

Public Policy and Trade Disputes in the Public Service in Southern Africa: Need for Policy Coherence

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Introduction

The public service in countries of Southern Africa is generally big. In terms of formal employment, the public service is normally the dominant component of the public sector. This is the case in Botswana, Swaziland, South Africa and Zambia,, where the public service employment accounts for over 80 per cent of the public sector, as shown in the accompanying table below.. It is particularly noteworthy that in the huge South African economy, the public service virtually constitutes the entire public sector employment. The size of employment in the public service is much lower in the remaining countries, but nowhere except Lesotho is it less than two-thirds of the total public sector employment. Given this ascendancy of the government sector, the functioning of the employment relationship, particularly in relation to the management of trade disputes, has significant implication for labour peace, not only in the public sector but in the entire economy in each country. Indeed, taking account of the magnitude of employment, and the critical nature of services being rendered in the public service, the management of trade disputes is paramount to the stability of employment relations and labour market governance in the economies of the region.

The table also presents an overview of other important features of labour relations in the public services in the region. For greater understanding, the countries are classified into 3 variable groups, which allow us to gain a broad impression of the capacity of the legal framework to effectively deal with dispute management in the public service. Thus, in the first group are Botswana, Lesotho Mozambique and Zimbabwe, where the legal framework has denied either partial or full organizational rights.¹ In such cases, the right to collective bargaining is for one reason or another non-existent, although in a country such as Zimbabwe, non-binding negotiations are possible. As to the right to participate in the resolution of disputes, this is inconceivable because in each case, the employer dominates the process, or the process is not accessible to the workers and their unions. It goes without saying that the right to strike is not legally tenable in these countries.

In the second group is Malawi, Swaziland, Zambia and Namibia, where organizational rights are granted by law, but where the legal frameworks or administrative contraptions have either restricted access to collective bargaining, as in

¹ Evance Kalula and Lovemore Madhuku, eds., *Public sector labour relations in Southern Africa: Developments and trends*. Institute of Development and Labour Law, University of Cape Town, 1997

Swaziland. Also, in Malawi the legal framework provides open-ended provisions on what constitutes the essential service, and in Zambia, colossal impediments are placed on the right of workers to strike.

Key Features of Public Service Labour Relations

	Public Service Employment ¹	Legal Framework	Organizational Rights	Dispute Settlement ²	Essential Services	Right to strike
Botswana	90	Regulated by labour code but conflicts with Public service regulation	Right to organize and bargain allowed, but not in force	Employers' processes	Recognized but not defined;	Allowed but not in force
Lesotho	45	Regulated by Public Service regulation	Workers association can consult, no negotiation	Employers' processes	Not defined but practically the entire service	Not allowed
Mozambique	91	Regulated by Public Service regulation	Not allowed	Employers' processes	Not defined but practically the entire service	Not allowed
Zimbabwe	72	Regulated by Public Service regulation	Workers' association can negotiate non-binding agreement	Employers' processes	Defined, the entire public service	Not allowed
Malawi	68	Regulated by the labour code	Right to organize and bargain, some restrictions	Public authority conciliation, arbitration, including labour court	Recognized but not defined	Allowed with restrictions
Namibia	67	Regulated by the labour code	Right to organize and bargain	Public authority conciliation arbitration, labour court	Recognized but not defined	Allowed
Swaziland	86	Regulated by the labour code	Right to organize and bargain, some restriction	Public authority conciliation arbitration, labour court	Defined but elastic	Allowed with severe restrictions
Zambia	83	Regulated by the labour code	Right to organize and bargain	Conciliation arbitration, labour court	Recognized but not defined	Allowed with restrictions
South Africa	93	Regulated by Labour Code and Public Service Act, both are consistent	Right to organize and bargain	Conciliation arbitration, labour court	Defined, quite specific	Allowed, provision for minimum service

¹As a proportion (%) of public sector employment. Figures for Namibia and Zimbabwe (2004); Lesotho (2001); Zambia (2002) South Africa (2006); Botswana, Mozambique and Swaziland (2005); and Malawi (1995).

²Employers' processes, where it exists, often have no employee representation/participation.

Sources: ILO Bureau of Statistics, ILO Laborsta internet. <http://laborsta.ilo.org/> Other sources of data are national surveys, bulletins of statistics and others available from the author.

This group also includes Namibia, where considerable acknowledgement of workers' organizational rights exists, but the public authority responsible for labour matters continue to exercise significant influence over the resolution of disputes. What is equally noteworthy is that in this group of countries, what constitute the essential services is either left undefined or changeable. South Africa alone occupies the third group, and represents what is arguably the most precise legal framework for constructive policies on the management of disputes in the public service. This is evidenced by the virtually unrestricted right to collective bargaining, a clearly defined essential services which is unrivalled elsewhere in the region, and where workers have the right to strike, excepting the requirement that unions must agree to the provision of minimum service delivery during a strike action.

From the foregoing, it is instructive that all but one country, Mozambique, has legal frameworks of varying description for dispute resolution in the public service. However, the effective application of the law in a way that it impacts favourably on the settlement of disputes exists only in Malawi, Namibia, Swaziland, South Africa and Zambia, although with notable differences in approach. Three other countries, Botswana, Lesotho and Zimbabwe, currently operate legal frameworks that severely restrict the exercise of organizational rights to collective bargaining and dispute resolution.

