

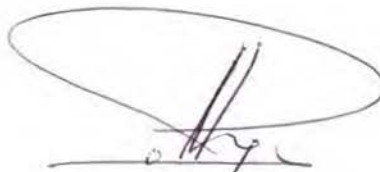
FREEDOM OF ASSOCIATION IN THE DISCIPLINED FORCES OF THE  
REPUBLIC OF BOTSWANA: A Comparative Analysis between the Laws  
Regulating Labour Relations in Botswana's Disciplined Forces and South  
African Security Services.



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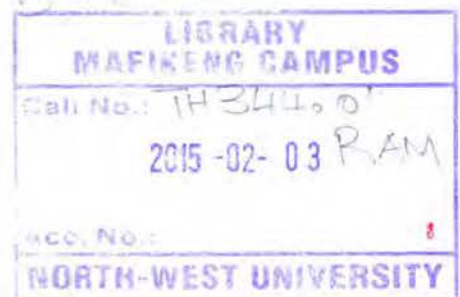
Mini-dissertation submitted in partial fulfilment of the requirements for  
Masters' Degree (LLM) in Labour and Social Security Law at the Faculty of  
Law (Mafikeng campus) of the North-West University.



PROF. P.F. IYA

**SUPERVISOR:**

9th MAY 2013

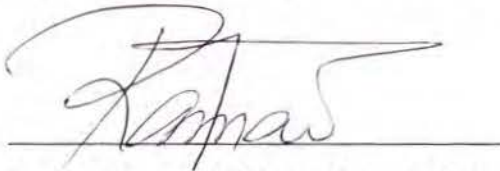


**DECLARATION:**

Student number: **22656758**

I, **RAMAOTWANA NELSON RAMAOTWANA**, do hereby declare that the mini-dissertation for the degree of Masters' in Labour and Social Security Law at the North West University, Faculty of Law (Mafikeng Campus), hereby submitted, has not been previously submitted by me for a degree at this or any other University. I also declare that it is my own work in design and execution and that all materials contained herein have been duly acknowledged.

Signed at Mafikeng on this.....<sup>9<sup>th</sup></sup>..... Day of <sup>May</sup>..... 2013

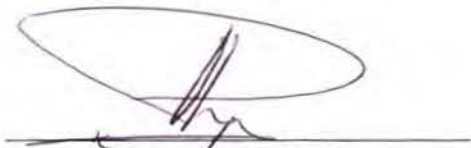


**Ramaotwana Nelson Ramaotwana**

### **SUPERVISOR'S DECLARATION:**

I, Professor Philip F. Iya, being the Supervisor of this mini-dissertation, duly approve it for submission as partial fulfilment of the requirement of the Masters' of Law (LLM) Degree in Labour and Social Security Law at the North West University of South Africa.

Signed at Mafikeng Campus on this *9<sup>th</sup>* day of *May*..... 2013.

A handwritten signature in dark ink, consisting of a large, stylized 'P' followed by 'F. Iya', written over a horizontal line.

Professor Philip F. Iya  
Supervisor

**DEDICATION:**

I dedicate this dissertation to the revolutionary University of Botswana students of the 2000-2005 generation and the larger population of Village ward in Gaborone Central Constituency for voting me their municipal Councillor in 2004 general elections. Their vote enabled me to use the salary to pay for my first degree tuition fees at the University of Botswana; otherwise my academic life could have gone up in smoke.

## **ACKNOWLEDGEMENTS**

The spirit of ubuntu (botho) taught me to value and appreciate the services of those who dedicated their time, energy and intellect to make vital contributions to this mini-dissertation. It is therefore, my singular honour to thank Mr. Mbako Mboki Chilisa for the invaluable brotherly input. He assisted with the editing and critiquing of this dissertation in an insightful and illustrious manner.

My gratitude also goes to the learned Judge of the High Court of Botswana, Justice DR O.B.K. Dingake, an accomplished scholar and profuse writer of labour law books, for his wonderful advice and critique.

Further accolades are extended to the staff members of the Lobatse High Court and Attorney General's Chambers' libraries for availing time and the libraries' resources to conduct my research. I am also indebted to Botswana Federation Trade Union (BFTU) Vice-President, Mr. Edward Tswaipe and Botswana Public Employees' Union (BOPEU) President, Mr. Andrew Motsamai, for availing to the researcher, articles on Freedom of Association and Deputy Commissioner and Minister of Defence, Justice and Security's speeches presented to a symposium on Police unionization (held on 3 – 5/08/2009) respectively.

I further recognize the invaluable input of Boitshepo Bojosi for typing this dissertation on her spare times. Without her input the work could have just ended as a mental thought without materializing into a typed work. The same goes to my friend, Mr. Shem Onyango, for typesetting the dissertation.

It would be remiss of me if I were to forget the valuable input of Professor Philip F. Iya, for mentoring me on the skills and tactic of writing a thesis. For that, I am forever indebted.

## TABLE OF ACRONYMS AND ABBREVIATIONS

|               |                                                              |
|---------------|--------------------------------------------------------------|
| <b>APF</b>    | African Police Force                                         |
| <b>BBP</b>    | Bechuanaland Border Police                                   |
| <b>BCCA</b>   | British Columbia Court of Appeal                             |
| <b>BCSC</b>   | British Columbia Supreme Court                               |
| <b>BDF</b>    | Botswana Defence Force                                       |
| <b>BDP</b>    | Botswana Democratic Party                                    |
| <b>BFTU</b>   | Botswana Federation of Trade Unions                          |
| <b>BLR</b>    | Botswana Law Reports                                         |
| <b>BNF</b>    | Botswana National Front                                      |
| <b>BOPEU</b>  | Botswana Public Employees' Union                             |
| <b>BONELA</b> | Botswana Network, Ethics, Law and Hiv/Aids                   |
| <b>BPA</b>    | Botswana Police Association                                  |
| <b>BPACSA</b> | Bechuanaland Protectorate African Civil Service Association  |
| <b>BPECSA</b> | Bechuanaland Protectorate European Civil Service Association |
| <b>BPOA</b>   | Botswana Prison Officers' Association                        |
| <b>BPFR</b>   | Bechuanaland Protectorate Police Regulations of 1957         |
| <b>BPS</b>    | Botswana Police Service                                      |
| <b>CA</b>     | Court of Appeal of Botswana                                  |
| <b>Cap</b>    | Chapter                                                      |
| <b>CC</b>     | Constitutional Court of South Africa                         |
| <b>CFA</b>    | Committee on Freedom of Association                          |
| <b>COE</b>    | Committee of Experts                                         |
| <b>ECHR</b>   | European Convention on Human Rights                          |
| <b>EHRR</b>   | European Human Rights Report                                 |
| <b>FOA</b>    | Freedom of Association                                       |
| <b>IC</b>     | Industrial Court                                             |
| <b>ICNL</b>   | International Centre for-Not-for- profit Law                 |
| <b>ILJ</b>    | Industrial Law Journal                                       |
| <b>ILO</b>    | International Labour Organization                            |
| <b>ILS</b>    | International Labour Standards                               |
| <b>LLM</b>    | Masters' of Labour Law                                       |

|               |                                                      |
|---------------|------------------------------------------------------|
| <b>LRA</b>    | Labour Relations Act                                 |
| <b>ODIHR</b>  | Office for Democratic Institutions and Human Rights  |
| <b>OSCE</b>   | Organization for Security and Co-operation in Europe |
| <b>POPCRU</b> | Police & Prisons Civil Rights Union of South Africa  |
| <b>PS</b>     | Prison Service                                       |
| <b>PSA</b>    | Public Service Act                                   |
| <b>SA</b>     | South Africa                                         |
| <b>SALJ</b>   | South African Law Journal                            |
| <b>SANDF</b>  | South African National Defence Force                 |
| <b>SANDU</b>  | South African National Defence Union                 |
| <b>S.C.R.</b> | Supreme Court Reports                                |
| <b>SCZ</b>    | Supreme Court of Zambia                              |
| <b>TDA</b>    | Trade Disputes Act                                   |
| <b>TUEOA</b>  | Trade Unions and Employers' Organisation Act         |
| <b>UK</b>     | United Kingdom                                       |
| <b>U.S.A</b>  | United States of America                             |

## LIST OF STATUTES

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- *Handyside v UK* (1976) 1 EHRR 737.
- *Health Services and support facilities subsector Bargaining Association v British Columbia*, (2007) S.C.C. 27.
- *Home Building and loan Association v Blasdell*, 290 US 398 (1934).
- *Ifezu v Mbadugha* (1984) 5 S.C. 79.
- *In Re Munhumeso and others* (1995) 1 SA 551 (ZSC).
- *Kgosi KgoloKgafela II Kgafela and 13 others v The State*, Case No. CLHLB-000148-10 (unreported).
- *Kgosikgolo Kgafela II Kgafela and another v Attorney-General of Botswana and Others, Criminal Appeal No. CLCGB-027/12* (unreported).
- *Lustig-Prean and Beckett v United Kingdom, European Court of Human Rights*, (2000) vol. 29 EHRR 548.
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- *Molefe v The Attorney-General and Others* (2001) 2 BLR 550 (HC).
- *Metal and Allied Workers Union v Hart Ltd* [1985] 6 ILJ 478 (IC).

