

**A Critical Analysis of the Impact of the Role of Commission for  
Conciliation, Mediation and Arbitration on Social Justice in  
South Africa**

**A Mini-dissertation submitted in partial fulfillment of the  
requirements for the Masters degree (LLM) in Labour and Social  
security Law, in the Faculty of Law, North West University  
(Mafikeng Campus)**

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**November 2008**

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## DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work which has not been submitted before in whole or in part for any degree at any other university



Peter Matekane

November 2008

## ACKNOWLEDGEMENTS

The joy that I express at this moment is immeasurable. First and foremost I would like to register my heartfelt thanks to my God Almighty for helping me put this work together. Had it not been because of His guidance, I would not have produced this invaluable material. To my mother Agnes Matekane; you are so special; your support has been immense and endless throughout the entire period of my study. I wholeheartedly appreciate your love, patience and encouragement during the course of my study. I, with special thanks acknowledge your financial support throughout the entire academic year, I really needed it. *'Molimo a o boloke'*

My gratitude also goes to my supervisor, Prof Iya for his incredible supervision. I am more than satisfied to have worked with a man of his calibre. It is also my great pleasure to acknowledge Mr. Tshoose's assistance in making this work successful. His encouragement has been very helpful to me. I also wish to thank all who have shown their support, especially friends and colleagues. It will be a mistake to forget Prof M. Mbao. He will always say "how far are u with your research? Are u ready to submit?" These words have always boosted my strength at all times.

I do not have gold and silver to offer, all that I can give out is a big thank you to all who have been supportive to me. 'Thank you'.

## DEDICATION

This dissertation is dedicated to my Mother, Agnes Matekane and my late father Joseph Matekane.

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## **ABBREVIATIONS AND ACRONYMS**

ADR – Alternative Dispute Resolution

AJCR – African Journal on Conflict Resolution

BCEA – Basic Conditions of Employment Act

BCLR – Butterworth Constitutional Labour Reports

BLLR – Butterworth Labour Law Reports

CCMA – Commission for Conciliation, Mediation and Arbitration

CLL – Contemporary Labour Law

EEA – Employment Equity Act

HNR – Human Nature Review

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICCPR – International Covenant on Civil and Political Rights

ILJ – International Labour Journal

LRA – Labour Relations Act

PEPUDA – Promotion of Equality and Prevention of Unfair Discrimination Act

SAC – South African Commission

SAJHR – South African Journal of Human Rights

SAJLR – South African Journal of Labour Relations

SDA – Skill Development Act

UDHR – United Declaration of Human Rights

UN – United Nations

UNDP – United Nations Development Programme

US – United States

## SUMMARY

Employment relations in South Africa have evolved through various phases culminating in the current dispensation initiated by the democratic system of government in 1994. The South African Constitution is the supreme law and determines work law and employment relations. The Preamble talks of the advancement of social justice while section 9 entrenches the right to equality and prohibition of discrimination. The watershed piece of legislation, the Labour Relations Act fortifies the Constitution by seeking to advance the concept of social justice. Upon realizing the importance of social justice the Act established the Commission for Conciliation, Mediation and Arbitration (CCMA) as the defender and protector of the concept of social justice.

Due to the recognition of the importance of this concept in society, much is expected from the CCMA in attempting to achieve the Constitutional mandate and in attempting to extend the objective of the LRA by advancing the concept of social justice. The study seeks to determine the extent to which the role of the CCMA advances this concept. While the study will vehemently argue that the CCMA fails to fulfill the advancement and promotion of the concept of social justice in accordance with the Constitution and as expected by other relevant statutes, it would be shown that there are certain fundamental rights which are annihilated which form the main pillars of social justice and without which social

justice will not be vivacious and upheld. The study will also after determining the shortcomings and weaknesses that retard the CCMA in contributing to the advancement of the concept of social justice attempt to disparage possible solutions which will help in the protection and advancement of the concept of social justice.

**Keywords:** Social justice; Conciliation; mediation; arbitration; equality; and discrimination.

# CHAPTER 1

## INTRODUCTION

### 1.1 BACKGROUND OF THE STUDY

Social justice is an important concept in the society in which, or through which justice is achieved in every aspect of the society.<sup>1</sup> It can generally be defined as “the way in which human rights are manifested in the everyday lives of people at every level of society”<sup>2</sup> It is explicit from the foregoing conceptions that the significance of social justice in society in *toto* goes without any impeach. This is based upon the rationale that the achievement of justice would in fact not be witnessed in society without the expression of social justice.

Consequent to the value accorded to this concept, a need arose for those in power to treat it with utmost respect.<sup>3</sup> This flows directly from the endeavours of the South African government which worked tirelessly towards satiating the objectives of social justice in many different ways in order to avail it to the society at large.<sup>4</sup> Following the government’s endeavours, and after the advent of

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<sup>1</sup> *Wikipedia*, the free Encyclopedia, accessed at [www.google.com](http://www.google.com).

<sup>2</sup> *Ibid.*

<sup>3</sup> Employment relations in South Africa have evolved through various phases culminating in the current dispensation initiated by the democratic system of government in 1994. The South African Constitution (Act 108 of 1996) is the supreme law and determines work law and employment relations. The Preamble talks of advancement of social justice while section 9 entrenches the right to equality and prohibition of discrimination. As if efforts were enough, the watershed piece of legislation, the Labour Relations Act, 66 of 1995 seeks to advance the concept of social justice. This will be seen as according respect by protecting social justice.

<sup>4</sup> For example, except the Constitution of the Republic of South Africa, the Labour Relations Act, the Basic Conditions of Employment Act, 75 of 1997 (BCEA) (as amended) promotes and advances the concept of social justice.

democracy in 1994, the law underwent a tremendous transformation in terms of putting the needs of the people upfront.<sup>5</sup>

This ensued after recognition of the poor standard of the laws amongst which the labour laws constituted the important area for close attention. In trying to revamp and reconstruct them into a good shape, the need to re-shape the concept of social justice which indeed hardly existed in the past became one of the targeted concepts which could not be left out.<sup>6</sup> In featuring this concept it was clearly recognizable that an important step moved towards the protection of people's rights.

In addressing the problems and the injustices brought about by the past, the apartheid era, amongst consequential issues of concern to society in which it could benefit, was the introduction of social justice in the legal system. The dispute resolution system underwent a serious vicissitude. The system of South African dispute resolution can be stressed without any impugn that it has evolved from the shortcomings and problems experienced with the old system of labour relations and dispute resolution before the advent of democracy in 1994.<sup>7</sup>

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<sup>5</sup> 1994 saw a great vicissitude as the ANC government embarked on programmes to promote the reconstruction and development of the country and its institutions.

<sup>6</sup> The concept of social justice was first recognised by the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>7</sup> Grogan, J. 1999. *Workplace Law*. 4<sup>th</sup> ed. Kenwyn: Juta & Co. 1.

The development of the system is further countenanced by other scholars by stating,<sup>8</sup>

*“South Africa has made great strides in introducing and amending labour laws that give employers and employees’ certainty and security in their employment relationship...”<sup>9</sup>*

One of the objectives of social justice is to maintain the balance between the interests of the employer and the employee. The above passage shows the importance of the labour laws introduction and amendment which revamped the protection of the employer and the employee in the workplace, the protection which is championed by the concept of social justice.

The emergence of the Labour Relations Act (hereinafter referred to as the LRA)<sup>10</sup> has been the masterpiece in the process of transformation of South African labour system, and much can be witnessed even today. To mention but a few developments engineered by this Act, it has been instrumental in the formation and institutionalization of dispute resolution mechanisms such as the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as CCMA). The commission, propounds Brand and Steadman,<sup>11</sup> is the centerpiece of the LRA. It is intended to play a key role in the overall dispute resolution system.

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<sup>8</sup> Mischke C, et al. 2002. *Labour Dispute Resolution*. Lansdowne: Juta & Co. 3<sup>rd</sup> ed, p 25.

<sup>9</sup> Benjamin, C and Gruen. *The Regulatory Efficiency in the CCMA: Statistical Analysis*. 2006. University of Cape Town Development Policy Research Unit, 1.

<sup>10</sup>LRA No 66 of 1995.

<sup>11</sup> Brand, J and Steadman, F. 2002. *Dispute Resolution Bodies*. Kenwyn: Juta & Co. 140.

The importance of the concept of social justice was acknowledged by this colossal statute in the labour relations. For the first time in the labour relations this concept was made part and parcel of the labour statute, with the aim of addressing the needs of the society. And, indeed, this was to ensure the protection and security of the rights and interests of the parties in dispute concerning labour matters. The introduction of this notion has been a major development especially in the workplace, more especially to instill sense of justice and fairness. In chapter one the LRA embodied social justice as one of its vital objectives. Not only was this the end of securing the concept, but to pursue this objective and the mandate of the Act, through the establishment of the CCMA by the LRA, the vision is as well to advance social justice.<sup>12</sup>

The major task of the CCMA, one would argue, is to further the mandate of practically ensuring the advancement of the objectives of social justice. Explicit in this concept is the notion of justice that the commission is indebted to further in the resolution of disputes in the workplace.

The question to pose therefore is whether the commission, through its role and activities, has fulfilled the objectives of social justice. Bendeman argued that although the concept of Alternative Dispute Resolution (ADR) is applied in the system of dispute resolution, it seems as if the benefits of such ADR approach are not being reaped.<sup>13</sup> Theron and Godfrey in outlining their view in this regard

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<sup>12</sup> Section 1 of LRA.

<sup>13</sup> Bendeman, H. *Alternative Dispute Resolution (ADR) in the Workplace: The South African Experience*. 2007. African Journal on Conflict Resolution, Vol 7, 140.

commended that the system is failing to fulfill the objectives of social justice.<sup>14</sup> It would be opportune therefore to attempt to indulge into a thorough investigation of whether the objectives of social justice are met and achieved by CCMA.

## **1.2. THE PROBLEM STATEMENT AND SUBSTANTIATION**

It was acknowledged earlier, in the above discussion, of the recent originality of this notion as brought about by the changing labour system in a reshaped form. The institutionalization of the CCMA was intended to bring an expression of the objectives of this concept in a manner intended to instill an element of justice and equal fairness in the resolution of disputes in the labour industry. And most importantly, to repair the historical inequalities and injustices of the past, in which case a constitutional imperative would be complied with.

### **1.2.1. Main problem**

Now, therefore, the problem of this undertaking simply relates to the impact of the role and or activities of the CCMA on social justice. In the discussion here above, reference was made to the indigenous legal system, the inability to meet the needs of the ordinary citizens not only due to the content of substantive law, but also due to structure and procedural requirements. With the amelioration of the labour laws, and with the aid of such laws, the CCMA became the hope with

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<sup>14</sup> Theron, J and Godfrey, S. *The Labour Dispute Resolution System and the Quest for Social Justice: A case study on the CCMA, Unfair Dismissal and Small Business*. 2002. South African Journal of Labour Relations, 26,1.

the dispute resolution processes inherent in its role, to contribute to the vivacity of this concept.

The paramount conundrum to propound therefore is whether the CCMA has a major contribution towards social justice. Whether it has in fact fulfilled the objectives of social justice. It can, in a simpler manner be put as thus, whether it has indeed curbed, corrected or repaired the historical inequalities and injustices of the past.

The enquiries of course lay at the epicenter of the problem of the impact it has in advancing the concept of social justice. It is interesting to test the extent to which it has overcome the above-mentioned problems in the workplace especially. The processes of conciliation and arbitration were invented and credenced to be the most opportune methods in which justice could easily be achieved. The notion of fairness was also behind the inventory of these processes. As social justice denotes that equality be the colossal element upon which justice could be scored, the tool for guidance that the activities of the commission is inclined to capture in their dispute resolution is without impeach, the notion of justice and fairness.

## 1.2.2. Specific problems

### 1.2.2.1 Exclusion of constitutional right to legal representation

There is no absolute right to legal representation at any stage of the proceedings of the CCMA. The exclusion of such a right is contrary to the Constitution and therefore raises a serious constitutional qualm. Rule 25 of the CCMA rules is instrumental in this regard as Legal representation is not allowed at conciliation stage<sup>15</sup>, while it is generally allowed at arbitration stage except at the incapacity or misconduct dismissals.<sup>16</sup>

On the contrary, Section 35 of the Constitution gives everyone the right to legal representation.<sup>17</sup> The interpretation of Section 35 was extended even to administrative proceedings.<sup>18</sup> The CCMA exercises administrative powers. With this note, the right to legal representation is unnecessarily curtailed to a certain extent and to the exclusion of incapacity or misconduct dismissals, which act is contrary to the Constitution. There seems to be a serious tension between Rule 25 and Section 35 as a result of which the legality and constitutionality of CCMA rules with regard to legal representation is hereby challenged.

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<sup>15</sup> CCMA Rules, rule 25(1)(a).

<sup>16</sup> CCMA Rules, rule 25(1)(c).

<sup>17</sup> [Http://www.btimes.co.za/guide/labour/labour13.htm](http://www.btimes.co.za/guide/labour/labour13.htm).

<sup>18</sup> The right to fair trial is applicable to both the determination of an individual's rights and duties in a suit of law, the term suit at law captures administrative proceedings (Lawyers Committee for Human Rights in the United States, in a *Basic Guide to Legal Standards and Practice* issued in March 2000, page 1), the CCMA is an administrative tribunal (Currie and De Waal. 2005 *The Bill of Rights Handbook*. Wetton: Juta & Co Ltd 5<sup>th</sup> ed, at 651) because its proceedings are administrative in nature therefore right to fair trial (Erassey, M. 2005 *Employment and Labour Law: Commentary on the Labour Relations Act*. Kenwyn: Juta & Co Ltd. Vol 3, at A7-1-A7-2.) is applicable in CCMA proceedings as a result of which legal representation is implicit in this particular right. (Own emphasis).

### 1.2.2.2 Unfair discrimination

The concept of unfair discrimination is prohibited. This is not only fortified by the Constitution in terms of Section 9 thereof, but even courts have shown their disapproval of an exercise of unfair discrimination in every respect. In the *Hoffmann v South African Airways*<sup>19</sup>, the court held that at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. The court enforces section 9 of the Constitution which is the prohibiting section of unfair discrimination.

The Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) prohibit unfair discrimination. Section 9 of the Constitution provides that no one may be unfairly discriminated while PEPUDA gives effect to Section 9 of the Constitution by expressly prohibiting unfair discrimination. PEPUDA defines discrimination as 'any act or omission including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantages on; or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.' The definition gives examples of acts or omissions which if they do not comply with the prohibited grounds under section 9 of the Constitution become unfairly discriminatory in nature.

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<sup>19</sup> 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 27.

CCMA's refusal to allow parties the right to be legally represented at misconduct and incapacity arbitrations, while allowing representation by trade unions, employer's organizations and in-house legal advisers, amounts to unfair discrimination against members of the legal profession, and indirectly to employees' client.

### **1.2.2.3. Right of access to CCMA**

It is presumed access to CCMA is what the LRA has intended. This is one of the objectives of the LRA to provide employees with access to the CCMA where their cases will be well ventilated. The right of access to the CCMA is generally guaranteed through a right safeguarding equal protection of law.<sup>20</sup> It is further contended that CCMA for instance is one such forum that is intended to provide for the safeguarding of the equal protection of law by upholding equality and fairness through disputed resolution mechanism such as conciliation and arbitration.<sup>21</sup> It is believed that complete and adequate accessibility is not yet achieved by the CCMA.<sup>22</sup> Can we confidently say accessibility is achieved yet legal representative is not fully featured? This leaves lay people in the field of labour law to fully dispose of their matters through the aid of legal experts.

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<sup>20</sup> Davis, D et al. 1997. *Fundamental Right in the Constitution: Commentary and Cases*. Cape Town: Juta & Co. Ltd. 143.

<sup>21</sup> *Ibid.*

<sup>22</sup> Bendeman, H. *An Analysis of the Problems of the Labour Dispute Resolution System in South Africa*. 2006. *African Journal on Conflict Resolution*, Vol. 6, No 1, p 97.

In a nutshell, the study focuses on the extent to which the CCMA via its role and activities has ensured the advancement of social justice. If these problems remain unsolved, injustice will remain firm in the workplace as a result of which serious prejudice will daily be suffered by the concerned parties. The study will attempt to solve these problems by investigating into the roles and activities of the CCMA, and related laws intended to give protection against the raised problems.

