

**Labour Law Reforms that Support Decent Work:
The Case of Southern Africa**

Evance Kalula, Ada Okoye Ordor and Colin Fenwick

ILO Sub-Regional Office for Southern Africa

Harare, Zimbabwe

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Foreword

Decent work summarizes the different dimensions of work, including employment and its quality, rights at work, representation and voice, and social protection. All of them emphasize the contribution of work to production and income of the individual, as well as social integration and self-fulfilment. The role of ILO constituents, that is, government, business and labour in incorporating decent work goals into national development strategies are particularly critical to the decent work agenda. ILO instruments, such as conventions, recommendations and declarations are normally domesticated in national laws.

This paper examines certain labour law reforms in Southern Africa that support decent work. The paper starts by identifying cross-cutting labour issues across the SADC region, and goes on to describe how recent and ongoing law reforms in a number of countries in the region are working to address decent work priorities. The aim is to identify those positive developments in law reform that have the capacity to strengthen decent work country programmes. The discourse highlights certain dynamics in the implementation of labour law reform. The authors argue that in earlier research on labour markets in Southern Africa, ‘...too little attention has been given to the functioning and characteristics of labour markets and their institutions as areas and agents for change’ in the region. They present a broader research agenda that seeks to address this gap by exploring the capacity of labour law as a change institution and process to promote decent work. From a general overview that brings out labour issues that have a bearing on the decent work agenda, the paper proceeds to specific country studies. Each country section reflects one or more aspects of these shared experiences occurring within varying developmental contexts. Furthermore, the paper challenges those countries whose legislative reforms are lagging behind to carry out reforms and meet the sub-regional expectations.

As ILO, we would like to express our appreciation to Professor Kalula, Dr Ador and Dr Fenwick for this important work and for putting across their findings and recommendations.

Tayo Fashoyin
Director
ILO Sub-Regional Office for Southern Africa

1. Overview

Under the decent work agenda the goal is ‘not just the creation of jobs, but the creation of jobs of acceptable quality’.¹ A number of factors and phenomena need to be addressed if the quality of existing employment and new jobs in Southern Africa is to become acceptable. The implicit cross-cutting nature of these issues in Southern Africa is captured in the following observation by Torres:

‘Southern African countries face many of the same issues in their increasingly globalized economies. They share similar characteristics in their labour markets and confront many of the same issues in their relations with the international trade regimes and financial institutions like the World Bank and the IMF. They face similar problems of unemployment and are confronted with high rates of poverty within the labour markets. They ponder over similar challenges of informal versus formal sector development, and share the same questions and dilemmas as to skills development, flexibility and restructuring of work. Migration, HIV and poverty compose different, but yet shared, concerns. It is not surprising then, that along with these similar problems and challenges, Southern African countries are now also beginning to regard regional co-operation as a new strategy for economic development internationally.’²

These factors are considered in this section.

Regional Integration and Labour Migration

The Southern African sub-region has no clear migration policy. Presently, key reasons for labour migration include large differentials between SADC member-states in terms of wages, standards of living and unemployment rates and political upheaval.³ Moreover, globalization has led to the growth of regional economic and political integration. Southern African countries being members of many of these bodies (COMESA, SACU, AU and WTO, for example) has affected national labour in key ways. Even though countries in the region are unequal in economic strength, integration often brings with it the adoption or imposition of a common external tariff, which often translates into an internal effort to keep industrial wages as low as possible.⁴ This also limits the capacity of individual countries to protect local industries by imposing their own tariffs, which significantly shapes industrialization policies in ways that may not necessarily be in the interest of workers. Often, countries with a lower economic strength are left with little option but to pursue export-driven industrialization policies, even if this is not their primary industrial need.⁵

¹ ‘Decent Work’, Report of the Director-General, the International Labour Conference 87th Session, 1999, Geneva: International Labour Office, p. 4.

² Torres, op. cit., p. 18.

³ J. Crush et al., ‘Migration in Southern Africa’, paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, University of Cape Town, 2005, p. 6.

⁴ Colin Fenwick, Evance Kalula and Ingrid Landau (2007), ‘Labour Law: A Southern African Perspective’, Geneva: International Institute for Labour Studies, Discussion Paper, pp. 15-16.

⁵ Colin Fenwick and Evance Kalula, ‘Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives’, *International Journal of Comparative Labour Law and Industrial Relations*, (2005) 21(2), p. 213.

Labour Market Transitions

A key challenge to the capacity of labour law to provide for decent work in Southern Africa is the traditional, but now inadequate, reliance on the standard employment relationship as the focus of protective labour legislation. Casualization and externalization have created varying forms of triangular employment that pose a challenge to workers' protection in Southern Africa. As these phenomena change the nature of employment, they remove many workers from the ambit of labour law protection.⁶

Labour Institutions and Law Reform⁷

Many labour institutions lack the capacity to do the job assigned to them by law. These include trade unions, courts and labour inspectorates. This capacity limitation relates to sufficient qualified personnel, finances and other resources. Labour inspectorates, for example, lack qualified personnel and resources such as adequate equipment and transport facilities. This is compounded by poor staff motivation and limited career prospects for inspectors. Low levels of knowledge of the law, corruption in labour standards enforcement, high levels of unemployment and the lack of adequate social security all increase the pressure on workers to ignore rather than report instances of non-compliance by their employer.

The limited role played by courts in labour law development is the result of a combination of factors, some of which are due to an acute lack of capacity in terms of qualified personnel and resources, both of which slow down court processes. With the exception of South Africa, many other courts in Southern African countries are limited by law to dispute resolution functions and have stunted powers when it comes to the development of labour law. To add to the problem, failure to report court decisions regularly also hampers the development of a coherent body of jurisprudence. In all, while labour law reform may be put forward as having the capacity to create jobs and facilitate economic growth, high labour standards tend to make hiring unattractive, thus leading to unemployment.⁸

Unemployment and Income Inequality

The problem of unemployment and inequality in income is pervasive in Southern Africa. This is significantly due to the low rate of economic growth in the region, which in 2003 was reported as averaging 2.7%. This growth is not equally accounted for by various countries, as disparities exist between the growth rates of individual countries. For example, Mauritius and Botswana currently record the highest levels of economic growth in the region. This position was previously occupied by Mozambique, Malawi and Tanzania with growth rates of 7%, 5.9% and 5.5% respectively in 2003.⁹ The region's unemployment rate is estimated at about 30 to 40%; in South Africa this is partly due to the steadily increasing demand for skilled labour.¹⁰

⁶ Fenwick et al., op. cit. pp. 19-22.

⁷ This is incisively discussed in Fenwick et al. (2007), op. cit., pp. 23-6.

⁸ Ibid., p. 16.

⁹ Ibid.

¹⁰ H. Bhorat, 'The Labour Market in Post Apartheid South Africa: A Brief Overview', Development Policy Research Unit, Policy Brief, University of Cape Town, p. 6. See http://www.commerce.uct.ac.za/Research_Units/DPRU/PBriefsPDF/PolicyBrief2-2004.pdf, accessed on 6 August 2007.

HIV and AIDS and the workplace

There are several distinct dimensions to the challenges posed by the HIV and AIDS pandemic. First is the attitude to employees and job-seekers who are identified as being HIV-positive. In many SADC jurisdictions, courts have not intervened with clear-cut authorities to establish the rights of people living with HIV and AIDS. Other challenges include the increase in child-headed households as a direct result of loss of parents and guardians to HIV and AIDS. This in itself presents a growing challenge to the efforts to eradicate child labour. Another issue worthy of note is that critical changes in the way employers source labour, typified by casualization and externalization, are properly informed on the need to deflect the toll of an HIV-embattled workforce on business.¹¹ Combined with the macro effect of a reduction in labour supply and a depletion of skilled labour, this constitutes a problem of serious proportions.

Social Protection

Social protection is an important pillar in the realization of the Decent Work Agenda in Southern Africa. While the sub-region continues to make progress towards democratic governance, notable setbacks notwithstanding, it is also recognized that social inclusion is imperative.¹² The high level of poverty is clearly worsened by social exclusion and inadequate social provision. Large numbers and significant categories of people in SADC countries are excluded from social security systems, such as they are.¹³ Most countries' social security systems only cater for the whole or part of the formally employed, so marginalizing those out of work, the self-employed and those in the informal sector.¹⁴ The impact of HIV and AIDS on child-headed households is now widespread, stifling attempts to deal with poverty and deprivation effectively.

Nevertheless, developments aimed at improving social protection have occurred at two levels: sub-regionally across SADC and in terms of individual countries. At the sub-regional level, the adoption of the Charter of Fundamental Social Rights in SADC is the key development. The Charter, adopted in Dar-es-Salaam on 5 August 2003,¹⁵ is an ambitious document that clearly underpins the need for protection, particularly of workers and vulnerable groups, and seeks to establish harmonized programmes of social security in the sub-region.¹⁶ Its provisions aim to extend social protection to both the employed and unemployed. Article 10, the lead article, provides that:

'SADC member states shall create an enabling environment that every worker shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance.'

¹¹ Paul Benjamin, 'Workers' Protection in an Increasingly Informalised Labour Market: The South African Case', paper presented at the Workshop on 'A Decent Work Research Agenda for South Africa' jointly organized by the International Institute for Labour Studies (IILS) ILO; Institute of Development and Labour Law, University of Cape Town (UCT); Sociology of Work Unit (SWOP), University of the Witwatersrand and the Faculty of Law, University of Cape Town, 4-5 April 2007, p. 4.

¹² Marius Olivier, Evance Kalula and Linda Jansen van Rensburg, 'Social Protection, Poverty Alleviation and Social Security in the SADC Region: the Need for Developing a Co-ordinated Social Security Paradigm' in Proceedings of the Third IIRA African Regional Congress, 5-8 March 2002, Cape Town, South Africa, p. 329.

¹³ Op. cit., p. 330.

¹⁴ Ibid.

¹⁵ ELS.MSP/2005/4.2.5 Final version adopted 5 August 2003.

¹⁶ Olivier et al., (2002), op. cit., p. 339.

In specific terms, the Charter requires that there be equal treatment of men and women as regards employment and social protection. Significantly, the Charter requires member states to develop reasonable measures to enable women to reconcile their occupational and family obligations.¹⁷ Similarly, the protection of children and young people is emphasized.¹⁸ The protection of the elderly is also of central importance. The concern with retirement is in respect of those with pension benefits and those without.¹⁹ The Charter also seeks adequate social assistance to cater for workers' basic needs, medical care included.²⁰ Other categories that it specifically identifies are mothers and persons with disabilities²¹, the formers in terms of maternal leave.²² Minimum requirements and their harmonization are envisaged in the area of paid maternity leave and occupational health and safety protection.

Two of the Charter's significant expectations do need to be mentioned as they are relevant to the implementation of the Decent Work Agenda. The Charter places the responsibility for the implementation of its provisions on national tripartite institutions and regional structures.²³ The Charter also requires member states to take appropriate action to ratify and implement ILO instruments with priority being given to core Conventions.²⁴ The search for enhanced social protection is also apparent in individual countries' efforts to reform and improve social security measures and institutions. No less than five countries, namely, South Africa, Namibia, Tanzania, Mauritius and Zambia, have embarked on heightened programmes to improve social protection in various ways through normative and institutional reform.²⁵

In spite of SADC sub-regional member states' willingness to improve social protection, considerable challenges remain to be overcome in the other areas relevant to the objectives of the Decent Work Agenda. The most daunting of such challenges include social exclusion precipitated by high levels of poverty and the impact of serious diseases such as Ebola and HIV and AIDS.²⁶ These challenges fly in the face of recent ILO suggestions that only 2% of GDP is needed to provide reasonable basic social protection.²⁷ That there is an active search for common approaches is clear. The Decent Work Agenda thus reinforces the need for effective policies and institutions.

SADC Capacity-Building Co-operation

In 1999, a SADC labour conference was convened under the auspices of its Employment and Labour Sector (ELS) in partnership with the ILO/Swiss Project for the Prevention and Resolution of Conflicts and the Promotion of Workplace Democracy. It featured extensive discussions on three themes: minimum standards, collective bargaining and

¹⁷ Article 6(c).

