawful, substantively valid, constitutional and protected[80].

Every party to a dispute of interest has the right to strike or lockout.[81] However, there are extensive and stringent conditions, the quasi-judicial powers of the Commissioner of Labour (COL) and the specific powers of the mediators and arbitrators so appointed.[82] In addition there is the political cum administrative oversight of the responsible minister in terms of all labour matters, real or perceived. The new definition of "trade dispute" includes a dispute between unions, a grievance and any dispute over the application or the interpretation of any law relating to employment; the terms and conditions of employment of any employee or class of employees, or the physical conditions under which such employee or class of employees may be required to work; the entitlement of any person or group of persons to any benefit under an existing collective agreement and the existence or non-existence of any collective agreement.

In addition, there are follow-up steps like dismissal, suspension from employment, retrenchment, re-employment or re-instatement of any person or group of persons/Others include recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment.[83] With regard to essential services, the relevant Schedule had, prior to the recent questionable amendment, identified the following specific areas as essential services unlike the approach adopted by the Essential Services Committee (ESC) in South Africa under the Labour Relations Act (LRA).

Air traffic control, Botswana Vaccine Laboratory, electricity, fire, and water services, transport and telecommunications services as deemed necessary, operational services of the railways, health services and the Bank of Botswana.

Relative to the ILO understanding of core essential services, some of those in the Schedule immediately become superfluous.[84] In furtherance of the minister's discretionary powers, he may invoke section 49 of the Act to and by order published in the Gazette, amend the schedule. The minister may also make statutory regulations with regard to any matters required to be prescribed under the Act.[85] The key question is whether the minister is clothed with the relevant authority to amend a core element of a statute without Parliamentary approval, bearing in mind that statutory discretionary authority is only in relation to subordinate or delegated legislation.

Secondly, assuming the amendment as gazetted was effected as a Statutory Instrument then it

[78] Section 70 (2)(c)
[79] Section 71
[80] Although the Court of Appeal claimed the Director,(DPSM) in her interpretation of the Public Service Act [Cap 26:01] of 2008 asserts a contrary view with regard to Public Sector Essential Services .Vide Par.47 of Civil Appeal No.CACLB-043-11/IC No. IC UR 13-11 of 13/03/20130 Supra.

[81] Section 39 TDA No 15 of 2004
[82] S 39,40,41,42 of No. 15 of 2004
[83] Part 1 section 2
[84] A.120 ss2 and 49
[85] s 50

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ought to have been subjected to Parliament scrutiny and approval.[86] In effect, the validity of widening the basket of essential services arbitrarily without proper justification and in contempt of both domestic law and the ILO's remonstrations creates room for concern. In simple terms, that singular act of defying the Legislature, international norms and practices and proceeding on grounds of domestic monist prerogative suggests a state in siege and a government bent on emasculating the nascent labour front.[87] Regarding legal strikes, the regulatory interventions do not and cannot *per se,* determine the lawfulness or otherwise of strikes with regard to essential services given that the procedures are deliberately cumbersome. It is therefore ironical that these fragmented unions are credited with better resourcefulness than the state and its agents in the theatre of labour relations.[88] At this point, the role of the Industrial Court becomes critical.

The role of the Industrial Court as understood, is crucial in matters related to the issue of employees, worker formations and essential services. The Industrial Court, created under the Trade Disputes Act, is vested with all the powers and rights set out in the Act as a court of law and equity.[89] The court, or any division of the court, shall have exclusive jurisdiction in every matter properly before it under the Act. There shall be an appeal to the Court of Appeal against decisions of the Industrial Court as the said Court is *ipso jure* of concurrent jurisdiction with the High Court. Whether it is so in fact is another issue.

VIII. Interpreting the Reality

The following section is germane to the position of the paper mainly as an illustration of the dynamics of the state – labour relationship in Botswana. Its other role is to provide an insight into the pivotal concern with the exploration of the internal motive force that propels the state in a given direction in its relations with other social actors such as labour. It discusses some major cases that have a bearing on the subject matter of essential services.

The first of these is the case concerning the interdiction and subsequent dismissal *en masse* of members of the listed unions for unlawful industrial action as essential service employees.

of:

Botswana Land Boards and Local Authorities Workers Union

Botswana Public Employees Union

National Amalgamated Local& Central Government& Parastatal Workers's Union

And

The Director of Public Service Management

Attorney General[90]

The second case is that of an appeal against the decision of the High Court in declaring the interdiction and subsequent dismissals above as unfair, unlawful and invalid.