### **1.3. RESEARCH AIMS AND OBJECTIVES**

#### **1.3.1. General aims**

The aim of this research is to critically analyse and assess whether the CCMA through its role and activities in terms of structure and mechanisms has made any impact on the concept of social justice. The study will attempt to determine further, the impediments that hamper the advancement and fulfillment of this concept by the CCMA. Thereafter, in the final analysis the study will attempt to provide the workable solution to the problem determined.

#### **1.3.2. Specific objectives**

The specific objectives of the research are the following;

- a) to specifically scrutinize the provisions of the constitution which in fact are of relevance to the study. The Constitution is the supreme law of the

country and the obligations imposed by it must be fulfilled.<sup>23</sup> In this regard it serves as the basis upon which other legislation must be based.<sup>24</sup> To explore some of these important provisions, the study will determine the protection accorded to salient principles reinforcing the concept of social justice.

- b) To scrutinize relevant legislation and to determine the weaknesses brought about by such legislation in carrying forward the concept of social justice. It is important that every legislation must comply with constitutional provisions in order to accord necessary protection to every right, duty and obligation.<sup>25</sup> It is important to test the protection accorded by labour legislations with regard to social justice and determine whether necessary protection as mandated by the Constitution is provided. This will help determine the weakness and challenges that our legislation faces in fulfilling this mandate.

#### **1.4. SIGNIFICANCE OF THE STUDY**

Due to the perceived and discernible shortcomings in the role and activities of the CCMA in advancing social justice, and infact due to the important nature of the concept, the study is tempted to attempt to offer a contribution to the advancement of this concept with the aim of achieving justice in the workplace.

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<sup>23</sup> Section of the Constitution shows the supreme status of the Constitution and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

<sup>24</sup> Any law or conduct inconsistent with it is invalid.

<sup>25</sup> The trend in South African labour law is that every legislation is must base itself to the Constitution. This is the influence of the International jurisprudence. It would seem labour laws are measured against the International Labour Standards. The Bill of Rights allows this practice.

The importance of this concept is recognised not only through the major legal instruments including the constitution but is also accommodated under the labour international instruments. The emphasis is clearly centered on strengthening of this concept to instill equality and equity in the workplace. This entails a clear indication of the value of this concept. It is intriguing therefore to build a brick to the construction of this concept to maintain the strength it was intended to gain.

Of significance in this study, is that the salient deficiencies or problems found in the South African dispute resolution mechanism (system) the CCMA being on the spotlight, will be highlighted and measured, which will include legislative proposals, to remedy those deficiencies or problems will be proposed. At the same time remedies are proposed aimed at improving, firstly the CCMA in its mandate to achieve social justice in the workplace, and secondly at improving the legislation that hinder the smooth progress of the CCMA in attempting to achieve its main objectives and the demands of social justice.

### **1.5. BASIC HYPHOTHESIS**

As outlined above, the major theme is centered on whether social justice is indeed advanced and achieved by the CCMA as required by the LRA. An answer to the negative will mean justice has indeed not be done to social justice as a result of which the CCMA will be said to gain the historical position in so far as dispute resolution is concerned. To enable the departure from the routine that

denied people justice, a need arose resulting in the introduction of the CCMA. The gigantic qualm of this study therefore is whether the requirements of social justice and the needs of the people are uplifted by the existence of the CCMA as expected.

## 1.6. LITERATURE REVIEW

The relationship between social and economic rights and the right to equality and transformative vision of the constitution is one that is committed to remedy socio-economic inequality.<sup>26</sup> The value of the equality and the equality clause as contained in the Bill of Rights strive to repair the historical inequalities and injustices of the past.<sup>27</sup>

As highlighted before, the element of doubt arises with regard to the CCMA contribution to social justice. Some may argue that South Africa shows mixed results in meeting her socio-economic obligations: however, she has not met any of the fundamental goals for economic and social transformation that work in synergy to eradicate the injustice of inequality...<sup>28</sup>

It was stated;

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<sup>26</sup> De Vos, Grootboom, “*The Right of Access to Housing and Substantive Equality as Contextual Fairness*” 2001. SAJHR, 258.

<sup>27</sup> Alexander, P et al, *Supra*.

<sup>28</sup> Forouk, F. “A Social Justice Response to the State of the Nation Address” – Quoting from the UNDP Development Report 2006.

*“The notion of social justice championed here embraces an equitable distribution of social resources...these can be conceptualized as public goods so the ultimate aim of the state is to ensure that all people enjoy access to these goods.”<sup>29</sup>*

To restore social justice, the LRA,<sup>30</sup> the Basic Conditions of Employment Act (BCEA)<sup>31</sup> and the Employment Equity Act (EEA)<sup>32</sup> were anticipated would form the pillars upon which economic and social justice will prevail and that workers will have their dignity restored.<sup>33</sup>

The notion of social justice hereof champions that the rights of citizens be protected. The CCMA is assumed with the responsibility as the trustee of the citizens' rights. In order therefore to carry out its duties entrusted upon it as such, compliance and regard to social justice as canvassed by the constitution of the Republic of South Africa must be adhered to.

Some people opine that the CCMA is a veritable contender of social justice, and credence the institution as having established itself as a protector of rights. They maintain that in the ten years of its existence the CCMA has rewritten the dispute resolution landscape in South Africa. It has established itself as a defender and

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<sup>29</sup> Swartz, O. *“On Social Justice and Political Struggle”* 2004 Human Nature Review. Vol, 4, 152-165.

<sup>30</sup> *Supra*.

<sup>31</sup> 75 of 1997.

<sup>32</sup> 55 of 1998.

<sup>33</sup> Monyane, K. *“Strengthening and Integrating Dispute Settlement Machinery and Conflict Resolution”* - A system Approach. 2002 Paper presented at the HRLAC, Seminar on Strengthening and Integrating Dispute settlement Machinery and Conflict Resolution. A System approach, 22-26 July 2002; Johannesburg SOCPOL Circular no. 96E/02. page 10.

protector of rights, freedoms and responsibilities.<sup>34</sup> It was further indicated "...the CCMA has not failed..."<sup>35</sup>

However, it is dispiriting that it is clear that the dispute resolution system is currently under strain, as is evident from numerous reports about the problems experienced by the CCMA.<sup>36</sup> Even though the LRA has brought statutory dispute resolution within reach of the ordinary worker, it might actually have compounded the problems relating to dispute resolution in the country.<sup>37</sup>

The new Constitution of South Africa which its bill of Rights, is based on the principle that all people are equal before the law.<sup>38</sup> The problem is that the equality thus achieved will be more of a façade than a reality if people are still *de facto* excluded because, due to past injustices, they do not have the economic, social or actual ability to make use of those rights...<sup>39</sup> It is however also true that, quite apart from the problems experienced by those previously disenfranchised, or otherwise powerless, the justice system in South Africa is under constant scrutiny and criticism from various interest groups (business, labour, religious groups, cultural groups or community groups)...<sup>40</sup>

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<sup>34</sup> A speech by Minister of Labour, *supra*

<sup>35</sup> *Ibid*

<sup>36</sup> Bendeman, H. "An Analysis of the Problems of the Labour Dispute Resolutions System in South Africa." 2006. African Journal on Conflict Resolution Vol 6. No 1 p 81-112.

<sup>37</sup> Le Roux, P et al. "Under Strain...but Coping so far: The first four Months of the CCMA." 1997 Contemporary Labour Law, Vol 6, no. 7 Rivonia: Gavin Brown & Associates, 12.

<sup>38</sup> Constitution of the Republic of South African, Act 108 of 1996.

<sup>39</sup> South African Commission, *supra*.

<sup>40</sup> Omar, A. "AFSA; The need for Alternative Dispute Resolution" Address delivered at the opening of arbitration House as extracted in 1996, 9 Consultus 126.

Apparent in the South African constitutional dispensation is the promulgation of equality and non-discrimination provisions that endeavour to cater for historical inequalities. These rights are catered for under the precept of social justice. To stretch this even further, social justice is one of the important notions that justice can not take its course in the absence of its exercise. This could be observed under the LRA adopting it as such and stretching its arms further as burden of other institutions, CCMA being an example to this effect. The advancement of this concept, peradventure, is illuminated by the literature herein as a thing never being achieved by the dispute resolution systems, the CCMA included.

The literature discussed herein falls short of definite solutions of how the CCMA could advance social justice without creating any complications or injustice to the concerned people. The present study will attempt through the emerging analysis to recommend solution to further the amelioration in the CCMA in meeting the requirements and objectives for social justice.

## **1.7. RESEARCH METHODOLOGY**

A research methodology is a strategy or plan of action that links the method or methods chosen to the outcomes.<sup>41</sup>

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<sup>41</sup> Mbao, M. "*Quidelines to Research Students*". 2007. North West University, p3.

The research methodology, in this instant study, is based upon qualitative method. It involves examining and reflecting on perceptions in order to gain an understanding of social and human activities.<sup>42</sup>

The qualitative method that the researcher undertakes will be opportune on the basis of its efficiency, and more fitting due to time constrain, and taking into consideration of the fact that this is a mini-dissertation which operates under specified time limit. This method is as well advantageous due to its cost effectiveness as opposed to qualitative method.

Utilization and engagements of writings of different jurists and scholars related and valuable to the contribution of this study shall be of great assistance. An attempt will also be made to analyze existing literature. Of help too, will be the regular usage of Library material, such as books, journals, law reports and periodicals. This shall be easily located due to the accessibility nature of the library and its resources. The desktop materials will as well facilitate in the construction of this material.

Special attention will also be made to international and foreign jurisprudence which will help determine the correct approach to the solution of the problem stated herein.<sup>43</sup> It is believed in borrowing international and foreign laws, this will help enhance the south African jurisprudence on the issues in question

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<sup>42</sup> Mbao, M. *supra*.

<sup>43</sup> Section 39 of the Constitution allows utilization of international law and foreign law.

## **1.8. THE SCOPE OF THE STUDY**

It has been clearly noticed from the inception that the study is confined to the South African Labour System. But this notwithstanding will not be a barring tool to the exploration of other jurisdictions in the treatment of subject matter of this study. Of course the study will venture into the territories of other countries which shall be helpful in finding solutions to the problem of the study

### **1.8.1. Provisional chapter division**

The study is divided into five inter-related chapters namely, the general introduction of the study, the underlying principles contributing towards social justice, the role of the commission for conciliation, mediation and arbitration in the advancement of social justice, analysing the impact of the Commission for Conciliation, Mediation and Arbitration on social justice, conclusions and recommendations.

Chapter one will comprise of the outline of the background of this study and conceptual issues whereupon the material concepts are defined. The problem that forms the basis of this particular study is also highlighted in this chapter, the purpose of the study, the significance of the study, the hypothesis, literature review, research methodology and the scope of the study are included as well.

Chapter two will basically discuss the underlying principles of social justice which for the purposes of this present endeavour are equality before the law and equal protection, equal enjoyment of all rights and freedoms, and the concept of discrimination. The application of these principles will be shown in the context of South Africa, and this will only be achieved by exploring various legislation and the Constitution which provide for this concept with a view of determining the protection accorded to this particular concept.

Chapter three will amongst others render a discussion on the processes of dispute resolution mechanisms (conciliation and arbitration) and activities with the view of determining the role played by the Commission as mandated by the LRA and other relevant legislation facilitating for the promotion and advancement of the concept of social justice.

A critical analysis of important issues which this study has covered will be discussed, the weaknesses and challenges, will form the major part of the fourth chapter.

A summary of conclusions reached throughout the study will be made as well as the key recommendations that shall help curb the problem studied in this study.

### **1.8.2. Limitations**

The legal context of South Africa will be highly of assistance to the study pertaining to the subject-matter entailed herein. The Constitution and labour

related laws will be analyzed, therefore the study will be confined to South African laws. This will be opportune considering the scope of the research as well as time factor which will not allow a very broad discussion and which will not allow a discussion beyond South Africa due to financial constraints. However, international trends will be discussed with regard to certain aspects of the study.

## **1.9. DEFINITION OF IMPORTANT TERMS**

It is of paramount importance firstly to provide definitions of terms that are of relevance to the study.

### **1.9.1. Social Justice**

The meaning of social justice varies from country to country, depending on the kind of society and the needs of such society. So many definitions can be extracted from this concept.

The concept of social justice has continued to be very popular in social and political discourse. However, debate still exists about how to define this concept.<sup>44</sup> Friesen expresses that "Certain terms or phrases appear so frequently that we often assume their meaning is well understood and agreed upon. However, Meaning is often slippery and one term or phrase can be associated with a surprisingly diverse range of definitions. "social justice" is one of those

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<sup>44</sup> Friesen, M. *Perspectives of Social Justice in New Zealand*. 2006. Research Project, University of Canterbury. New Zealand. 146.

phrases. It frequents political party circles, is a catch-phrase for numerous charitable organizations, and has been associated with everything from fashion to football, from poverty to prostitution, and from entertainment to the environment.”<sup>45</sup>

Many writers have expressed their views with regard to defining this concept. Social justice is a broad term, we take it to mean the striving for equal and fair treatment of all human, regardless of their ethnicity, social class or gender.<sup>46</sup>

Friesen in attempting to lay out a definition, elucidately expounded social justice as an attempt to promote greater equality among people, whether through rights, opportunities, treatment or distribution of resources.<sup>47</sup> He further articulates that social justice is treating people equally regardless of any group or individual characteristics...<sup>48</sup>

For our present discussion therefore the definition provided by Friesen shall be adopted as it is credenced it is the appropriate definition so far as this study is concerned.

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<sup>45</sup> *Ibid.*

<sup>46</sup> Friesen, *ibid*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* 149

### 1.9.2. Equity

Equity connotes that individuals must be accorded just treatment...<sup>49</sup> The principle of equity therefore contemplates fairness and reasonableness.<sup>50</sup>

### 1.9.3. Conciliation

Conciliation is one of the main mechanisms for dispute resolution under the CCMA. Conciliation is '...a process by which a conciliator appointed by the CCMA, a bargaining or statutory council, or an accredited agency helps the parties to a dispute to reach a settlement. This can be done by any consensus building process including mediation, fact-finding or by making recommendations, including advisory arbitration...it is generally a compulsory process by which one party refers the dispute to conciliation and the other party is compelled to attend. It may also be invoked voluntarily by both parties.'<sup>51</sup>

### 1.9.4. Mediation

Mediation is defined as an attempt to settle a legal dispute through active participation of a third party (mediator) who seeks to find points of agreement and

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<sup>49</sup> Social Justice...*a means to an end, an end in itself*, a discussion paper issued in February 2006 by Canadian Nurses Association in Canada.

<sup>50</sup> The growing clarity of the definition and purpose of equity has led many organizations around the world to start to work towards social justice. For example, the Universal Declaration of Human Rights has been a pivotal document in the initiation of human rights legislation and rights based approaches to global development. In many cases advocates have used human rights to provide the legal framework for the pursuit of social justice.

<sup>51</sup> Basson, A et al. 2000. *Essential Labour Law*. Groenkloof: Labour Law Publications. P 184.

make those in conflict agree on a fair result. Mediation differs from arbitration in which the third party (arbitrator) acts much like a judge but in an out-of-court less formal setting but does not actively participate in the discussion.<sup>52</sup>

### **1.9.5. Arbitration**

Arbitration is a form of adjudication and is a process where an impartial third party decides the submitted issue after reviewing evidence and hearing argument from the parties. It may be binding on the parties, either through agreement or by operation of the law, or it may be non-binding in that the decision is only advisory. Arbitration may be voluntary, where the parties agreed to resolve the issues by means of arbitration, or it may be compulsory, where the process, by law or by prior agreement, is the exclusive means provided in respect of the issues concerned. Arbitration may be expedited. It may be conducted on an inquisitorial or adversarial basis.<sup>53</sup>

## **1.10. CHAPTER CONCLUSION**

The importance of social justice is strongly withheld. South African law has endeavoured to enhance this concept to give it the value that it deserves. But the question which the answer is yet to be investigated is whether the constitution is complied with. This remains very dubious on the basis of the strong contentions raised as the main problem of this discussion. That said, leaves a great concern

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<sup>52</sup> [Http://legal-dictionary.thefreedictionary.com/mediation](http://legal-dictionary.thefreedictionary.com/mediation) at [www.google.com](http://www.google.com).