¹⁸ Article 7.

¹⁹ Article 8(a).

²⁰ Article 8(b).

²¹ Article 9.

²² Article 11(a).

²³ Article 6(1).

²⁴ Article 5.

²⁵ See for instance, discussion of various reform efforts in Olivier et al., *Introduction to Social Security*, pp. 191-2; Kalula and Carolus, 'Labour Market Regulation Employment Promotion and Social Protection in the SADC Region, Prospects for Developing Common Regulatory Approaches', 2005.

²⁶ Olivier et al., 2004, p. 2002.

²⁷ Assante Diop, Paper to FES Joint Workshop, World Social Forum, Nairobi, January 2007.

dispute prevention and resolution.²⁸ The conference precipitated a number of developments that have had a positive influence on the capacity of labour market processes in Southern Africa.

For example, the ILO/Swiss Project for Regional Conflict Management and Enterprise development in Southern Africa trained about 180 people in mediation and arbitration through the postgraduate diploma programme in dispute resolution.²⁹ The countries covered by the project were Botswana, Lesotho, Mozambique, Namibia, Swaziland and Zimbabwe. In each country institutions involved included the Ministry of Labour, national union federations, national employer organizations and selected universities. The project formed part of a wider initiative undertaken by the ILO/Swiss project in these countries to reform labour law and introduce modern and effective dispute resolution arrangements. The result of this project was a significant boost to dispute resolution capacity in the participating countries and a broader understanding of dispute resolution challenges in SADC countries:

*'All participating countries experienced relatively volatile labour markets and poor dispute resolution capacity. All desired greater labour market stability, to attract investment and stimulate growth and create jobs. All recognized the importance of extending access to industrial justice through effective dispute resolution machinery. The creation of a skilled cadre of suitably qualified dispute resolution practitioners would make a material contribution to these objectives.'*³⁰

Another intervention under the ILO/Swiss Project for Regional Conflict Management and Enterprise Development in Southern Africa includes the 'Dialogue-Driven Performance Improvement in the Clothing and Textile Sector in South Africa.' This project sought to improve the performance of mediators and arbitrators to promote sustainable growth in enterprises involved in the project. This would provide employment to the predominantly rural female workforce and so enhance access to healthcare in an area with a high incidence of HIV and AIDS. The project demonstrated that performance improvement can be achieved through a combination of implementing good practice and developing skills, underpinned by a healthy labour-management dialogue at enterprise level. This, in turn, would help to shape industrial policy around performance improvement.³¹ The report on the Project to Advance Social Partnership and Promote Labour Peace in South Africa (another ILO/Swiss project) observed that 'respect for procedure has increased dramatically and unprocedural industrial action has virtually been eliminated from the South African industrial relations landscape. Settlement of disputes by conciliation is in excess of 70% and arbitrations are completed on average within 120 days from date of referral to date of award.'³²

²⁸ See Communiqué of the Southern African Development Community (SADC) Labour Relations Conference Held on 13-15 October 1999, held in Johannesburg, South Africa, p. 1.

²⁹ See Summary Report entitled 'Educating for Effective Dispute Resolution in Southern Africa', ILO/Swiss Project for regional conflict management and enterprise development in Southern Africa, RAF/03/04/SWI, Pretoria, 2006).

³⁰ Ibid., p. 2.

³¹ Summary Report titled 'Dialogue Driven Performance Improvement in the Clothing and Textile Sector in South Africa', ILO/Swiss Project for regional conflict management and enterprise development in Southern Africa, supra, p. 3.

³² Summary Report titled 'The ILO Promoting Labour Peace and Democracy in Southern Africa', ILO/Swiss project to advance social partnership and promote labour peace in Southern Africa, RAF/99/M10/SW1 Pretoria, 2006 p. 1.

Interventions such as the above ILO/Swiss Project serve to build the capacity of employment establishments to observe the law. They also foster collaboration between commercial enterprises and employees in order to attain the protective and developmental intent of the law.

The dispute resolution mechanisms established in various Southern African countries, typified by the Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa, are now collaborating at regional level to establish the Southern African Dispute Resolution Forum. The aims of the Forum are to promote co-operation on training and technology transfer and to stimulate debate on how to entrench and sustain good practice in dispute resolution in the Southern African region. The CCMA model has already driven the development of dispute resolution mechanisms and institutions in Botswana, Lesotho, Mozambique, Namibia Swaziland and Zimbabwe.³³

'Improving Labour Systems in Southern Africa' (ILSSA) is another ILO initiative that partially overlaps with the ILO/Swiss project in that its coverage of jurisdictions has focused on similar efforts in labour law reform. The project covers six countries – Botswana, Lesotho, Malawi, Namibia, Swaziland and Zambia – and has procured and provided technical assistance in the reform of labour legislation. The basis of intervention has clearly been driven by decent work agenda goals. Thus, the labour reform underway in Lesotho and Malawi, for example, dwells on what ILO supervisory bodies have identified as challenges in the implementation of ratified Conventions. Major issues such as child labour, health and safety at work and dispute resolution have been tackled in the proposed labour law reform.

Civil Society Collaborations

Different forms of civil society associations – which are distinct from trade unions, but sometimes mutate to form them – have emerged around the employment scene. Some are made up of people on the peripheries of formal systems of employment, such as self-employed micro-entrepreneurs, employees who have been laid off and atypical employees such as home workers.³⁴ Other forms include formal non-governmental organizations (NGOs) that the ILO has recognized as valid counterparts in international co-operation programmes:

*NGOs have been behind many voluntary initiatives that address corporate citizenship and workers' welfare, such as codes of conduct and social labelling. Successful NGOs display strength, flexibility and imagination. They have their drawback; their action may be sporadic, their representation uncertain, their life-span limited and their funding unstable. The ILO has to support ways in which its constituents can work more effectively in partnership with these groups to pursue shared objectives. Closer links with civil society, if well defined, can be a source of great strength for the ILO and its constituents.'*³⁵

³³ See 'Thematic Evaluation Report: Strengthening Institutions, Processes, Legal Frameworks and Capacity of Tripartite Constituents for Tripartism and Social Dialogue', ILO Committee on Technical Co-operation 289th Session GB.289/TC/1 March 2004, p. 9, accessed at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/tc-1.pdf> on 18 October 2007. See also Summary Report titled 'The ILO Promoting Labour Peace and Democracy in Southern Africa', ILO/Swiss project to advance social partnership and promote labour peace in Southern Africa, supra, p. 3.

³⁴ 'Decent Work', Report of the Director-General, the International Labour Conference 87th Session, 1999, Geneva: International Labour Office, 1999, p. 39.

³⁵ Ibid., pp. 39-40.

The ratification and implementation of core ILO Conventions are important yardsticks with which to measure commitment to the decent work agenda. Although there are varying levels of implementation, it is clear that, as a sub-regional grouping, SADC countries are indeed committed to core labour standards that enhance the decent work agenda's goals. Those shortcomings that persist relate to the endemic lack of capacity caused by resource constraints and institutional inadequacies. Table 1 shows the pattern of ratification of the fundamental international labour standards by those Southern African countries covered by the ILO Sub-Regional Office for Southern Africa in Harare (SRO-Harare).

Table 1 The ratification of core ILO Conventions by countries covered by the ILO Southern Africa SRO, including month and year of ratification.

Country	Convention No.	Forced Labour		Free Association		Discrimination		Child Labour	
		C.29	C.105	C.87	C.98	C.100	C.111	C.138	C.182
1 Botswana		6/97	6/97	12/97	12/97	6/97	6/97	6/97	1/2000
2 Lesotho		10/66	6/2001	10/66	10/66	1/98	1/98	6/2001	6/2001
3 Malawi		11/99	11/99	11/99	3/65	3/65	3/65	11/99	11/99
4 Mozambique		6/2003	6/77	12/96	12/96	6/77	6/77	6/2003	6/2003
5 Namibia		1/95	1/95	11/2000	11/2000	-	11/2001	11/2000	11/2000
6 South Africa		3/97	3/97	2/96	2/96	3/200	3/97	3/2000	6/2000
7 Swaziland		4/78	2/79	4/78	4/78	6/81	6/81	10/02	10/02
8 Zambia		12/64	2/65	9/96	9/96	6/72	10/79	2/76	12/01
9 Zimbabwe		8/98	8/98	4/03	8/98	12/89	6/99	6/2000	12/2000

The next section brings out aspects of labour law reforms on decent work in specific countries in Southern Africa starting with South Africa – a good example of progress in the identification of issues affecting the decent work agenda.

In the context of Southern Africa, it is not always easy to categorize the developments in labour relations and labour law under the four pillars of the decent work programme as they are not taking place within any pre-determined framework. Moreover, each aspect discussed throws up issues of decent work, some clear, others nuanced, not all of which can be entirely accommodated within this research paper. For this reason, country sections will identify some internal trends and describe developments in labour law that have the potential of promoting decent work.

2. South Africa

Labour Market Transitions

The term ‘labour market transitions’ is used here in the dual sense of employees’ transition from one sector of employment arrangement to another and transitions by employers from one system of sourcing labour to another. These include the labour market phenomena described as casualization, externalization and informalization. As Benjamin observes, employee transitions between formal employment, informal sector employment and unemployment are particularly pronounced among low-wage workers.³⁶ The main thrust of the decent work discourse in South Africa is informalization and the growth of atypical forms of employment characterized by casualization and externalization.

Casualization refers to the ‘displacement of standard employment by temporary or part-time employment or both’, while externalization refers to ‘a process of economic restructuring in terms of which employment is regulated by a commercial contract rather than by a contract of employment.’³⁷ Informalization refers to ‘the process by which employment is increasingly unregulated and workers are not protected by the labour law.’³⁸ These changes in work relationships are fuelled by several factors, including the economic toll of HIV and AIDS on businesses in terms of reduced levels of productivity, high rates of absenteeism and increased health insurance costs, to name a few. Significantly, the post-apartheid labour law framework has retained the standard employment model in its protective provisions. Meanwhile, research-led evidence shows that the growth of non-standard employment has eroded the quality of labour protection, making a reappraisal of labour policy and law imperative.³⁹

To address the challenge of casualization and externalization of labour, the South African government amended the Labour Relations Act of 1995 (LRA) and the Basic Conditions of Employment Act of 1997 (BCEA), introducing a rebuttable presumption that a worker is an employee if any one or more of a listed number of factors is present, irrespective of the nature of the form of the contract. However, it is felt that by introducing an earnings threshold to the category of workers covered, and by making the presumption rebuttable by the employer, the presumption was divested of much of its usefulness to the worker. As stated by Theron and Godfrey, ‘If the factors introduced are valid indicators of an employment relationship, they must hold for employment relationships of any kind.’⁴⁰

³⁶ Benjamin, *op. cit.*, p. 8.

³⁷ Benjamin, *op. cit.*, p. 5.

³⁸ *Ibid.*

³⁹ Benjamin, *op. cit.*, pp. 4-7, cites research by Department of Labour, Theron, Lund and Ardington, Valodia et al.

⁴⁰ Jan Theron and Shane Godfrey, ‘The Shift to Services and Triangular Employment: Implications for Labour Regulation’, paper presented at the ‘Workshop on: A Decent Work Research Agenda for South Africa’ jointly organized by the International Institute for Labour Studies (IILS) ILO; Institute of Development and Labour Law, University of Cape Town (UCT); Sociology of Work Unit (SWOP), University of the Witwatersrand and the Faculty of Law, University of Cape Town, 4-5 April 2007, p. 15.

Further, Section 198 of the Labour Relations Act recognizes a temporary employment service (TES) as the employer of a person who provides services to a client.⁴¹ Further, the TES and its client are both jointly and individually liable if the TES contravenes the terms and conditions of employment provided for in various sources, including a collective agreement, a binding arbitration award, provisions of the BCEA and a wage determination.⁴² The Employment Equity Act (1998) (EEA) goes further to provide that a TES employee who provides services to a client indefinitely or for more than three months is deemed the client's employee and, as a result, the client may be held liable for unfair discrimination.⁴³ However, the client's liability does not extend to the termination of employment.