Generally in all jurisdictions in Southern Africa, the foundation for workers' rights is in each case the national constitution, which guarantees the right of all citizens to freedom of association and fair labour standards. In practice, however, subsidiary legislation, such as the labour code, usually redefine constitutional guarantees, in seeking to provide specific regulations. In doing so, legislative frameworks have in some cases compromised constitutional provisions. Yet, in some cases administrative processes have also implicitly or explicitly compromised constitutional guarantees. A typical example, which can be found in several jurisdictions, is Swaziland, where section 3 of the Constitution guarantees freedom of association for *all* citizens, but section 3 of the Industrial Relations Act, as amended, excludes workers in the defence forces, health, water and sanitary services, electricity and fire services from enjoying these rights.

It is similarly noteworthy that the evolution of a generally favourable legal framework for employment relations in the public service is a fairly recent phenomenon in Southern Africa, and it is the outcome of three mutually reinforcing developments which are briefly reviewed here. The first is political evolution, which is illustrated by the democratization of political formations across Africa since the 1980s. This movement acquired considerable impetus with the collapse of apartheid in South Africa in 1994. In this context all the countries in the Southern Africa region have moved from various form of dictatorship or one party state to pluralistic democracy.² This evolution has had a positive demonstration effect on the legal framework for the right to organize and bargain collectively in both the private and public sectors of the economy. However,

² Tayo Fashoyin, *Industrial Relations in Southern Africa: The challenge of change*. Southern Africa Multidisciplinary Advisory Team Policy Paper No. 5. Harare, ILO 1998 and IMF, *Globalization. Opportunities and Challenges*. World Economic Outlook. Washington DC., 1997.

the extension of these rights to the public service is a much recent policy initiative in several countries. For the most part, the labour code did not automatically confer organizational rights on public workers and only in the more recent years were specific mechanisms put in place for the resolution of disputes, and these remain an evolving process in most countries.³

The second was the active role of the Southern African Development Community, SADC, the regional economic grouping, which continue to promote common regional policies on several developmental issues.⁴ With regard to labour and employment issues, the SADC adopted in 1995, a tripartite consultative mechanism, providing space for representatives of employers and labour to participate in the setting of common labour and employment policies at the regional level. Over the years this institutional arrangement has created an effective window for regional integration on labour market issues. The tripartite forum has provided a rallying point for member States to ratify and implement international labour standards. Also the tripartite framework has so far facilitated the adoption of 7 protocols and codes of conduct in wide-ranging issues, including a social charter on fundamental rights at work, codes on HIV/AIDS, safety and health, social security, abolition of child labour, the promotion of productivity, gender mainstreaming.

The third explanation was the role of the ILO in capacity and institution building for labour administrators in the new democracies, to develop suitable labour laws that were consistent with International Labour Standards.⁵ In *all* the countries covered in this paper ILO's technical assistance to governments, labour and employers has been decisive in helping the tripartite partners to assume ownership for the development and implementation of national labour codes.⁶ ILO's technical and advisory services have focussed primarily on guiding the tripartite partners to develop employment relations systems that suits their needs and consistent with international best practice. This support has contributed to the development of the emerging orientations, institutions and

³ A. Murray, M. Sycholt and M. Kampungu, "Labour relations in the public sector: Country report Namibia" In Kalula and Madhuku, loc. cit., 1997.

⁴ Dot Keet, "The effect of economic transformation and regional integration on the public sector and public sector unions in Southern Africa" In Madhuku & Kalula, loc. cit., David Tajgman, *International labour standards in Southern Africa*. Labour Law Unit, University of Cape Town, Monograph 4/94, 1994 and Colin Fenwick and Kalula Evance, *Law and labour market regulation in East Asia and Southern Africa: Comparative Perspectives*. Institute of Development and Labour Law, University of Cape Town, 2004.

⁵ ILO, *Report on the first tripartite seminar on national and international labour standards in Southern Africa*. Geneva, 1994, Sarah Christie and Lovemore Madhuku, eds., *Labour dispute resolution in Southern Africa*. Institute of Development and Labour Law, University of Cape Town, Cape Town, South Africa, 1996 and Tayo Fashoyin, loc. cit.

⁶ Country after country, ILO's technical advisory services and capacity building programme for the tripartite partners were provided in the making the labour code, starting with Swaziland in 1980 to date. During 1995-2006, an ILO technical cooperation project provided training and resources for the reform of labour laws on dispute resolution throughout the Southern Africa region, while another project currently provides technical and advisory services for the improvement in labour relations in 6 countries in the region. For more see www.ilo/dialogue.org.

processes for collective bargaining and dispute resolution in the public and private sectors.

In what follows I analyze the policy frameworks on the management of trade disputes in the public service and their application in areas commonly referred to as the essential services. In do so the paper presents an overview of the experience of the legal frameworks, as well as the evolving approaches in the countries covered in the table above. The point of view taken is that although legal frameworks on the recognition of the right to organize and engage in collective bargaining have been introduced in the region, policy incoherence appears to suggest a general reluctance of the employers to grant full labour rights for public service workers in most countries. This leads to one predictable conclusion, namely that public policy has been half-hearted or indecisive on the organizational rights of workers in the public service.