<sup>53</sup> Pretorius, P. 1993. *Dispute Resolution*. Cape Town: Juta & Co. Ltd. 1<sup>st</sup> ed, p 5.

as to the promotion and advancement of this concept by the relevant institutions such as the CCMA. This will assist in promoting the principles of equality and equity as a result of which justice will be achieved in the workplace, hence a call for revamping of a system to satisfy the mandate of the constitution.

The chapter gives an introductory nature of the research as it has tried to unpack the concept of social justice, shown the general picture of its importance in society, and shown the position of the laws towards the concept. The chapter has shown that due to the doubted protection of the concept of social justice through labour laws and institutions inclined to give protection required, the research will analyse such laws to investigate the gaps.

## CHAPTER 2

### UNDERLYING PRINCIPLES CONTRIBUTING TOWARDS DEVELOPMENT OF SOCIAL JUSTICE

#### 2.1 INTRODUCTION

Social justice is in fact illuminately elucidated as an attempt to promote greater equality among people, whether through rights, opportunities, treatment or distribution of resources.<sup>54</sup> As indicated earlier, the pivotal principle underpinning social justice is the principle of equality.<sup>55</sup> The importance of the principle of equality has highly been remarked.<sup>56</sup> This is indicative of its place in the constitution of the Republic of South Africa.<sup>57</sup>

Since the whole notion of social justice in the South African Constitution is aimed at instilling equal fairness and treatment, and healing the injustices of the past brought about the inequality and divisions,<sup>58</sup> it was befitting for the government of South Africa to extend the aim of the Constitution even to legislative, administrative and judicial organs.<sup>59</sup> Laws have been enacted that aim at advancing this notion in the workplace. It is coherently comprehended therefore

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<sup>54</sup> Friesen, M. *supra*.

<sup>55</sup> See chapter one page 7.

<sup>56</sup> 1919 ILO Constitution. See also the case of *Consumer Education & Research Centre v Union of India (1995)* where the court held that “social justice is a device to ensure life to be meaningful and livable with human dignity.”

<sup>57</sup> The Constitution of the Republic of South Africa, *supra*.

<sup>58</sup> The Preamble of the Constitution of the Republic of South Africa indicates the purpose of adopting this Constitution as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

that proper measures are put into place that satiate the foregoing issues which were left unattended prior to 1994.<sup>60</sup> Forums, such as the CCMA, were established to advance this notion in the workplace.<sup>61</sup>

As social justice is striving for equal and fair treatment for all human beings,<sup>62</sup> the most important aspects to be dealt with in this chapter will be equality before the law and equal protection or non-discrimination, equal enjoyment of all rights and freedoms, and the concept of discrimination. This chapter will therefore attempt to give a discussion of the mentioned concepts with the *animus* of showing how the notion of social justice has to be advanced generally and with particular focus on CCMA. It will further attempt to draw attention to international trends, constitutional recognition and highlight important legislation which give effect to this concept with the view of recognizing the legislative attempt in advancing this concept more especially in the workplace. For that purpose the chapter will highlight the following issues; the historical context of dispute resolution system, general human rights approaches to social justice, special attributes of social justice (legal framework) and social justice as a basis for establishment of CCMA.

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<sup>60</sup> Employment relations in South Africa have evolved through various phases culminating in the current dispensation initiated by the democratic system of government in 1994. See Landis, H and Grossett, L. 2005. *Employment and the Law: A Practical Guide for the Workplace*. Cape Town: Juta & Co. Ltd. Page 1.

<sup>61</sup> Labour Relations Act (LRA) section 1.

<sup>62</sup> Friesen, M. *supra*.

## 2.2 HISTORICAL CONTEXT

The importance of the equality right to the post-apartheid Constitutional order is obvious. The apartheid social and legal system was squarely based on inequality and discrimination. As the Constitutional Court has pointed out;

*“Apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as white, which constituted nearly 90 percent of the land mass of South Africa; senior jobs and access to established schools and universities were deemed to them; civic amenities including transport systems, public packs, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of these appalling programmes are still visible in our society.”<sup>63</sup>*

The deep scars of decades of systematic racial discrimination can be seen in all the key measures of quality of life in South Africa. White South Africans are significantly healthier and better nourished than black fellow-citizens. They enjoy relatively higher standards of literacy and education.<sup>64</sup>

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<sup>63</sup> *Brink v Kitshoff No 1996 (4) SA 197 (CC) para 40 (O'Regan J).*

<sup>64</sup> A study conducted in 1994 found 80 percent of Africans and 40 percent of whites could not read or compete at a standard 5 level (the basic level of literacy) South African Institute of Race Relations South African Survey 1995/6 96.

It is observed that the first era constructed a racially exclusive system and African or black workers were marginalized from the mainstream of industrial relations.<sup>65</sup> The exclusion of African workers, however, meant that they could be employed on terms inferior to those set by industrial council or conciliation board agreements.<sup>66</sup> There is a wide perception that the formal system of justice in the country before the commencement of the present constitutional dispensation suffered from the effective exclusion of most South Africans from the formation and implementation of the legislation.<sup>67</sup>

The inability to meet the needs of the ordinary citizens was however not merely due to content of the substantive law, but also because the structure and procedural requirements of the courts meant that many people were denied access to the courts.<sup>68</sup> Many of the peculiar problems facing the black community stemmed from the largely ineffective administration of the justice system in black areas.<sup>69</sup> The legal problems as well as problems of social adjustment encountered by urban blacks were not being solved. The state established alternative institutions such as advisory boards, urban and community councils and town councils which proved unsuccessful in instilling sense of formality.

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<sup>65</sup> Separatist policies, the exclusion of black (African) employees from the ambits of labour legislation from the start and attempts to establish alternative structures for Blacks led to a divided system. on the other had, government's reform initiatives in the late 1970's gave impetus on the new system, which had been born of black employee unrest at the beginning of that decade. (See Bendix, S. 1992. *Industrial Relations in South Africa*. Cape Town: Juta & Co Ltd. 2<sup>nd</sup> ed. 77.

<sup>66</sup> Webster. 1978. 'Essays in South African Labour History'. P 68 cited by Matekane, P and Mbeng, J *Comparing and Contrasting the History of Trade Unions in South Africa with one other SADC Country and Plotting a Feasible Road Map for an Effective Labour Law for the SADC Region*. A Seminar Presentation Paper delivered on the 25<sup>th</sup> day of March 2008 at North West University. P 14.

<sup>67</sup> Carpenter, G. "Public Opinion, the Judiciary and Legitimacy." 1996 11 SAPL, 110.

<sup>68</sup> Grant, B and Schwikkard, P. 1991. "People's Courts?" 7 South African Journal of Human Rights (SAJHR). 304.

<sup>69</sup> *Ibid*

More recently, attempts have however been made by a number of non-governmental organizations to introduce more appropriate forms of dispute resolution mechanisms to communities. Examples of such initiatives are those being conducted by the Community Dispute Resolution Trust (CDRT) and the Community Peace Foundation (CPF). These initiatives have been met with mixed degrees of success.

In the 1970's the major shift that took place in industrial relations gave rise to a need for more appropriate forms of dispute resolution in the workplace. This need was filled at the time by Independent Mediation Service of South Africa (IMSSA) which was instrumental in introducing forms of mediation and arbitration. The success of this initiative has been borne out by the extensive reliance on mediation and arbitration in the new LRA and by the establishment of the CCMA to carry out these functions.<sup>70</sup>

It was credenced therefore that the establishment of these institutions could curb the violations of people's rights and entitlements, and correct the inequalities occasioning at the workplaces, hence the reinforcement of social justice. And this time through the formal structures that could apply to people both in the rural and urban areas.

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<sup>70</sup> The LRA brought about a major shift in the industrial relations as a result of which the CCMA was established which in fact is responsible for dispute settlement in the workplace. This was done with the view of closing the gap that was brought about by the old system which was a turned to be a fiasco in terms of settlement of disputes.

The value of equality and the equality clause as contained in the Bill of Rights strive to repair the inequalities and injustices of the past.<sup>71</sup>

The vision of social justice is as well accepted by the CCMA. It was argued that the old system was labyrinth-like, discriminatory and inadequate. It abounded in complexities and uncertainties.<sup>72</sup> The report on CCMA tenth year's anniversary indicated as follows,

*"The fact is that barely more than 10 years ago the South African labour market and the dispute resolution mechanism, was fractured, divided by race, class, sector and even ideology. Little was held in common between competing interests. We had no uniform dispute resolution system. The old Industrial Court was inaccessible, unaffordable and unable to meet the requirements of the changing workplace. It did not enjoy the sanction or legitimacy of the majority of workers. Disputes that arose were often unprocedural and unregulated frequently leading to bitter and protracted conflicts, with the ever-present threat of violence and disruptions. The workplace was figuratively, if not literally in a state of revolt..."*<sup>73</sup>

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<sup>71</sup> Alexander, P et al. "Social Security for Non-Citizens in South Africa". 2002. A Draft Report on sociological Research, Rand Africans University, Center for Sociological Research.

<sup>72</sup> Cameron, E. 1989. *The New Labour Relations Act*. Cape Town: Juta & Co, 44.

<sup>73</sup> A speech delivered on the 27<sup>th</sup> November 2006 by Minister of Labour, M M S Mdlalana MP, on celebrating the tenth anniversary of the Commission for Conciliation, mediation and Arbitration.

It is argued therefore that the issues surrounding the principle of equality have to be enforced and be seen in the activities of the CCMA in fulfilling the objectives of social justice in the workplace.

### 2.3 GENERAL HUMAN RIGHTS APPROACH TO SOCIAL JUSTICE

*“In the United States I sometimes refer to the work of Eleanor Roosevelt when chairing the Commission which drew up the Universal Declaration of Human Rights. I remember her words, ‘where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood we live in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination...’<sup>74</sup>*

Article 1(3) of the *Charter of the United Nations* states that human rights, and fundamental freedoms should be encouraged and promoted, “without distinction as to race, sex, language, or religion.”<sup>75</sup> *The Universal Declaration of Human Rights (UDHR)* reiterates this statement in Article 2, which states as follows;

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<sup>74</sup> Mary Robinson. *A Human Rights Approach to Social Justice*. 2007 London: The New Politics network, p 16.

<sup>75</sup> 1945.

*“Everyone is entitled to the rights and freedoms set forth in this Declaration without distinction of any kind, such as...”<sup>76</sup>*

Equality and non-discrimination on (certain grounds) are also to the fore in the United Nations Covenants. Article 2 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>77</sup> states;

*“The parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to ...”*

This is very similar to article 2 of the *International Covenant on Civil and Political Rights (ICCPR)*,<sup>78</sup> which states;

*“Each State party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as...”*

The recognition of social justice as a human right remains undebatable. Not only South Africa has addressed this notion in its legal order, but even other countries such as the United States through Section 1 of the Fourteenth Amendment to their Constitution found place for this notion.

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<sup>76</sup> 1948.

<sup>77</sup> 1966.

<sup>78</sup> 1966.

### 2.3.1. The concept of social justice

The concept of social justice had well been recognised historically as one of the fundamental concepts in society. It should however be noted that unlike the present moment, government of the past did not initiate in its upbringing. Some of the tenets of social justice relate it as a concept that some used to describe towards as socially just world.<sup>79</sup> In this context, so they argue, social justice is based on the concepts of human rights and equality.

*“The Constitution of the Republic of South Africa offers a vision of the future; a society in which there will be social justice and respect for human rights in which basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another.”<sup>80</sup>*

The concept of social justice puts more emphasis on the principle of equality which is, firstly in terms of rights, which manifests that legal system should foster protection of rights of everyone. Secondly, in terms of opportunities, which rely upon societal institutions providing framework or structures by which people, can independently access these opportunities. Thirdly, equality is related to treatment, in terms of which the institutions in society should accord similar

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<sup>79</sup> Rawls, J. (1921-2002). *A Theory of Justice* (1971).

<sup>80</sup> Chief Justice Arthur Chaskalson, President of the Constitutional Court of South Africa, Bram Fischer Memorial Lecture, May 2000.

treatment to people. Fifthly, the issue of resources emerge which stresses the fact of access to legal resources.<sup>81</sup>

### 2.3.2. Social justice and human rights

The Preamble in the Constitution gives a connection of social justice and human rights as pillars of human life.<sup>82</sup> The relationship is based on the fact that without these two concepts, human dignity is in peril. The importance of the two concepts is what makes them related.

John Rawls illustrate the importance of human right by lamenting that 'each person possesses and inviolability founded on justice that even the welfare of society as a whole cannot override.'<sup>83</sup> Human rights include a wide range of economic, social, cultural, civil and political rights. They include the rights to health, education, housing, food, a fair trial, freedom of religion, and freedom from torture. Human rights have a preoccupation with values and processes at the heart of social justice, such as dignity, equality and non-discrimination, participation and access to justice.<sup>84</sup>

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<sup>81</sup> See Friesen, *supra* , in attempting to lay out a definition, elucidately expounded social justice as an attempt to promote greater equality among people, whether through rights, opportunities, treatment or distribution of resources. He further articulates that social justice is treating people equally regardless of any group or individual characteristics...

<sup>82</sup> Preamble of the Constitution states that we the citizens of Republic of South Africa have to establish a society based on democratic values, social justice and fundamental human rights.

<sup>83</sup> John Rawls (1921-2002) *supra*.

<sup>84</sup> [Http://www.who.int/hhr/news/en/series-4-neglected%20diseases-social-justice-human rights%20P](http://www.who.int/hhr/news/en/series-4-neglected%20diseases-social-justice-human-rights%20P).

Social justice is also a concept that is used to describe the movement towards a socially just world. In this context, social justice is based on the concepts of human rights and equality, and can be defined as ‘the way in which human rights are manifested in the everyday lives of people at every level of society.’<sup>85</sup> Due to the norms and values of human rights, social justice does not only focus on the needs of the people but on the rights – on entitlements which have legal obligations. And in this sense social justice becomes more than a moral obligation, it becomes a legal obligation.<sup>86</sup>

## **2.4. SPECIFIC ATTRIBUTES OF SOCIAL JUSTICE: THE LEGAL FRAMEWORK**

### **2.4.1. International trends**

#### **2.4.1.1. Canadian**

Canadian equality jurisprudence is an obvious early port of call in exploring the meaning of [section 9].<sup>87</sup> The relevant section is section 15(1) of the Canadian Charter which reads;

*“Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on*

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<sup>85</sup> [Http://en.wikipedia.org/wiki/social\\_justice](http://en.wikipedia.org/wiki/social_justice).

<sup>86</sup> *Ibid.*

<sup>87</sup> Chaskalson, M et al. 1996. *Constitutional Law of South Africa*. Cape Town: Juta & Co. p 14 – 14.

*race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”*

The Canadian equality clause promises equality ‘before and under the law’ as well as ‘equal protection and equal benefit before the law’.<sup>88</sup>

#### **2.4.1.1.1 The Concept of Equal Protection of Law**

Section 9(1) of the Constitution provides for this concept in a clear manner. It manifests that equal protection of law must be accorded to everyone without any distinction whatsoever in any form. Chief Justice Marshall stated that, ‘the very essence of civil liberty certainly consists in the rights of every individual to claim the protection of the laws, whenever he receives an injury, one of the first duties of government is to afford that protection’.<sup>89</sup>

#### **2.4.1.2 United States**

The promise in section 9(1) of ‘equal protection of the law’ echoes the Fourteenth Amendment to the United States Constitution<sup>90</sup>, section 1 of which provides, *inter alia*, that ‘[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws.’<sup>91</sup> It has been suggested that three different meanings

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<sup>88</sup> *Op cit.*

<sup>89</sup> *Marbury v Madison (1803).*

<sup>90</sup> Chaskalson et al, *op cit.*

<sup>91</sup> The Federal government is also bound to afford the equal protection of the laws, since the fourteen Amendment has been held to be incorporated into the due process clause of the Fifth Amendment.

have been given to the equal protection clause by the United States Supreme Court.<sup>92</sup>

The first approach regards the clauses as nothing more than an opportunity for a judicial attack on legislative mistakes. Accordingly the courts exist to articulate permissible levels of over inclusion or under inclusion in legislative classifications and to remit to the legislature statutes that have exceeded these limits.