It has been emphasized that the effective extension of protection must be informed by an appreciation of the diversity of forms of work within the contemporary labour market.⁴⁴ In this regard, a number of distinct categories of workers, defined by diverse labour relationships, are identified as follows:

- i. Workers within formal employment who have inadequate protection.
- ii. Workers employed through triangular arrangements (i.e., three-dimensional work relationships) or in outsourced work.
- iii. Workers employed by informal businesses.
- iv. Self-employed workers.
- v. Dependent contractors employed within the formal sector.⁴⁵

Labour Migration

With South Africa's position as the most developed and prosperous economy in the sub-region, it is thus the primary destination for labour migrants, both formal and informal. Historically, migration to South Africa for mining and commercial agricultural activities has been from Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe.⁴⁶

Recent research on labour migration in South Africa has concluded that internal migration is beneficial to both the sending and the receiving location if it is temporary, otherwise social consequences for the households that lose principal members are severe.⁴⁷ Some of the direct benefits are the economic rewards and the skills-transfer it promotes, while an indirect benefit is the remittance of ideas and positive influence, which are described as political remittances.⁴⁸ Undocumented migrants are mainly to be

⁴¹ Labour Relations Act, s.198(2).

⁴² LRA, s.198(4).

⁴³ EEA s.57(1).

⁴⁴ Benjamin, op. cit., p. 1.

⁴⁵ Ibid.

⁴⁶ Fenwick et al., p. 14.

⁴⁷ Khayaat Fakier, 'The Internalisation of the South African Labour Markets: The Need for a Comparative Research Agenda', paper presented at the Workshop on 'A Decent Work Research Agenda for South Africa' jointly organized by the International Institute for Labour Studies (IILS) ILO; Institute of Development and Labour Law, University of Cape Town (UCT); Sociology of Work Unit (SWOP), University of the Witwatersrand and the Faculty of Law, University of Cape Town, 4-5 April 2007, p. 13.

⁴⁸ Fakier, op. cit., p. 13.

found in insecure forms of work. Meanwhile, offshoots of small enterprises owned by migrants include job creation for South African workers and the expenditure of up to 50% of their earnings within South Africa.⁴⁹

Skills Development and Unemployment

The Skills Development Act (1998) (SDA) provides for learnerships and internships. As these are largely carried out within employment relationships, they do not create much room for the unemployed. In particular, those who cannot present any proof of previous work experience find it particularly difficult to acquire necessary skills.⁵⁰ Additionally, no provision is made for unemployment insurance if an employee has to leave employment in order to acquire further training, as employees who resign are not covered by this Act. As Benjamin points out, this hampers job mobility and prevents employees from undergoing training that may enable them to become self-employed.⁵¹ These interrelated situations present a real challenge to the skills-development, job security and job-creation ethos of South African labour law.⁵²

HIV and AIDS

Among the key challenges facing the decent work agenda in South Africa is HIV and AIDS. Currently, South Africa is reported as having the most extensive legislative provisions that protect the rights of people living with HIV and AIDS in and outside the employment context.⁵³ Principally, the provisions of the Labour Relations Act on unfair dismissal can be appropriated to cover dismissal on grounds of HIV status by virtue of s187(1)(f) LRA as well by the decision in *Hoffmann v South African Airways*⁵⁴, which extended the grounds of discrimination prohibited by the Constitution to include those that are analogous.

In 2000, NEDLAC published a Code of Good Practice on Key Aspects of HIV and AIDS and Employment. This Code provides guidelines for employers, employees and trade unions that are designed to prevent unfair discrimination against HIV-positive employees, manage HIV and AIDS within the workplace and foster co-operation at various levels. The Code does not, however, have any binding force and employers and employees and their respective organizations are merely encouraged, not compelled, to follow it.⁵⁵

On the other hand, the Employment Equity Act includes a person's HIV status as a prohibited ground for discrimination. Employers are thus prohibited from demanding that employees and job applicants undergo HIV testing unless the Labour Court finds that such testing is justifiable and authorizes it.⁵⁶ And, in authorizing a test, the Labour Court may impose conditions relating to counselling, confidentiality and limitations on the categories of employees who may be tested.⁵⁷ Job applicants are also covered by the Employment Equity Act as far as it is applicable to them.⁵⁸

⁴⁹ Ibid., p. 18.

⁵⁰ Benjamin, op. cit., p. 13.

⁵¹ Ibid.

⁵² Section 2(1)(c)(iv) makes it a purpose of the Skills Development Act to employ persons who find it difficult to be employed.

⁵³ See report cited in Fenwick et al., op. cit., p. 12.

⁵⁴ (2001) (1) SA 1 (CC).

⁵⁵ Fenwick et al., p. 13.

⁵⁶ EEA s.6(1).

⁵⁷ EEA s.50(4).

⁵⁸ EEA s.9.

Labour Law Protection

Judicial contributions to the development of labour law have notably been related to unfair labour practice jurisdiction and the Industrial Court in the 1970s. It has supplied a substantial amount of what was codified in the Labour Relations Act of 1995.

The need to balance labour law protection of workers with the needs of micro and small- and medium-scale business enterprises poses a challenge to attaining certain decent work goals. This is chiefly a direct result of government's inclination to exempt these categories of enterprises from certain regulations, including those relating to central bargaining and other labour arrangements.⁵⁹

⁵⁹ See Fenwick et al., p. 16.

3. Botswana

Botswana's accelerated economic development in the 1980s required major changes to be made to its laws, including its labour law framework for the private sector. The provisions of the Employment Act of 1982, for example, had become inadequate in terms of meeting the labour needs of the new economic order. For one, it made no provision for the enforcement of the employer's obligation.⁶⁰ It also contained gender-discriminatory provisions in the section on gender.

Except to state that public service employment in Botswana is governed by the Public Service Act, public service regulations and general orders⁶¹, this section of the paper is concerned with labour law reform in the private sector. In passing, it should be pointed out that labour relations in the public sector in Botswana have not fared as well as in the private sector. Moreover, the existence of trade unions has only recently been permitted.

Labour Law Amendments

In the early 1990s, far-reaching amendments were made to the 1982 Employment Act and the Trade Disputes Act. The amendments to the former affected five key areas, identified as:

1. The right to work and job security.
2. Aspects of work obligations.
3. Gender-discriminatory provisions.
4. Remedies and Jurisdiction of the Labour Department.
5. Changes at work with reference to severance benefits.⁶²

With respect to the right to work, the amendments neutralized the employer's discretionary power of summary dismissal for serious misconduct by introducing a closed definition of 'serious misconduct'.⁶³ Other changes were introduced to the quantity of work, leave entitlements, changes at work and the issue of temporary absence from work. This brought about increases in the maximum overtime hours and maximum permissible daily hours and also secured a minimum period of paid annual leave and sick leave per year.⁶⁴ The amendments also introduced severance pay entitlement while still in service to those employees not covered by any company pension, provident fund or other gratuity arrangement.⁶⁵

⁶⁰ Kupe-Kalonda (2001), 'The Industrial Court in Botswana: An Assessment of its Contribution to Labour Relations', unpublished LL.M. dissertation, Faculty of Law, University of Cape Town, p. 42.

⁶¹ K. Solo, 'Discipline and Dismissals in the Botswana Public Service', Rondebosch: Institute of Development and Labour Law, University of Cape Town, Development and Labour Monograph Series, 2004, p. 1.

⁶² N. Takirambudde and A. L. Molokomme, *The New Labour Law in Botswana* (Southern African Labour Monographs 1994, Labour Law Unit, University of Cape Town, p. 20.

⁶³ Ibid.

⁶⁴ Ibid., p. 23, See amendment to ss.96 and 99 of the Employment Act.

⁶⁵ Amendment to s.28 of the Employment Act.

The Trade Dispute Law was amended to provide for the following:

- i. The broadening of the scope of trade dispute.
- ii. The provision of an Industrial Court.
- iii. The introduction of the concept and mechanism of industrial councils.
- iv. The consolidation of dispute and grievance resolution procedures.⁶⁶

More recent amendments to Botswana's Employment Act (1982) have expanded the concept of 'employer' to include 'the person who owns or is carrying on for the time being or is responsible for the management of the undertaking, business or enterprise of whatever kind in which the employee is engaged'.⁶⁷

Gender

The Employment Act (1982) placed restrictions on the employment of women in certain kinds of employment such as on mines (underground) and on certain forms of night work.⁶⁸ These restrictions were removed.⁶⁹ Further, the liability to forfeit maternity allowance by a female employee who failed to disclose the fact of pregnancy at the point of being employed was repealed by an amendment to Section 119 of the old Employment Act. The Act now prohibits the serving of a notice of termination to a female employee during her period of maternity leave.⁷⁰

Dispute Resolution

The Trade Disputes (Amendment) Act (1992) introduced a revised procedure for addressing grievances. This starts from reporting grievances to the nearest labour officer through the Commissioner of Labour for alternative dispute resolution, and moves on to the Industrial Court, where settlement is not achieved.⁷¹ The Panel of Mediators and Arbitrators (PMA) was established by the Trade Disputes Act to administer the alternative dispute resolution system as a first option in dispute resolution. Mediators and arbitrators are appointed by the Minister, but work under the direction of the Commissioner of Labour.⁷² This effectively transformed the position of the Commissioner of Labour and the subordinate officers from a judicial to a mediatory one.⁷³ The Act provides a detailed procedure for this.⁷⁴ Other amendments provided for the broadening of the concept of 'trade dispute'.⁷⁵

⁶⁶ Takirambudde and Molokomme, *op. cit.*, p. 24.

⁶⁷ See definition of 'employer' in s.2 of the Employment Act.

⁶⁸ Employment Act 1982, ss.115 and 116.

⁶⁹ See sections 115 and 116 of the Employment Act as amended.

⁷⁰ Employment Act, s.116

⁷¹ Trade Disputes (Amendment) Act 1992, ss.5 and 7.

⁷² Trade Disputes Act, s.3(3) and (4).

⁷³ Trade Disputes Act, ss.6 and 7.

⁷⁴ Trade Disputes Act, ss.8 and 9.

⁷⁵ This was effected by the Trade Disputes (Amendment) Act of 1992.

Industrial Court

The Industrial Court was established by the Trade Disputes (Amendment) Act (1992) as an independent institution for resolving disputes that could not be settled by the government machinery. It replaced the office of the Permanent Arbitrator, previously established under Section 17 of the 1982 Trade Disputes Act.⁷⁶ Judges of the Industrial Court are appointed in the same way as those of the High Court.⁷⁷ The Commissioner of Labour may refer a dispute mediated upon under the Act to the Industrial Court for determination.⁷⁸

Labour Institutions

Botswana's Employment Act provides for a Labour Advisory Board.⁷⁹ It includes advising the Minister on any proposed principal or subsidiary legislation, reviewing dispute prevention and resolution procedures and advising on the constitution of the Panel of Mediators and Arbitrators.⁸⁰ Thus, the establishment of the Panel of Mediators and Arbitrators is done in consultation with the Labour Advisory Board. The Trade Disputes Act also introduced Joint Industrial Councils (JICs) as negotiating machinery for concluding collective agreements within industrial sectors.⁸¹ A union and an employers' organization that considers that it is sufficiently representative of workers in an industry may apply to establish a JIC for that industry. Where the Commissioner of Labour refuses to register a new JIC, or cancels an existing one, an appeal may be made to the Minister.

HIV and AIDS

A key challenge posed to decent work in Botswana is HIV and AIDS. With 24.1% of adults in the 15-49 year-old category living with HIV, Botswana has the second highest estimated HIV prevalence rate in Southern Africa.⁸² The country's national policy on HIV and AIDS in the workplace provides guidelines on a number of issues such as equal opportunities and non-discrimination; HIV testing, confidentiality and disclosure in employment; provision of fair and equitable employment benefits, information, communication and awareness; and the planning and implementation of HIV and AIDS interventions in organizations. This policy is guiding the proposed reform of employment legislation to reinforce constitutional rights and obligations.⁸³

⁷⁶ Takirambudde and Molokomme, op. cit., p. 25.