The Attorney General

And

Botswana Land Boards and Local Authorities Workers Union

Botswana Public Employees' Union

National Amalgamated Local & Central Government& Parastatal Worker' Union

Kefilwe Toteng[91]

The first of the trio of cases is referred to as the 'mother of all strikes' which resulted in an appeal was heard at the High Court in August 2012. It involved the matter between:

Botswana Public Employees Union (BOPEU)

Botswana Teachers' Union (BOTU)

National Amalgamated Local & Central Government & Parastatal Workers Union (NALCGPWU)

Botswana Secondary Teachers' Union (BOSETU) as appellants or the Union

And

Minister of Labour and Home Affairs

Attorney General and the Director of the Public Service (DPSM) or the State.[92]

As per the facts of the case, the members of the aforementioned union, on 18 April 2011 embarked on a nationwide industrial action which also involved some ''essential'' service employees as well as the non – essentials such as veterinary, teaching, transport and other services. The Industrial Court, at the behest of the state, subsequently issued an interim interdict restraining participation in the strike by those workers in the essential services. This order was ignored and because it was subsequently executable, the state dismissed those essential service workers who had refused to return to work.

[86] Section 9 (1) Statutory Instruments Act [Cap 01:05]

[87] CEACR Observation Report,2011 ILO 101st Session: See below comments on amendments to the Schedule Order 2011 of15/07 2011

[88] In Civil Appeal No.CACGB-053-12/HC Civil Case No.MAHLB-000631-11 of 20/03/2013 at P.86,Par.128, the Judge president of the Appeal Court described Botswana Public sector unions as "well-funded ,sophisticated body with highly knowledgeable senior staff and the benefit of legal advice"

[89] Part 111 Section 15 (1) Trade Disputes Act No. 15 of 2004 [Cap 48:02]

[90] Court Of Appeal Civil Case No. CACLB-043-11/Industrial Court Case No. IC UR 13-11 of 13/03/2013

[91] Court of Appeal Civil Appeal No. CACGB-053-12/High Court Civil Case No.MAHLB-000631-11 of 20/03/2013

[92] MAHLB 000674-11/8/2012 Unreported

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In June 2011, the Botswana Federation of Trade Unions (BFTU) was informed by the office of the Commissioner of Labour (COL) of an impending meeting by the Labour Advisory Board (LAB) the purpose of which was to amend the Schedule listing essential services so as to include veterinary and teaching services. As per the court records, the COL made reference to the ILO definition and categorisation of "essential services" which, from the foregoing parts of the paper, was a misinterpretation of the ILO position. First, animal husbandry is not cited as an essential service and in any case, given the poor performance of the Botswana Meat Commission (BMC) and the cattle industry in terms of GDP as a whole, cattle cannot be considered as 'backbone of the economy.'[93]

An equally weak argument was proffered with regard to teaching because without it, there 'would be no education'. [94]It is common knowledge that classroom learning is not the only form of education and such strikes in any case have a target and often peter out quickly. As to be expected, a new Statutory Instrument was gazetted (SI49) on the 17 June changing the scope of the Schedule of Essential Services. It then added such ancillary services like telecommunications, transport, veterinary, teaching, diamond-sorting, cutting and selling services as core essential services' and all support services in connection therewith'

The Legislature then took steps to contain the executive intrusion into its domain by resolving to annul the said SI 49 and directing the Minister to gazette the annulment. Rather than do so, the state persisted in its advocacy of its position as above and reintroduced the same expanded basket of essential services via another Statutory Instrument (No.57). Despite this, the Court of Appeal subsequently declared the following as essential services: doctors, nurses, other specialists, support staff, caterers, grounds men cooks and others such as night watchmen [95] even when there was no provable looming disaster or' acute national disaster' as explained by the ILO [96]. This also refers to ''acute national emergency or genuine crisis situations such as those arising from serious conflict, insurrection or natural disaster.[97]

The Union then decided to challenge these developments on several grounds, in particular the validity of Statutory Instrument No. 57(SI 57). The paper has only selected a few pertinent areas and these are examined below:

a) That the Minister's powers under Section 49 of the TDA were *ultra vires* Section 86 of the Botswana Constitution because it conveys the impression that the Legislature, contrary to the Constitution, purported to relinquish its legislative authority and oversight and by so doing, confer unconstitutional power on the Executive to amend an Act of Parliament.