This approach effectively represents a negative concept of equal protection, the courts being more concerned to check upon the legislative than to develop a jurisprudence which might remedy conditions associated with inequality.

The second approach is the concept of equal protection in terms of the rationale of fundamental rights.<sup>93</sup> If a fundamental right is considered to exist, the court must use the equal protection jurisprudence to set aside legislation which impinges upon this right.

The third meaning of equal protection was outlined by the United States Supreme Court in *Straudes v West Virginia* more than a hundred years ago.<sup>94</sup> 'The words of the amendment ...contain the necessary implication of a positive immunity of right, most valuable to the coloured race, the right to exemption from unfriendly legislation against them distinctively as coloured, exemption from legal

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<sup>92</sup> Freeman, *Legitimizing Racial Discrimination through Anti-Discrimination Law; A Critical Review of the Supreme Court Doctrine* (1978) 62 Minnesota LR 1049 at 1058 et Seq.

<sup>93</sup> *Ibid*, 1059.

<sup>94</sup> 100 US, 303, 307-8 (1880).

discrimination implying inferiority in civil society, lessening the security of their employment from the rights which others enjoy, and discrimination which are steps towards reducing men to the condition of a subject race.'

Here the court was concerned with the concept of substantive equal protection, focusing on the end or the purpose of the clause, to redress a position of inequality or conversely to attempt to produce some sense of equality in society.

There have been few cases in United States constitutional history which have attempted to develop this concept of substantive equal protection. However, the case of *Griggs v Duke Power Company*<sup>95</sup> although dealing with Title VII of the Civil Rights Act of 1964 is widely interpreted as representing an attempt in this direction.<sup>96</sup>

## **2.4.2. The South African perspective**

### **2.4.2.1 Constitutional Imperative**

The commitment of equality lies at the heart of the South African Interim Constitution.<sup>97</sup> The preamble in the Constitution speaks of the need to create a new order in which all South Africans will be entitled to a common South African citizenship and democratic state in which there is equality between men and

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<sup>95</sup> 401 US 424 (1971).

<sup>96</sup> Freeman, *op cit* (n7) 1093 et Seq.

<sup>97</sup> The Constitution of the Republic of South Africa, Act 200 of 1993.

women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms.

The proscript looks toward a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.<sup>98</sup> The *President of the Republic of South Africa v Hugo*<sup>99</sup> created the same impression hereto by concretizing contents of the preamble as contained in the Constitution. It upholds that all human beings regardless of membership of their particular groups would be accorded equal dignity and respect. The final Constitution follows the same view.

Section 39(1) thereof enjoins Courts interpreting the Bill of Rights to 'promote the values which underlie an open and democratic society based on freedom and equality.'<sup>100</sup> This was also illustrated in the case of *Executive Council, Western Cape Legislative & Others v President of the Republic of South Africa & Others*.<sup>101</sup> The theme of 'an open and democratic society based on freedom and equality' is leitmotif of the Bill of Rights.

Equality is without no doubt a foundational norm and an indispensable element of the constitutional order. Its importance is underlined by the brutal past during

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<sup>98</sup> The Constitution of South Africa provide for the establishment of one Sovereign State, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

<sup>99</sup> 1997 (4) SA 1 (CC).

<sup>100</sup> Cf *in S v Makwanyane & Others* 1995 (3) SA (CC) 1995 BCLR 665 (CC) at paras 155 (Ackermann J).

<sup>101</sup> 1995 (4) SA 877 (CC), 1995 (101) BCLR 1289 (CC) at paras 41 (per Chaskalson).

which gross and immoral unequal treatment of human beings based particularly on race and gender was the order of the day. Millions of people have been disadvantaged by past discrimination. It was clear to almost all involved in the negotiating process that the achievement of equality would necessitate extensive and fundamental reconstruction of our society. It was in this context that the equality provision of the Constitution was devised. It is nevertheless suggested that the Constitution ascribes a particularly important role to equality, both as a good in itself and as a powerful tool of national reconciliation and reconstruction.<sup>102</sup>

The place of equality in the [... South African] Constitution is pivotal as its commitment lies at the heart of the Constitution.<sup>103</sup> The textual commitment to equality must itself be understood in the historical context in which the text was drafted, as is made explicit in both the Preamble and the Proscript to the Constitution.<sup>104</sup> It was explained,

*“The core value of this principle is that all people have equal worth. When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the laws ... Mediated by the anti-subjugation principle, the equal*

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<sup>102</sup> See in particular the Preamble, Proscript and Schedule 4’, *Cfackerman J in S v Makwanyane & Another* 1995 (3) SA 391 (CC) 1995 (6) BCLR 665 (CC) at paras 155.6. *Mahomed j in S v Mhlungu & Others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 8.

<sup>103</sup> *Fraser v Children’s Court, Pretoria North* 1997 (2) SA 261 (CC).

<sup>104</sup> *Brink v Kitshoff supra*.

*protection clause asks whether the particular conditions complained of examined in their social and historical context, are a manifestation or a legacy of official oppression.*<sup>105</sup>

In Canada, the Supreme Court has identified 'political, social and legal disadvantage and vulnerability' as the targets of the equality clause of the Charter of Rights and Freedoms.<sup>106</sup> One can also argue that South Africa stands on the same footing.

The South African Constitution basically redresses the effects of history in the light of apartheid and oppression. This was clearly established in the case of *President of the Republic of South Africa v Hugo*.<sup>107</sup> The court in the Hugo case specifically endorsed the approach of L'Heureux – Dube J in her minority judgment in the case of *Egan v Canada*<sup>108</sup> in the Canadian Supreme Court;

*“Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity.”*

Section 9(1) thereof guarantees to every person the right to 'equality before the law' and to 'equal protection of the law'. The right to equality

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<sup>105</sup> Laurence Tribe in Tribe American Constitutional Law 1515-16.

<sup>106</sup> *Mckinney v University of Guelph* (1999) 76 DLR (4<sup>th</sup>) 545 at 609.

<sup>107</sup> *Supra*.

<sup>108</sup> (1995) 29 CRR (2d) 79 at 104-5, quoted with approval by the Constitutional Court in *President of the Republic of South Africa v Hugo*, *supra*.

before the law and to equal protection of the law does not prohibit every conceivable legal distinction.<sup>109</sup> As a matter of principle equality consists as much in the different treatment of those who are not alike as it does in treating those who are alike in the same way.<sup>110</sup> The right to equality is infringed only by differences in treatment which are illegitimate.<sup>111</sup>

#### **2.4.2.1.1. The Concept of Equality Before the Law**

The interpretation of 'equality before the law'... must give effect to the purposes of the Constitution and the values which support it.<sup>112</sup> Hence it must take into account a history of inequality and oppression and the need for reparation and reconstruction.<sup>113</sup>

Read in this context, the minimum content of 'equality before the law' is equality of process. As the Canadian Supreme Court said in the Turpin case, equality before the law,

*"Is designed to advance the value that all persons be subject to the equal demands of the law and not suffer any greater disability in the substance and application of the law than others. This value has historically been associated with the requirements of the rule of law*

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<sup>109</sup> *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) para 19.

<sup>110</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

<sup>111</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

<sup>112</sup> *City Council of Pretoria v Walker* 1998 (2) SA 3.3 (CC)

<sup>113</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice*, *supra*.

*that all persons be subject to the law impartially applied and administered.”<sup>114</sup>*

Equality before the law requires that each person is accorded equal concern and respect both in the formulation and the application of the law.<sup>115</sup> It requires that the rules of law should in principle apply equally to all persons. The guarantee of equality ‘entitles everybody, at the very least, to equal treatment by courts of law.’<sup>116</sup> Equality before the law means that those who come before the courts of the land are assured of fair and impartial adjudication.

#### **2.4.2.1.2. A Constitutional Framework**

Section 9(3) of the Constitution states that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Section 9(4) of the Constitution states that no person may unfairly discriminate directly or indirectly against anyone or more on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

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<sup>114</sup> *R v Turpin (1989) 1 SCR 1296 at 1329.*

<sup>115</sup> The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration...

<sup>116</sup> *S v Ntuli, supra*

The Constitutional Court has confirmed that a particular and distinct meaning is to be attributed to the specific prohibition of 'unfair discrimination in sections [9(3) and (4)]. It has emphasized the pejorative connotation of the word discrimination itself;

*“The proscribed activity is not stated to be ‘unfair differentiation’ but is stated to be ‘unfair discrimination’. Given the history of this country we are of the view that ‘discrimination’ has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.”<sup>117</sup>*

In interpreting the term 'unfair discrimination' the court adverted to the historical context in which the prohibition was formulated;

*“We are emerging from a period in our history which humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in powers rather than as persons of infinite worth. In short they were denied their inherent dignity.”<sup>118</sup>*

In context of section [9] as a whole said the court, unfair discrimination 'principally means treating persons differently in a way which impairs their

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<sup>117</sup> *Prinsloo v Van der Linde, supra.*

<sup>118</sup> *Ibid.*

fundamental dignity as human beings, who are inherently equal in dignity'.<sup>119</sup> In the *President of the Republic of South Africa v Hugo*<sup>120</sup> the Constitutional Court stated that the prohibition of unfair discrimination in section [9(3)&(4)] recognized that the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups is a core purpose of the constitutional enterprise.

The court endorsed the approach of L'Heureux - Dube J in her minority judgment in the case of *Egan v Canada*<sup>121</sup> in the Canadian Supreme Court which identified the protection of fundamental human dignity as the defining purpose of the constitutional right to equality

In the Hugo case the Constitutional Court gave a careful consideration to the factors which render discrimination unfair to the particular sense intended by section [9(3) and (4)];

*"We need ... to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case therefore, will require a careful and thorough understanding of*

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<sup>119</sup> *Ibid.*

<sup>120</sup> *Supra.*

<sup>121</sup> *Supra.*

*the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in our context may not necessarily be unfair in a different context.*<sup>122</sup>

#### **2.4.2.2. Statutory framework**

The historical workplace inequalities is besides the Constitution being redressed by other laws which the South African government enacted consequent to motivation by the International Labour organization that would prohibit discrimination and advance social justice in the workplace.

##### **2.4.2.2.1. Labour Relations Act**

Until the promulgation of the LRA, there were no provisions which prevented an employer from refusing to appoint someone on the basis of, for example, gender, race or trade union membership.<sup>123</sup> Looking at discrimination in South Africa, employees themselves did not fair any better. In fact, some legislative provisions specifically permitted discrimination in employment.<sup>124</sup>

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<sup>122</sup> *Supra.*

<sup>123</sup> *Supra.*

<sup>124</sup> For example the Wage Act 5 of 1957.

The Commission of Inquiry into Labour legislation (The Wiehahn Commission) established in the aftermath of the strike wave of the early 1970's argued that the blacks should be allowed to register trade unions and to have them recognized as part of the official conciliation process.<sup>125</sup> The Commission also recommended the elimination of statutory job reservations. The commission recommended the incorporation of anti-discrimination principles into South African legislation by stating that;

*"The Commission cannot avoid the conclusion that in due course discrimination in the field of labour on the ground of race, colour, political opinion, religious belief, national extraction or social origin will have to be outlawed and criminalized in South African's labour dispensation."*<sup>126</sup>

The LRA contains a number of provisions that specifically prohibits discriminatory treatment of employees and applicants for work. Section 187(1)(f) states that the dismissal of an employee is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, either directly or indirectly on one or more of a number of non-exhaustive prohibited grounds. The dismissal may however be fair if the reason for the dismissal is based on an inherent requirement of the job or if the employee has reached the normal or agreed to retirement age for persons employed in that capacity.<sup>127</sup>

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<sup>125</sup> Wiehahn N E The Complete Wiehahn Report (1982) (The Wiehahn Report).

<sup>126</sup> The Wiehahn Report at 33.9.2 and 3.9.3.

<sup>127</sup> Section 187(2)(a) and 11 of the LRA.

#### **2.4.2.2.2. The Promotion of Equality and Prevention of Unfair Discrimination Act**

The purpose of PEPUDA is to give effect to section 9 of the Constitution by providing for equal enjoyment of all rights and freedoms by every person, the promotion of equality and the prevention of unfair discrimination.<sup>128</sup>

#### **2.4.2.2.3. The Basic Conditions of Employment Act**

The BCEA regulates conditions in the workplace.<sup>129</sup> The aim of BCEA is to eradicate unfair labour practices. The purpose of the BCEA is to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution; by establishing and making provisions for the regulation of basic conditions of employment; and thereby to comply with obligations of the Republic as a member state of the ILO; and to provide for matters connected therewith.

#### **2.4.2.2.4. The Skills Development Act**

The aim of SDA is to provide an institutional framework to devise and implement the national and workplace training strategies.<sup>130</sup> The purpose is to develop and improve the skills of employees and to integrate those strategies within the national qualifications framework. The SDA is not generally targeted at women although one of the stated purposes of the Act is to improve the employment

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<sup>128</sup> Act 4 of 2000.

<sup>129</sup> BCEA Act 75 of 1997.

<sup>130</sup> SDA Act 97 of 1998.

employees themselves as white employees received different treatment from that which was received by the black employees. The laws that existed by then differentiated between employees on the basis of race and colour. Workers were also excluded from the application of certain laws on the basis of race. It was clear that workers could not have access to dispute resolution amongst others on grounds of discrimination.

Due to the fact of inappropriateness of dispute resolution in the industrial relations, there was a major shift which gave rise to a need for more appropriate forms of dispute resolution in the workplace. The Independent Mediation Service of South Africa (IMSSA) was seen to be instrumental in this regard. It formalised dispute resolution in the workplace through the introduction of mediation and arbitration forms.<sup>132</sup> The success of this has been borne out by the extensive reliance on mediation in the new LRA and by the establishment of the CCMA to carry out these functions. A means of bringing workplace justice by promoting the objectives of social justice has been encapsulated in the objectives of the CCMA.<sup>133</sup> It is well clear that CCMA is the contender of social justice, the defender and protector of rights, freedoms and responsibilities.<sup>134</sup> It was further alluded to the fact that it is a “factory” a place where social justice is made, day

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<sup>132</sup> See Pretorius, P. *ADR Successes and Challenges*, in: Centre for Applied Legal Studies: Trends in South African Labour Law: Selected Paper from the Fourth Annual Labour Law Conference 1991. Johannesburg University of the Witwatersrand.

<sup>133</sup> Zack, A. Can Alternative Dispute Resolution help resolve employment disputes? 1997. *International Labour Review*, Vol. 136, No. 1. Geneva International Labour Organisation. 69.

<sup>134</sup> See the Speech by the Minister of Justice delivered on the 27<sup>th</sup> November 2006 on celebrating the tenth anniversary of the CCMA at <http://www.labour.gov.za/media-desk/speeches/2006Ministers-Speech-at-ccma-tenth-anniversary>.

by day.<sup>135</sup> It is with the foregoing that social justice is seen as a basis for the establishment of the CCMA.

## 2.6. CONCLUSION

It can boldly be advanced that the concept of social justice is a revolutionary concept which provides meaning and significance to life and makes the rule of law dynamic. Social justice is not a blind concept or a preposterous dogma. It seeks to do justice to all the citizen of the state. This is evident from the constitutional expression which is consummately articulated on the principles underpinning the notion of social justice. Since this notion was first conceived by the Constitution as acalectically consequential to the citizens of the state it means therefore that the responsibility is laid to other institutions that are infused with the prerogative to pursue justice.

Since the Constitutional mandate of social justice is obligatory, it is seen through legislation, the role it plays to uplift social justice, to balance the rights of citizens as equal and to permit justice be done at the workplace. As to how the CCMA advances social justice is the subject-matter of the ensuing chapter.

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<sup>135</sup> *Ibid.*

## CHAPTER 3

### THE ROLE OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION IN THE ADVANCEMENT OF SOCIAL JUSTICE

#### 3.1. INTRODUCTION

The previous discussion in chapter two has clearly shown an indication of the direction to which the instant discussion will ensue. The underlying principles afore-discussed have been a centre of fascination everywhere in South Africa as to whether veritably, it can be bravely articulated that they have been scored. But most interestingly, diverse statutes have been enacted which cement the constitutional mandate of embosoming those principles and giving effect to their application in an equal mode to all and sundry.