⁷⁷ Ntuny p. 159.

⁷⁸ Trade Disputes Act, s.13

⁷⁹ Employment Act, s.143.

⁸⁰ Employment Act, section 148 as amended by the Employment (Amendment) Act 2003.

⁸¹ Trade Disputes Act, s.30(A)(1).

⁸² Fenwick et al., p. 11.

⁸³ Ibid., p. 12.

4. Lesotho

The adoption of the Lesotho Labour Code Order (the Code) in 1992 shaped contemporary industrial relations in Lesotho. The Code, drafted by the ILO, established Lesotho as one of the few jurisdictions to comply with ILO standards. It was amended in 1997 and again in 2000 to bring it into substantial conformity with the ILO Declaration on Fundamental Principles and Rights at Work of 1998 and other ILO Conventions Lesotho had ratified.⁸⁴

Freedom of Association

The Labour Code Order provides for freedom of association for all workers and employers as well as their organizations. In Part XIII, the Code makes administrative provision for trade unions, but does not establish a distinct set of organizational rights for them. The protection afforded to trade unions is in respect of three situations only, namely: employers' discrimination against union members and union officials as a backlash for union activities, interference by employers in trade union affairs and the refusal by an employer to offer 'reasonable facilities to confer' in matters affecting the employer and union members.⁸⁵

The Labour Code Amendment Act of 2000 introduced a duty to bargain in good faith for recognized trade unions. However, this provision applies only to a representative union, which is defined as a union that has a majority of the employees at a workplace as its members.⁸⁶ The 2000 amendment also provides for the establishment of both an Industrial Relations Council and the office of the Director of Dispute Prevention and Resolution. It also provides for the conciliation and arbitration of disputes.⁸⁷

Lesotho has employed soft law by way of Codes of Good Practice in relation to a number of issues, including termination of employment, collective bargaining, strikes and lockouts, sexual harassment and discrimination in employment.⁸⁸ It is in the Codes of Good Practice that detailed provisions on unions, such as recognition, representative thresholds and access to information for negotiation are provided. A measure of influence is given to the Codes of Good Practice by the Labour Code (Amendment) Act (2000) which provides that 'the arbitrator shall take into account any code of conduct or guideline, published by the Minister in accordance with this Act, that is relevant to a matter being considered in the arbitration proceedings'.⁸⁹ The Codes of Good Practice are a product of tripartite consultation, and their capacity to serve as tools of moral persuasion should be optimally utilized.

⁸⁴ Review of the National Labour Legislation in the Kingdom of Lesotho: External Collaborator's Mission Report and Labour Code Analysis (ILO, 2004) (Lesotho Report), p. 4.

⁸⁵ Ibid., p. 5.

⁸⁶ S.198A.

⁸⁷ Labour Code (Amendment) Act 2000 ss.6-8.

⁸⁸ Labour Code (Codes of Good Practice) Notice 2003, Government Notice No.4 of 2003.

⁸⁹ Section 228D, introduced by s.25 Labour Code (Amendment) Act 2000.

The ILO Conventions on freedom of association and the right to organize are exercisable through collective agreements, arbitral awards and other ways consistent with national practice. Within Lesotho, it has been observed that the institution of collective bargaining and the conclusion of collective agreements is not a well-established practice. Consequently, it is imperative that the application of these standards be secured by law.⁹⁰ Although the provision of the 1992 Code on freedom of association applies to workers and employers in all sectors, the Public Service Act of 2005 prohibits public service employees from becoming members of any union registered under the 1992 Code, classifying their work as essential service.⁹¹ This is a glaring setback in terms of freedom of association and the decent work agenda.

Gender

The Constitution and the Labour Code Order are the statutory frameworks for gender equality at the workplace. The Constitution, which came into operation in April 1993, prohibits discrimination on a number of grounds including gender in its provisions and effect of any law.⁹² This is reinforced by the further provision that every person shall be entitled to equality before the law and to equal protection by the law.⁹³ However, this anti-discrimination provision is subject to a number of qualifications, including the application of Lesotho customary law to those subject to it.⁹⁴

The Labour Code Order also contains general prohibition against sexual harassment and discrimination arising out of a variety of factors including marital status and sex, for example.⁹⁵ These provisions also safeguard the norm of equal pay for work of equal value.⁹⁶ The provisions against discrimination apply both to the process of employing new staff and to occupational processes such as access to training. However, operational requirements that may involve exclusions or preferences are not seen as discrimination, particularly if such differences are inherent in the requirements of the job.⁹⁷ These non-discrimination provisions were earlier assessed as consistent with international labour standards.⁹⁸ The problem of its application does however remain. Although the Labour Code Order provides for 12 weeks of maternity leave, six of which should take effect after birth, there is no guarantee that this proviso will actually be observed particularly in private employment establishments. Furthermore, this period of maternity leave is not required by statute to be paid leave, but a contract of employment may provide for paid maternity leave.⁹⁹

A number of policy documents also underline work to promote gender equality in the workplace in Lesotho. These policy documents include the Gender and Development Policy (GADP), which seeks to advance gender mainstreaming in state policies and

⁹⁰ Lesotho Report op. cit., p. 7.

⁹¹ Labour Code Order 1992, s.168, s.19 Public Service Act 2005.

⁹² The Constitution of Lesotho s.18(1) and (2).

⁹³ The Constitution of Lesotho s.19.

⁹⁴ The Constitution of Lesotho s.18(4)(c).

⁹⁵ Labour Code Order s.5(1) and (2).

⁹⁶ Labour Code Order s.5(3).

⁹⁷ Combined effect of Labour Code Order s.5(4) and The Codes of Good Practice s.51(4)(b)(i).

⁹⁸ See ILO, *Promoting Gender Equality in Employment in Lesotho: An Agenda for Action*, Final Report of an ILO Multidisciplinary Mission to Lesotho, International Labour Office: International Project on Equality for Women in Employment, January 1994, p. 49.

⁹⁹ Labour Code Order s.134.

activities.¹⁰⁰ It enshrines the three core principles of equal participation in development, non-discrimination and the empowerment of disadvantaged women by mainstreaming gender concerns.¹⁰¹ However, the continuing legal disabilities of women vis-à-vis land ownership, contracts, inheritance and legal proceedings under customary and common law severely limit their ability to participate in informal forms of employment that require these capacities.¹⁰² One of the efforts being made to address this is the Married Persons Equality Bill (2000), which seeks to remove the minority status conferred on married women by the old common law principle of marital power. Although the influence of the marital power principle is no longer critical to a woman's choice of where to work, it still has certain negative effects. For instance, the fact that a woman has no legal capacity to sue, or be sued, limits her ability to seek legal redress for various grievances, including workplace-related issues.¹⁰³ More recently, another legislative effort has been made to address the low visibility of women in those circles of policy and decision-making where they can influence labour law reform processes. This was enacted through the Local Government Elections (Amendment) Act of 2004, just ahead of the 2005 local government elections. The amendment was, among other things, directed at increasing the participation of women in politics by reserving one-third of electoral seats for women. This was a hotly contested development, one which does not seem to have been observed in the 2005 elections.¹⁰⁴

The textile industry is the largest private employer in Lesotho and women represent 78% of its workforce. The sector is driven by foreign investors whose economic activities seem to be priced above compliance with labour law provisions, with the result that workers' rights are either overlooked or ignored in the bid to attract and retain foreign investors.¹⁰⁵ These challenges notwithstanding, a 2006 Country Report on Human Rights in Lesotho found that there was no discrimination against women in terms of access to employment, credit, or pay for substantially similar work.¹⁰⁶

HIV and AIDS

Although Lesotho has continued to enjoy strong economic growth, its workforce nevertheless faces the threat of HIV and AIDS. With the statistic of 23.2% of adults in the 15-49 year age bracket living with HIV, Lesotho has the third highest estimated HIV prevalence rate in Southern Africa.¹⁰⁷ A 2004 draft bill on HIV and AIDS and employment sought to give the force of law to the principles of non-discrimination on the grounds of HIV status contained in the Codes of Good Practice.

¹⁰⁰ The contents of GADP was shaped by a combination of sources including the SADC Declaration on Gender and Development, the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and NEPAD.

¹⁰¹ See Foreword to GADP.

¹⁰² These disabilities are comprehensively described in ILO, *Promoting Gender Equality in Employment in Lesotho: An Agenda for Action*, supra, pp. 46-8.

¹⁰³ Fenwick et al., op. cit., p. 32.

¹⁰⁴ Report of the Commonwealth Expert Team on the Lesotho Local Government Elections held on 30 April 2005, pp. 9 and 18, accessed at http://www.sarpn.org.za/documents/d0001408/P1752-Lesotho_Govt_April2005.pdf on 6 July 2007.

¹⁰⁵ Fenwick et al., op. cit., pp. 30-1.

¹⁰⁶ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, '2006 Country Reports on Human Rights Practices: Lesotho', released on 6 March 2007, accessed on 4 July 2007 at <http://www.state.gov/g/drl/rls/hrrpt/2006/78741.htm>.

¹⁰⁷ Fenwick et al., op. cit., p. 11.

Labour Administration

Labour administration is governed by statutory provisions that establish institutions and processes such as the Labour Court, the office of the Labour Commissioner, the Directorate of Dispute Prevention and Resolution (DDPR), the National Employment Service (NES), labour inspection and other processes.¹⁰⁸ The use of these channels is however limited and no statistics that could show the pattern of compliance with key provisions such as equal pay for equal work and the nature of labour complaints are kept.¹⁰⁹ There is currently a move to amend the Labour Code Order by way of the Labour Code Amendment Bill (2006). The scope of the proposed amendments to the law includes the specific inclusion of domestic workers in the Code's provisions.

¹⁰⁸ Labour Code Order ss.12,14,22 and 46B.

¹⁰⁹ Fenwick et al., *op. cit.*, pp. 31-2.

5. Malawi

Malawi experienced the return to a constitutional democracy after a long dictatorship following a political transition that lasted from December 1991 to May 1994.¹¹⁰ The new Constitution which came into effect in 1994, captured certain fundamental labour rights in its principles of national policy that commit the State to the active promotion of welfare and development, including gender equality, non-discrimination, maternity benefits, fair opportunities of employment for the disabled, the protection of children and the support of the elderly. In line with Malawi's international law obligations, the Constitution prohibits forced labour, slavery and servitude.¹¹¹ The Constitution further provides for the right to fair and safe labour practices, fair remuneration and the right to form or join trade unions, in addition to the broader provision on freedom of association.¹¹²

Subsequently, dedicated labour law reform led to the enactment of a new complement of labour laws including the Labour Relations Act (1996) and the Employment Act (2000). The Labour Relations Act (LRA) addressed collective labour law, while the Employment Act of 2000 made provisions for individual employment and introduced new social security measures applicable to workers in both the private and the public sector. The Employment Act was specifically designed to put into effect Malawi's ILO obligations, with particular regard to core labour rights.

Freedom of Association

The LRA provides for the freedom of association in Part II, and in Parts III and IV for trade unions, employers' organizations, collective bargaining and organizational rights respectively. Other provisions relate to the dispute resolution process, the tripartite Labour Advisory Council and the Industrial Relations Court.

The LRA confers on a trade union the entitlement to access an employer's premises for lawful purposes.¹¹³ This entry is to be made at a time and place to be determined by the employer. The drawbacks to this provision are that i) the employer seems to have sole discretion in determining a reasonable time and place for the trade unions to enter the premises, and ii) there are no objective criteria to assess an employer's action(s) and responses to such requests. Another provision with the capacity to impede the exercise of freedom of association is the empowering of the Minister to adjust the threshold of union membership to 40% in order for the union concerned to gain the right to collective bargaining.¹¹⁴

¹¹⁰ See C. Ng'ong'ola, 'Employment and Industrial Relations Law in Malawi: A Prospectus for Reform', Southern African Labour Monographs 6/94, Friedrich Ebert Stiftung and Labour Law Unit, University of Cape Town, p. 2.