Public policy frameworks on trade disputes

The policy framework for the employment relationship and hence for dispute resolution is, in all the countries, derived from specific labour codes that outline organizational rights and obligations of employers and workers, generally in both the private and public sectors.⁷ In this context the thrust of public policy has been towards a common approach to the management of trade disputes, particularly in the private sector. The policy approach in the public service is fundamentally different in several countries, because in addition to the general labour code in each country, the nature and scope of the employment relationship are elaborated in legislation specifically made for the public service. South Africa provides an illustrative example of this dual policy framework. In that country the Labour Relations Act covers both sectors, but the Public Service Act provides additional clarity on the nature of employment relationship in the public service.

As can be expected, the management of trade disputes in the public services depicts wide differences, even when the institutions created for this purpose share certain common characteristics. In three countries, namely Lesotho, Zimbabwe and Botswana, the legal framework that deals with the right to form or join the union or to engage in collective bargaining in the public service had either been reversed or non-operational. In the case of Lesotho, the Labour Code of 1992 recognized freedom of association and the right to collective bargaining, and provided mechanisms for dispute resolution in both the public and private sectors. However, in 1995 the government enacted the Public Service Act, which effectively withdrew the application of the 1992 law in the public service.⁸ Instead the government introduced parallel procedures that have the effect of denying these rights. But under pressure from the workers' organizations and the ILO, the government later enacted the Public Service Act of 2005 which recognizes the right of

⁷ Sarah Christie and Lovemore Madhuku, loc. cit.

⁸ N. Motjoloane and N.P. Selinyane, "Coming to the cross-roads: The state of public sector labour relations in Lesotho", In Madhuku and Kalula, loc. cit.

workers to form or join a public officers' association. Also in Zimbabwe, public service workers were granted full organizational rights only in 2002, under the Labour Relations Amendment Act of that year. Curiously, however, the government amended the law three years later – in 2005, unexpectedly withdrawing the rights previously granted to public service workers.⁹ As the law now stands in these two countries, a public officers' association which is sanctioned in each case has no legal right to a binding collective agreement,¹⁰ and neither does the workers' association have a role in the dispute resolution processes nor can its members legally contemplate a strike action.

In the case of Botswana, it was only in 2004 that the right to organize and bargain collectively was granted to workers in the public service, through an amendment to the Trade Unions and Employers' Organizations Act of that year.¹¹ A complementary law, the Trade Disputes Act of the same year provides for institutions and machinery for the resolution of trade disputes in the public service. Critically, however, another complementary law, the public service act, that has thus far legitimized the authority of government as the sole player in the conduct of labour relations remains in force. This is because, four years down the line, the public service act is yet to be aligned with the other legislative changes. This implies that in practical terms, the conferred rights to organize and bargain, as well as the use of the dispute settlement machinery is not operational in that country.

Mozambique remains the only country in the region that has made no pretence about its unwillingness to grant organizational rights to public service workers. The country's Labour Law No. 8 of 1998 is unambiguously exclusive to the private sector and, in this context compares favourably with similar laws in the region.¹² In other words, the denial of organizational rights makes it illegal for public service workers to join or form unions, participate in setting conditions of service or to withhold their labour.¹³ With the right to organize and bargain collectively so denied, the related processes of dispute resolution are effectively under the control of the employer in the country.¹⁴

⁹ The government has however yet to honour a promise to enact a new law within the framework of the public service, which will restore the rights of workers to collective bargaining and dispute resolution.

¹⁰ Although in Zimbabwe, the Minister may approve a collective agreement, thus making it legally enforceable.

¹¹ For earlier times, see M. Mogalakwe, B. Molatlhegi and B. Othlhogile, "Labour relations in the public sector in Botswana" In Kalula and Madhuku, loc. cit.

¹² Peter E.Coughlin, Ed. *Labour relations in Mozambique. Laws, praxis and economic implications*. EconPolicy Research Group Ltd., Chapters 1 and 2. Maputo, Mozambique, 2005.

¹³ Edward Webster, Geoffrey Wood and Beata Mtyingizana, "A survey of industrial relations practices in Mozambique" In: Peter Coughlin, Ed, *Labour Relations in Mozambique*. Pp. 71-72. Maputo: EconPolicy Research Group Ltd., 2005

¹⁴ Noemia Francisco and Orlando G.J. Rubene, "Developments in public sector labour relations: The case of Mozambique" in Kalula and Madhuku, loc. cit.