As acknowledged in chapter one that prior to the advent of the LRA<sup>136</sup> and before both the interim constitution<sup>137</sup> and the final constitution,<sup>138</sup> required protection in the workplace regarding interested stakeholders remained doubtful. It therefore acknowledges that due to the development of labour law and labour relations brought about by the vicissitudes of the new dispensation, a crucial step was taken to depart from the antique labour law system.

The LRA has remarkably brought about extensive reform of the statutory dispute resolution system. Abolishing the industrial court and establishing the CCMA, the

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<sup>136</sup> 66 of 1995, *supra*.

<sup>137</sup> 1993 Constitution. *supra*.

<sup>138</sup> 1996 Constitution, *supra*.

Labour Court and the Labour Appeal Court is indicative of a direction of amelioration. Of importance therefore are the processes or mechanisms utilized by the commission in the resolution of labour disputes which are credenced will bring about justice and fairness in the resolution of disputes in the workplace.

It is therefore with this tone that the role of the CCMA will acalectically be witnessed through conciliation and arbitration. In *toto* justice in the workplace can be proffered through means of these mechanisms as a result of which social justice will be accorded. This chapter will therefore discuss the above-mentioned mechanisms with the view of determining the role of the Commission.

### **3.2. THE POSITION OF LABOUR SYSTEM PRIOR 1994**

The old system was said to be catastrophic in nature. The system by then was described as, discriminatory and inadequate. It was conceived of complexities and uncertainties.<sup>139</sup> The report on CCMA tenth year's anniversary support this argument by indicating as follows,

*“The fact is that barely more than 10 years ago the South African labour market and the dispute resolution mechanism, was fractured, divided by race, class, sector and even ideology. Little was held in common between competing interests. We had no uniform dispute resolution system. The old Industrial Court was inaccessible, unaffordable and unable to meet the requirements of*

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<sup>139</sup> Cameron, E., *supra*.

*the changing workplace. It did not enjoy the sanction or legitimacy of the majority of workers. Disputes that arose were often unprocedural and unregulated frequently leading to bitter and protracted conflicts, with the ever-present threat of violence and disruptions. The workplace was figuratively, if not literally in a state of revolt...”<sup>140</sup>*

The above passage precisely illustrates that before the establishment of the CCMA it was clear that the dispute resolution mechanism was discriminatory in nature and inaccessible. This means that the dispute resolution mechanism was inadequate as employees were denied access on the basis of discrimination. In a nutshell, the old dispute resolution mechanism was lacking in terms of delivering justice in the workplace.

One would observe that as a result of all the factors that denied the existence of justice to be done, e.g. discriminatory labour laws, discriminatory labour law system, complexities and uncertainties of old labour law system etc... this has led to the exclusion of social justice into being effected. It is veracious to express that the old system failed to carry out the mandates and objectives of social justice in many respects. This is evident from the very fact that none of the enacted laws by then catered for such a principle notwithstanding the fact that it was already in existence. Not only the laws but the Constitution as well by then just didn't cater for social justice. This proves to be different in the current system

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<sup>140</sup> A speech by Minister of Labour MMS Mdlalana MP, *supra*.

as the Constitution and the enacted laws expressly and impliedly provide for advancement of social justice. The expression of these laws in relation to the concept of social justice will hereunder be seen.

As a result of the failures experienced historically, laws were enacted that redress the historical inequalities and brutalities occasioned by this antique system and that promote the principle of equality to all workers. For instance, the Preamble in PEPUDA<sup>141</sup> gives a palpable indication of the inspiration behind enactment of certain other laws. It basically demonstrates the fact that the values of equality, social justice and human dignity are the basis upon which some of the laws were founded. These laws seek to achieve equality and the advancement of human rights and freedoms which were never granted as most fundamental rights in the apartheid hegemony.

The CCMA has also formed part of the transformation that should promote all the values that are entailed in the Preamble.<sup>142</sup> This is so because one of the key objectives of the CCMA is to promote social justice.<sup>143</sup> Such exercise can be illuminated through the new processes that are put into effect for the functioning of the commission.

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<sup>141</sup> Promotion, Elimination and Prevention of Unfair Discrimination Act (PEPUDA), N0 4 of 2000

<sup>142</sup> *Ibid.*

<sup>143</sup> Deale, P. 2001. *The Costs of Disputes*. People Dynamics, May/June: 32-35.

### 3.3. CONSTITUTIONAL RECOGNITION OF SOCIAL JUSTICE

The South African Constitution gives a wholehearted support to the concept of social justice. It commits itself by establishing a society based on social justice. This shows the importance of this concept in South African society. It is opined therefore that the Constitution upholds the concept of social justice as an indispensable concept needed to be advanced for the interest of a society as a whole. The incorporation of this concept is clearly indicated in the Preamble in the Constitution. Chief Justice Chaskalson reiterated the importance of this concept by stating that the vision of the future is offered by promoting the concept of social justice and showing respect for human rights in which all basic needs of the society will be met.<sup>144</sup>

Even though the Constitution does not come out clearly in giving the definition of social justice, at least it seeks to ensure the necessary protection worthy for its upbringing. On the basis of this background the statutory framework which will ensue hereafter will show how clearly this concept is expected to be advanced.

### 3.4. STATUTORY RECOGNITION OF SOCIAL JUSTICE

The LRA, BCEA and EEA are most important statutes that include the concept of social justice as well as the underlying principles underpinning this concept as reflected in the previous chapter. The CCMA is also expected to forward the

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<sup>144</sup> Chief Justice Arthur Chaskalson of the Constitutional Court of South Africa, *supra*.

same and adhere to these particular statutes.<sup>145</sup> These statutes also give recognition to the mandate of the constitution by upholding such principles. However, it manifest that the role of the CCMA in putting into effect and practice these principles is colossal.

The primary purpose of the LRA is portrayed in the Preamble which provides that the purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act.<sup>146</sup> Even though the Act clearly stipulates its major pillars for its purpose, it however does not put light as to providing the definition of social justice. Neither specific nor general definition is provided by the LRA. The only attempt that it has done is to show how social justice can be fulfilled.

Of importance, it shows that social justice can of course amongst other objects through which social justice can be advanced is by promoting the effective resolution of labour disputes.

The BCEA as well incorporates the concept of social justice in its Preamble.<sup>147</sup> The Preamble provides that the purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act. The Act does not differ from the LRA as it does not explain the concept of social justice. Still it has rather shown how it can be advanced.

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<sup>145</sup> CCMA Annual Report 2006/2007.

<sup>146</sup> The Preamble in the LRA.

<sup>147</sup> The Preamble of the BCEA.

It clearly states that social justice can be advanced through fulfilling the objects of the Act which, amongst others, is giving effect to and regulating the right to fair labour practices conferred by section 23(1) of the Constitution. It would seem the Act speaks the same language with the Constitution in giving effect to the concept of fair labour practice. It in actual fact reinforces the concept of fair labour practice.

One of salient features of social justice is the principle of equity. The principle of equity is implicit in social justice. The EEA incorporates this principle as an important principle through which social justice can be achieved. The EEA in its Preamble provides that the purpose of the Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. It is evident from the purpose of the Act that the only way through which equity can be achieved is by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The Act entrenches the principle of equality and upholds the principle of unfair discrimination. It actually upholds the constitutional mandate of promoting the values of equality and protecting anyone from unfair discrimination in the workplace.

One would however opine that the concept of social justice is fortified by the above discussed statutes. Giving a particular attention to these statutes, one will realize the importance of their relation. The most important aspect that the LRA

dealt with was the aspect of effective resolution of dispute. What is more interesting is that the BCEA and the EEA give additional aspects which illustrate how the concept will be fulfilled. Each of the statutes has an indispensable role to play in showing how this concept will be fulfilled

### **3.5. THE ESTABLISHMENT OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION**

The LRA of 1995 was one of the major pieces of legislation to be introduced after South Africa's first democratic elections. Although in important respects it maintained the status quo in labour relations, it is perceived by organised labour as consolidating gains made in the years of struggle.<sup>148</sup> One of the principal gains is perceived to be the establishment of a new dispute resolution body, the CCMA, modelled on a private system of mediation and arbitration that was perceived to be effective in practice.

The CCMA was established as a new dispute resolution body in November 1996. The CCMA as the statutory institution is legally established by LRA as an independent juristic person with jurisdiction in all the provinces of the Republic.<sup>149</sup> Its main objective is to ensure the swift and expeditious resolution of employment disputes.

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<sup>148</sup> Theron, J and Godfrey, S. *The Labour Dispute Resolution and the Quest for Social Justice: A Case Study on the CCMA, Unfair Dismissal and Small Business*. 2002. SAJLR.26. 1

<sup>149</sup> Section 112.

### 3.6. FUNCTIONS OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

The general functions of the commission are expressly provided by the LRA<sup>150</sup> and are hereby summarized as;<sup>151</sup>

- a) to resolve any dispute referred to it through conciliation and if unsuccessful, through arbitration. The CCMA must arbitrate the dispute if; the Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration, or all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the CCMA;
- b) to assist parties in the establishment of workplace forums;
- c) to advise a party to a dispute about the procedure to follow;
- d) to assist a party to a dispute to obtain legal advice,
- e) to accredit councils or private agencies and subsidize such accredited councils or private agencies,
- f) to conduct, oversee or scrutinize any election or ballot,
- g) to conduct and publish research into matters relevant to its functions and sexual harassment in the workplace,
- h) [to offer to resolve a dispute that has not been referred to it through conciliation];
- i) [to make rules regulating the practice and procedure for any process to resolve a dispute through conciliation and or at arbitration proceedings;

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<sup>150</sup> Section 115.

<sup>151</sup> Du Plessis J *et al* (1998) – *A Practical Guide to Labour Law*. Durban: Butterworths, 3<sup>rd</sup> ed, p 193.

- j) To publish guidelines in relation to any matter dealt with in the Act;
- k) To perform any other duties imposed and to exercise any other powers conferred on it by or in terms of this or any other Act...

### 3.6.1. Conciliation

One of the roles of the commission is to attempt to resolve any dispute referred to it in terms of the LRA through conciliation. The important thing which will cause the intervention of conciliation is when the dispute exists. Generally a dispute is a highly formalized manifestation of conflict in relation to workplace related matters which may include the failure to address a grievance.<sup>152</sup> A grievance may relate to a number of things; the terms or interpretation of a collective agreement, managerial policies, actions of the employer or other employees, customs in the workplace, or practices in the workplace itself.<sup>153</sup>

The LRA places great emphasis on consensus-seeking as a first step in dispute resolution. Most disputes are first required to be dealt with in a consensus-seeking process before they become the subject of industrial action or are identified by an arbitrator or a judge of the labour court.<sup>154</sup> This is consistent with contemporary theory that consensus should always be sought prior to the resort to power or adjudication. This was also an important feature of dispute resolution under the previous Labour Relations Act and of disputes procedures negotiated

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<sup>152</sup> Salamon, M. 1987. *Industrial Relations: Theory and Practice*. Hempstead: Prentice-Hall, at 480-481 cited by Mischke c et al 2002, *Labour Dispute Resolution*. Cape Town: Juta & Co Ltd. 11.

<sup>153</sup> *Ibid*, 10-11.

<sup>154</sup> Brand J & Steadman F. 1997. *Labour Dispute Resolution*. Cape Town: Juta & C. Ltd. 77.

in recent years. The primary consensus-seeking processes contemplated in the labour Relations Act are negotiation, conciliation and facilitation.<sup>155</sup>

Statutory conciliation is generally of a compulsory nature. A party declares a dispute in terms of the LRA and then refers that dispute to the commission for conciliation, mediation and arbitration, a bargaining council or an accredited agency.<sup>156</sup> In the CCMA conciliation the dispute must be referred on LRA form 7.11 which requires the nature of the dispute be defined. It is necessary to be precise in this regard because the commission has to be sure that it is entitled to conciliate in terms of the Act. This is similar to statutory arbitration where the Labour Relations Act only permits the arbitrator to determine the dispute defined by the referring party.<sup>157</sup>

Conciliation is by and large an uncontroversial process.<sup>158</sup> From an institutional point of view, it is expeditious and relatively inexpensive. The object at conciliation is to settle disputes. Settlement is perceived to be a social good, in itself and regardless of the terms of settlement.<sup>159</sup> The proposition of labour disputes settled by the CCMA at conciliation is generally contrasted favourably with that of conciliation Board's established in terms of the LRA.<sup>160</sup>

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<sup>155</sup> *Ibid.*

<sup>156</sup> Section 134.

<sup>157</sup> *Ibid.*, 78.

<sup>158</sup> Theron, J and Godfrey, S. *supra.*

<sup>159</sup> *Ibid.*

<sup>160</sup> Act 28 of 1956.

### 3.6.1.1. Advantages and disadvantages of conciliation

Conciliation enjoys certain advantages compared to arbitration. But it will be recognised that conciliation have common characteristics. There seems to be a thin line between conciliation and mediation. Conciliation just like mediation it originates from an agreement between the disputants to call in the aid of a facilitator to assist in the structuring and conduct of settlement negotiations. It would be recognised firstly that the major advantage of conciliation is that it is said to be speed in nature. Secondly, it is said to be inexpensive. Thirdly, the whole process remains entirely on the flexible and dependent upon the continuing willingness of the disputants.

However, just like mediation, the consensual procedure heavily dependant on the cooperation of the parties can be abused by one party using delaying tactics. Further, the involvement of legal representatives inevitably brought about formalised and technical arguments and procedures.<sup>161</sup> The internal procedures to deal with conflict have become very technical.<sup>162</sup>

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<sup>161</sup> Benjamin, C and Gruen, *supra*.

<sup>162</sup> *Ibid*.

### 3.6.2. Mediation

Mediation in its widest sense is a voluntary procedure whereby a mutually acceptable third party helps to bring the parties to a dispute to an agreed solution.<sup>163</sup>

The powers of mediator or conciliator are determined by an agreement between the parties to the dispute. It has been said that both conciliation and mediation have three fundamental characteristics. In the first place both originate in an agreement between the disputants to call in the aid of a facilitator to assist in the structuring and conduct of settlement negotiations which will include, as part of their very essence, private consultations with each disputant. In the second place the facilitator has no authority to impose a solution on the disputants as does a judge, arbitrator, or expert appraiser. And in the third place, the whole process remains at all times entirely flexible and dependant upon the continuing willingness of the disputants to continue it until such time as either they themselves agree upon the terms of a settlement or one or other of them terminates the negotiations; it is in short consensus orientated.”<sup>164</sup>

Mediation and arbitration are fundamentally different processes for resolving disputes. The object of arbitration is for arbitrator to resolve dispute between the parties regarding past events in accordance with their legal rights. The object of

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<sup>163</sup> Butler D and Finsen E. 1993. *Arbitration in South Africa: Law and Practice*. Johannesburg: Juta & Co, Ltd. page 10

<sup>164</sup> *Ibid.*

the mediator is to facilitate the parties arriving at an agree solution to their dispute particularly in a situation where the parties wish to maintain a cordial relationship in the future.<sup>165</sup>

### **3.6.2.1 Advantages and disadvantages of mediation**

Mediation enjoys certain advantages compared to arbitration. Butler and Finsen<sup>166</sup> give some of the advantages and disadvantages of mediation. Starting with advantages he goes on to state that; first it should result in a significantly quicker and less expensive resolution of the dispute. Secondly, it promotes the possibility of a negotiated settlement based on the parties' interests, which may be more beneficial as regards the ongoing commercial relationship between the parties, if maintaining the relationship is important, than an arbitrator's award determining the parties' legal rights. Thirdly, the parties are not bound by an opinion with which they are dissatisfied and may take the dispute to arbitration or litigation. Therefore, a party need not be too concerned by the possibly somewhat superficial investigation made by a mediator before drawing up his opinion, where the party knows he is not bound by that opinion.

However, mediation is not free from disadvantages; firstly because it is a consensual procedure, heavily dependent on the co-operation of the parties, it can be abused by one party using delaying tactics. Secondly, where mediation

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<sup>165</sup> *Ibid*, page 12.

<sup>166</sup> *Ibid*, page 14-15.

takes place before discovery and an exchange of experts' reports, one party may agree to a negotiated settlement without being fully aware of weaknesses in his opponent's case which this information would have disclosed.<sup>167</sup> Thirdly, there is a perception that a party may accept a mediator's opinion which is based on an inadequate examination of the matters in dispute and the available evidence. Fifthly, although a settlement may be achieved during the mediation process, further disputes may arise when trying to reduce the settlement to writing, particularly if the parties are left to draw up the document with the help of their legal advisers.