¹¹¹ The Constitution of Malawi 1994 s.27(3).

¹¹² Sections 31 and 32.

¹¹³ Section 35(2).

¹¹⁴ Malawi Report, Review of the National Labour Legislation: ILO External Collaborator's Mission Report and Labour Legislation Analysis (2005), p. 7.

A number of other LRA provisions call for clarification. One is the impediment presented to the effective exercise of the right to strike and lock out by the provision that the Industrial Relations Court is to determine what constitutes an essential service.¹¹⁵ This lack of clarity lessens employees' freedom to resort to strikes and thus those categories of work qualifying as essential services – guided, where relevant, by ILO standards – should be clarified with the contribution of social partners.

Another LRA provision that needs clarification is the one requiring seven days' notice to be given before employees or employers embark on a strike or lock out. It is unclear whether this seven-day period includes the date of the Minister's application to the Industrial Relations Court to determine whether they are part of any essential service. If the interpretation of 'essential services' is given after the strike has been conducted and it is not in favour of the striking parties, there may be negative repercussions. In such circumstances, they may feel compelled to refrain from exercising their right to strike for fear of provoking an Industrial Court definition that would strip them of this right altogether.

The democracy that replaced the Banda dictatorship has seen the reform of labour law and the growth of trade unions. However, although the outright repression of trade union activity is uncommon, the government uses a covert means of undermining trade union strength, namely, 'divide-and-rule' and 'hide-and-seek' tactics.¹¹⁶ Malawi has been criticised for its violent repression of workers' protest marches and for its continued tolerance of employers' anti-union behaviour.¹¹⁷

Eliminating Discrimination at the Workplace

Section 7(2) of the LRA prohibits employers from discriminating against any person on the grounds of race, colour, nationality, ethnic or social origin, national extraction, political opinion, language, gender, marital status, family responsibilities, age, disability, property or birth. The Employment Act (EA) has similar anti-discrimination provisions. The principle of non-discrimination is to be observed in the recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.¹¹⁸ The EA also provides for the equal remuneration for work of equal value.

Eliminating Forced or Compulsory Labour

In 1996, when the LRA was enacted, Malawi had yet to ratify the Forced Labour Convention of 1957. It was silent on certain fundamental principles of eliminating all forms of forced or compulsory labour and the effective abolition of child labour. In 1999, Malawi did ratify the Forced Labour Convention and, in 2000, the EA was passed to give effect to its obligations. Forced labour is defined as any work or service which is either extracted from any person under the threat of any penalty or which is not

¹¹⁵ Section 47.

¹¹⁶ Dzimbiri, pp. 15, 53.

¹¹⁷ See for example, CEACR, 'Individual Observation Concerning Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), Malawi' (2006) and CEACR, 'Individual Observation Concerning Right to Organize and Collective Bargaining Convention, 1949 (No.98), Malawi' (2006).

¹¹⁸ Employment Act 2000, s.5.

voluntarily offered. A penalty is imposed on any person found guilty of procuring or extracting forced labour.¹⁰⁹ Usually, provisions on forced labour are qualified by the exemption of certain kinds of communal work. The EA does not make this exception, thus creating an undesirable ambiguity.

The Effective Abolition of Child Labour

The EA prohibits employment of persons under the age of 14.¹²⁰ While this is in line with the Minimum Age Convention (1973), the Malawi Constitution of 1994 goes further with its protection of children under the age of 16. While this may be in order, the law needs to be clear as to what age limits are allowed to work and on what activities. There may also be a need to reconcile these age prescriptions with the Worst Forms of Child Labour Convention, which defines a child as a person under the age of 18. Child labour is a criminal offence under the EA and a fine of roughly US\$5.00 is imposed on an offender.¹²¹

Complaints Procedures

Employees or employers who are aggrieved in respect of any provision of the LRA may report the complaint to the Principal Secretary responsible for labour. There are, however, no timelines within which the application may be made, an omission that has the potential of being exploited in a way that may discriminate against different complainants. By contrast, complaints relating to the provisions of the EA are made to the Labour Commissioner. It is submitted that the Office of the Labour Commissioner, as a specialist labour position, should be the one responsible for attending to complaints, with the Principal Secretary being the officer accountable.

Industrial Relations Court

The Industrial Relations Court (IRC) was established by the Constitution as a court subordinate to the High Court.¹²² The IRC has original jurisdiction to hear and determine all labour disputes and any other disputes assigned to it.¹²³ As this does not affect the unlimited jurisdiction of the High Court, it may lead to problems of concurrent and overlapping jurisdiction.

Other problems related to the functioning of the IRC include the lack of procedural guidelines for redundancies, retrenchments and reorganizations in labour legislation.¹²⁴ Consequently, unmitigated lay-offs have resulted from downturns in the economy. While the EA has a provision on the termination of employment ‘based on operational requirements of the undertaking’, it does not provide any procedural guidelines for arriving at this determination.¹²⁵ In this instance, international labour standards would be useful as the IRC does sometimes resort to the ILO Convention on Termination of Employment when dealing with cases centred on termination.

¹¹⁹ Employment Act 2000, s.4.

¹²⁰ Section 21.

¹²¹ Section 24.

¹²² 1994 Constitution, s.110(2).

¹²³ Labour Relations Act, s.64.

¹²⁴ Evance Kalula, Malawi Report: Review of the National Labour Legislation, ILO External Collaborator’s Mission Report and Labour Legislation Analysis, 2005, p. 12.

¹²⁵ Employment Act 2000, section 57.

Other challenges to the effective implementation of labour law provisions by the IRC include the lack of substantive provisions on pensions. The EA merely stipulates the timelines for paying pension and other terminal benefits. Also considered inadequate are the provisions on suspension¹²⁶, the notice requirement in respect of unfair dismissal¹²⁷, the lack of distinction between direct and indirect discrimination and its implications, proof of unfair dismissal and its principal remedy¹²⁸, summary dismissal¹²⁹, reinstatement and job security, compensation¹³⁰, absence of limitation period for lodging of disputes¹³¹ and the non-inclusion of interim relief in the principal legislation and legal representation.¹³² Poor funding, lack of the necessary infrastructural facility and limited human resource capacity are also identified as constraints on the ability of the IRC to properly discharge its duties.¹³³

Labour Law Amendment

The ILSSA project led to a labour law reform effort in Malawi. The Employment (Amendment) Bill (2006) and the Labour Relations (Amendment) Bill (2006) are currently undergoing detailed review. The aim of this reform is to bring labour law in Malawi into better compliance with the ILO core rights and the ILO Conventions it has ratified. The Employment (Amendment) Bill proposes a number of changes, including a redefinition of overtime by specifying limits on daily and weekly hours of work for different categories of workers.¹³⁴ Further, it defines other acts that constitute unfair labour practices and establishes two distinct systems for enforcing the LRA and regulating temporary employment services.¹³⁵ Among proposals made by the Labour Relations (Amendment) Bill (2006) are amendments that enhance principles of non-discrimination at the workplace, promote the access of trade union representatives to the workplace and establish civil immunity for employees participating in a strike.¹³⁶

¹²⁶ EA sections 41(3)(h) and 56(1)(2)

¹²⁷ EA ss. 28, 29, 57 and 58.

¹²⁸ EA ss. 57(1)(2) and 61(2)

¹²⁹ EA ss. 57, 58, 59 and 61.

¹³⁰ EA s.63(4).

¹³¹ EA s.62(1).

¹³² Some of these issues are discussed in R. Zibelu Banda, 'Labour Law Reform: Proposals from the Industrial Relations Court in Malawi', paper presented to the IIRA 4th Africa Regional Congress held in Mauritius, 28-30 November 2005, revised February 2006, pp. 5-14.

¹³³ See Industrial Relations Court of Malawi, Annual Report 2005-2006 (8 August 2006), pp. 16-7.

¹³⁴ Employment (Amendment) Act, s.36.

¹³⁵ Employment (Amendment) Act, ss.45 and 57.

¹³⁶ Sections 7, 35 and 49 Labour Relations (Amendment) Bill 2006.

6. Mozambique

In 2003, Mozambique recorded the highest growth rate in the Southern African region with its rate of 7%.¹³⁷ Although other countries such as Botswana and Lesotho have since shown higher growth rates, economic growth in Mozambique has continued. However, there has been no corresponding growth in employment, mainly because this growth is export-driven. The challenge of monitoring compliance with labour law has been exacerbated by the reduced resource allocation for the activities of labour inspectorates. For example, compared to the 4 978 in 2000, the number of employment establishments inspected was only 1 417 in 2003.¹³⁸

Labour Law Reform

In May 2007, Mozambique passed a new labour law that introduced far-reaching reforms. However, this law has yet to take effect.¹³⁹ It provides extensively for individual employment relationships as well as for collective employment relations, dispute resolution procedures, occupational health and safety, employment and vocational training, social security and labour administration.¹⁴⁰ It also covers special classes of workers such as persons with disabilities, student workers, migrant workers and foreign workers.¹⁴¹ An earlier study conducted by a joint team from the Mozambique Ministry of Planning and Development and the Poverty and Economic Management Department, Africa Region and The World Bank was released in November 2006. It assessed the potential changes expected from this new labour law – then a draft bill – with special regard to those likely to increase output and employment in the private enterprise sector, and the possible poverty and social impacts.¹⁴² Due to a dearth of materials on the subject, this section draws extensively from this document, which is subsequently referred to as *Job Creation in Mozambique*.

Job Creation

Job creation in the private sector rests on the growth of exports, which itself depends on a country's investment climate. The new labour law is aimed at creating an enabling environment for investment. It proposes to do this by, among other things, lowering hiring and firing costs, severance pay and other benefits and by making various institutional changes to the system for resolving labour conflicts.¹⁴³ Aside from this, it is

¹³⁷ Fenwick et al., op. cit., p. 9.

¹³⁸ Ibid., p. 26.

¹³⁹ Labour Law 2007 accessed on 17 August 2007. See www.mozlegal.com/corporate/content/download/685/3371/file/LabourLaw2007finalversion.

¹⁴⁰ See Labour Law 2007, Chapters III, V, VI, VII, VIII and IX, respectively.

¹⁴¹ Labour Law 2007, Articles 28, 29, 30 and 31-3, respectively.

¹⁴² 'Job Creation in Mozambique: Is Labour Law Reform the Answer?', Ministry of Planning and Development, Mozambique and Poverty and Economic Management Department, Africa Region, The World Bank, November 2006, p. 1, accessed at www.mozlegal.com on 7 August 2007.