b) That by placing a limitation on the right to strike, which must be seen to be reasonably justifiable in a democratic country,, the Minister's amendment of Section 49 is *ultra vires* Section13 of the Constitution.

c) That the amendment is *ultra vires* Section 49 of the TDA which, on proper reading, does not empower the Minister to unilaterally publish an order whose effect is incompatible with Botswana's international law obligations as a recognised member State of the ILO that has ratified the Conventions relevant to this case.

d) That Botswana's membership of the ILO and ratification of its Conventions gives rise to a legitimate expectation by workers that the Minister will not include services outside the ILO standards, and any such act shall be susceptible to review.

Before making his orders, the Judge referred to a recent report by the ILO Committee of Experts on Application of Conventions and Recommendations (CEACR, 2011)) about events in Botswana. Of note is the following observation: "*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 request the Government to amend the Schedule accordingly.*"[98]

In his decision, the learned Judge ordered as follows;

- That Section 49 of the Trade Disputes Act No.15 of 2004 is incompatible with the Constitution of Botswana and is accordingly invalid.
- That the Trade Disputes (Amendment of Schedules) Order contained in Statutory instrument of 2011(No. 57) is invalid and of no force or effect.

The paper contends that the issues raised in this 98 page judgement need no further interpretation. One could be excused for concluding that Indeed an unexpected development did occur. On 20th March 2013, an appeal case saw the decisions of the High Court *a quo* was thrown out of the window. This was a clear message as to the direction of the future and portends more interesting developments along the

[93] Par 14 p.4
[94] Ibid
[95] Par.140pp 97-98 Civil Appeal No.CACGB-053-12 Op. Cit. supra
[96] ILO 1996d para.527
[97] ILO 1994a para.152

[98] Op Cit The BOPEU Case p.78 par 225

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trajectory of the emancipation of labour formations in Botswana[99].

IX. Conclusion

It is clear that since its inception, the Industrial Court in Botswana has acted more as an extension of the state bureaucratic adjunct in its supportive role of state labour regulatory measures. Though a higher court of judicature, it has been more of an appendage to the senior courts of the judicature. Similarly, the Appeal Court has done its best to defend state intervention and parochial interpretation of labour legislation. To date, the decisions affecting how the laws are interpreted and applied on the ground have not been addressed resulting in the state having its sway in how it interprets and applies labour relations in Botswana.

Indeed, there are on-going efforts to harmonise the various statutes that have segregated particularly public sector employment law into petty fiefdoms overseen by bureaucrats. This amalgamation of regulatory mechanisms governing the public service is crucial in order to give practical effect to ILO engineered reforms. However, this is also an indication of the problems caused by the provisions in the Constitution allowing derogation. The conclusion to be drawn therefore is that while the Legislature reserves the right to exclude some segments of workers as it might deem fit from the basket of the freedom to strike on one hand and on the other hand prescribes modalities for industrial action for other employees, its selections and scope run the risk of unjustifiably stifling the rights envisaged under Section 13 of the Constitution of Botswana.

In its overall effect, labour legislation and policy formulation in Botswana as an evolving process is still essentially elitist and prescriptive rather than co-regulatory. This is why one hopes the case above will set the trend in asserting the intervention and guidance of the judiciary. Secondly, the requirements for lawful strikes by essential services is crafted so that a lawful strike is not realizable. There is no sub-section 4 as referred to in Section 45 which is necessary to legalise the procedures required for contemplated strikes. The said reference needs to be either completed or deleted and ideally, a harmonised procedure adopted for both essential and non-essential services.

The industrial relations scene in Botswana can best be summarized as prescribed and regulated stability. Tripartite structures are essentially symbolic as any union official who attends such meetings would attest to. Institutional mechanisms are largely advisory as they are mainly given statutorily prescribed roles. Their membership reflects the state's leadership position and subjective and selective empowerment of the social partners particularly organized labour. Just like in the colonial past, the centrality, dominance and arrogated leadership by the state in all spheres including labour matters are still very evident. Contrary to expectation, it would appear that Section 23 of the Employment Act [Cap 47:01] regarding automatically unfair dismissals is being flouted to victimize employees for their union activities.