- *Mulundika and 7 others v The People* (1996) LRC 15 (SCZ).
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- *National Union of Metal Workers of SA and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA (3) 513 (CC).
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- *Young, James and Webster v The United Kingdom, European Court*, (1981) EHRR 38.

## **ABSTRACT:**

*Another facet of this case concerns the restriction of the applicants' choice as regards the trade unions which they could form of their own volition. An individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value.*

*-Jayawickrama*

The principal objective for this study is to investigate the prohibition and/or the effectiveness of freedom of association in the disciplined forces in Botswana as contrasted with the laws and practices in South Africa. The study aims to explore whether freedom of association exists in the disciplined forces of the Republic of Botswana; and if it does, how effective it is, and if it does not exist, whether such non-existence infringes the human rights of the disciplined forces to enjoy the fundamental rights to form and join trade unions of their choice as provided for in section 13(1) of the Constitution of Botswana.

The study finds that the right to form or belong to a trade union is an absolute right in terms of section 13(1) of the Constitution. The study therefore surmises that the exclusion of trade unions in the disciplined forces of Botswana is not reasonably justified in a democratic society, thereby rendering section 24 of the Police Act, section 35 of the Prisons Act and Regulation 75 of the Botswana Defence Force unconstitutional.

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## CHAPTER ONE: INTRODUCTION

### 1.1 BACKGROUND OF THE STUDY

*I agree that, important though a communal esprit de corps (that is, chain of command and discipline) may be for the armed forces, the mystique that any military force requires cannot take away the need for soldiers to be able to speak in their own distinctive voices on mundane but meaningful questions of service. In my view, however, the freedom of association that 'everyone' has (section 18), and the right to fair labour practices that 'everyone' has [section 23 (1)], clearly entitle soldiers to set up a body as SANDU [the applicant] to look after their employment interest.<sup>1</sup>*

The South African National Defence Force, prior to 1999, had a law, namely; the Defence Force Act, No. 28 of 1957, which prohibited trade unions her security services. The Constitutional Court in the SANDU case declared the provisions of the said Defence Force Act invalid and unconstitutional.

Like the South African Defence Force Act of 1957, the Bechuanaland Protectorate Police Regulations No. 71 of 1957, prohibited police officers to form or join trade unions. The prohibition currently subsists.<sup>2</sup> On the 3<sup>rd</sup> - 5<sup>th</sup> August 2009, Minister of Defence, Justice and Security, Dikgakangamatso Seretse, told a symposium hosted by the Botswana Public Employees Unions (BOPEU) that it was impossible to allow Botswana police officers to unionise. In addition, the Deputy Commissioner, Ikotlhaeng Bagopi, at the same symposium, told the Police and Prisons' Civil Rights Union (POPCRU), to go and toyi-toyi in their country (South Africa) and leave Botswana in peace.<sup>3</sup> These statements by two senior members of the Botswana Government are indicative of the magnitude of the problem relating to prohibition of freedom of association in the disciplined forces. The prohibition of freedom of association emanated from proclamation No.71 of 1957 bequeathed to Botswana by her colonial master (Great Britain) and the

<sup>1</sup> *SANDU v MINISTER of DEFENCE* (1999) 4 SA 469 (CC) at para.48.

<sup>2</sup> Section 24 (2) of the Police Act [Cap 21:01] provides thus; "A police officer shall not be or become a member of (a) any trade union or anybody or association affiliated to a trade union".

<sup>3</sup> Makgala and Maundeni, *History of the Botswana Public Employees Unions: 1885 – 2009*, (2010), Cape Town, Centre for Advanced Studies of African Societies, p. 239.

problem still persists- that is, trade unions are still prohibited in the disciplined forces to date.

The same law which prohibited trade unions in the police force (now called police service) in 1957 was extended to Prisons Force (now called prisons service) in 1964 through the Prisons Law, No. 41 of 1964. The 1980 Prisons Act [Cap 21:03]<sup>4</sup> sustained the prohibition till to date. In 1977, almost eleven (11) years after Botswana got her independence in 1966, the Botswana Defence Force (BDF) was established through the Botswana Defence Force Act [Cap. 21:05]. Subsequent to that, but still in 1977, Regulations that govern the day to day affairs of the army were promulgated. Regulation 75 (4) prohibits soldiers to form or join trade unions. In fact, Regulation 75 (4) of the Defence Force Act [Cap 21:05], provides "that a trade union or employers' organisation shall... be deemed to be a movement or organisation of a political character".

The above quotation shows that trade unions in Botswana are deemed organisations of a political character regardless of whatever shape there may take, hence total prohibition of trade unions in the Botswana Defence Force. Unlike Botswana, South Africa has extended the right to form and join trade unions to her security services as indicated in the SANDU case *supra*.

The problem investigated by this dissertation relates to the provisions stipulated in the Police, Prisons and the Defence Force Acts, which provisions prohibit trade unionism in the disciplined forces. The said problem compelled the researcher to undertake a study concerning unionization of the Botswana disciplined forces (that is, unionization in the Police service, Prison service and the Defence Force) with a view to suggest law reforms in order to extend freedom of association to the disciplined

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<sup>4</sup> Section 35 (1) of Prison Act [Cap 21:03] provides thus; "No prison officer shall become a member of –  
(a) A trade union or any body affiliated to a trade union".

forces. The Constitution of Botswana refers to the Police, Prison and the military forces, collectively, as the disciplined force.<sup>5</sup>

In Botswana as already pointed out above, the statutory laws that regulate the disciplined forces prohibit members to form or join trade unions. This study explores how the prohibition impacts upon the rights of the members of the disciplined forces in relation to freedom of association. The study further explores whether the prohibition contravenes the norms of the Constitution, especially the Bill of Rights which provides for protection of Fundamental Rights and Freedoms of the individual. The Bill of Rights is contained in chapter II of the Constitution of Botswana. Section 3 is the key or umbrella provision of the Bill of Rights.<sup>6</sup> Section 3 (b) of the Bill of Rights guarantees every person in Botswana the freedom of conscience, of expression and of assembly and association.

The study explores whether the prohibition of trade unions in the disciplined forces is compliant with section 13 of the Constitution of Botswana. If the study finds out that the prohibition is not compliant with section 13, recommendations for law reforms on the impugned provisions contained in the statutory laws regulating the disciplined forces shall become a necessary evil. This study scrutinizes statutory laws which regulate the disciplined forces in Botswana as a holistic package.

In a nutshell, the study explores whether the prohibitions of trade unions in the disciplined forces are consistent with the exceptions<sup>7</sup> listed under section 13(2) of the Constitution. Therefore, a comparative analysis between Botswana disciplined forces and South African security services is pursued to explore whether the laws and practices governing labour relations in both countries promote freedom of association.

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<sup>5</sup> See Section 19(1) (a) - (c) of the Constitution of Botswana.

<sup>6</sup> See *Attorney General v Dow* (1999) BLR 119 (CA), p. 133 F – G, per Amisshah P. held that; “From the wording of Section 3, it seems to me that the section is not only a substantive provision, but that is the key or umbrella provision in Chapter II under which all rights and freedoms protected under that Chapter must be subsumed. Under the section, every person is entitled to the stated fundamental rights and freedoms”.

<sup>7</sup> See section 13(2) of the Constitution.