The foregoing analysis of the policy frameworks in the four countries leaves the observer with two obvious conclusions. The first, in sharp contrast to the policy framework to allow organizational right to collective bargaining in the private sector, these rights have not been granted in the public service. The incoherence in public policy is also highlighted by the conflicting frameworks. The second is the inescapable view that in some jurisdictions, there has been little intention on the part of government to fully grant organizational rights, or create the space for engaging workers on employment relations issues in the public service.¹⁵

In countries where public policy has been unwavering in support for the right to organize and bargain in the public service, i.e. Swaziland, Malawi, Namibia, South Africa and Zambia (groups 2 and 3 in the above table), the overall orientation has been in favour of comparable institutional framework, notwithstanding some differences in detail and scope of the law. In these five countries the labour code in each case is complemented by the public service act, both of which define the nature and scope of the employment relationship. Two observable trends appear to be emerging in these countries. The first is the growing tendency to divest the disputes settlement machinery from the control of the Ministry of labour. Correspondingly, the institutions and processes of dispute resolution allows the tripartite partners, namely government, workers and employers to play a key role in the setting of procedural rules and processes, as well as the actual settlement of trade disputes. This policy choice has enabled the ministries of labour to devote more of their resources to functions such as standard setting and policy formulation, as well as to play the oversight role. The second is with respect to the dispute settlement machinery which emphasizes mediation, conciliation and arbitration. This orientation is conceptually along the lines of the ‘alternative dispute resolution’ (ADR) mechanisms.¹⁶ These emerging tendencies allow the parties in employment relations to have ownership and assume responsibility for the operation of the dispute resolution processes.

Arguably the best evidence of these emerging trends is South Africa where, for example, full responsibility for dispute resolution lies with the Commission for Conciliation, Mediation and Arbitration, CCMA, in both the private and public sectors. The CCMA was created under the Labour Relations Act of 1995, and has responsibility for dispute prevention and dispute resolution. Comparable institutions exist in some of the countries in the region. In Swaziland, for example, the Industrial Relations Act of 2000 created the Conciliation, Mediation and Arbitration Commission, CMAC, and performs functions that are nearly similar to the CCMA. In Namibia, the comparable institution is called the ‘Office of the Labour Commissioner’ and was created under the Labour Act of 1992, and performs mediation, conciliation and arbitration of disputes in

¹⁵ Later I will provide a sketch of the limited though hardly satisfactory mechanism for dealing with workers’ grievances in these countries.

¹⁶ Maziya Muhawu, “Resolving labour disputes in Southern Africa: the case of Swaziland” In Christie and Madhuku, loc. cit.

public service labour relations. However, as will be shown in the next section, the institutions for dispute settlement in these two countries, and also in Malawi and Zambia operate somewhat differently in some fundamental respect. This refers to the fact that, unlike in South Africa, the legal frameworks in these countries assign considerable role to the Ministry of Labour as to when and how to access the services of the available institutions. Also unlike the legal framework in the former, the law in the four countries assigns a key role to the officials of the ministries in the dispute resolution of labour disputes in the public service.

Additional to the institutions enumerated above are labour or industrial courts, and beyond them labour appeal courts and supreme courts across the countries of Southern Africa. Labour courts are intended to provide further settlement possibility to mollify the disputants, particularly when they believed that the lower machinery might not have fairly dealt with their grievances. In most cases, labour courts operate in original and appellate capacity. In a few countries, notably South Africa and Swaziland, labour appeal courts have jurisdiction to review some of the decisions of lower institutions.¹⁷ In two countries - Malawi and Zambia – disputes may be taken to the Supreme Court.¹⁸ In all cases the role of the labour court is seen as reinforcing the participation of the two parties in settling their own disputes, and as such the courts can be said to deepen the use of the ADR concept.

The public policy regime in South Africa needs further elaboration, if only to underscore the significantly different policy thrust in the country, as compared to other policy frameworks in Southern Africa. As noted the Labour Relations Act 1995 complemented by the Public Service Act of the previous year grants the right to collective bargaining and establishes the dispute resolution for South African public (and private) sector workers. The CCMA is supervised by a tripartite board, and is responsible for conciliation, mediation and arbitration services, as well as the determination of the rules and processes for the settlement of disputes.¹⁹ Of particular importance is that the law also provides for the CCMA to authorize and empower the sector-based bipartite Bargaining Councils to assume responsibility for resolving certain disputes in the particular economic sector. Thus in the case of the public service, the Public Service Bargaining Council, PSBC, is given the mandate to resolve most disputes as outlined in the collective agreement reached at the PSBC. This body also has authority to apply and interpret any collective agreement concluded in the public service, and indeed the constitution of the council.²⁰ In these ways, the goal of public policy was to entrench ownership and the responsibility of the parties to manage their disputes.

¹⁷ Ibid.

¹⁸ In most of these jurisdictions, appeals to the higher courts are generally limited to matters of law rather than the substance of the dispute.

¹⁹ Sue King, "Labour disputes settlement in Southern Africa: The case of South Africa" In Christie and Madhuku, loc. cit.

²⁰ To a limited extent the Zimbabwe dispute resolution system, though still much relevant to the private sector, is similar to the South African orientation.

Procedures for settlement of trade disputes

Despite some important similarities in the legal frameworks and the institutions established for the resolution of disputes in the public services in Southern Africa, there are differences that impacts on the procedures for resolving disputes. As might be expected, these differences, subtle as they may be, have important implications for the processes and outcomes of the dispute settlement machinery. Worth noting also is the fact that, in most jurisdictions, procedures differs as to whether a dispute occurs in the general public service or in that segment commonly referred to as the 'essential' services. The present section deals mainly with the former, while the next section focuses specifically on the treatment of disputes in the essential services. All five countries (Namibia, South Africa, Malawi, Swaziland and Zambia) prescribe procedures such as conciliation, mediation and arbitration of disputes, normally in this order. Where these fail, labour courts exist as additional step in the settlement machinery. In some jurisdictions, awards from the lower steps may be referred to superior courts, such as the labour appeal court or the Supreme Court, normally for a review.