¹⁴³ 'Job Creation in Mozambique', op. cit., p. 1.

projected that the job-creation effect of this law will be minimal in the medium term as the private sector constitutes only about 5% of Mozambique's workforce.¹⁴⁴ On the other hand, in the short term, a reduction in hiring and firing requirements may lead to loss of jobs, as commercial enterprises that have been coping with the financial burden of overstaffing may then lay off workers more easily.¹⁴⁵

A comparison with other developing jurisdictions that have carried out labour law reform led to the conclusion that Mozambique's labour law reforms are not, by themselves, likely to increase employment if its economy is not ready for job creation.¹⁴⁶ For example, the Latin American experience shows that in times of recession or slow economic growth, labour reforms have a neutral effect on employment. However, in times of strong economic growth, a more flexible labour market can boost employment and help the economy grow more than if the labour market were rigid, as firms can take advantage of lower costs and risks and so increase investment even further.¹⁴⁷

The new labour law passed in May 2007 is designed as a compendium of laws relating to various aspects of employment and employment relations. Fundamental rights, individual employment relationships, including probationary periods, termination of employment, collective employment relations, trade unions and employers' associations, individual and collective dispute resolution, including alternative dispute resolution processes, occupational health and safety and social security all receive substantial treatment. Some of the changes to the old law are highlighted in *Job Creation in Mozambique* and are reproduced in the several sub-headings that follow.

a) Termination and Severance Pay

Severance pay is payable if an employer terminates the employment of a permanent, full-time employee for various economic reasons, especially for redundancies arising from business restructuring, technological changes and market difficulties or a reduction in turnover.¹⁴⁸ Where termination occurs for any of the above reasons, the new law would set severance pay at 20 days per year of service. The old law requires employers to pay terminated employees with more than three years of service severance pay equal to three months' salary for every two years of service. Employees with six months to three years of service receive three months' severance pay. Employees with as little as three months of service receive 45 days' pay under the old law.¹⁴⁹

The old law stipulates that when the employment of a permanent employee is terminated and the employer is i) unable to demonstrate that the reason was structural, technological or market-related or has ii) violated the worker's legal rights, the amount of severance pay is doubled. Under the new law, the amount of severance payable under such circumstances would be 45 days per year of service.¹⁵⁰

¹⁴⁴ Ibid., p. 2.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid., p. 11.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid., p. 13.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

When the employer terminates a fixed-term contract for just cause¹⁵¹, the employer now must pay the employee for the unused portion of the contract. This requirement does not change under the new law. Where the employer fails to prove just cause, the amount of severance doubled only under the old law, but not in the new law.

b) Leave

Under the old law, permanent employees enjoy 21 days' annual paid leave after the first year of service and 30 days thereafter. The new law would change those amounts to one day per month of work in the first year, two days per month of work in the second year and 30 days in the third year. Thus the change would affect only first- and second-year employees. Workers on fixed-term contracts lasting between three months and one year would receive one day of paid leave for every month of service.¹⁵²

Under the old law, employees are required to give five days' notice before taking unscheduled leave that has been justified¹⁵³. An extensive number of days is allowed. Under the new law, employees must provide their employer with at least two days' notice before taking leave. The new law imposes limits on justified absences and requires employees to obtain permission from their employers before taking leave for cultural and sports activities.¹⁵⁴

c) Institutional Changes¹⁵⁵

These include the issue of strikes in export zones, time for claiming workers' rights, conflict resolution, collective bargaining, size of enterprises and so on.

i) Strikes in export zones

The old law prohibits strikes in export zones. The new law submits strikes in duty-free zones to the same treatment as strikes affecting essential services and activities.

ii) Term for claiming workers' rights

Under the old law, workers must assert claims for employment-related benefits and redress within one year. The new law halves this period.

iii) Conflict resolution

The old law provides that conflicts may be solved by mediation, arbitration or judicial process. Mediation is voluntary. The new law provides a new, alternative extrajudicial mechanism for resolving collective and individual conflicts. Public and private entities, profit or non-profit, are licensed to offer mediation services and both parties are required to make use of them. The new law also makes binding the decisions of arbitration panels. Grievances have to be filed within six months of the disputed event.

¹⁵¹ 'Just cause' implies that reasons for termination of contract were of structural, technological or market nature. Ineptitude of the worker is also considered just cause, but in this case, no severance is paid. Just cause by the worker implies rights violation by the employer and the worker receives severance. It also includes the worker's duty to fulfil legal obligation, but in this case no severance is paid.

¹⁵² 'Job Creation in Mozambique', op. cit., p. 13.

¹⁵³ For a description of justified leave, see Annex 1, 'Other leave'.

¹⁵⁴ 'Job Creation in Mozambique', op. cit., p. 14.

¹⁵⁵ Ibid.

iv) *Collective bargaining*

Under the old law, firms with more than ten workers must engage in collective bargaining at firm level. The new law sets negotiations between the firm and workers' representatives as the fundamental basis for collective bargaining. It also extends the collective-bargaining system to all enterprises, small ones included.

v) *Size of enterprises*

The new law classifies enterprises according to the number of workers. Large enterprises are those with more than 100 workers. Medium-size enterprises employ between 11 and 100 workers. Small enterprises employ up to ten workers.

Below is a table taken from Job Creation in Mozambique that shows the anticipated impact of the new labour law on employment and, by extension, on foreign investment.

Table 2 Projected employment impact of key provisions of the draft law

Provision of draft law	Expected effect on employment
Flexibility	
Fixed-term contracts	<i>Significant impact.</i> Firms already use these contracts, but extension of the time limit will allow employers to keep fixed-term workers employed longer; especially beneficial for small firms (who can use the contracts without limit) and start-ups.
Length of work week	No impact.
Temporary agencies	<i>Moderate impact.</i> The option of obtaining manpower from temporary agencies increases flexibility in labour management and reduces labour costs.
Notice period	<i>Significant impact.</i> The significant reduction in the notice period required before termination increases firing flexibility, putting Mozambique in a better competitive position.
Contracting foreign workers	<i>Limited impact.</i> The simplification of entry into the country is not a major change from the previous provision.
Reduction in labour costs	
Severance pay for dismissal without cause and layoffs for economic reasons.	<i>Moderate impact.</i> This is one of the major changes in the law, and it affects an area where Mozambique is an outlier among direct competitors. Since investors' perception of Mozambique's labour regime has worsened since 2002, this change could have a positive impact, although severance pay will remain high even if the draft law is enacted.
Annual leave (vacation)	<i>Limited impact.</i> The leave period would remain essentially the same. Reductions in the draft law affect only workers employed for less than two years.
Other leave (sick leave, family leave, etc.)	<i>Limited impact.</i> New limits on absences should reduce workplace absenteeism, but should not have a significant impact on job creation.
Institutional changes	
Dispute resolution (mediation)	<i>Significant impact.</i> Conflict mediation and the creation of extrajudicial mediation mechanisms will simplify and shorten dispute resolution, reducing uncertainty and management costs.
Collective bargaining	<i>Limited impact.</i>
Deadline for asserting worker's rights	<i>Moderate impact.</i> This measure reduces the firm's obligations and thus reduces risk. Like the item above, this provision will be more significant for large enterprises, since small and medium enterprises do not perceive labour regulations as a major impediment.
Strikes in duty-free zones	<i>Limited impact.</i> The proposal to classify strikes in duty-free zones with strikes affecting essential services and activities offers workers in duty-free zones a limited amount of new bargaining power, as currently they are forbidden to strike.

7. Namibia

After independence from South Africa in 1990, labour legislation in Namibia was consolidated in the 1992 Labour Act. The Act was prepared by the Namibian Government with the technical assistance of the ILO.¹⁵⁶ A number of amendments have been made to this Act over the years and, in 2004, the Labour Act 15 of 2004 was passed to further consolidate and amend Namibian labour law. The Labour Act (2004) (LA) was a comprehensive effort to provide for different aspects of labour relations. These include the entrenchment of labour rights and protection, provision of basic terms of employment, health, safety and welfare regulation. Also consolidated by this Act were the regulatory framework for trade unions, employers' organizations and collective labour relations, the institutional and judicial framework for the administration and resolution of labour disputes and the establishment of ancillary bodies.¹⁵⁷

ILO Core Rights

The 2004 Act made a clear departure from the 1992 Act in that it provided specifically for ILO core labour standards.¹⁵⁸ In Chapter Two, headed 'Fundamental Rights and Protections', the Act provides for the prohibition and restriction of child labour, the prohibition of forced labour, the prohibition of discrimination and sexual harassment in employment and the freedom of association.¹⁵⁹ The chapter also provides for disputes concerning fundamental rights and protections.¹⁶⁰

The LA delimits the meaning of forced labour by excluding the forms of labour described in Art.9(3)(a) to (e) of the Constitution of Namibia. These are:

- a) Any labour required in consequence of a sentence or order of a Court
- b) Any labour required of persons while lawfully detained which, though not required in consequence of a sentence or order of a Court, is reasonably necessary in the interests of hygiene
- c) Any labour required of members of the defence force, the police force and the prison service in pursuance of their duties as such or, in the case of persons who have conscientious objections to serving as members of the defence force, any labour which they are required by law to perform in place of such service
- d) Any labour required during any period of public emergency or in the event of any other emergency or calamity which threatens the life and well-being of the community, to the extent that requiring such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation

¹⁵⁶ L. Torres, *Labour Markets in Southern Africa*, Oslo: Fafo Institute of Applied Social Sciences, 1998, p. 156.

¹⁵⁷ See long title to the Labour Act 15 of 2004.

¹⁵⁸ LA 2004, Chapter 2.

¹⁵⁹ Sections 3-6.

¹⁶⁰ Section 7.

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- e) Any labour reasonably required as part of reasonable and normal communal or other civic obligations.

This recent labour reform, which has specifically legislated ILO core rights into domestic labour law, clearly establishes a legal framework for the development of the decent work project in Namibia.

Trade Union Engagement

The 2004 Labour Act introduces job security entitlements and increases workers' statutory leave entitlements. Further, workers in EPZs who were formerly classified as essential services and thus denied basic labour rights such as the right to strike have been relieved of that incapacity.¹⁶¹ Changes effected to labour relations issues such as basic standards of employment and the dispute resolution process by this Act have been welcomed by employees' associations, but resisted by employers' organizations. Employers have been opposed to implementing these measures, fearing that they would reduce competitiveness, repel foreign direct investment and increase hiring and firing costs.¹⁶²

Underdeveloped trade union–government engagement presents a somewhat covert challenge to the negotiation that needs to go into developing a decent work paradigm. It is felt that the umbrella trade union organization, the National Union of Namibian Workers (NUNW), tends to rely more on its close association with the state to influence government rather than developing shop floor strength and translating this into policy-making power.¹⁶³ This is made more problematic by low literacy levels and the limited knowledge of the law.¹⁶⁴ The frequency of strikes in the 1990s, for example, suggests that parties are seldom sufficiently familiar with labour law provisions and thus able to comply with its requirements.¹⁶⁵

Casualization

Another challenge to decent work in Namibia is casualization. It is predominant in the construction industry and pervasive in the fishing, retail and manufacturing sectors.¹⁶⁶ Casual workers lack union representation because their status is unattractive to traditional trade union interests; these workers are perceived as threats to standard employees who supply the financial muscle of trade unions.¹⁶⁷ Moreover, they are difficult to organize, a fact that serves to keep casual workers on the margins of labour law, much to the advantage of employers.¹⁶⁸ A step in addressing the situation of casual workers has been taken by the expansion of the definition of 'employee' to cover those not necessarily

¹⁶¹ See Fenwick et al., op. cit., p. 17.

¹⁶² NEPRU, 'Background Paper for Employment Creation Policy', 27 July 2005.

¹⁶³ Bauer, *Labour and Democracy in Namibia 1971-1996*, pp. 108-16.

¹⁶⁴ Labour Resource and Research Institute (LARRI), 'The Namibian Labour Market – Workers' Experiences and Perceptions', June 2004.

¹⁶⁵ C. Fenwick (2007), 'Labour Law Reform in Namibia: Transplant or Implant' in T. Lindsey (ed.) *Law Reform in Developing and Transitional States*, pp. 317-43.

¹⁶⁶ G. Klerck, 'Trade Union Responses', p. 106, cited in Fenwick et al., p. 19.

¹⁶⁷ Ibid.

¹⁶⁸ Fenwick et al., p. 20.

working under a contract of employment. The revised LA includes in its definition of employee a person who ‘in any manner and for remuneration assists in carrying on or conducting the business of an employer’.¹⁶⁹ Another challenge to the enforcement of labour law is presented by the persistent failure of agricultural estate owners to comply with minimum wage law and other labour laws.¹⁷⁰

HIV and AIDS

In 1998, Namibia adopted a national Code on HIV and AIDS and Employment in terms of section 112 of the Labour Act (1992), which empowers the Minister to make guidelines for the administration of the Act. Although the Code is not a binding legal document, the responsibility for its monitoring, reviewing and implementation is placed on the tripartite Labour Advisory Council and the Ministry of Labour.¹⁷¹

New Labour Bill

In July 2007, during the course of this study, a new labour bill was introduced in the Namibian parliament. This bill is designed to amend and consolidate existing labour law, so as to establish a comprehensive labour law for employers and employees.¹⁷² In this respect, it provides extensively for fundamental labour rights and protections, basic terms and conditions of employment, health, safety and welfare of employees and unfair labour practices. It also provides for the registration of trade unions and employers’ organizations and also regulates collective labour relations. It also provides for the prevention and resolution of disputes as well as new labour institutions such as a Labour Advisory Council and a Labour Court, a Wages Commission and a labour inspectorate. It also establishes the position of a Labour Commissioner and a Deputy Labour Commissioner.¹⁷³ It is yet to be seen how much of a departure the proposals in the bill will make from the current position of the labour law if it goes through.