## 1.2 PROBLEM STATEMENT AND SUBSTANTIATION

The study investigates the effects of prohibiting trade unions in the disciplined forces in Botswana. The purpose is to determine whether the denial to form or belong to trade unions violates the right to assembly and associate (s 3 of the Constitution), and whether such denial to form and to belong to trade unions violates members' freedom of expression (s 12 of the Constitution), and whether the prohibition complies with the exceptions enumerated under the Constitution of the Republic of Botswana.<sup>8</sup>

This study was motivated by the prohibition of trade unions in the disciplined forces in Botswana. Hence, the following questions are discussed in chapter three at length.

### 1.2.1 *Is the freedom of association protected in Botswana?*

The problem discussed is the banning of unions in the disciplined forces in Botswana. It has been stated above that the Police Act, Prisons Act and the Botswana Defence Force Act, all ban unions in their workplaces. This situation is not helped by the remarks made by the Honourable Minister Seretse in August 2009 that it is impossible to unionise police service in Botswana. Recently, another Deputy Commissioner<sup>9</sup> of the Police service, Mr. Kapinga, was reported in the *Mmegi* newspaper dated the 19<sup>th</sup> April 2011, to have warned police officers not to embark on a go slow, since in Botswana the law does not allow members of the police and other disciplined forces to unionise. These statements from senior members of the government are not helped by the statutory laws that ban unionism in the disciplined forces. Hence this study investigates the aforesaid problem and proposes law reforms where necessary.

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<sup>8</sup> See Section 13(2) of the Constitution. See also *Mulundika and 7 others v The People* (1996) LRC 15 (SCZ), the Court held that "... **the provisions did not fall within the categories listed in the Constitution**". Similarly, the study will explore whether statutory laws which prohibit formation of trade unions in the disciplined forces of Botswana fall or do not fall within the grounds listed in section 13(2)(a) of the Constitution.

<sup>9</sup> Piet, B. 'Police threaten to go slow' (No. 58), (19 April 2011) vol. 28, Gaborone, *Mmegi Newspaper*, p. 3.

The Constitution of Botswana provides for the right to freely associate for purposes of protecting one's occupational interest. Section 13 (1) of the Constitution provides as follows:

Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assembly freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.

It goes without saying that freedom of association in Botswana is protected under the Constitution. This explains why the above problem raised by the question needs a thorough investigation.

### *1.2.2 Is the protected freedom one that is deemed to be fundamental?*

Section 13 forms an integral part of Chapter II of the Constitution. To this end, section 13 confers freedom of association to every person lawfully resident in Botswana. In the words of a Nigerian Labour Law expert,<sup>10</sup> freedom of association properly construed means:

That people may do whatever they wish as long as they do not harm others; an individual should be free to join an organisation and to act in association with others as long as no harm is caused.

The foregoing definition concurs with the guarantee of freedom of association enshrined in Section 13 of the Constitution. This study argues that the freedom under investigation is deemed a protected fundamental right in Botswana such that any statutory law which seeks to ban it maybe deemed inconsistent with section 13(1).

### *1.2.3 Does the banning of trade unions in the disciplined forces impair the protected fundamental rights minimally or substantially?<sup>11</sup>*

The study investigates whether the government has a reasonably justifiable objective which outweighs the individual fundamental right to associate for purposes of protecting his or her occupational interests. The study

<sup>10</sup> Okene, O.V.C. 'Freedom of Association' (2008) Lagos, ICNL, p.3.

<sup>11</sup> Wolf, L. 'A Comparison between German and South African Limitation Provisions' (1996) Vol. 113 SALJ, p. 280 – 281.

concedes that the disciplined forces deal with the national defence and security of the nation but to deny them the mere right to form or belong to a trade union may fail to bear any rational connection between security issues of the nation and freedom to form or join trade unions.

This study discusses constitutional provisions which protect and guarantee freedom of association in Botswana vis-à-vis those statutory laws that prohibit enjoyment of same. In the final analysis the study recommends ways in which law reform may be carried out.

#### *1.2.4 Is the prohibition of trade unions in the disciplined forces reasonably justifiable in a democratic society?*

The exceptions for restricting enjoyment of freedom of association are outlined in Section 13 (2) (a) of the Constitution. Section 13(2)(a) provides thus:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health.

The study discusses in detail the exceptions sanctioned by section 13(2)(a) of the Constitution in chapter three under the heading 'Limitation of freedom of association in the interests of defence, public safety, public order, public morality and health. This beckons the proportionality test<sup>12</sup> to establish whether there is a rational connection between the government objectives and the prohibition of trade unions in the disciplined forces.

#### *1.2.5 Is there a less damaging option to achieve the government objectives without prohibiting trade unions in the disciplined forces?*

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<sup>12</sup> See *R v Oakes* [1986] 1 S.C.R. 103 @ paras. 69-71; see also *S v Makwanyane* [1995] 3 391 SA (CC), para. 104. All these sources agree on the principle of proportionality test which is needed to measure whether the government policy or objective is justified in infringing a fundamental right.

The main aim of this study is to determine whether laws regulating employment of members of the disciplined forces are complying with section 13 (1) of the Constitution, thereby ensuring that every employee in Botswana enjoys his or her right to form or join a lawful trade union of his or her choice, within the realm of her employment enterprise. In exploring less damaging option, which option the government may exercise in the quest to achieve a safe, orderly and moral nation, the study analyses whether sections 16 and 17 of the Constitution do not provide adequate safeguards to accommodate the government's concern of protecting and securing the defence and public order of the Republic of Botswana. The issue is whether sections 16 and 17 provides sufficient room for government to attain its objective such that the declarations to be made under sections 16 and 17 in times of emergency may provide the same remedy equivalent to section 13(2) exceptions; whilst retaining "hard core" essential elements of freedom of association. The quest for a less damaging option also beckons at the principle of proportionality test to determine whether the prohibition is reasonably justifiable in a democratic society.

Freedom of association is an exalted right conferred on an individual to exercise through participation in a collective. In the words of Tocqueville, "*freedom of association is an inalienable right such that no legislator can attack it without impairing the foundations of society*".<sup>13</sup> The main issue is not whether the freedom is absolute, but whether it is reasonably justifiable in democratic society to prohibit trade union formations in the disciplined forces.

In light of the fact that freedom of association is a protected human right, this study explores different mechanisms used in other jurisdictions both in SADC and Europe to determine whether statutory laws regulating the disciplined forces in Botswana conform to international best practices.

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<sup>13</sup> Tocqueville A. *Democracy in America*, (1885) 222, cited in De Waal J. and Currie I., *The Bill of Rights Handbook*, (2005) 5<sup>th</sup> ed., Cape Town, Juta & Co. Ltd, p.420.

### 1.3 AIMS AND OBJECTIVES OF THE RESEARCH

#### 1.3.1 *Broad Aims of the Study*

The theme for this study is to explore reasons for prohibiting freedom of association in the disciplined forces of Botswana as contrasted with the South African experience. The study explores whether freedom of association exists in the disciplined forces of the Republic of Botswana; and if it does, to what extent, and if it does not apply, whether such conduct infringes section 13(1) of the Constitution of Botswana. If it does infringe, what legal measures or remedies are available to redress the problem (infringement). In the end, this calls for weighing up of the options and make a determination as to whether the remedy lies in severing (pruning) the bad portions of the provisions or simply repeal off the impugned provisions of the Police Act, Prisons Act and the Defence Force Act.

#### 1.3.2 *Specific Objectives*

- To analyse provisions of the Botswana Constitution(that is, ss 3, 12, 13, 16 and 17) relating to freedom of association and its limitations.
- To evaluate pieces of legislation that prohibit trade unions in the disciplined forces; namely, (1) the Police Act [Cap. 21:01],<sup>14</sup> the Prisons Act [Cap. 21:03],<sup>15</sup> and the Defence Force Act (Regular Force)(Officers) Regulations [Cap.21:05].<sup>16</sup>
- Whether the prohibition of trade unions in the armed forces, Police service, and Prisons service, is an act inconsistent or in contravention of section 13(1) of the Constitution.
- To compare Botswana's laws and practices with South African labour jurisprudence in her security services.
- To consider foreign case laws in relation to promoting freedom of association in the armed forces from other countries.

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<sup>14</sup> Section 24(2) of the Act.

<sup>15</sup> Section 35(1) of the Act.

<sup>16</sup> Regulations 75(1), (2) (a) and (4) of the Act.

- To conclude the study by suggesting law reforms (if any) on the aforementioned pieces of legislation to enable the disciplined forces in Botswana to enjoy their section 13 (1) constitutional rights.