In each country the law distinguishes between 'rights' and 'interest' disputes. The former refers to disputes that may require interpretation or enforcement of *agreed terms and conditions*. On such issues, the assumption is normally that there are no fundamental differences among the parties that would encumber prompt resolution. This perspective on 'rights' disputes and the prescribed machinery for settling them are generally acknowledged by unions. At the same time, labour's acquiesce is usually anchored on the understanding that there exist good faith and genuine compliance by the employer. Interest disputes, on the other hand, relate to wage or non-wage *demands* and on which the parties normally engages in hard and energy-sapping bargaining. In dealing with interest disputes, disputants are normally required to go through the entire route of the specified settlement machinery, before embarking on any action, where such action is legally possible.

In Namibia, disputes over right issues are resolved by binding arbitration, and awards can be reviewed by the labour court. In that country, as in others, workers in the public sector are normally not allowed to take the strike option over rights disputes, even though strikes do regularly take place. As to interest disputes, or issues for collective bargaining, the common practice in all the countries is that when bargaining fails, the first step is conciliation or mediation. When either of these fails, the expectation is always that the disputants will go to the next stage of the resolution machinery, i.e. arbitration, the labour court or recourse to strike.

In Swaziland, Malawi and Zambia, the contemplation of a legal strike after futile conciliation, mediation or arbitration, as the case may be, however depends on a vote by the majority of voting workers in support of the strike option. Also, a legal strike is theoretically feasible where the public authority fails to refer the matter for a vote within the stipulated time. On the other hand, a favourable vote to call workers to strike does not automatically lead to the action, ostensibly because there is usually a 'cooling off'

period of not less than a week. This provision is designed to allow the public authority to gain more time to try to settle the dispute. In some countries, such as Swaziland, a simultaneous application may be made to the industrial court to stop the strike altogether, on the supposed reason that such a strike would not be in the public interest. The approach in Malawi elicits a peculiar response. In that country, the union frequently appeal to the industrial court rather than take the strike vote, because a vote which is not in favour of the union may abruptly terminate the dispute. Also in Malawi, a party to a dispute has the option to bypass the Industrial Relations Court and take its case directly to the High Court for justice.²¹ In South Africa and Swaziland, it is permissible for a dispute to be referred directly to the industrial court, even when the dispute is not in an essential service.

In South Africa, the dispute resolution procedure is outlined in the constitution of the PSBC, and provides for conciliation or arbitration, which may be conducted by an individual or a panel of conciliators or arbitrators. The disputing parties may agree on the choice of the intermediary, or may leave this responsibility to the PSBC. Where the parties disagree on the choice of the intermediary, the council has responsibility to appoint. In Swaziland, only the Labour Commissioner has this authority, or to refer a dispute to either the CMAC for conciliation, arbitration or the labour court. In effect, it depends on this government functionary to decide whether or not a dispute will be so referred, while the choice of a particular settlement option is entirely that of the government functionary. It goes without saying that these wide powers give a huge possibility to the public authority to influence the outcome of a dispute. This contrasts the procedure in Zambia where the parties are required to submit to conciliation, either appointed by themselves, or by the minister when the parties fail to agree on the choice of conciliators. When a conciliator or a board of conciliators achieves a settlement, a memorandum of the agreed terms is signed and registered with the industrial court.²² In the event that a settlement is not reached, parties may appeal to the industrial court, whose decision is final. Finally, in using the mandated dispute settlement machinery in the public service, each of the stages has prescribed timeline in most countries. This subtle provision is important because failing to abide by the prescribed timeline may fundamentally influence whether or not an industrial action may be contemplated.

A recent strike in South Africa provides an instructive insight on the usefulness or suitability of the legal framework for disputes settlement in the public service. On 1st June 2007, nearly 1 million workers in the country's public service embarked on a 19-day nationwide strike when bargaining over wages failed. The powerful labour centre, the Congress of South African Trade Unions, COSATU, gave its backing for the strike by 17 unions in the public service. The unions' demand of a 12 per cent wage increase was countered by the employers' offer of 6 per cent. This disparity resulted in weeks of arm-twisting and acrimonious negotiations, while the stalemate in negotiations resulted in discordant divisions among the striking unions. However, when the government

²¹ Rachel Zibelu Banda, *Unfair labour practices. A guide to relevant cases and materials*. Johannesburg, Lexis Nexis Butterworths, 2005.

²² If the agreement is contrary to any law, the court will not register the agreement.

improved its offer to 7.5 per cent, the unions were so factitiously divided that the face saving option was to agree to the government offer. Meanwhile the strike had resulted in an estimated 11 million man-days lost, and a productivity loss estimated at \$418.1 million.²³ Of equal importance was that the strike crippled state institutions, such as educational institutions and caused considerable chaos in public hospitals.²⁴

This dispute is particularly instructive because neither party approached the arbitration machinery as required in the dispute settlement procedure. Seemingly, the failure or reluctance of the parties to go to arbitration was premised on the mutual fear that the machinery might compel them into accepting an unpalatable outcome. Significantly this dispute illustrates the limit of the dispute settlement procedures, and equally the extent of compliance when dealing with real interest disputes. The 2007 strike adds to the case history on the political dynamics of the employment relations over the contentious issues of wage bargaining. In South Africa, the strike has regularly been the means of winning government agreement in all major negotiations in the public service.