### **3.6.3. Arbitration**

Arbitration is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to more persons (the arbitrators, arbiters or arbitral tribunal), by whose decision (the award) they agree to be bound.

A palpable definition of the term arbitration is offered in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,<sup>168</sup> in the following manner;

*“Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal)*

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<sup>167</sup> Trollip, A. 1991. *Alternative Dispute Resolution in a Contemporary South African Context*. Durban: Butterworths. 14.

<sup>168</sup> (CCT 85/06) (2007) ZACC 22.

*instead of by a court of law. The decision of the arbitral tribunal is usually called an award. The reference to arbitration may form the agreement of the parties (private arbitration) or from statute”.*

Arbitration in the United States and in other countries often includes alternative dispute resolution (ADR) a category that more commonly refers to mediation (a form of settlement negotiation facilitated by a neutral third party). It is more helpful, however, simply to classify arbitration as a form of binding dispute resolution, equivalent to litigation in the courts, and entirely distinct from the various forms of non-binding dispute resolution such as negotiation, mediation, or non-binding determinations by experts. Arbitration is today most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions and sometimes used to enforce credit obligations.

It is also used in some countries to resolve other types of disputes, such as labour disputes, consumer disputes or family disputes, and for the resolution of certain disputes between states and between investors and states.<sup>169</sup>

Arbitration is, of course, a quasi-judicial proceeding as pointed in the case of *Estate Milne v Donohoe Investments (Pty) Ltd and Others*.<sup>170</sup> The precepts which govern the procedure in judicial proceedings apply to an arbitration as stated in

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<sup>169</sup> Wikipedia at [www.google.com](http://www.google.com).

<sup>170</sup> 1967 (2) SA 359(A) at 373 H.

*Shippel v Morkel and Another*.<sup>171</sup> CCMA arbitrations bear all the hallmarks of a judicial function in that there is a *lis* between the employer and a worker in which a tribunal is called upon to apply a recognised body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with rights of workers and employers.<sup>172</sup>

Arbitration is increasingly recognised as an important method of resolving commercial and other disputes, which can help to relieve the pressure on the civil justice system. The objects of a modern arbitration statute are the fair resolution of disputes by an independent and impartial tribunal without unnecessary delay and expense; party autonomy; balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the arbitral proceedings effectively.<sup>173</sup>

There comes a time when even good intentions, spirited efforts and powerful arguments may have failed to resolve a dispute. It may not be in the interests of either party to resolve the dispute by means of economic force but the parties, although by now perhaps slightly disheartened, still require a resolution. This is a time for arbitration. There are those disputes which by their very nature are also best resolved by arbitration and may even be required by statute to be resolved in this way. These are so-called rights disputes. For the parties to resort to

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<sup>171</sup> 1977 (1) SA 429 at 434 H-E.

<sup>172</sup> *Sidumo supra*.

<sup>173</sup> South African Law Commission on Domestic Arbitration, A Project 94 Report issued in May 2007, p viii.

economic warfare would be counterproductive and unnecessary. Again arbitration is the answer.<sup>174</sup>

In South Africa arbitration as a means to resolve labour disputes has developed mainly in response to the inadequacies of the statutory adjudication process contained in the LRA. These procedures have been seen as too technical, complicated and cumbersome.<sup>175</sup>

The explanatory memorandum to the LRA of 1995 countenance this argument by stating that existing statutory conciliation procedures are lengthy, complex and pitted with technicalities.

The LRA 1956 suffered from another incurable disease – illegitimacy. Passed by an unrepresentative parliament, its unacceptable political pedigree contaminated its processes and its institutions.

The first reaction to the difficulties of the old statutory dispute resolution procedures was the formation IMMSA in 1984. The private trust provided and continues to provide parties to labour disputes with an alternative dispute resolution system which has proved very popular. Most importantly, however IMSSA enjoys legitimacy.

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<sup>174</sup> Brand & Steadman, *supra*.

<sup>175</sup> Lotter C, *et al* p 115.

The promulgation of the LRA 1995 can be seen as the second reaction. The LRA places emphasis on the use of arbitration as a means of resolving disputes this is mainly because it is said to provide simple procedure for the resolution of labour disputes.

It should, therefore, not come as a surprise to find that the Act requires that a number of disputes be resolved through compulsory arbitration. This is an attempt to serve the needs of both labour and management for a simple procedure with a compulsory, statutory, dispute resolution regime.<sup>176</sup>

### **3.6.3.1. Advantages and Disadvantages of Arbitration**

The advantages traditionally claimed for arbitration over litigation have been aptly summarized by Voet:

*'[I]t is a common thing for arbitrators to be approached with a view to the termination of a dispute and the avoidance of a formal trial. The [reasons for resorting to arbitration are the fear of the too heavy expenses of lawsuits, the din of legal proceedings, their harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of the law'<sup>177</sup>*

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<sup>176</sup> *Ibid* 116.

<sup>177</sup> Butler D and Finsen E, *supra* at page 19.

It is clear from the summary of Voet that the main advantages of arbitration are that the dispute are not formalized and technical, there are no delays and the process is not expensive.

However, attempts to avoid the delays and expense of litigation by using arbitration have not always been successful as indicated by Edmund Davies J in *S J & M M Price Ltd v Milner*.<sup>178</sup>

### **3.7. EFFECTIVE RESOLUTION OF DISPUTES: CRITICAL AREAS OF CONCERN**

Even though the LRA calls for effective resolution of disputes, it would seem such would not be achieved without certain concepts being addressed which seem to be very critical. Those critical areas of concern will hereunder be discussed.

The importance of the promotion of effective dispute resolution was emphasized as one of the four primary objectives of the LRA<sup>179</sup> and the CCMA was seen to be the pillar of the new dispute resolution dispensation that had been ushered in by the LRA.<sup>180</sup> It was also anticipated that the LRA, the BCEA and the EEA would form the pillars upon which economic and social justice will prevail and that workers will have their dignity restored.<sup>181</sup>

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<sup>178</sup> [1966] 1 WLR 1234 at 1236 cited in Butler and Finsen, *ibid*.

<sup>179</sup> Gon, S. *The CCMA to date*. 1997. Industrial Democracy Review. Vol.6.No.3 August-September. 23.

<sup>180</sup> CCMA (Commission for Conciliation, Mediation and Arbitration), Annual Report. 1996, *supra*.

<sup>181</sup> Monyane, K. *Strengthening and Integrating Dispute Settlement machinery and Conflict Resolution: A System Approach Paper Presented at the ARLAC Seminar on Strengthening and Integrating dispute*

Through the mastering of the principle of social justice only can it be said that the effective resolution of disputes is achieved. The LRA requires that amongst other objectives and purposes, the effective resolution of disputes relies upon the promotion of social justice. That means the effective resolution of disputes remains to be one of the components of social justice that the LRA champions.

### **3.7.1. Fair labour practices**

The BCEA amongst other things stipulates that the advancement of social justice can be achieved by giving effect to and through the regulation of fair labour practices. The CCMA is the institution to give effect to such concept. Noteworthy is the fact that the Act prohibits the concept of unfair labour practice. The unfair labour practice in terms of the LRA can be divided conveniently into two categories: labour practices relating to unfair discrimination, and other unfair labour practices.<sup>182</sup>

### **3.7.2. Unfair Discrimination**

In terms of item 2 of Schedule 7 of the LRA, unfair discrimination amounts to an unfair labour practice. Unfair discrimination is defined as being<sup>183</sup>-

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settlement and conflict resolution: A systems approach, 22-26 July 2002, Johannesburg. SOCPOL circular NO.96E/02.

<sup>182</sup> Mischke, *Supra*, 233.

<sup>183</sup> Mischke, *Ibid*, 234.

*'...the unfair discrimination, either directly, against an employee on any arbitrary ground including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility...'*

Whenever an employee alleges that he or she is the victim of unfair discrimination, the matter must first be referred to a bargaining council if the parties to the dispute fall within the registered scope of the council. If no council has jurisdiction, the matter must be referred to the CCMA. The CCMA must attempt to settle the matter through conciliation.<sup>184</sup>

The LRA<sup>185</sup>, BCEA<sup>186</sup> and EEA<sup>187</sup> totally prohibit any discrimination against an employee. Any council or CCMA must attempt to resolve the dispute that relates to any form of discrimination through conciliation.<sup>188</sup>

### **3.7.3. Other Unfair Labour Practices**

The LRA also provides another category of unfair labour practices which are the following:<sup>189</sup>

(a) unfair conduct by the employer relating to the promotion, demotion or training

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<sup>184</sup> Mischke.

<sup>185</sup> LRA section 5(1).

<sup>186</sup> BCEA section 79(2).

<sup>187</sup> EEA section 51(1).

<sup>188</sup> LRA section 9, BCEA section 80 and EEA section 52.

<sup>189</sup> Mischke, 235.

- of an employee or the provision of benefits to an employee
- (b) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee
  - (c) the failure or refusal of an employer to reinstate or re-employ any employee in terms of any agreement.

Disputes about these unfair labour practices are referred to a bargaining council if the parties to the dispute fall within the registered scope of the council. If there is no council, the dispute must be referred to the CCMA. The council or the CCMA will attempt to resolve the dispute through conciliation. If conciliation fails, any party to the dispute (in other words, either the employer or the employee) may request that the dispute be resolved through arbitration.<sup>190</sup>

#### **3.7.4. Equity**

The principle of equity contemplates fairness and reasonableness, in which case the EEA portrays that the CCMA is anticipated to apply these two concepts in dispute resolution. It is in this notion that social justice is expected to be advanced and promoted. Promoting equal opportunity and fair treatment in the workplace is the gigantic objective of the Act, the whole idea being the elimination of unfair discrimination in all its forms in the employment.

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<sup>190</sup> Mischke.

The principle of fairness was illuminated in *National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd and Others*<sup>191</sup> in which the Appellate Court stated the following;

*“Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances. And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act.<sup>192</sup> In my view, it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair.”*

In *NEHAWU v University of Cape Town and Others*<sup>193</sup> this court said:

*“[T]he focus of s. 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to*

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<sup>191</sup> 1996 (6) BLLR 697 (AD).

<sup>192</sup> LRA *supra*.

<sup>193</sup> 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC).

*accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.”*

It would seem the above mentioned cases are in *ad idem* in understanding the concept of fairness. It can be stressed that both the interests of the employer and the employee before the CCMA must be weighed in order to make a balanced and equitable assessment. Basically, the paramount endeavour of the CCMA is the ventilation of workplace disputes through the application of the principles of law and fairness. The case of *Engen Petroleum Ltd v CCMA and Others*<sup>194</sup> and that of *Sidumo v Rustenburg Platinum Mines Ltd and Others*<sup>195</sup> are illustrative in this regard. Ncobo J in the *Sidumo* case states that it is the task of the CCMA to determine facts and to apply principles of law and fairness to those facts. In doing so so he maintains, it determines the rights of both workers and employers.<sup>196</sup>

Social justice requires that both the interests of both of the employer and the employee must be regarded in an equal manner. So it is the sole role of the CCMA to proffer social justice by mustering these principles.

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<sup>194</sup> 2007 BCLR 707 (LC)

<sup>195</sup> (CCT 85/06) (2007) ZACC 22.

<sup>196</sup> *Sidumo v Rustenburg Platinum Mines & Other.s*

### 3.7.5. The right to legal representation under the Commission

The issue of legal representative at the CCMA is a vexed one. Notwithstanding amendments to the LRA, changes to the rules for the conduct of proceedings before the CCMA and recent law, the law relating to legal representative in labour disputes remains unchanged. There is no absolute right to legal representation at any stage of the proceedings arising from incapacity and misconduct dismissals.<sup>197</sup>

A party to the dispute may at the arbitration hearing be represented only by<sup>198</sup> a legal practitioner which is any person admitted to practice as an advocate or an attorney or a co-employee or if a party is a juristic person, for example a company or close corporation; a director or employee or himself or herself all the parties and the commissioner agree to if or the commissioner is of the view that it is unreasonable not to allow legal representative taking into account the questions of law raised by the dispute, the complexity of the dispute, the public interest and the comparative ability of the parties or their representatives to deal with the dispute.

It is important to note that where the dispute is about the fairness of a dismissal on grounds of misconduct or capacity, the parties are not entitled to legal

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<sup>197</sup> Collier, D. *The Right to Legal Representation at the Commission for Conciliation, Mediation and Arbitration and at Disciplinary Enquiries*. 2005 ILJ vol 26 NO 1.4. Lansdowne: Juta & Co Ltd p 1.

<sup>198</sup> Section 138 (4) of LRA 1995.

representatives.<sup>199</sup> The explanatory memorandum summaries the reasons for the provision as follows –

*“a lawyer make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach they adopt. Allowing legal representative places individual employees and small businesses at a disadvantage because of the cost.”*

The law relating to legal representation at the commission can be summarized as follows:-

1. Legal representation is not allowed at the conciliation stage<sup>200</sup>
2. Legal representation is generally allowed at arbitration stage (except at incapacity or misconduct dismissals).<sup>201</sup>

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<sup>199</sup> Section 140(1) of LRA 1995.

<sup>200</sup> CCMA Rules, rule 25(1)(a).

<sup>201</sup> Subsection C, *ibid.*

### 3.8. CHAPTER CONCLUSION

In summation, a detailed account of the responsibility of the CCMA is unraveled in this particular discussion forming the paramount theme. The general purport was basically to discuss the role of the commission. The role obviously forms the epicenter of this chapter upon which it is succinct that the concept of social justice can exclusively be driven through. This was manifest from the discussion of different scholars.<sup>202</sup>

Fundamental therefore, was the driving force behind the creation and establishment of the commission as enunciated by *Engen case*.<sup>203</sup> Its role was seen as imponderable as it was aimed at burdening off courts and carrying out justice efficiently and speedily. Impressive of it also it was aimed to serve as the vehicle of the principles of law and fairness implicit in social justice. The *animus* therefore was indubitably to advance social justice.

To uplift social justice, the processes of the commission, conciliation and arbitration form the integral part in the disposition of portraying this concept. It is therefore concluded that the Commission is purported to be an engine for ventilating justice and fairness in equal mode in the workplace without discrimination as required by social justice.

It is however clear that the dispute resolution system is currently under strain as is evident from numerous reports about the problems experienced by the

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<sup>202</sup> For instance Wade and Forsyth, *supra*.

<sup>203</sup> *Supra*.

CCMA.<sup>204</sup> Even though the LRA has brought statutory dispute resolution within reach of the ordinary worker, it might actually have compounded the problems relating to dispute resolution in the country.<sup>205</sup>

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<sup>204</sup> Bendeman, H., *supra*, page 81.

<sup>205</sup> Le Roux P, et al. *Under Strain but Coping so far: The first four Months of the CCMA*. 1997. Contemporary Labour Law, vol.6.No.7 Rivonia: Gavin Brown & Associates. 12

## CHAPTER 4

### ANALYSING THE IMPACT OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION ON SOCIAL JUSTICE

#### 4.1 INTRODUCTION

Having seen the last chapter which was specifically dedicated to the role of the CCMA and which work of the commission was evidenced from its weapons which are basically the processes utilized to resolve labour disputes, it is befitting at this particular instant therefore to analyze the impact of the commission to social justice. This is more suitable so as to assess the activities of the Commission and if they in fact align themselves with the demands and objectives of the concept of social justice.

One of the intriguing questions after exploring the role of the commission pertains to the delivery of justice as an inherent purpose of the CCMA. Now therefore, in the whole process of delivering justice the important precepts of social justice, equality and fairness form the main target of the commission through which social justice will be satiated.

The present discussion basically intends to assess and analyse whether the principles of equality and fairness are well exercised by the commission as a result of which social justice will be said to be advanced.

## 4.2. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS FOR SOCIAL JUSTICE

### 4.2.1. The application of equality and fairness

The principle of equality and fairness contemplates that equal and fair treatment should as a matter of principle be accorded (in the context of labour dispute) to employee and employer and applied in the proceedings all throughout without any prejudice to any of the parties involved in the litigation. The importance of these two principles has been emphasized by numerous scholars.<sup>206</sup>

The principle of fairness is mighty demanding as a result of which special attention has to be paid exclusively to its satisfaction. The place of fairness is of paramount importance in the administration of justice. The CCMA is one institution which is infused with absolute powers to administer justice. Implicit in the administration of justice is the principle of fairness, the exclusion of which justice will be failed. Through conciliation and arbitration justice is intended to be delivered.