#### 1.4 **ASSUMPTIONS/HYPOTHESIS OF THE STUDY AND THE EMERGING RESEARCH QUESTIONS**

The point of departure for this research is that, the prohibition of trade unions or voluntary independent professional associations in the disciplined forces of Botswana may be inconsistent with the basic right to associate freely and voluntarily. The study further assumes that freedom of association is a fundamental human right conferred to every person in Botswana to pursue her individual right to form, join and sustain a collective or union for the benefit of the individual via the association.

The study also assumes that targeted exclusion of some contents of the freedom of association, such as; the right to strike, the right to form alliances with political inclined trade unions will be consistent with the spirit of section 13(2) of the Constitution for purposes of keeping the disciplined forces away from political party influence. The armed forces perform unique functions in the pursuit of national defence. Hence partisan political neutrality may be necessary to observe.

The problem to be resolved in this study is: is it reasonably justifiable to completely exclude or prohibit trade unions in the disciplined forces; which unions are meant to pursue matters underpinning the occupational interests of the employees. The study assumes that to do so may be invalid and inconsistent with section 13(1) of the Constitution. The study establishes and determines whether there is a need for law reform if at the end of the analysis it becomes evident that the impugned provisions are inconsistent with section 13(1) of the Constitution.

## 1.5 THE RESEARCH METHODOLOGY

Researchers the world over usually employ qualitative or quantitative methods to conduct their studies or dissertations. Qualitative method entails reviewing documented data whilst quantitative method refers to collection of empirical data. The qualitative method deals with reviewing statutory laws, reports, books, journals, articles and case laws. On the other hand, quantitative method is an empirical analysis of collected data through questionnaires and involves samples of data to be investigated. However, the methods sometimes are used simultaneously; but still; there should be a dominant method that the study depends on to reach the desired objectives.

Qualitative method commences from a particular premise and ends with general principles derived from the exploratory analysis whilst quantitative method commences from general facts and ends with a particular premise or principle or answer.

The qualitative method is easier to handle due to recorded and traceable documents. On the other hand, quantitative method is time-consuming since it involves drafting of questionnaires and collection of representative samples (data) to make an informed conclusion from the observed data. This then explains why the qualitative method has been chosen for this study. The qualitative method is an ideal method for reviewing laws or journal articles. The quantitative method will be inappropriate for this study because that entails formulation of questionnaires to seek opinions of other stakeholders.

The following sources were used during the course of the investigation of the theoretical framework of this study:

- 1.5.1 Acts of Parliament regulating the disciplined forces;
- 1.5.2 The Constitution of Botswana;
- 1.5.3 Case laws;

- 1.5.4 Articles and Journals;
- 1.5.5 Books;
- 1.5.6 Internet; and,
- 1.5.7 Foreign law, with emphasis on South Africa

To this end, the qualitative method is used in this study since it is an appropriate tool to determine through case laws and comparative analysis, whether the prohibition of trade unions in the disciplined forces, is reasonably justified in a constitutional democracy.

## 1.6 LITERATURE REVIEW

The purpose of literature review is to explore the problem on the basis of what others have said or not said about the topic. What research has been done previously? What theories address it and what do they say? Are there consistent findings or do past studies disagree? Are there flaws in the body of existing research that a researcher can remedy?<sup>17</sup>

The specific objectives under paragraph 1.3.2 above, especially, the second bullet shows three pieces of legislation that govern the disciplined forces in Botswana. The said laws do not permit the formation of trade unions. The prohibition of trade unions in the disciplined forces started in 1957 through the Bechuanaland Protectorate Police Regulations No. 71 of 1957 and continued post independence till to date. The Prisons Law No. 41 of 1964 also prohibited trade unions in the prison service. It was repealed and replaced by Prisons Act which commenced in 1980. The 1980 Prisons Act, like its predecessor prohibits trade unions till to date. The Botswana Defence Force was established in 1977 and the BDF Act and its Regulations were enacted post independence but also prohibit trade unions till to date. This is the problem that this study aims to resolve by suggesting some law reforms in the affected institutions.

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<sup>17</sup> Babbie, E. *The Practice of Social Research* (1992) 6<sup>th</sup> ed., Belmont, Wadsworth Publishing Company, p. 110.

The study has stated under the problem statement above that section 13 (1) of the Constitution gives every person, lawfully resident in Botswana, the right to form or join a trade union of his/her choice. The limitation of freedom of association [FOA] is regulated by section 13 (2)(a) of the Constitution as read with sections 16 and 17 of the Constitution..

The researcher is not aware of any study done previously on this topic. However, the researcher is aware that some organisations and individuals have only commented about the need to promote trade unions in the disciplined forces. For instance, the Botswana National Front [BNF]<sup>18</sup> in its revised Social Democratic Programme [SDP] stipulates that soldiers, police and prisons officials will be permitted to form or join trade unions of their choice, albeit; with some limitations on some of the contents of the freedom of association, such as strike.

In 2008, Justice Dingake advised that whoever desires to investigate the exclusion of the disciplined forces from enjoying freedom of association, such investigation must be conducted within the purview of section 13 of the Constitution. Justice Dingake's advice reads as follows:

In terms of the Act, the expression 'employee' excluded only members of the Botswana Defence Force, Botswana Police Service, Local Police, and Prison service. This exclusion is permissible in terms of Convention 87. What is perhaps a matter of debate is whether this exclusion is constitutional, as section 13 of the Constitution says that 'no person shall be hindered to enjoy his or her freedom of association'. This debate must be conducted within the context of the constitutional provision that allows Parliament to pass legislation that may be restrictive of the rights conferred under the Constitution, as long as such restriction is reasonably justifiable in a democratic society.<sup>19</sup>

I wholly agree with Justice Dingake's advice and this study aims just to do that. Just on the heels of Dingake's instructive advice *supra*, the Botswana

<sup>18</sup> *BNF Social Democratic Programme* (revised 2004; unpublished); Gaborone, p. 8. However, the BNF is an opposition party and its policies can only be realized upon assumption of state power. For now its guarantee remains a promise.

<sup>19</sup> Dingake, O.B.K. *Collective Labour Law in Botswana*, (2008), Gaborone, Bay Publishing (Pty) Ltd, p.96. Note that at the present moment the local police had merged with the Botswana Police Service.

Public Employees' Unions [BOPEU] organised a workshop in Gaborone on the 3<sup>rd</sup> – 5<sup>th</sup> August 2009, and interrogated the prohibitions of trade unions in the Police Service. BOPEU invited Police and Prison Civil Rights Union [POPCRU] of South Africa to share experiences on the importance of trade unions in the Police Service. The workshop was attended by among others, Deputy Commissioner, Ikotlhaeng Bagopi and the Minister of Defence, Justice and Security, Honourable Ramadeluka Seretse. Both of them presented papers at the symposium and the Mmegi Newspaper dated 19<sup>th</sup> April 2011, reported as follows:

In 2009, the Police and Prisons Civil Rights Union (POPCRU), based in South Africa, convened a meeting in Gaborone to advocate for Botswana Police Officers to be allowed to unionise. However, they were met with a hostile response from Deputy Commissioner, Mr. Ikwathaeng Bagopi, who told them that it was impossible to allow Botswana Police Officers to unionise. He even told them (POPCRU) to go and toyi-toyi in their country and leave Botswana in peace.<sup>20</sup>

Makgala and Maundeni also in their book commissioned by BOPEU wrote about police unionization in Botswana as follows:

It should be pointed out that in Botswana the law does not allow members of the police force and other disciplined forces to unionize. Therefore, on the 3<sup>rd</sup> -5<sup>th</sup> August 2009, BOPEU collaborated with the ILO, and the Police and Prisons Civil Rights Union (POPCRU), a South African based police union, to organize an International Symposium on Police Labour Relations: The theme of the symposium, which was held at the Gaborone International conference centre (GICC), was 'Breaking New Ground' ..., I.G. Bagopi, presented a paper entitled 'Perspective on policing in Botswana and Challenges'. The Botswana Cabinet Minister responsible for Defence, Justice and Security, Dikgakangamatso Seretse, gave a keynote speech in which he categorically stated that government had no plans to unionize the police and other disciplined forces in the country. This was in line with what Deputy Commissioner Bagopi had said in his presentation.<sup>21</sup>

The purpose of this study is to examine whether Acts regulating labour relations in the disciplined forces are compliant with the constitutional norms of section 13(1) of the Constitution. To that end, there is a need to conduct a study by examining the three pieces of legislation listed above

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<sup>20</sup> See note 9 *supra*, p. 3.