¹⁶⁹ Labour Act 2004, s.1.

¹⁷⁰ S. Gallo and R. D. Cohns, ‘Tripartite Development of Indicators for Conditions of Work in Namibia’, Hagen Resources International and US Department of Labour, Institute of Development and Labour Law, University of Cape Town, 2004) pp. 15-17.

¹⁷¹ Guidelines for Implementation of National Code on HIV/AIDS in Employment (No.78 of 1998), clause 6.12.

¹⁷² See long title to the Namibia Labour Bill (2007).

¹⁷³ The bill covers these provisions in ten chapters, each divided into several parts.

8. Swaziland

The monarchical structure of government in Swaziland is a unique situation that presents challenges to workers' rights. The 1973 proclamation, which repealed the 1968 Constitution, served to restore legislative, executive and judicial power to the King of Swaziland. Thereafter, all other existing laws could be enforced, if amended, to bring them into conformity, not with international standards, but with monarchical decrees.¹⁷⁴

Fundamental Rights

Formerly, the King-in-Council was empowered to order the detention of any person in the public interest for sixty days at a time, without any court enquiry.¹⁷⁵ Subsequently, in response to the work of the ILO Committee on Enforcement and Application of Conventions and Regulations (CEACR) on Convention 87, Decree no. 2 was repealed and the immunity of protesters from civil liability for criminal, malicious and delictual acts restored.¹⁷⁶

As in many other countries, police permits are required for holding political meetings in a public place, but in the case of Swaziland, the permit may be refused, and not just on the usual grounds of a disturbance of the peace, but also if the meeting is suspected to be linked to a political movement. In any case, political parties and other civil society associations considered reactionary were proscribed.¹⁷⁷

Freedom of Association

The IRA 2000 provides a lengthy procedure as a pre-requisite to embarking on a strike.¹⁷⁸ Further, through s.52 of the IRA 2000, only employers were empowered to establish works councils to represent workers who are not members of unions. However, the details of this representation are not set out. Further, the Act provides for the recognition of a trade union if it represents at least 50% of workers in a work unit; recognition of any other smaller union is discretionary. These requirements impede workers' exercise of their freedom of association and have informed the description of the IRA 2000 as 'a cautious responsiveness from a government whose cultural and ideological baggage works against a functional and acceptable labour law regime'.¹⁷⁹

¹⁷⁴ E. K. B. Ntuny, 'Emerging Trends in Labour Legislation and Policy in the SADC Region: The Experiences of Botswana and Swaziland in the Context of the ILO Convention on Freedom of Association and Protection of the Right to Organize', unpublished M.Phil dissertation, Faculty of Law, University of Cape Town, 2003, p. 150.

¹⁷⁵ Decree No.2.

¹⁷⁶ Act No. 8 of 2000; see also Ntuny, op. cit., p. 152.

¹⁷⁷ Decree Nos 11 and 12.

¹⁷⁸ Industrial Relations Act, s.4.

¹⁷⁹ Ntuny, op. cit., p. 153.

Labour Institutions

The Industrial Relations Act (2000) was designed as a consolidated labour legislation, providing for a number of labour institutions and systems. These include an industrial court, a Labour Advisory Board, employees' and employers' organizations, Joint Negotiation Councils (JNCs), works councils, collective agreements, disputes resolution procedure, freedom of association, the right to organize and others.¹⁸⁰ The Conciliation Mediation and Arbitration Commission, Essential Services Committee and a Code of Practice were also established by the IRA.¹⁸¹ The tripartite Conciliation, Mediation and Arbitration Commission (CMAC) is responsible for administering alternative dispute resolution processes in order to minimise the number of cases that proceed to the industrial court. The Essential Services Committee determines what amounts to essential services and also presides over disputes to determine whether or not a service is essential.¹⁸²

Dispute Resolution

The IRA provides for an industrial court composed of judges appointed in the same manner as the High Court.¹⁸³ This court adjudicates in matters arising from employment and trade disputes and appeals are put before the Industrial Court of Appeal.¹⁸⁴ The IRA provides for a Labour Advisory Board and spells out in detail the composition, procedures and duties of the Board. These include advising on proposals for new labour legislation and the domestication of ILO Conventions.¹⁸⁵ Of the 18 members of the Board, six are government officials, another six are employers' representatives and the remaining six employees' representatives, a configuration that has been described as a potential '12 versus 6' position.¹⁸⁶

The IRA provides for JNCs (which may be formed by one or more employer), an employers' organization or a registered trade union.¹⁸⁷ Where an application for the registration of a JNC is refused, the aggrieved party can seek referral of the matter to the Industrial Court or CMAC.¹⁸⁸

HIV and AIDS

HIV and AIDS remains one of the stiffest challenges to the Swazi workforce. With 33.4% of adults aged between 15 and 49 living with HIV, Swaziland has the highest estimated HIV prevalence rate in Southern Africa.¹⁸⁹

¹⁸⁰ Industrial Relations Act 2000 Parts II-IX respectively.

¹⁸¹ IRA ss.62, 92 and 109.

¹⁸² IRA s.95.

¹⁸³ IRA s.6(1)-(3).

¹⁸⁴ IRA s.20(1).

¹⁸⁵ IRA ss.23(1) and 24(1).

¹⁸⁶ See Ntuny, *op. cit.*, p. 160. The specific composition of the Labour Advisory Board is set out in IRA s.23(1) and (2).

¹⁸⁷ IRA s.45(1)

¹⁸⁸ IRA s.45(3) and (4).

¹⁸⁹ UNAIDS (2005) 'Report on the Global AIDS Epidemic', UNAIDS, Geneva.

9. Zambia

Although Zambia has experienced a lower growth rate than some other SADC countries, it is projected to increase from 4.8% in 2005 to over 6% over the next two decades.¹⁹⁰ The principal source of employment is subsistence agriculture, which accounts for 75% of the working population.¹⁹¹

Labour Law Framework

The principal forms of labour legislation are the Employment Act (1965) (EA), as amended in 1982 and 1989¹⁹², and the Industrial and Labour Relations Act (1993), as amended in 1997. The Industrial and Labour Relations Act (ILRA) does not apply to workers in the judicial and security services. The EA, as amended, applies to all employees, except, as in the case of the ILRA, persons in the defence forces, members of the Zambia Police Force and the Zambia Prison Service.¹⁹³ However, the Minister of Labour is empowered to exempt or exclude certain categories of persons from coverage by the EA. This Act regulates the manner in which wages are paid to other employees. Collective labour law is governed by the ILRA, which establishes the right to establish and join trade unions. The ILRA also provides protection of the rights normally associated with trade union membership, such as the right to leave in order to perform trade union functions, and the right not to be victimized, penalized or dismissed for exercising the rights conferred.¹⁹⁴ Labour courts have attempted to develop key principles of labour law, but have had only minimal success. Limited capacity significantly accounts for this, as there are only about two industrial courts that are staffed by part-time judges.¹⁹⁵

Fundamental Labour Rights

The right to freedom of association is protected by the Zambian Constitution (1991), subject to certain limitations. The right to strike is not protected by the Constitution, neither are certain other rights such as the right to fair labour practices and the right to collective bargaining. The latter are provided for in specific labour statutes, and it is on this ground that the government maintains that reference to them in the Constitution is unsuitable.¹⁹⁶

¹⁹⁰ National Social Security Policy Document May 2007 (Government of the Republic of Zambia, Ministry of Labour and Social Security, Lusaka, Zambia), p. 12.

¹⁹¹ E. Kalula, D. Carolus, 'Labour Market Regulation in Zambia', paper presented at the Labour Market Regulation in the SADC Region Workshop, University of Cape Town, 12-13 January 2006.

¹⁹² Employment Amendment Act 18 of 1982 and Act 15 of 1989 Cap 268, respectively.

¹⁹³ Industrial and Labour Relations Act, s.2.

¹⁹⁴ Ibid., s.5.

¹⁹⁵ Fenwick et al., p. 26.

¹⁹⁶ E. Kalula and D. Carolus, Zambia, *International Encyclopaedia of Laws*, 2003, p. 23.

Social Protection

Social security reform has been on the government agenda since 1983, when the Kabwe Commission of Enquiry was set up to study the challenges to social security in the country and recommend remedial measures. Subsequently, in 1991, with the election of the first new government since the post-independence era, the Kabwe Commission Report was revisited. The new government's commitment to implementing the report was manifested in the formation of a Committee known as the National Social Security Reform Implementation Committee (NSSRIC), whose activities led to the creation of the Department of Social Security under the Ministry of Labour and Social Security. The NSSRIC's role was to carry out social security reform and establish a comprehensive social security system, among other things.¹⁹⁸ A number of other results emerged from this, such as the merger of the Workers' Compensation Fund and the Pneumoconiosis Board.²⁰³ Nevertheless, the persisting problem of poverty demanded a more dynamic, research-led intervention to create a suitable social security framework. Subsequent efforts led to the articulation of the National Social Security Policy document (NSSP) that seeks to identify and devise feasible ways of addressing the poverty situation. The NSSP also makes part of its aim the harmonization of fragmented social security legislation and regulations as well as the extension of coverage to contingencies not previously included.¹⁹⁹

Zambia's social security system has traditionally operated on a social insurance model, which has been limited to the provision of protection against loss or reduction of income resulting from retirement, disability and survivorship.²⁰⁰ For this reason, it has been limited to formal sector employees who constitute only about 10% of the working population.²⁰¹ In respect of this, the NSSP recognizes that 'the informal sector at the moment is not covered by the social security institutions and yet they are the most vulnerable to destitution'.²⁰²

In implementing the new social security policy, certain guiding principles have been identified. These include a focus on members' rights and social justice, promotion of the multi-pillar approach, coverage for all, private participation and scheme regulation.²⁰³ Certain policy objectives are articulated in respect of each category of benefits. For example, in the case of retirement, the objectives are to improve the adequacy and timeliness of benefits, strengthen private occupational and personal plans, ensure long-term sustainability of a retirement programme and improve coverage of the basic retirement pension.²⁰⁴ Objectives for maternity insurance include reducing the cost of maternity on employees and making this provision open to employees in all sectors. Policy objectives for work injury include improving levels of compensation, improving funding and transparency by publishing annual reports, setting an expenditure limit and renewing the composition of the Board 'to give voice to the weak within the concept of

¹⁹⁷ National Social Security Policy Document, May 2007, Government of the Republic of Zambia, Ministry of Labour and Social Security, Lusaka, Zambia, p. 9.

¹⁹⁸ These changes were effected by Act No.28 of 1996, Act No.35 of 1996, Act No. 40 of 1996 and Act No. 10 of 1999, respectively.

¹⁹⁹ National Social Security Policy (NSSP), p. 15.

²⁰⁰ Ibid., p. 10.

²⁰¹ Ibid., p. 12.

²⁰² Ibid., p. 10.

²⁰³ Ibid., p. 14.

²⁰⁴ Ibid., p. 15-17.

tripartism'.²⁰⁵ Further policy objectives include a legislative review to redefine the basis for determining incapacity and the appropriate corresponding awards and closing gaps in coverage. For example, government workers who are covered by NAPSA are not eligible to receive benefits from the Workmen's Compensation Fund because government is exempt from making payments to it.²⁰⁶ Other policy objectives relate to unemployment insurance, social health insurance and housing.²⁰⁷ Social assistance benefits are directed at the most vulnerable groups, as they may not possess the employment status essential to qualify for social insurance benefits.²⁰⁸

HIV and AIDS

A measure of control has been achieved in the fight against the pandemic, with a relatively stable prevalence of 16% being recorded.²⁰⁹

²⁰⁵ Ibid., p. 24.