The application of fairness seems to be broad as it needs to be seen to be applied all throughout the proceedings. Equality is intended to advance fairness. This gains confidence from the Canadian case of *R v Turpin*<sup>207</sup> which expressed

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<sup>206</sup> For example see, Friesen, M., *supra* who states that social justice means striving for equal and fair treatment of all human beings, regardless of their ethnicity, social class or gender.

<sup>207</sup> (1989) 1 SCR 1296 at 1329.

*'[Equality] [i]s designed to advance the value that all persons be subject to the equal demands of the law and not suffer any greater disability in the substance and application of the law than others. This value has historically been associated with the requirements of the rule of law that all persons be subject to the law impartially applied and administered. '*

These principles were also acknowledged in the case of *S v Ntuli*<sup>208</sup> as the court therein pointed out that equality before the law means that those who come before the courts of the land are assured of fair and impartial adjudication. The principle of fairness ought to be applied equally to the employee and employer in the dispute. In *National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd and Others*<sup>209</sup>, the court alluded that 'Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment...'

It is explicit therefore that equality and fairness must be applied by the CCMA to further the purpose of the Act<sup>210</sup> as mandated by the Constitution.<sup>211</sup> It is only then that it can be baldly purported that social justice envisions in the Constitution that the Preamble talks of will be established.<sup>212</sup>

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<sup>208</sup> 1996 (1) SA 1207 (CC).

<sup>209</sup> 1996 (4) SA 577 (A).

<sup>210</sup> LRA, *supra*.

<sup>211</sup> Constitution of the Republic of South Africa, *supra*.

<sup>212</sup> Para 2 of the Preamble of the Constitution of South Africa, *op cit*.

#### 4.2.2. The exclusion of the constitutional right to legal representation

The issue of legal representation at the CCMA has remained critical and controversial. Even though it has not been exhausted, it otherwise remains to be excluded under the CCMA. Notwithstanding amendments to the Labour Relations Act (LRA)<sup>213</sup>, changes to the Rules for the conduct of proceedings before the CCMA and recent law, the law relating to legal representation in labour disputes remains unchanged; there is no absolute right to legal representation at any stage of the proceedings arising from incapacity and misconduct dismissals.<sup>214</sup> The law can be summarized as follows:-

(a) legal representation is not allowed at conciliation stage<sup>215</sup>

(b) legal representation is generally allowed at arbitration stage (except at incapacity or misconduct dismissals)<sup>216</sup>

The current wording of Rule 25(1)(c) provides that if the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employees' conduct or capacity, the parties, despite subrule (1)(b), are not entitled to be represented by a legal practitioner in the proceedings unless<sup>217</sup> -

(a) the Commissioner and all the other parties consent;

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<sup>213</sup> LRA, *ibid.*

<sup>214</sup> Collier, D. *The Right to Legal Representation at the Commission for Conciliation, Mediation and Arbitration and at Disciplinary Enquiries*. 2005. Lansdowne: Juta & Co. Ltd. ILJ 26 pg 1.

<sup>215</sup> CCMA Rules, rule 25(1)(a).

<sup>216</sup> CCMA Rules, rule 25(1)(c).

<sup>217</sup> Collier, *Ibid.*

- (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-
- (i) the nature of the questions of law raised by the dispute;
  - (ii) the complexity of the dispute;
  - (iii) the public interest; and
  - (iv) the comparative ability of the opposing parties or their representative to deal with the dispute.

The LRA renders the Commission ample latitude, firstly to determine the representation of a party in a dispute after considering certain factors that according to the commissioner amount to a belief and conclusion that in fact a legal representation should be excluded from representing a party. Secondly, to make rules regulating the practice and procedure for any process to resolve a dispute through conciliation and or arbitration proceedings.

The LRA allows the CCMA to make rules regulating the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings<sup>218</sup> and all other matters incidental to performing the function of the commission.<sup>219</sup>

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<sup>218</sup> S. 115(2A)(k) Amendment Act of 2002.

<sup>219</sup> S. 115(2A)(M) Amendment Act of 2002.

### 4.2.3. The right to equality

Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law; and section 9(3) goes on to prohibit unfair discrimination.<sup>220</sup>

*'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'*

Section 35 of the Constitution speaks of a right to legal representation by a legal practitioner. This right is available to everyone be it criminal proceedings, civil proceedings or administrative proceedings. As the law requires and infuses everyone with the volition to benefit from the law by exercising such right or otherwise, to restrict one from exercising his or her right would be disenfranchising such an individual human being, in which case a constitutional qualm will be raised.

Legal representation is permitted under the CCMA with regard to certain cases. Allowing such a right is constitutionally in compliance, but restricting it exclusively to certain matters can not gain constitutional approval. Curtailing the right to

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<sup>220</sup> The Constitution of the Republic of South Africa, *op cit*.

certain matters would veritably be to discriminate against employees and employers whose cases do not attract such a right.

There is no rational reason why the LRA should provide a right to legal representation in arbitrations about dismissals as a result of operational requirements but disallow it where the dismissal concerns the conduct or capacity of the employee.<sup>221</sup> This argument gains support from the following passage;

*'There is in particular no rationality in permitting a right of legal representation in disputes about discipline falling short of dismissal (where job security is not in jeopardy) and [no] in conduct and capacity dismissals. In these [conduct and capacity dismissal] cases the stakes are so much higher.'*<sup>222</sup>

By the same token, prohibiting legal representation would be to discriminate against legal practitioners, and if they are discriminated against, by analogy, it follows that also the client would be denied a hyperstance to get the services of the lawyer of his choice to represent him or her under the CCMA. In the same vain he or she would be denied the benefit of the law in this regard, as a result of which justice will be teared apart.

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<sup>221</sup> *Ibid.*

<sup>222</sup> Landman J in *Netherburn t/a Netherburn Ceramics v Mudau supra.*

The Law Society of South Africa (LSSA) also challenges the legality and constitutionality of CCMA Rules with regard to legal representation on the following grounds:

(a) Rule 25(1)(c) and the *Ultra vires* doctrine

The *ultra vires* doctrine generally recognizes that an administrative authority which has the power to regulate and control will transgress its authority if it totally prohibits an activity.<sup>223</sup> The right to regulate procedural matters contained in s.115 of the LRA, the LSSA argues, does not include the right to exclude legal representation. The LSSA's argument is that rule 25(1)(c) does not regulate, instead it excludes legal representation in disputes involving dismissals for conduct or capacity, leaving it to the discretion of a commissioner to allow legal representation while the legislature may have the right to exclude the right to legal representation, it has not delegated this right to the CCMA.

(b) Rule 25(1)(c) and the right not to be unfairly discriminated against.

The Constitution<sup>224</sup> and the PEPUA<sup>225</sup> prohibit unfair discrimination. PEPUA defines discrimination as;

'[A]ny act or omission including a policy, law, rule, practice, condition or situation which directly or indirectly-

(a) imposes burdens, obligations or disadvantages on ; or

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<sup>223</sup> Wiechers *Administrative Law* (vol 1) Law of South Africa para 79 Steyn Witleg Van Wetter (7ed) at 191 cited by Collier *supra*.

<sup>224</sup> The Constitution *supra*.

<sup>225</sup> PEPUA), *supra*.

(b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.'

The LSSA asserts that the CCMA's refusal to allow parties the right to be legally represented at misconduct and incapacity arbitrations, while allowing representations by trade unions, employer's organizations and in-house legal advisers, amounts to unfair discrimination against members of the legal profession.

In *Netherburn Engineering cc t/a Netherburn Ceramics v Mudau and Others*<sup>226</sup>, following the dismissal of an employee who challenged the dismissal at the CCMA, the managing member of *Netherburn Engineering cc* appeared at the CCMA arbitration, accompanied by his attorney. The attorney duly applied for permission to represent his client on the grounds that the matter was complex, the member had little experience in labour matters and the employee was represented by an experienced union official. The Commissioner refused the attorney's request and ultimately found in favour of the employee.

*Netherburn Engineering cc*<sup>227</sup> took the matter on review, where it challenged the Commissioner's decision to exclude the lawyer, his refusal to postpone the matter, and the award itself. Specifically, the decision to exclude the employer's legal representative was challenged on the following grounds: In *Netherburn*<sup>228</sup>

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<sup>226</sup> (2003) 23 ILJ 1712 (LC).

<sup>227</sup> *Op cit.*

<sup>228</sup> *Op cit.*

the court considered whether there was an actionable differentiation of treatment, that is, whether the parties were treated differently. Although it acknowledged that the law relating to legal representation at misconduct and incapacity dismissal disputes was inconsistent with legal representation at arbitration proceedings generally, it was of the view there was no differentiation as regards the qualified right of legal representation between the employer and its former employee. As both employer and employee were on the same footing, the court reasoned there was no inequality.

#### **4.2.4. The right to fair public hearing**

Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court of law or where appropriate, another independent and impartial tribunal or forum. The *International Covenant on Civil and Political Rights (ICCPR)*<sup>229</sup> guarantees the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The employer in *Netherburn*<sup>230</sup> argued that implicit in the right to a fair public hearing is the right to legal representation. Landman J was prepared to concede that the CCMA is an appropriate neutral tribunal as contemplated by s.34 but replied in the negative to the question. '[d]oes it flow from this that a party in similar circumstances to *Netherburn* has the right to legal representation.

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<sup>229</sup> ICCPR, 1966 Article 14.

<sup>230</sup> *Op cit.*

*Netherburn's* submission that a 'fair public hearing entails that legal representation is a constitutional right of litigants participating in civil litigation was not accepted by the court. Landman J emphasized the distinction between court and tribunal and, insofar as tribunals are concerned, was of the view that; 'Legal representation may be appropriate in some situations and in a specific tribunal and not in other cases or on (sic) other tribunals. One cannot read a right of legal representation *vis-à-vis* a tribunal as being implicit in s.34.'

#### **4.2.5. The right to fair trial**

Section 35 of the Constitution provides that every accused person has a right to a fair trial which includes the right to choose, and be represented by a legal practitioner.

This particular section seems to raise different views. Different interpretations are labeled to this particular section. Others vehemently opine that section 35 specifically with particular reference to the concept of fair trial includes the right to legal representation which is exclusively applicable to persons accused of offences in a court of law and has no application in other tribunals.<sup>231</sup> It is further stretched that the CCMA, a tribunal for deciding labour disputes, is an organ of state and not a court of law and therefore the notion that s.35 is not applicable at CCMA arbitrations is gaining in acceptance.<sup>232</sup>

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<sup>231</sup> *Netherburn* *ibid* footnote 21.

<sup>232</sup> *Ibid.*

The view that the limitations of legal representation established by the LRA and the CCMA Rules, do not infringe any constitutional right, expressed by the labour court in the Netherburn matter, was endorsed by Van Niekerk AJ in the *Norman Tsie Taxis*.<sup>233</sup>

Adopting a different line of argument obviously contrary to the foregoing argument, fair trial standards apply to a wide range of processes, actors and institutions. In the first place, they apply to all kinds of legal proceedings. In principle, civil or other non-criminal proceedings are also encompassed.<sup>234</sup>

One would seem not to share the same sentiments with the judgment here-above. The right to a fair trial is applicable to both the determination of an individual's rights and duties in a suit at law...<sup>235</sup> it is argued that the term "suit at law" refers to various types of court proceedings – including administrative proceedings, for example – because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties.<sup>236</sup> The proceedings of a tribunal are administrative in nature.<sup>237</sup> It follows therefore that because the CCMA exercises powers that are administrative in nature, it is an administrative tribunal.<sup>238</sup> The right to fair trial

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<sup>233</sup> *Norman Tsie Taxis v Pooe NO & Others* (2003) 26 ILJ 110 (LC).

<sup>234</sup> Marks, S and Clapham, A. 2005. *International Human Rights Lexicon*. New York: Oxford University Press. Inc, pg 152.

<sup>235</sup> A Basic Guide to Legal Standards and Practice issued by Lawyers Committee for Human Rights in the United States on March 2000, at page 1.

<sup>236</sup> *Op cit*

<sup>237</sup> Currie and De Waal. 2005. *The Bill of Rights Handbook*. Wetton: Juta & Co Ltd 5<sup>th</sup> ed, at 651, fn 34

<sup>238</sup> Brassey, M. 2006. *Employment and Labour Law: Commentary on the Labour Relations Act*. Kenwyn: Juta & Co. Ltd. Vol 3, at A7-1-A7-2



therefore applies even to the CCMA in which case the right to legal representation is implicit in this particular right.

Albeit the courts view based on the fact that the LRA and CCMA Rules do not annihilate any constitutional right some however, adopt a contrary view. They maintain however that under South African new constitution everyone has the right to legal representation.<sup>239</sup>

There are still some arguments advanced to this effect which are of recent stated to have grounded in practical, public policy and constitutional concerns regarding to the legality of LRA provision and CCMA Rules and the right to legal representation.<sup>240</sup> From a practical point of view, a change to the rules would bring consistency to the law which currently, arbitrarily, differentiates between misconduct and incapacity arbitration and all other arbitrations.<sup>241</sup>

#### **4.2.6. Just administrative action**

The CCMA is considered to be an administrative tribunal and is therefore subject to section 33 of the constitution which provides that, 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'<sup>242</sup>

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<sup>239</sup> [Http://www.btimes.co.za/guide/labour/labour13.htm](http://www.btimes.co.za/guide/labour/labour13.htm).

<sup>240</sup> Collier *ibid* page.

<sup>241</sup> *Ibid*.

<sup>242</sup> Collier, *Ibid* at 766-767.

In *Hamsta & Another v Chairperson Peninsula Technikon Internal Disciplinary Committee & Others*,<sup>243</sup> the Supreme Court of Appeal held that, although there was no discernable constitutional imperative regarding legal representative in administrative proceedings, the constitution was flexible enough to permit legal representative in cases where it was truly required to attain procedural fairness. The court went on to say that this was especially true in cases where decisions required entailed legal consequences that ranged from the trivial to the most grave.

Buirski too argues that requiring 'procedurally fair' action may well entail a right to representation in situations such as an arbitration conducted by the commission.<sup>244</sup> To bolster his argument, Buirski relies on two additional fundamental rights contained in the constitution namely; the right to equality<sup>245</sup> and the right of access to courts.<sup>246</sup>

At the least, procedurally fair administrative action right entrenches the common law right to natural justice.<sup>247</sup> Implicit in this right is the *audi alteram partem maxim* which requires compliance with the principle of 'equality of arms'. This means that everyone who is a party to any proceedings should be given a reasonable opportunity of presenting his case under conditions which do not

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<sup>243</sup> (2002) 5 SA 449 (SCA).

<sup>244</sup> Collier *Ibid*.

<sup>245</sup> S.9 of the Constitution Act 108 of 1996.

<sup>246</sup> S.34 of the Constitution *op cit*.

<sup>247</sup> De waal, J et al. 2001. *The Bill of Rights Handbook*. Lansdowne. Juta & Co. Ltd, 4<sup>th</sup> ed, p 509.

place him at substantial disadvantage vis-à-vis his opponent.<sup>248</sup> In the *Netherburn* case, the employee was represented by an experienced union official who was diametrically equipped with labour matters while the employer who was not fully familiarized with labour matters was denied a reasonable opportunity of presenting his case before the CCMA under the conditions which do not place him at substantial disadvantage vis-à-vis his opponent.

On the other hand there are dissenting arguments contrary to representation by legal representative to the CCMA. Benjamin states that there are strong indications that a high degree of legal representation would both undermine endeavours to resolve these disputes expeditiously and tilt the balance unfairly in the favour of employers.<sup>249</sup>

However Collier strongly countenance to the involvement of legal representative to the CCMA by stating that<sup>250</sup> "If justice is to be done, [s]he ought to have the help of someone to speak for him [her]; and who better than a lawyer who has been trained for the task."<sup>251</sup>

In cementing to Lord Denning's view, Buirski states,<sup>252</sup>

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<sup>248</sup> *Ibid.*

<sup>249</sup> Benjamin, P. *Legal Representation in Labour Courts*. (1994) 15 ILJ 250 at 260 cited by.