As the foregoing shows, the right to use the strike or lockout in the advancement of a claim is possible after due compliance with the provisions of the law. Having said this, it must be borne in mind that, in practice, strict adherence to the law in most cases would make the strike legally inconceivable. This is in view of the fact that, at the end of the dispute settlement machinery in each country, a binding scenario or obligation is created, at which point it makes the conduct of a strike inappropriate or a nullity. This policy incoherence presents one of the dilemmas of law and practice because, in most countries, the strike do occur at *any* stage of the settlement machinery, irrespective whether it involves 'rights' or 'interest' disputes.

Grievances and disciplinary procedures

To digress I provide a brief discussion on the grievance procedures particularly in cases where the machinery for dealing with collective dispute resolution does not apply in some countries of Southern Africa. This is particularly the case in those countries (Botswana, Lesotho, Mozambique and Zimbabwe) where current legislation precludes collective relations in matters relating to dispute resolution. In such cases, the right to organize for collective bargaining in the public service is yet to be legally recognized.

Grievance and disciplinary procedures exist in most civil service systems, essentially as internal civil service mechanism for resolving *individual disputes and grievances*. In countries where collective bargaining takes place in the public service, the grievance procedure is an addition to the dispute resolution processes. In such cases, however, the former is subordinate to the processes provided for in the relevant labour

²³ *Mail & Guardian*, 6 July 2007.

²⁴ See www.polity.org.za.

law. This is to say that, in the absence of the right to form a union and engage in collective relations, the grievance and disciplinary procedure is the de facto machinery available to workers. Unfortunately, the grievance procedure has fundamental limitations in seeking to ameliorate workers' dissatisfaction. One such limitation relate to the fact that the grievance machinery has no capacity to resolve some of the key issues in employment relations, particularly those affecting wages and other conditions of service. Another is that, for the most part, the grievance machinery is structurally deficient because it does not always provide space for workers or their representative to actively participate in the processes that might be set up to resolving grievances. In cases such as these workers in the public service irrespective of whether or not they are in the essential services, have no access to the dispute resolution machinery.

The application of the grievance procedure in Zimbabwe and Namibia illustrates the limitations of this mechanism in dealing with workers' dissatisfaction. In that country, public service regulations empower the public service commission to establish a hearing committee in which staff association is not representation. The committee may hear grievances and issues of misconduct, during which the affected employee is afforded the right to respond to any allegations. Where this disciplinary machinery is put into use, an employee would normally defend himself, and in some cases could have legal representation. The cost of legal representation is borne by the employee, and this alone disadvantages the workers, because only a few can afford this expenditure. Although in most cases, an observer status is granted to the association to observe the hearing, but this does not allow participation in the proceedings. In the case of Namibia, the Public Service Act provides for the establishment of a grievance committee. The committee is not a bipartite forum, but a union representative is allowed to observe the proceedings. As might be expected, unions are not enamoured of this arrangement, because they prefer to be active participants.²⁵

The processes of the grievance machinery are in sharp contrast to the highly participatory and institutionalized bipartite machinery of dispute resolution as provided for in the relevant labour legislation. The latter assures fairness, transparency and good governance of the labour market. It underscores the importance of granting organizational rights to workers, through which the latter and their union can join the employers in finding a solution to a given problem.

Treatment of essential services and the right to strike

The argument in favour of identifying certain services for special treatment in the management of disputes is that certain arms of the public service provide essential services where disruption or cessation of work due to strike or other forms of industrial action could adversely affect the wellbeing of the population, a threat to life or security.

²⁵ In this country, there is the possibility that, if the union is dissatisfied with the proceedings in the committee, the affected worker through the union may lodge an appeal with the labour court. At this point union representation is recognised.

With such reasoning, services that are deemed essential are normally specified, while expeditious procedures for settling the disputes that may arise are outlined in the legal framework. In so far as the International Labour Organization's provisions are concerned, a look at the jurisprudence of the Committee on Freedom of Association considers, apart from the defence forces, the following as essential services: the hospital sector, electricity, water supply, telephone and air traffic controls.²⁶ Under ILO guidelines, countries are obliged to set up clearly defined dispute settlement machinery that are designed to achieve prompt and effective resolution of disputes in such services.

But in nearly all the countries of Southern Africa, the legal frameworks that deal with essential services either lacks precision or are open-ended to the extent of mystifying what constitute an essential service. As an example, the Industrial Relations Act in Swaziland defines an 'essential' service as one "whose interruption would endanger the life, personal safety or health of the whole or part of the population". The act proceeds to identify health and sanitary services, water, fire and emergency and postal and telecommunication as essential services, where the use of the strike is prohibited.²⁷ But in that country, the correctional service which is not so defined is also treated as an essential service!