<sup>21</sup> See note 3 *supra*, p. 239.

and determine whether there are consistent with section 13 of the Constitution and further suggest law reforms (if need be) to resolve any manifest legal deficiencies which may be discovered during the course of the examination of the impugned provisions.

## **1.7 ETHICAL CONSIDERATIONS**

The literature of other people shall be acknowledged whenever such is used during the course of the study. The researcher's personal experiences shall be noted or taken cognizance of. For instance, in the run-up to the 2004 general elections, as well as during the researcher's Gaborone Mayoral tenure in office, the researcher interacted with the prison, police and army officers who complained of lack of effective workplace platforms (trade unions) which they can utilise to voice their occupational interests. At this stage no interviews will take place due to financial and other related limitations.

## **1.8 SCOPE AND LIMITATION OF THE STUDY**

### *1.8.1 Scope of the study*

The study entails five (5) chapters. The first chapter deals with background of the study, aims and objectives, the scope and central statements of the problem. It also includes research methodology, literature review and the scope of the study.

The second chapter deals with introduction to key words and historical perspectives in relation to development of freedom of association in the disciplined forces. The third chapter focuses on discussing the current provisions of the Constitution, constitutionality of the prohibition of trade unions and remedies availed to the aggrieved parties.

The fourth chapter explores a comparative analysis between Botswana and South African laws regulating labour relations in their respective security services to determine whether such laws promote freedom of association.

The fifth and final chapter covers conclusions and recommendations. It also suggests proposal for law reform as well as the bibliography of the study.

### *1.8.2 Limitation of the Study*

The study only covers the special categories of the civil service, notably, Botswana Defence Force, Botswana Police Service and Prisons Service. The ordinary public service unions do not form part of this study; save that, wherever mention may be made it will be for illustration purposes only.

The study further explores the concepts of positive and negative freedom of association<sup>22</sup> in relation to section 13 (1) of the Constitution. The analysis of the limitations or infringements of the fundamental rights focuses chiefly on the disciplined forces. The intent of focusing the study on the special categories of the civil service is to manage the study and avoid costs associated with an all encompassing study.

## **1.9 SUMMARY**

Flowing from the discussion above, the pith of this study is to explore, whether prohibition of trade unions in the Botswana Defence Force (BDF), Botswana Police Service (BPS) and Prisons Service (PS), is consistent with the lofty ideals of section 13 (1) of the Constitution. The said provision guarantees freedom of association to every person.

The study also shows that the prohibition may be inconsistent with section 13 of the Constitution. The study further shows that the prohibition of the

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<sup>22</sup> Landman, A.A. 'Freedom of Association in South Africa Labour Law' (1990) *Acta Juridica*, pp. 89 – 99, states thus; "The concept of freedom of association is multi-faceted. There is the freedom or right of association with other persons for the purpose of achieving some lawful goal. This is said to be the positive freedom or right. The negative aspect is the freedom or the right of non-association".

trade unions in the disciplined forces may be arbitrary and excessive, as the effects of the impugned provisions may not be reasonably justifiable in a democratic society. The study assumes that the prohibition may be wide and exceed the framers intent stipulated in the exceptions contained in Section 13 (2) of the Constitution.

Finally, the study shows that, the Botswana Police Association<sup>23</sup> and Botswana Prisons Officers Association,<sup>24</sup> are ineffective and do not enforce the spirit of section 13 of the Constitution.

The aforesaid associations are not effective because the effects of prohibiting trade unions seriously violate the right to associate and render collective bargaining impotent and meaningless. The Supreme Court of Zimbabwe held that when examining the compatibility of the legislation with a Bill of Rights, it is the effects of the legislation rather than its purpose or intent that is relevant.<sup>25</sup> The test laid down by the Zimbabwean Supreme Court was endorsed by Nihal Jayawickrama thus;

The purpose of the legislation, however, is the initial test of constitutional validity, and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.<sup>26</sup>

In a nutshell, this study has made preliminary suppositions, under the problem statement and hypothesis of the study *supra*, that the prohibition of trade unions in the disciplined forces may be inconsistent with section 13 of the Constitution. This supposition of inconsistency necessitates thorough investigations of the statutory laws governing the labour relations of the disciplined forces and further proposal for law reforms; to accordingly align

<sup>23</sup> See Section 49 of Police Regulation [Cap 21:01].

<sup>24</sup> See Section 2 (1) – (8) of Prisons (Botswana Officers Association) Regulation [Cap 21: 03].

<sup>25</sup> See *In Re Munhumeso and Others* (1995) 1 SA 551 (ZSC), p. 561 D-E; see also, *Elliot v Commissioner of Police*, Supreme Court of Zimbabwe, (1997) 1 ZLR 15.

<sup>26</sup> Jayawickrama, N. *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002), United Kingdom, Cambridge University Press, p. 166.

the impugned laws with the constitutional norms and other best international practices. The next chapter discusses the history of disciplined forces as well as the evolution of anti-unions statutory laws. It also briefly defines key words that are used from time to time in this study.

## CHAPTER TWO: CONCEPTUAL ISSUES AND HISTORICAL PERSPECTIVE

### 2.1 INTRODUCTION TO KEY WORDS

The phrase, 'conceptual issues', refers to a myriad of concepts or words that are used from time to time in the conduct of this study. It is, therefore, crucial that the meaning of such concepts be defined, so that, the reader will be able to appreciate the intent and standpoint of the researcher. In short, definitions of words simplify the interpretation and meanings of concepts and the researcher hopes that the reader will find the concepts enumerated below handy and meaningful in reading this dissertation.

#### 2.1.1 Freedom of Association

Freedom of association is universally recognised as a human rights issue. Many books and journals have been written on the concept and scholars are agreeable that freedom of association is *the freedom to do in combination with others what one is free to do alone*.<sup>27</sup> The concept of freedom of association was succinctly defined by Clyde Summers thus;

Although commonly asserted by the organisation, freedom of association is not simply a collective right vested in the organisation for its benefit. Freedom of association is an individual right vested in the individual to enable him to enlarge his personal freedom. Its function is not merely to grant power to groups, but to enrich the individual's participation in the democratic process by his acting through those groups.<sup>28</sup>

The chief aim of fundamental rights is to protect individual's freedoms from undue violation either by the State, public institutions or other individuals causing harm or injuring other people's rights.<sup>29</sup> This study adopts the definition offered by Clyde Summers *supra* as the one to be used throughout this study, whenever the concept of freedom of association is mentioned.

<sup>27</sup> Langile, B. 'The freedom of Association Mess: How we got into it and how we can get out of It' (2009) vol. 54, Canada, *McGill Law Journal*, p.183.

<sup>28</sup> Summers, W.C. 'Freedom of Association and Compulsory Unionism in Sweden and the United States' (1964) vol. 112, *University of Pennsylvania Law Review*, p. 647.

<sup>29</sup> See Section 3(b) of the Constitution of Botswana, provides that every person is entitled to the fundamental rights and freedoms of the individuals, namely; freedom of conscience, of expression and of assembly and association, subject to respect for the rights and freedoms of others.

That is, freedom of association entails the right to form, to belong to, and to maintain a relationship via a collective to enlarge an individual's freedom.

### *2.1.2 Absolute Rights*

According to John de Waal, absolute rights attract absolute protection from state interference. John de Waal defines absolute protection to mean that the essence of the right may not be limited even if the demands of the principle of proportionality are met. He further states that the essence of the right may not be limited even if the state can show that its motivation for limiting the right is reasonably justified; even if the state legitimate aim is the only manner to achieve the state's compelling objectives; and even if the interests of the individual are clearly outweighed by that of the society.<sup>30</sup> This is the meaning to be used in the context of this study.

### *2.1.3 Limited Rights*

Limited rights refer to those rights which contain internal limitations. The Botswana Bill of Rights sets out explicitly circumstances in the constitutional subsections outlining exceptions or limitations upon which a right or freedom may be restricted. For instance, the freedom to liberty constitute a limited right [s 5(1) of the Constitution]. Limited rights perform identical functions as those performed by qualified rights. Therefore, this study will use limited rights and qualified rights interchangeably.