<sup>250</sup> Collier, D. *The Right to Legal Representation under the CCMA* (2003) 24 ILJ.

<sup>251</sup> Lord Denning in *Pett v Greyhound Racing Association Ltd* quoted by Zietsman AJP in *Fbhayi City Council v Yantolo 1991(3) SA 665 (E) at 674B: (1999) 12 ILJ 1005 (E)*, quoted in Buirski – The Draft Labour Relations Bill: 1995 – The Case for Legal Representation as its Proposed for to Dispute Resolution' (1995) 16 ILJ 529.

<sup>252</sup> Buirski, *supra*, quoted by Collier *supra* at 753-754.

*'The advantages of having a representation trained in law are too frequently ignored....'*

Buirski simply shows that the importance of a legal representative must be highly acknowledged. He simply states that their work as legal representatives must be respected for that is what they are trained for. They play an important role in reaching a just decision by a decision maker. Such role will be seen in the interpretation of laws, simplifying complex legal and factual issues.

#### **4.2.7. Right of access to the Commission for Conciliation, Mediation and Arbitration**

The right of access to the CCMA is generally guaranteed through a right safeguarding equal protection of law.<sup>253</sup> Section 34 generates a right of access to a court, where appropriate, another tribunal or forum.

It is contended that the CCMA is appropriate for individual employees for reasons pertaining firstly to the fact that it is easily accessible, low-cost and user-friendly, and that employees know about the CCMA and are aware of their rights.<sup>254</sup> It was further argued that the accessibility is one of the reasons why the CCMA is so overburdened with individual unfair dismissal cases...<sup>255</sup>

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<sup>253</sup> See Davis D, *et al.* 1997. *Fundamental Right in the Constitution: Commentary and Cases*. Cape Town: Juta & Co. Ltd. 143. for example, he contends that the right to access to courts [forum] is generally guaranteed through a right safeguarding equal protection...CCMA for instance is one such forum that is intended to provide for the safeguarding of the equal protection of law by exercising equality and fairness through disputed resolution mechanisms such as conciliation and arbitration.

<sup>254</sup> Bendeman, *supra*.

<sup>255</sup> *Ibid.*

Even though the CCMA is perceived to be accessible hence being overloaded more particularly because of dismissal cases, it is still believed that complete and adequate accessibility is not yet achieved by the CCMA. The Constitutional Court in *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others*<sup>256</sup> emphasized the fact that the right of access to court or tribunal or forum is succinctly a rule of law. That means the law should be seen to take its course in the administration of justice by the CCMA. The underlying principles of equality and fairness in the process should be carried out. Can it be said that accessibility is achieved yet the right to legal representative is not fully featured? Most of the employees are inauspicious to labour matters and need a counsel to present his case on his behalf. Should we say justice is done to this kind of people who want their matters to be handled out by people they choose to assist in disposing of their matters on their behalf?

The matter is more complicated further by the fact that even legal aid is not available in administrative proceedings. It was contended that legal assistance for poor persons in administrative forums is not availed as a result of which their rights are overlooked.<sup>257</sup> Are the poor effectively excluded from the legal system?<sup>258</sup> This will seem to be in view of the fact that some of the employees cannot afford the services of lawyers where for example such right of representation is permitted by the CCMA.

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<sup>256</sup> 2003 (CC).

<sup>257</sup> Vawda, Y. *Access to Justice: From Legal Representation to Promotion of Equality and Social Justice- Addressing the Legal Isolation of the Poor*. University of Kwazulu-Natal. 239.

<sup>258</sup> *Ibid*.

### 4.3. COMPLIANCE WITH OTHER REQUIREMENTS

There are other important issues which the CCMA through its role is expected to address. Having seen the role played by the CCMA through conciliation on and arbitration processes, other than the constitutional issues raised above, the question of effectiveness is another aspect which the Commission is expected to portray.

Some critical views emerge which questions the effectiveness of the CCMA through its processes. It is indicated that conciliation process is far beyond advancing social justice on the basis of this regard.<sup>259</sup> Bendeman doubts and questions the effectiveness of the conciliation process by arguing that the parties to the dispute resolution process are not equipped to effectively function within the system as created by the LRA.<sup>260</sup>

Conciliation is said to be expeditious and relatively inexpensive.<sup>261</sup> The object of conciliation is to settle disputes amicably and in this respect it said to be a social good as settlement depends on the willingness of the parties. With this note the process is said to be incomplete in it, it is said not to be a discrete process.

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<sup>259</sup> See Bendeman *supra*.

<sup>260</sup> *Ibid*.

<sup>261</sup> For the parties, there are the costs of preparing for and attending an arbitration hearing, on top of attending conciliation. Arbitration hearings also generally take longer than conciliation. For the CCMA, there are the additional costs associated with a more formal process, as well as the costs of engaging an arbitrator. The tape-recording of arbitration hearings is an example of a requirement imported by the Labour Court, with considerable cost implications for both the CCMA and the parties to disputes.

Obviously, the parameters of the conciliation are set by the processes that follow it.<sup>262</sup>

It can be argued that conciliation is not however an important process in advancing social justice. This is because its effectiveness is dependant on the willingness of the parties themselves not as a result of the requirement of the law itself of the rules of the CCMA. In this regard too, it is said to be a delaying process as it compels parties before proceeding to arbitration unless in other cases, should start with conciliation process.

The effectiveness nature of the CCMA is also questioned with regard to certain kind of employees. It was argued by Theron and Godfrey that only permanent employees access the services of the CCMA especially in dismissal cases.<sup>263</sup> The referring of dismissal disputes by employees involved in the informal employment and temporary employees is not prevalent in South Africa as in some other jurisdictions.<sup>264</sup> It would seem in general only few have challenged their dismissals to the CCMA. They state that all the indications are that employment in the informal economy whatever the form it takes is burgeoning. The alternative explanation is either that part-time and temporary workers are not aware of their rights, and are not using the CCMA to challenge dismissals, or they are being frustrated from doing so at a stage prior to arbitration, or both.

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<sup>262</sup> Theron, J and Godfrey, S. *supra* page 5.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

From the foregoing it would seem the peripheral workers are left out from accessing the CCMA. The CCMA is not doing enough in terms of letting this kind of workers know about their rights. It is astonishing to find that the CCMA is not taking services to the people as expected. This challenges the effectiveness of the CCMA. If its effectiveness is in doubt so is advancement of social justice.

#### **4.4. AN OVERVIEW OF THE IMPACT: CRITICAL AREAS OF CONCERN**

It is said that from an institutional point of view, conciliation is expeditious and relatively inexpensive.<sup>265</sup> One of the main objects of conciliation is the settlement of disputes, and that the terms of settlement are not veritably an issue to propound. The scientific basis for these claims is open to question as it was pointed out that the CCMA statistics of cases settled includes cases that are withdrawn or repeated for lack of jurisdiction.<sup>266</sup>

It is further expressed that apart from other considerations, it is incorrect to view conciliation as a final process.<sup>267</sup> In a case of disputes of mutual interest, it is the willingness of ability of the parties to resort to effective industrial action that is the inducement to settle at conciliation. Where a party has the right to refer a dispute to arbitration, it is the risk of losing at arbitration and the consequences of losing that are first and foremost what induces parties to settle. Arbitration is seen as a

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<sup>265</sup> Theron, J and Godfrey, S. *ibid.*

<sup>266</sup> Brand, J. "CCMA: Achievements and Challenges – Lessons from the First Three Years; Paper presented at the 12h Annual labour Law Conference. 1999, 9.

<sup>267</sup> *Ibid.*

process which is better well equipped than conciliation as parties are compelled to comply by the award.<sup>268</sup>

Legal representation being a critical issue is totally excluded under conciliation. that means even the peripheral workers who are not well equipped with the legal knowledge and skill in labour related matters are denied access to the process. It was advanced by Theron and Godfrey<sup>269</sup> that this kind of workers decides not to take their cases to the CCMA because of lack of knowledge on labour matters. It would also seem the CCMA is only accessible to permanent and formal employment workers to the exclusion of peripheral workers.<sup>270</sup>

It is therefore concluded that conciliation in itself cannot promote social justice. This is more so also due to the fact that some of the important rights such as legal representation are absolutely denied in conciliation.

#### **4.5. CONCLUSION**

The endeavour proved by the CCMA in advancing the objectives of social justice is indisputably indubitable. Addressing the needs of social justice is a peremptory obligation that our Constitution envisions. The present relevant statutes adopt the same view by entrenching the principle of social justice. It becomes the major

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<sup>268</sup> Ibid, p 5-6.

<sup>269</sup> Theron & Godfrey.

<sup>270</sup> According to the sample of Theron & Godfrey only one employee in the informal employment challenged her dismissal in the CCMA. This was a worker in a flea market, who was unfairly dismissed, but was actually only seeking her leave pay.

task of the CCMA therefore to put into utilization and effect this principle in its complete form.

From the above discussion, it is palpable that a serious concern is held against CCMA in trying to address the principle of social justice. These issues raise a lot of doubts with regard to the effectiveness of the commission and with regard to the delivery of justice. The LRA and the CCMA rules form part of the culprits to the detriment of employees and employers rights which as a matter of right have to receive.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Introduction

The purpose of this study is to assess whether through its role and activities, the CCMA has made any impact in so far as the concept of social justice is concerned. And one of the central qualms is whether the CCMA has fulfilled the objectives of social justice. And its quest to realize its set goal, the study will while placing particular emphasis to the reasons that retard CCMA to meet its vision of advancing social justice, identifies existing areas that raise concerns.

#### 5.2 Conclusions

One would articulate positively that not only the rudiments of social justice have been unraveled in this particular endeavour, unpacked also proved to be the salient principles which gave light to what this animal, social justice has to look like. It was sagacious for this kind of approach to place the importance of these underlying principles into light to enable a thorough comprehension of the study. And to see the value that is attached by the existing relevant laws which place the concept of social justice upfront. Above all, the paramount law of the country mandates the upholding of this particular concept by these other statutes that are concerned about labour issues. Of importance, which this study is concerned

about, is the CCMA which is the institution that is dressed with the responsibility of advancing social justice with utmost respect.

The importance of this concept is undeniable, its magnitude is recognized, and this is due to its significance in life as a whole hence it is a revolutionary concept that renders the rule of law dynamic. It seeks to do justice and resurrect equality in the workplace. It would seem important existing labour laws attach great authority towards this concept. In turn the CCMA will be expected to do the same. However it would seem from the discussion above that even though much was expected from the CCMA, less was received from it in terms of advancing this concept. Adequate justice was not done to satiate the objectives and demands of social justice. This is more so because accessibility of certain fundamental rights was denied employees and employers as a result of which constitutional mandate was overlooked.

Chapter one shows that because of the shortcomings and problems experienced with the old system of labour relations and dispute resolution before the advent of democracy in 1994, the need arose for the establishment of the CCMA. But the potential of CCMA in revamping the novel system remains dubious. One of the central contentions embodied therein is that the CCMA is seen not as a diametrically protector of social justice. Bendeman<sup>271</sup> agrees in this regard. He collaborates that the processes of CCMA bears no fruits for employees and

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<sup>271</sup> *Supra.*

employers. Theron and Godfrey<sup>272</sup> also come out clear by implying that the CCMA is failing to fulfill the objectives of social justice.

It was argued in chapter two that in the past, the inability of the dispute resolution institutions to meet the needs of the ordinary citizens was due to content of substantive law and the structures and procedural requirements which upon viewing them, meant that people were denied access as a result. As if this problem was addressed and attended satisfactorily without loopholes by the existing dispute resolution institution (CCMA), less seems to paste or appear to be done to improve and rebuild the dispute resolution system towards addressing the left out gaps which still exist even today. This is indicative of the discussion in the preceding chapters.

Chapter two above further gives a clear discussion on the principles which are understood to have an obligatory feature which the CCMA is obliged to follow in dealing with matters in the workplace. These principles of social justice do not exclusively enable the CCMA to discharge its duties smoothly, but perhaps, help it to restore equality of justice and equity in the workplace.

Now, therefore, in addressing the question whether social justice is advanced by the CCMA, chapter three spells out the role of the CCMA in terms of which the LRA, BCEA and the Employment Equity Act EEA all are in *ad idem* to the point that the major objective of the CCMA is to advance social justice. This objective,

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<sup>272</sup> *Supra*.

basically, is orchestrated by the LRA as to be advanced through conciliation and arbitration. It is further shown in that very chapter that the advancement of social justice may well be advanced by application of principles of law and fairness in the ventilation of workplace disputes. It was perchance also stressed that access to justice is intended to be the main feature of the CCMA.

Chapter four identified areas of concern which create a huge doubt to the fulfillment of the objective of CCMA of advancing social justice. While this has been answered earlier, it is argued in chapter four patently so that constitutional annihilation has been seen to exist. There seem to exist the tension between the CCMA rules and the Constitution. This as earlier stated created by section 25 of the CCMA as against section 35 of the Constitution. Compliance of the CCMA is clearly doubted in this regard. This would mean that legal right is excluded and curtailed under the Commission. The issue of equality was also canvassed in this very chapter as being denied to employees and employers and if such is not availed to employees and employers section 9 of the Constitution was in contravention. It was also canvassed in this very chapter that prohibiting legal representation to employees would be to discriminated against the legal representatives and employees. This was further explained in chapter four.

It is emphasized that because the governing statutes failed to protect certain important rights, the CCMA fails also to address those rights under conciliation and arbitration. It is felt in this regard that failure to address these problems constitute denial of advancement of social justice within the workplace.

Resurgent ideas therefore will be forwarded which will give vivacity to the initial intentions of CCMA of advancing social justice, with the aim of revamping the system to the betterment of all those involved in the workplace. In this chapter a selection of recommendations made which are extracted from this analysis are presented in two parts, namely; redesigning the processes of the CCMA, and extension of legal assistance in administrative proceedings.

### **5.3 Recommendations**

#### **5.3.1 Redesigning the Processes of the Commission for Conciliation, Mediation and Arbitration**

Numerous statutes contain plenty of rights which form the epicenter of social justice, included amongst these statutes is the LRA<sup>273</sup> which marshals the CCMA. Being the important statute in this regard, it limits the accessibility of certain rights to the grab of employees and employers.

The LRA itself, for instance, curtails the right to equality and promotes unfair discrimination. This is so due to the arguments put forth above. It curtails the right to legal representative to certain matters. To do so would be to give unnecessary restrictions which are not in compliance with constitutional mandate as discussed above.

To do away with these curtailments and unnecessary restrictions, it is disparaged that the LRA should be amended to include the absolute right to legal

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<sup>273</sup> LRA Act 66 of 1995

representation under the CCMA. A party to an arbitration dispute is to give evidence, call witnesses, to cross-examine any witnesses and to address the Commissioner. This is type of work that an attorney is trained to do, legal representation is desirable not only in complex matters, but in all disputes whether conducted by conciliation or arbitration.<sup>274</sup> This will have the effect of causing the commission to amend its rules to fit in this right as more broad in terms of application.

### **5.3.2 Extension of Legal Assistance to Administrative Proceedings**

It was emphasized herein above that fair trial standards apply to a wide range of processes, actors and institutions. In the first place, they apply to all kinds of legal proceedings. It would mean that legal representation has a place in administrative proceedings. If it has, as indicated above, then one would advise that legal assistance should be given to those indigent employees who need it.

One has in mind the scenario where an employee is not a member of any trade union and cannot be represented by a union official. One also imagines the situation where an employee is new to the field of labour matters. This would mean in order for his case to be disposed of according to the demands of justice, someone equipped with the knowledge of labour issues has to help, and who can that be if not a legal representative. What about if such employee can not afford the services of such legal representative? One therefore suggests that a place

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<sup>274</sup> Buirski, cited by Collier, D. (2003) *supra* at page 769

for legal assistance should be created by the legal aid so as to cater even for the poor employees.

This is a serious concern especially as rights of those who utilize the services of administrative forums, are overlooked. This helps bring equal footing of criminal proceedings and administrative proceeding in terms of legal assistance.

The issue of legal representative and legal aid assistance will help to respond to the demand of equality of justice and address critical problems in access to justice which are in summation mainly based upon, firstly, sophistication in the nature of the proceedings under CCMA, secondly unequal resources between employer and employee.

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