The legal framework in countries such as Malawi leaves the determination of what constitutes essential services wide open, and so are the criteria for such determination.²⁸ This is equally true of Zambia, where the strike or lockout is prohibited in services 'where disruption can cause harm to life or bring about death'. But the manner of determining the circumstances when a disruption of services would be injurious to the public is not entirely clear. In most jurisdictions, including South Africa, a special panel may determine which service or part of is essential, although the union is usually not represented in such panel. It is not surprising, therefore, that trade unions in several countries are engaged in long-drawn disputes with the authorities over the classification, the imprecision of the classification, or the presumption of essentiality of unclassified services. As an example, the trade unions in Swaziland have for several years questioned government's refusal to allow the unionization of workers in the correctional service, when this service had not been classified as an essential service.²⁹

South Africa is undoubtedly the exception to the common lack of precision on what constitutes the essential service, or the notion of the essentiality of the entire public service, as implied in Lesotho, Mozambique and Zimbabwe. In South Africa the Labour Relations Act declares the armed forces, i.e. the military and police, and health and

²⁶ Paragraphs 544 and 545 *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Fourth (revised) Edition, 1996, Geneva.

²⁷ Sections 91 and 93.

²⁸ The extreme cases, however, exist in countries such as Mozambique, Lesotho and Zimbabwe, where the legal frameworks implicitly presume the entire public service as essential.

²⁹ *Comments of the Committee of Experts on the Application of Conventions and Recommendations. Observation, CEACR 2004/75th Session, 2004, ILO, Geneva.*

welfare, as well as Parliamentary arm of government as essential services, where the strike is untenable. But in services such as health and welfare, the strike may be used, provided the union concerned negotiate with the employers to provide ‘minimum service’ during a strike action. Thus, during the wage dispute between the employers and public service workers discussed in the preceding section, the main significant compliance with the legal framework was the provision of minimum services in the fire service, the police, and in hospitals by doctors and nurses. (In addition a court order had prevented immigration officers from taking part in the strike.³⁰) In other words, under certain circumstances, the right to strike is not totally denied for *all* workers in the essential services in South Africa.

In most jurisdictions, the procedures for the settlement of essential services are similar to those used elsewhere in the public service. These include conciliation, mediation and arbitration, but in the case of the essential services, arbitration is for the most part a binding process. A common approach is the referral of disputes to higher level machinery, such as the labour court. In Malawi and Zambia, for example, the minister may skip either of the regular machinery and refer a dispute directly to the labour court. In Swaziland, this function is performed by the labour commissioner. In such cases, however, the decision of the industrial court may also be appealed to yet a higher level court, such as the Supreme Court. In these jurisdictions, the right to strike or lockout is granted, provided the dispute resolution procedures have been followed as prescribed in the labour code. On the other hand, the right to strike is however not without its downside. In Malawi, for example, the law obliges workers to give ‘proper notice’ of their intention to strike. However, it remains unclear as to what constitutes proper notice!

In these jurisdictions, the procedures for the settlement of disputes in the essential services are usually ambiguous and complex, in several cases enabling the public authority enormous influence over procedural details and hence the outcome of the settlement machinery. The lack of precision or the incoherence that characterize most legal frameworks may be seen as concealing the intrinsic nature of government in not granting full organizational rights in the public service. This disposition casts doubts on the objective purpose of public policy.

Discussion and Conclusions

This analysis of the management of trade disputes in the public service acknowledges the generally favourable policy environment for the recognition of the organizational rights of workers as regards the settlement of disputes in the public service. In this context the policy framework in most countries is consistent with ILO Conventions 87 and 98, respectively on freedom of association and the right to collective bargaining. As a result specific policy frameworks and institutional processes now exist

³⁰ Although the immigration service is not formally classified as an essential service.

in law and practice in dealing with public service disputes in most of the countries in Southern Africa. As the evidence shows, the thrust of the evolving approaches is to deepen governance and regional integration. Nevertheless, the challenge in most countries revolves around the apparent lack of policy coherence, which results in the unwillingness of the employer to grant workers full and effective exercise of their rights to engage in collective employment relations.

Policy incoherence is observable both in law and practice across the region. At one end of the policy spectrum, Lesotho and Zimbabwe exemplify policy vacuum or incoherence. In the former the Labour Code was made redundant in public service labour relations in 1995, when the parliament passed the Public Service Act, to remove the application of the labour code in the public service. Instead the government set up procedures that effectively denied workers' organizational rights. The orchestrated campaigns by trade unions, coupled with gestures from the ILO to comply with adopted international labour standards appeared to have induced the government to enact the Public Service Act of 2005. This law nevertheless failed to grant meaningful rights, because all it did was to allow the formation of public officers' associations, which may engage in non-binding collective bargaining and with no perceptible role in the resolution of trade disputes.

Zimbabwe provides another example of policy incoherence. For a brief period the government took constructive steps to extend organizational rights to public service workers by enacting the Labour Relations Amendment Act of 2002. Intriguingly, however, the rights granted by the law were abruptly withdrawn three years later.³¹ But the sudden action has hardly dampened the spirit of the workers to use the strike weapon as regularly as they had grievances, particularly in such sectors as education and health services. To illustrate, as recent as January 2007, several public service workers, including teachers, doctors and nurses went on damaging strikes, to press for better wages. At the other end of the policy spectrum is Mozambique which is yet to recognize the right, even when failure to do so contradicts the constitutional provisions and the international labour standards that the country had ratified. Botswana is in-between, because in 2004, the government enacted a law granting organizational rights to public service workers. However, more than three years later, the country is yet to amend the subsisting public service law that prohibit collective relations among public service workers.