### *2.1.4 Qualified Rights*

These are constitutional rights whose application can be qualified in line with certain criteria. However, the overall scope of the right is not narrowed by a qualification in a particular case.<sup>31</sup> Examples of qualified rights include freedom of thought, conscience and religion [s11], freedom of expression [s 12], protection of private property [s 9] and freedom of assembly and

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<sup>30</sup> De Waal, J. 'A Comparative Analysis of the Provisions of German Origin in the Bill of Rights' [Part 1](1995), vol. 11, *South African Journal on Human Rights*, p. 23.

<sup>31</sup> The Scotland Parliament, 'European Convention on Human Rights incorporation into Domestic Law: The Human Rights Act 1998 and The Scotland Act 1998' (15<sup>th</sup> January 2001) *The Information Centre*, p. 6.

association [s 13]. Freedom of assembly and association forms the upshot of the investigation of this study.

John De Waal refers to qualified rights as relative protection. He argues that relative protection means that the essence of the right is equated with that part of the freedom which is protected by the principle of proportionality. He further avers that all disproportionate limitations of a freedom infringe upon the essence of the freedom.<sup>32</sup> The proportionality principle is invoked whenever there is a clash of opposing rights or interests.<sup>33</sup>

The study explores which elements of freedom of association can be limited and which cannot be limited without impairing the essence of the right. In the end, the study determines which essential elements are absolutely protected to be enjoyed by the disciplined forces and which are not absolutely protected such that limitation of such elements will not impair the fundamental rights of the disciplined forces. In this study, freedom of association is considered as a qualified right.

#### *2.1.5 Trade Union*

The Trade Unions and Employers' Organization Act [Cap. 48:01] of Botswana defines the term "trade union" as:

An organization the principal objects of which include the regulation of relations between employees and employers or employers' organizations or between employers and employees.<sup>34</sup>

Similarly the South African Labour Relations Act<sup>35</sup> defines trade union as an association of employees whose principal purpose is to regulate relations between employees and employers on behalf of any of its members or in the interest of any of its members. In this study a trade union means a voluntary association of employees formed independently by the employees

<sup>32</sup> See note 30 *supra*, p. 23.

<sup>33</sup> See note 121 below, p. 272F –H.

<sup>34</sup> See Section 2(1) of the Trade Unions and Employers' Organizations' Act (TUEOA) [Cap. 48:01].

<sup>35</sup> See Section 200 (1) and 213 of Labour Relations Act, Act 66 of 1995 (August 2009 revision).

to regulate the relations between employees and employers in the pursuit to enhance terms and conditions at their workplace.

#### *2.1.6 Labour Relations*

The concept is as old as mankind. It refers to a relationship between those who hire labour and those who sell it in return for remuneration. In short, the concept labour relations, refers to the relationship between people who work and those whom they work for; as such, labour or work relationships have, therefore, existed since the first individual approached another to perform a task for him against the promise of payment.<sup>36</sup> The concept is used to assess the nature of the labour relations that obtains in the disciplined forces of Botswana and to what extent do such labour relations promote or encourage voluntary freedom of association.

#### *2.1.7 Disciplined Force*

Under the Constitution of Botswana the words “Disciplined Force,” means:

- (a) a naval, military or air force;
- (b) a police force; or
- (c) a prison service<sup>37</sup>

#### *2.1.8 Disciplinary Law*

“Disciplinary law”; means a law regulating the discipline of any disciplined force;<sup>38</sup> to this end, Police Act, Prison Act, Botswana Defence Force Act and other pieces of subsidiary legislation applicable to the disciplined forces, shall be considered disciplinary law for purposes of this study.

#### *2.1.9 Comparative Analysis*

Comparative analysis focuses on comparing and contrasting methods, practices and processes of different legal systems between two or more countries. The purpose or chief aim of comparative analysis was aptly

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<sup>36</sup> See Sonia, B. *Industrial Relations in South Africa*, (2000) 4<sup>th</sup> ed., Cape Town, Juta and Co., p.3.

<sup>37</sup> See Section 19 (1) of the Constitution.

<sup>38</sup> See note 37<sup>supra</sup>.

captured by Monika Ambrus by stating that comparative analysis entails three questions, namely; why, what and how to compare.<sup>39</sup> Ambrus opines that the first question (why to compare) necessitates the identification of the aim of comparison, the second question (what to compare) refers to the sources of comparison and whilst the third question (how to compare) examines the way in which the comparison is carried out.<sup>40</sup>

The study uses Ambrus's method of comparison to answer the chief aim of this study. The chief aim of this study is to determine whether prohibition of trade unions in the disciplined forces in Botswana is compliant with Section 13 of the Constitution. The chief aim of this study is extensively discussed under chapter three below. Comparative analysis (under chapter four), compares the labour relations, labour statutes and practices that obtain in Botswana's disciplined forces with those prevailing in the South African security services. The reason for comparing the South African labour relations in her security services with those prevailing in Botswana's disciplined forces is because both countries do not only share borders and cultural values, but are members of the Southern African Development Community (SADC) and one expects commonality in their labour relations.<sup>41</sup> Ambrus's definition of comparative analysis is used in this study whenever the comparison of Botswana legal system is juxtaposed with other jurisdictions.

## 2.2 HISTORICAL PERSPECTIVE

The history of the past informs the present, and the present informs the future. In the words of Muller "man looks to the past to provide him with understanding of the present and the foundations on which his future must rest".<sup>42</sup> The labour regime that currently obtains in the disciplined forces,

<sup>39</sup> Ambrus, M. 'Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law' (No. 3) (2009) vol. 2 *Erasmus Law Review*, p. 355 (accessed at [www.erasmuslawreview.nl](http://www.erasmuslawreview.nl) on 24 September 2011).

<sup>40</sup> See note 39 *supra*, pp. 355 – 356.

<sup>41</sup> See note 39 *supra*, p. 355.

<sup>42</sup> MULLER, C.F.J. *Five Hundred Years A History of South Africa* (1998), p. xi.

namely; Botswana Defence Force, Botswana Police Service and Prisons Service, is a carbon copy of the colonial relic. In order to appreciate the labour regime currently regulating the labour relations in the disciplined forces, an overview of the evolution of the disciplined forces in Botswana is necessary to consider for purposes of understanding the past practices and policies which regulated the disciplined forces in Bechuanaland. It is also necessary to consider current laws which regulate the labour relations in civilian trade unions in Botswana for purposes of appreciating whether freedom of association has been or is operational or not. Finally, a brief overview of the evolution of freedom of association at the international plane is considered.

### *2.2.1 Evolution of Disciplined Forces in Botswana*

#### *(a) Pre-1885 disciplined forces in Bechuanaland*

During the epoch of feudalism, the tribal regiments performed the duties of the modern day policemen, prison officers and military men.<sup>43</sup> Their duties were to protect the Chief from internal and external enemies. The regiments also constituted the tribal army and fought its wars for the defense of their respective tribes. In the primordial era (Stone Age) the king was the head of government. The king exercised the role of the legislature, executive and the judiciary.<sup>44</sup> The notion of separation of powers was an alien concept at the time.

Prior to the establishment of the British Protectorate over Bechuanaland [now Botswana], there was no formal employment. The type of labour relations that existed at the time was agrarian employment based on master & servant relationship. The servants worked for the master and were remunerated in kind (that is, via meal rations and clothing).

<sup>43</sup> Schapera, I.A *Handbook of Tswana law and custom: compiled for the Bechuanaland Protectorate Administration*(1955), 2<sup>nd</sup> ed., London, International African Institute, p. 110.

<sup>44</sup> See note 43 above, p. 62, which says; "The chief is the symbol of tribal unity, the central figure around whom the tribal life revolves. He is at once ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people". See also 1Kings 4: 1-6 (Bible).

The socio-political and economic system that obtained at the time was communalism. The serfs worked for the benefit of the entire community. As stated *supra*, the King was the political head of the tribe and looked after the poor and vulnerable members of his community. Tribesmen were allocated arable fields and pastoral lands to plough for subsistence purposes and any surplus yields were handed over to the King to distribute to the poor and store some for unforeseen calamities, for example famines and droughts.