At another level, it is apparent that there is a continuous wage disparity even in the public sector. This is in the face of increasingly high cost of living. This is occurring in tandem with evident, differentiated and structured conspicuous consumption and accumulation by some segments of society. This could create socio-economic cleavages that might manifest themselves on the shop floor by way of episodes of periodic display of the synergic force, form and trajectory of worker sentiments.

Another worrying development is that, since the recent amendments to the labour laws, there has been a multiplicity and fragmentation of worker formations. This is remarkable because, hitherto, the Registrar of unions had been vigilant in exercising the discretion not to register or de-register to unions to avoid this very situation of potential duplication, waste of resources and dissipation of worker collective capacity that is now prevalent. There seems therefore to be an emasculatory strategy behind this liberalization.

Botswana may indeed be an economic success story. However, for the success to permeate society, there must be seen to be an inclusiveness particularly with regard to the processes for labour legislation and policy formulation. This is because, the regenerative labour force has, along the historical continuum, played a dominant role in wealth creation. Yet, forty odd years after independence, domestic workers and employees in agricultural undertakings have only just been brought under the protective ambit of minimum wage law and policy.

[99] *Trade Disputes Bill No. 12 of 2015* (Published in the Government Gazette on 22 June, 2015). In Part V11 Section 46 (1), a new list of essential services is being enacted. Included are: Air Traffic Control Services, Botswana Vaccine Laboratory Services, Bank of Botswana, Diamond Sorting, Cutting and Selling Services, Electricity Services, Fire Services, Health Services, Operational and Maintenance Services of the Railways, Sewerage Services, Water Services, Veterinary Services in the Public Service Teaching Services ,Government Broadcasting Services, Immigration and Custom Services and services necessary to the operation of any of the foregoing services. In Sub-section 2, the Minister, after consultation with the Board, by Statutory Instrument published in the Gazette declare any service not referred to in Sub-section (1)essential in the event the interruption of the service which, as a result of the duration of strike, endangers life, safety or health of the whole or part of the population.

Section 47 proceeds to seal the fate of workers in those services by providing that :"no employee in essential services shall take part in a strike and no employer in essential services shall take part in a lockout"

See (a) Motaung v National University of Lesotho and Others (CIV/APN/182/06 (b) Lerotholi Polytechnic and Another v Lisene Case No. LAC?CIV/O5/2009 (c)Minister of Labour and Employment and Others v Ts'euoa (C of A (CIV) 1/2008

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Given global economic trends, the worker may yet be called upon again to make sacrifices for the nation. The generality of workers demand a living wage as understood by them. They also feel a sense of privation and deprivation. The challenge therefore lies not in nominal, incremental wage adjustments. It lies in the collective transformation of labour legislation and policy into engines of redistribution of the wealth that the workers help to create.

By way of recommendation, the time for an omnibus definition of a public servant or an employee in the public service in contradistinction from the private sector has come. Basically, an essential service worker should be seen as an employee who possesses the power to exercise authority in the name of the state, not the power to discipline or merely supervise work and definitely not the presumption that each can be a threat to public health, security or welfare. For this to be meaningful, all stake holders must constantly review the realities that apply via the mechanism of an Essential Service Committee (ESC). This cannot be done under the oversight of a Minister as a political appointee, an employee, a manager and also a supervisor.

The Committee should exercise the power to designate essential services as in South Africa under the LRA and its composition should, ideally, be from the Ministry of Labour and Home Affairs, parties to the Bargaining Council and the Directorate of Public of Public Services Management (DPSM). The first objective should be a Minimum Service Level Framework Agreement as part of any Bargaining Council negotiation process. The functions of the Committee should include the ratification of Essential Service Agreements and the enforcing of Minimum Agreements. Also to be included should be ways of identifying problems, resolving them and providing guarantees against engaging in unnecessarily disruptive industrial action.

Naturally, problems would be encountered primarily because both essential and non-essential employees fall within the same bargaining unit whose interests are collectively pursued by the same union. Employers find it easier to band all employees together because public sector workers easily qualify as essential employees who can be easily restricted or even prohibited from going on strike. In essence, the best practicable approach is via bargaining and negotiation for the minimum service agreement.

What Botswana needs now is not a combative and confrontational labour legislation and policy environment founded on power and coercive authority on one hand and a fragmented, confused labour sector on the other. It needs a collaborative and therefore synergic match along the long road to mutually beneficent emancipation within a developmental and democratic system.

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