²⁰⁶ Ibid.

²⁰⁷ Ibid., pp. 19-22, 24-5.

²⁰⁸ Ibid., pp. 17-8.

²⁰⁹ <http://www.dfid.gov.uk/countries/africa/zambia.asp>, accessed on 29 August 2007.

10. Zimbabwe

Trade Unionism and Labour Market Transitions

Political unrest in Zimbabwe has adversely affected economic performance and employment levels. This presents serious challenges to trade unions as they have to grapple with problems of reduced union density and the resultant poor resourcing, both of which affect their ability to influence labour law and economic policy formulation. Union density is suffering in the wake of informalization, casualization and externalization, all of which have led to the development of ‘non-standard’ work relationships which present major difficulties in organizing workers. Where unions do not adopt flexible strategies to respond to these labour market realities, their capacity to attract members and to represent them is significantly diminished.²¹⁰

Fundamental Rights

The Constitution of Zimbabwe contains a comprehensive bill of rights.²¹¹ Section 14(1) provides that no person shall be held in slavery or servitude or be subjected to forced labour. Its definition of forced labour excludes certain kinds of work, including work required in execution of a sentence or order of a court and labour required of a detainee while in detention. Other exclusions include labour required of a member of a disciplined force, labour by way of parental discipline and labour required for public emergency period.²¹² Further, the Constitution protects the freedom of assembly and association and guarantees the right to belong to a political party, trade union or other association for the protection of personal interests.²¹³ This freedom includes the right not to be compelled to belong to any association.²¹⁴ Although certain laws may restrict the freedom of association and assembly, such laws will not be in contravention of this freedom if they make provision for certain specified matters. These include matters of defence, public safety, order, morality and health as well as laws protecting the rights and freedom of others. Others include laws for the registration of companies, partnerships, societies and other associations except political parties, trade unions and employers’ organizations as well as laws imposing restrictions on public officers. However such laws must be shown to be reasonably justifiable in a democratic society.²¹⁵

Other fundamental rights protected by the Constitution include the right to life, personal liberty, freedom of expression and freedom of movement.²¹⁶ Also provided in the Constitution is protection from discrimination, inhuman treatment and deprivation of property.²¹⁷

²¹⁰ Fenwick et al., pp.24-5.

²¹¹ Schedule to the Zimbabwe Constitution Order 1979 S.I. 1979/1600 of the United Kingdom, sections 11-26.

²¹² Section 14(2).

²¹³ Section 21(1).

²¹⁴ Section 21(2).

²¹⁵ Proviso to s.21(3).

²¹⁶ Sections 12, 13, 20 and 22.

²¹⁷ Sections 23, 15 and 16.

Labour Act²¹⁸

The Labour Relations Act passed in 1985 was renamed the Labour Act in 2003. The Labour Act was designed to provide comprehensively for various labour relations matters in order to give effect to Zimbabwe's obligations to international law.²¹⁹ The Act provides for fundamental rights of employees, conditions of employment, unfair labour practices, formation and operation of trade unions, employers' organizations, collective bargaining, and the establishment and functions of the Labour Court, among others. It has undergone many amendments, mostly minor, to bring its provisions in line with these purposes. Part II of the Labour Act reinforces certain constitutional provisions on fundamental rights. These include employees' right to belong to a trade union, the prohibition of forced labour and the protection of employees against discrimination.²²⁰ Other workplace rights provided in Part II are the right to fair labour standards and the protection of employees' right to democracy in the workplace.²²¹ The right to form trade unions and employers organizations is provided for in Section 27. The protection from discrimination is further entrenched by the requirement that the constitution of a trade union is to incorporate a clause expressly prohibiting discrimination against any member on grounds of race, tribe, place of origin, political opinion, colour creed, gender, pregnancy, HIV and AIDS status or disability.²²² A trade union may be deregistered upon the application of any person through a specified procedure to be followed by the Registrar. An appeal against the deregistration of a trade union may be made to the Labour Court.²²³

The Labour Court has the power to hear and determine applications and appeals arising from the Labour Act as well as matters referred to it by the Minister. The Labour Court may also refer a dispute for conciliation, appoint an arbitrator, exercise powers of review and other matters assigned by the Labour Act or any other Act.²²⁴ Remedies that may be awarded in cases of unlawful or wrongful dismissal include reinstatement, damages or any monies due to an affected employee.²²⁵

Social Security

Plans to introduce a compulsory national health insurance scheme have been vigorously resisted by labour, mainly on the grounds that key stakeholders have not been consulted. Industry and labour unions, notably the Zimbabwe Congress of Trade Unions (ZCTU) and the Employers Confederation of Zimbabwe (EMCOZ) maintain that more consultation should have gone into a process that would effectively impose a higher contribution from workers' salaries than their current contributions to pension funds. As such, the move is widely perceived as a covert means of levying workers to generate funds for the ruling party ahead of the 2008 presidential elections and the 2010 parliamentary elections.²²⁶ It is also perceived as a way of taxing workers to fund a health system that would cater for the health needs of the political elite and their cronies.²²⁷

²¹⁸ Chapter 28:01.

²¹⁹ See long title to the Labour Act.

²²⁰ Sections 4, 4A and 5 Labour Act.

²²¹ Sections 6 and 7 Labour Act.

²²² Section 28 (1)(b)(vii).

²²³ Sections 39 and 40.

²²⁴ Section 89(1).

²²⁵ Section 89(2).

²²⁶ 'Outcry over NSSA's Health Scheme', news report by Dumisani Ndelela and Lucia Makamure, published in the *Zimbabwe Independent* on 19 January 2007, accessed at www.kubatana.net on 14 August 2007.

²²⁷ *Ibid.*

HIV and AIDS

In 1998, in response to the HIV and AIDS pandemic, Zimbabwe adopted a national Code on HIV AIDS and Employment. The Code is in the form of statutory regulations made in terms of the Labour Relations Act. Although the regulations make no specific provision for monitoring, review and implementation, any contravention of the regulations amounts to an offence punishable with a fine or with six months' imprisonment.

The Effect of Land Reform

No discussion of decent work in Zimbabwe would be complete without a consideration of the impact of the country's controversial accelerated land reform programme. Job losses, affecting about 70% of farm workers were reported²²⁸ and less than 5% were given land under the land redistribution programme of the 2000s. As a result, the fortunes of these farm workers were closely tied to those of settler farmers who lost their farms.²²⁹ The spillover effect of the departure of settler farmers and the subsequent closure of many farms was that many dependent and/or farm-subsidized activities and institutions also closed down. For example, many schools and clinics were shut down in communities where farms ceased to operate.²³⁰ The loss of jobs by farm workers meant that trade unions in the farming sector, principally the General Agricultural and Plantation Workers Union of Zimbabwe (GAPWUZ), lost a significant proportion of their members. This resulted in losses in trade union income and thus a decline in the financial capacity of trade unions to organize and mobilize members.²³¹ For workers who lost their jobs as a result the land reforms, the fundamental right that is most pertinent is to ensure that they can now recover their lost livelihoods. One way of doing this, it has been suggested, is through planned resettlement designed to provide land to former farm workers.²³² In addition, other priority areas identified for the successful resettlement of displaced farm workers include the provision of agricultural inputs such as draught power, seed, fertilizer, the restoration of social infrastructure such as schools and health facilities closed down during the reform and, most importantly, the provision of food in the interim.²³³

²²⁸ L. M. Sachikonye, 'The Situation of Commercial Farm Workers after Land Reform in Zimbabwe: A Report Prepared for the Farm Community Trust of Zimbabwe' in May 2003, p. 7. See [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/CA45FC315C06E708802570B7005A5684/\\$file/FMTZ+report+_May+2003_.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/CA45FC315C06E708802570B7005A5684/$file/FMTZ+report+_May+2003_.pdf), accessed on 14 August 14 2007.

²²⁹ Ibid., p. 25.

²³⁰ Ibid.

²³¹ Ibid., p. 70.

²³² Ibid., p. 72.

²³³ Ibid., pp. 72-3.

Conclusion

At the SADC Labour Relations Conference of October 1999 participants drew attention to the importance of simplifying legislation that incorporated minimum international labour standards, improving the efficiency and effectiveness of compliance policies and creating a wider coverage of minimum standards to ensure the protection of all employees, vulnerable employees in particular.²³⁴ A key question that begs an answer at this point is: how far have Southern African countries come to achieve these markers of decent work? This question is best tackled by reviewing SADC countries' experiences and performance under the four pillars of the ILO Decent Work Agenda, namely fundamental rights, employment opportunities, social protection and voice or participation.

There is no doubt that many SADC countries have, through constitutional provisions and successive labour law reform, formally shown some commitment to the fundamental rights that engender decent work. This is apparent, not only from various constitutional bills of rights that invariably entrench, for instance, freedom of association, prohibition of forced labour and discrimination, but also in the widespread ratification of core labour standards. In fact, at the sub-regional level, SADC has placed obligations on member states to ratify core labour standards through the Charter on Fundamental Social Rights. The major challenge, however, is addressing the gap between formal acceptance and effective implementation and practice. In the face of resource constraints signified by institutional weaknesses and lack of technical and human resource capacity, fundamental rights still have to be fully realized in most countries of the SADC sub-region.

The situation is similar, if not worse, in the area of social protection. In keeping with the lead taken by the Social Charter, many countries have indicated the need to enhance social protection, but as yet little has been done. For example, although extensive reform has been undertaken, or is underway, in Namibia, Tanzania and Zambia, little has been accomplished by their efforts. Most countries are still to pay heed to the notion that no country is too poor to invest in its people, which the Decent Work Agenda clearly implies.

The third pillar, that of creating employment opportunities, remains the most elusive in the sub-region. Despite repeated programmes and development plans, employment, particularly in the formal sector, continues to decline. Many countries' economies have shown no significant growth, a fact which continues to have devastating consequences for employment opportunities. Labour markets in the sub-region are not only failing to absorb new entrants, they are drastically shedding workers through retrenchment and business closures.

²³⁴ See Communiqué of the Southern African Development Community (SADC) Labour Relations Conference held on 13-15 October 1999, held in Johannesburg, South Africa, item 12, p. 2.

Developments under the fourth pillar of decent work, that of voice and participation, show a lot of promise. Following the lead of South Africa's efforts in this area, many countries have sought to enhance voice and participation through various social dialogue mechanisms. In the past, and across the sub-region, the major institution of voice and participation – labour advisory councils or their equivalent – did not work effectively. They were either ignored or manipulated in many jurisdictions. Now, indications are that the outlook is changing in many of these countries, either through enhanced commitment, as is apparent in the inclusion of social partners in labour law reform, or through the creation of new institutions such as NEDLAC in South Africa. The full impact of these new institutions remains to be seen. The unfolding South African experience suggests that while there have been some benefits for social dialogue, the executive has not yet fully embraced social partners' participation in decision-making and implementation driven by social dialogue.²³⁵

Although it can be reasonably asserted that many of the current labour law reform efforts in the SADC sub-region appear to be in line with the broader expectations of the Decent Work Agenda, they are far from fulfilling its objectives. In all jurisdictions, attaining specific goals under the four pillars of decent work continues to be easier said than done. Furthermore, commitment to Decent Work Agenda goals is uneven, mainly at the level of implementation and practice. Everywhere, there appears to be a big gap between the laws adopted and implementation. This is mainly due to an inadequate capacity to effectively monitor and enforce standards. And, in a number of instances, the laws adopted are not sufficiently in compliance with the international labour standards ratified. It can be said that while the legal framework is important in ensuring normative guidance, much depends on institutions and resources being truly committed to actual implementation and monitoring. On this basis, the realization of the Decent Work Agenda in the SADC sub-region can only be judged, at best, as being work in progress.

²³⁵ Evance Kalula, 'NEDLAC and Social Dialogue in South Africa: Participating Labour Market Governance in Comparative Perspective', paper presented to IIRA Asian Regional Congress, New Delhi, 11-18 April 2007.