To this end, no formal employment existed prior to 1885 in Bechuanaland. The poor tribesmen sold their labour for free and in turn they were provided with free meals and clothing. Hence, no freedom of association existed in the Bechuanaland prior to 1885 epoch. Lack of employment opportunities in Botswana led to absence of trade unions prior to 1885. The absence of trade unions in Botswana is explained by Monageng Mogalakwe as follows:

In Botswana, as in the rest of Sub-Sahara Africa, the development of trade unionism to a large extent parallels the late arrival of capitalism in this part of the world. Until the 1940s there were no trade unions in the country. The persistent underdevelopment of the economy and the absence of wage labour on any significant scale ensured that there was virtually no working class to support a trade union movement. The opportunities for formal employment were in South Africa, where most of Botswana's workers went as migrant workers.<sup>45</sup>

(b) *Development of the Disciplined Forces during the British Protectorate: 1885 - 1964*

The influx of the British and Dutch nationals in South Africa after 1652 led to a clash of economic interests in Zambia and Zimbabwe. At the time Bechuanaland was seen as a dry desert and did not attract much economic interests from the Dutch and British, except that it was convenient to provide thorough-fares en-route to Zambia and Zimbabwe.<sup>46</sup> The first employees in Bechuanaland were based in South Africa and appointed under the auspices of the 9<sup>th</sup> May 1891 Order-in-Council.

The 1891 Order-in-Council authorized the High Commissioner to appoint Deputy Commissioners, Resident Commissioners, Assistant Commissioners

<sup>45</sup> Mogalakwe, M. *The State and Organised Labour in Botswana: Liberal Democracy in Emergent Capitalism* (1997), England, Ashgate Publishing Ltd, pp.98-99.

<sup>46</sup> Nsereko, N. D.D. *Constitutional Law in Botswana* (2004) 1<sup>st</sup> ed., Gaborone, Pula Press, p. XV.

or any other public officer (s) to assist him. Sir Shippard was appointed the first colonial civil servant together with three Magistrates stationed at Vryburg, Taung and Mafikeng and a small batch of police officers working under the Bechuanaland Border Police.<sup>47</sup>

The Bechuanaland Border Police (BBP) was replaced by some sixty African Constables in 1896.<sup>48</sup> The emergence of the African Police Force (APF) gradually replaced the tribal regiments. To date pockets of tribal regiments exist here and there and their duties are merely to perform social ceremonies, such as initiation schools (bogwera). Justice Lesetedi explained the relevance of tribal regiments in modern society as follows:

Mephato (tribal regiments) who in the old days served as the King's law enforcement organs no longer have any recognition in the present scheme of governance. The institutions of mephato now merely became a tribal feature with no legal power of law enforcement or policing. Such powers fall under the police.<sup>49</sup>

The number of employees in Bechuanaland between 1885 and 1919 was negligible so as to warrant any attempt to formulate laws either for promoting trade unions or prohibiting them. On the contrary, Great Britain formulated laws prohibiting trade unions in 1919 due to police strikes of 1918.

The Police strikes of 1918 and 1919 in Great Britain did not affect only its colonies but many European and Western countries were affected. Many countries promulgated laws prohibiting trade unions in their Police Forces. The behaviour of countries around the globe following the 1918 and 1919 Police labour unrest was captured by Adams as follows:

Inflation stemming from the cost of World War I eroded the purchasing power of workers who organised in protest. In some countries labour demonstrations grew into general resolution and the fall of monarchies in Russia, Germany and the Austro-Hungarian Empire. In the United States the Seattle General strike and the Boston Police strike of 1919 and in Canada the Winnipeg General strikes which also occurred in

<sup>47</sup> See note 3 *supra*, p. 21, which reads thus; "A small police force called Bechuanaland Border Police, being the only entity in place to prevent encroachment by the troublesome Boers of the Transvaal. It was primarily manned by Basotho who were already expert horsemen.

<sup>48</sup> See Note 3 above, p.22.

<sup>49</sup> *Kgosi Kgafela and 13 others v State*, Case No.CLHLB-000148-10, para. 59 [unreported].

1919, were all interpreted by some observers as radical events that might spark similar widespread social upheal. Although the Winnipeg General strike came after the Order-in-Council of 1918, in conjunction with the Boston Police Strike, it no doubt helped to perpetuate the fears that gave rise to the order. In Winnipeg police joined the strikers and put themselves under the command of the strike committee. Although little violence and disorder occurred in that case, in Boston the strike resulted in broadly publicised looting and violence.<sup>50</sup>

History shows that Europe used to provide common law rights to form trade unions by the Police Forces. The common law right was also available to Bechuanaland Police Force, until 1957.<sup>51</sup> Bechuanaland was a British colony such that laws enacted in Great Britain, *mutatis mutandis*, applied to its colonies. The common law right to form Police Unions in Great Britain was repealed in 1919 after the British Police Labour unrest of 1918. The labour unrest of 1918 spread across the globe such that on the 15<sup>th</sup> August 1919 Great Britain enacted the Police Act<sup>52</sup> of 1919 prohibiting trade unions but permitting Police Federation as follows:

Section 1(1) of the Act provided that:

*An organization to be called the Police Federation shall be established to consider matters affecting the welfare and efficiency of the police officers.*<sup>53</sup>

Section 2 of the said Act provided that:

- (1) *subject as aforesaid, it shall not be lawful for a member of police force to become, or after the expiration of one month from the passing of this Act to be, a member of any trade union, or any association having for its objects, or one of its objects, to control or influence the pay, pensions, or conditions of service of any police force; and any member of a police force who contravenes this provision shall be disqualified for continuing to be a member of force; and, if any member of a police force continues to act as such after becoming so disqualified, he shall forfeit all pension rights and be disqualified from being thereafter employed in any police force;*
- (2) *If any question arises whether any body is a trade union or an association to which this section applies, the question shall be determined by the Minister of Labour".*

<sup>50</sup> Adams, R.J. 'The Human Right of Police to Organise and Bargain Collectively' (2009), Canada, *Police Practice and Research Journal*, p.3.

<sup>51</sup> See Section 20 of Police Proclamation No. 71 of 1957.

<sup>52</sup> Citrine, N.A. *Trade Unionism* (1960), 2<sup>nd</sup> ed., London, Stevens and Sons Ltd, p. 381.

<sup>53</sup> See note 52 *supra*, pp. 382 – 83, wherein the provisions of the 1919 Police Act are contained.

On the 28<sup>th</sup> May 1957, Bechuanaland Protectorate Police Regulations No. 71 of 1957 was enacted. The Regulations prohibited any formation of trade unions in the Police force.<sup>54</sup> The prohibition of trade unions in the Bechuanaland Police Force was motivated by the British Police Officers' strike of 1919. The British government responded by enacting a law that prohibited trade unions in the British Police Force and this was replicated in Bechuanaland without modification.

The prohibition of trade unions in British Police Act of 1919 was transplanted stock, lock and barrel into the Prisons law of the Bechuanaland Protectorate, No. 41 of 1964 at Section 20 (1) and (2) thereof. Section 20 of the Prisons law No. 41 of 1964 was couched as follows:

A prison officer was prohibited to form or join a trade union, a prison officer was prohibited to join any body (entity) which sought to control or influence conditions of employment in any trade or profession, it prohibited a prison officer to join an entity or body that sought to control the conditions of service and only permitted a prison officer to join an association solely confined to the members of the prison service.

The same prohibition '*fathered*' by Section 2 of the British Police Act of 1919 was not only validated by the democratic government elected in 1965, but entrenched it, in the Prisons Act [Cap 21:03], which commenced on the 1<sup>st</sup> March 1980. What is astonishing is that, the democratic government elected in 1965, retained the colonial legal footprints in the Police and Prisons Acts to date.

(c) The Post-Independence Development of Disciplined Forces in Botswana: *the 1965 Constitution as a basis for independence*

In terms of Statutory Instrument No.134 of 1965, Bechuanaland Protectorate (Constitution) Order was made on the 29<sup>th</sup> January 1965 at the Court of Buckingham Palace in London before Her Majesty the Queen of

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<sup>54</sup> See regulation 18 of Bechuanaland Protectorate Police Regulations which provides: it shall not be lawful for a member of the Force to become, or after the expiration of one month after the promulgation of this regulation to remain a member of any political association or of any trade union or of any association having for its objects, or one of its objects, the control of or influence on the pay, pensions or conditions of service of the Force; see also Section 20 (1) of the Bechuanaland Protectorate Prisons law, No. 41 of 1964, which carries the same words.