A further illustration of policy incoherence is with respect to what constitute the essential services and hence the restrictions on the right to strike. Admittedly, the determination of what is an essential service is a contentious issue in public service employment relations. Almost generally, governments have tended to apply this provision more conventionally than labour, or indeed as envisaged in the ILO jurisprudence. In the latter, it is noteworthy that ILO's Committee on Freedom of Association acknowledges that what constitute an essential service depends on the

³¹ President Robert Mugabe had in a speech at the opening of the Parliament on Tuesday 25 September 2006 assured that the rights will soon be restored. See *The Herald*, 26 September 2006.

circumstances prevailing in a particular country.³² (ILO 1996). Nevertheless, the Committee provides guidance as to services where a strike might have the effect of endangering life and personal safety, and where definitive and effective dispute resolution mechanisms should be in place. But as the evidence in many countries reveals, public policy frameworks have been disinclined or equivocal in identifying the essential services, or set up realistic settlement procedure in such services.

Equally problematic is the notion of the whole public service as essential! The folly of this supposition, as implied in the countries in group 1 of the above table - Botswana, Mozambique, Lesotho and Zimbabwe - is that the prohibition of the right to strike has failed to intimidate workers into complying with legal injunctions. The experience of Lesotho, illustrate this dilemma. Of the 12 strikes that occurred during 2005/6 in that country, only one was legal!³³ Across the countries of Southern Africa - from those that recognize the right of public employees to unionize and bargain collectively, to those that have not - the experience has tended to legitimize the strike as a compelling coercive instrument to bring the employer to the negotiating table. This perception of how the legal frameworks operate has regularly induced workers to disregard the no-strike provision in public policy to embark on industrial action.

The incoherence of public policy is complicated by the blatant legal and administrative bottlenecks in the labour relations processes in most countries. These have had a disconcerting effect on the full exercise of the rights granted by law. This is particularly worrisome in those services where the legal or administrative processes appear to frustrate the exercise of the right to strike. But, despite such encumbrances, strikes do occur, in part because of the failure to establish functional machinery for dispute resolution and use it in good faith, and in part for the failure to faithfully implement agreed terms. A recent dispute in Namibia is an example of this orientation. In December 2005, the negotiations process came to a stalemate, because the parties disagreed on the qualifications that a secondary school teacher must have to be employed.³⁴ The mediation of the ministry of labour did not resolve the dispute until the workers embarked on a strike, which then induced the employers to sign a settlement earlier mediated by the ministry. A strike by nurses in Swaziland presents another face of this policy challenge. In that case, the labour court had ordered the employers to pay agreed overtime rates to striking nurses, but government refused and subsequently filed an affidavit of inability to pay. The nurses embarked on a work to rule – practically a strike - whereupon the government rushed to court to declare the strike illegal.³⁵ But the fact that this service was classified as essential did not deter workers from taking the strike action.

³² ILO, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body*. Fourth (revised) Edition, 1996, Geneva.

³³ Based on information from the Ministry of Labour and Employment, Maseru, Lesotho.

³⁴ Based on information from the Ministry of Labour, Windhoek, Namibia.

³⁵ The Swazi News. 24 June 2006, pp. 8-9.

Finally in South Africa where the law and practice appear to be relatively more constructive, the practice has however not fully absolved public policy of avoidable incoherence. In that country, the strike has accompanied nearly all major national negotiations on terms and conditions of service during the past several years. As shown in the preceding section, the strike weapon had been the ultimate means for winning wage concessions from the employers, an outcome which disregard the statutory machinery of arbitration in resolving disputes over wages. In an earlier strike in 2004, the PSBC declared a dispute and subsequently embarked on nationwide strike by most public service employees, including health workers – nurses, teachers and police officers. Government reaction was to adopt a ‘no work no pay rule’ and by that means brought the strike to an abrupt end just after two days.³⁶

Bearing in mind these realities in the management of labour disputes in the public services of Southern Africa, the employers are often portrayed as unwilling to engage in meaningful negotiation or in genuinely seeking the resolution of disputes. This is discernible in the response of workers to the indecision or the half-hearted thrust of public policy. As a result workers appear to understand the strike as a veritable instrument for inducing concession from the employers. In other words, the reluctance to negotiate, or the existence of lengthy and oftentimes inconclusive procedures have tended to give the impression that the strike is an effective option to negotiation and a logical recourse in employment relations in the public service.

This incongruity between public policy and practice presents the debatable question of the commitment of the employers in the public service to constructive and purposeful management of disputes, so the notion that government is a reluctant partner in labour relations is almost incontestable. At the same time, the call for purposeful public policy frameworks that not only explicitly recognize the rights of public service workers to organize and negotiate on terms and conditions of service, but goes further to remove all legal and administrative contraptions that frustrate or nullify workers’ fundamental rights can hardly be flawed.

³⁶ Shamira Huluman, “The practice of social dialogue in the South African Public Service”. *Proceedings of the 4th African Regional Congress of the International Industrial Relations Association*. 28-30 November 2005 Mauritius.