England and laid before British Parliament on the same day.<sup>55</sup> The Bechuanaland Protectorate Order of 1965 was the precursor to the formulation of the Botswana Constitution Order of 1966. Following the 1965 draft Constitution, the Botswana Independence Order of 1966 was made in September 20, 1966 and laid before Parliament at the Court at Balmoral in Great Britain.<sup>56</sup> The purpose was to enact an instrument that would sanction the coming into being of the new Constitution and revoked the Foreign Jurisdiction Act of 1890 which gave power to Her Majesty to oversee British Colonies.<sup>57</sup>

The Botswana Independence Order of 1966 came in operation on the 30<sup>th</sup> September 1966. The Independence Order revoked the Bechuanaland Protectorate (Constitution) Order 1965, Statutory Instrument No. 134 of 1965 via Botswana Independence Order of 1966.<sup>58</sup>

Some scholars aver that the 1966 Constitution of the Republic of Botswana was imposed on the people. It is reported that Kgosi Bathoen II of Bangwaketse, Kgosi Linchwe II of Bakgatla, and other chiefs including Opposition parties<sup>59</sup> rejected the 1966 Constitution as it was devoid of legitimacy (people did not participate in the discussion of the draft). Kgosi Kgafela challenged its validity. He is quoted to have described the validity of the Botswana Constitution as follows:

Kgosi Kgafela's first target is the Constitution of Botswana, the bedrock of Botswana's legal system on whose shoulders rests all the country's laws. He is calling for a total overhaul of the Constitution, arguing that

<sup>55</sup> See *Bechuanaland Protectorate Statute Law*, Volume XLIX (1965), legal notice no. 1 of 1965, pp. 303-327.

<sup>56</sup> See *Republic of Botswana Statute Law*, Volume L, (1966), p. 697.

<sup>57</sup> See note 56 *supra*, especially schedule 1 of The Botswana Independence Order 1966, pp. 706-707.

<sup>58</sup> See schedule 2 of the Botswana Independence Order, Statutory Instrument No. 1171 of 1966; pp. 707-725. The Independence Order did not only usher in the new Constitution but added sections 1 and 2 to the 1965 Constitution. Section 1 declared Botswana a Sovereign Republic whilst section 2 introduced a public seal as per Act of parliament. The Bill of Rights in the 1965 Constitution commenced with section 1-16. After the revocation of statutory No.134 of 1965 by S.I. No. 1171 of 1966 to cater for the public seal and a sovereign republic, the Bill of Rights commenced at section 3-19 of the Botswana Independence Order 1966. The bill of rights still contains sections 3-19 in the current Constitution.

<sup>59</sup> Kgafela's affidavit states that "the negotiations which preceded the promulgation of the Constitution were improperly conducted by persons who did not enjoy a genuine mandate from the people of Botswana. The Constitution in the format agreed by them was objected to by opposition parties and by the Chiefs of several tribes, who claimed that there had been no proper consultation on the matters being agreed".

the current document is a fraud, road-railed by former Presidents Sir Seretse Khama and Sir Ketumile Masire at the exclusion of other Batswana. He calls Botswana Constitution a "fake document" that does not take into consideration the cultural dynamics of Botswana society as evolved over centuries. To justify his calls for fresh constitutional talks, Kgafela reaches for a secret letter written by his father Linchwe II and three other paramount chiefs; Kgosi Bathoen of Bangwaketsi, Kgosi Gaborone of Batlokwa and Kgosi Mokgosi of Balete fifty years ago in which, like him today, they called the Botswana Constitution a fake document imposed upon the people of Bechuanaland without proper consultations. Opposition parties, civil societies and academics including members of the ruling party have called for constitutional review since it is overtaken by events.<sup>60</sup>

Kgosi Kgafela launched his constitutional challenge at the High Court.<sup>61</sup> Kgosi Kgafela's main contentious ground is contained in the Court of Appeal judgment as follows:

That the Constitution is a fraud, the Presidency is a fraud, the Ministry of Local Government has usurped the authority of Kings (like himself) which is God-given, the Minister of Tourism is corrupt, the Cabinet is "a complete fraud manned by gangsters marauding as important public figures", the justice system is a fraud, as is the entire court system; the Attorney-General is "a generator of chaos", and a named High Court Judge is labeled as corrupt.<sup>62</sup>

Kgosi Kgafela II lost his High Court case in May 2012, on the basis of the Court of Appeal decision. On the 27<sup>th</sup> April 2012, the Court of Appeal held thus;

What is clear, and we so hold, is that neither this Court nor any Court has the power to set aside the Constitution or any part of it.<sup>63</sup>

Notwithstanding its legitimacy saga, the 1966 Constitution embodies the right to assembly and to freely associate in Section 13(1) thereof.

The provision of 1966 Independence Order was amended by Parliament in April 1969 by inserting Section 13(2)(d). Section 13(2)(d) introduced the

<sup>60</sup> The Sunday Standard Newspaper dated June 12-18, 2011 at page 11.

<sup>61</sup> Case no. MCHLB- 000286/11.

<sup>62</sup> *KgosiKgolo Kgafela II Kgafela and Another v Attorney-General of Botswana and others*, Criminal Appeal No.CLCGB-027/12, para. 18.

<sup>63</sup> See note 62 *supra*, para. 67.

restrictions on registration of trade unions. The restriction was due to the 1968 waves of strikes<sup>64</sup> waged by civilian trade unions.

*(d) Statutory prohibition of trade unions in the disciplined forces: 1966-2012*

The Acts regulating the disciplined forces in Botswana prohibit formation of trade unions. These Acts are:

Police Act (Cap.21:01)

Trade unions are prohibited in the Police Service. The Police Act provides in Section 24 thus;

24(2): *A police officer shall not be or become a member of-*

- (a) Any trade union, or any body or association affiliated to a trade union;*
- (b) Any body or association which includes in its objects the control or influence condition of employment in any trade or profession;*
- (c) Any body or association which includes in its objects the control or influence of the pay of pensions, condition of service, or loyalty of the service;*

*Provided that a police officer may become a member of any such body or association which may be constituted and regulated pursuant to this Act*

24(3): *Any police officer who contravenes this section shall be guilty of an offence against discipline, and, in addition to any other penalty which may be imposed, and be dismissed from the service.*

Prisons Act (Cap. 21:03)

The provision which prohibits trade unions in the Prisons service provides as follows:

Section 35:

- (1) No prison officer shall become a member of:*
  - (a) A trade union or any body affiliated to a trade union; or*

<sup>64</sup> See note 45 *supra*, pp. 82, Mogalakwe states that "it was at the same sitting of parliament in the aftermath of the 1968 wave of strikes that the process to overhaul Botswana's labour laws started". The said wave of strikes is reported in detail at pages 116-123 of note 45 *supra*.

- (b) A body the object or one of the objects is to control or influence conditions of employment in any trade or profession or the salaries, pensions or other conditions of the service
- (2) If any question arises as to whether a body is a trade union or a body such as is referred to in subsection(1), that question shall be decided by the Minister, whose decision shall be final.
- (3) A prison officer may become a member of an association established by the Minister for members of the service alone and regulated in the manner prescribed, notwithstanding that the association is a body such as is referred to in subsection (1)(b).
- (4) Any prison officer who contravenes the provisions of subsection (1) shall be liable to be dismissed from the service and to forfeit all rights to any pension or gratuity.

Botswana Defence Force Act (Cap.21:05)

It is crucial to note that prior to the British Protectorate, during the colonial period and ten years after self-determination (in 1966), there was no military force in Botswana. The Botswana Defence Force (BDF) was founded in 1977 and the legislation enacted in 1977 to govern its activities, still governs BDF, and was enacted and commenced on the 15<sup>th</sup> August 1977. Since its inception, the Act has been amended eleventh times. The first amendment was in 1977, by Act No. 13 of 1977, and the last and recent amendment was in 2006, by Act No. 18 of 2006.

The recent amendment of the Botswana Defence Force Act [Cap 21:05], by Act No. 18 of 2006, left the Regulation which prohibits trade unions in the Defence Force intact. To date the said Regulation still prohibits trade unions in the BDF. It reads thus:

Regulation 75:

- (2) Subject to sub-regulation (3), the following acts in relation to an officer are prescribed as being acts constituting active participation in politics-
  - (a) Joining or being associated with an organization or movement of a political character;
  - (b) Canvassing any person in support of or otherwise actively assisting an organization or movement of a political character

- (4) a trade union or employer's organization shall, for the purposes of sub-regulation (2)(a) and (b) be deemed to be a movement or an organization of a political character.

The above-mentioned provisions prohibit trade unions in the disciplined forces. The study examines the constitutionality or otherwise of the aforesaid provisions under chapter three (3) of this dissertation. Consequently a glimpse of the current labour laws regulating freedom of association in civilian trade unions is imperative.

#### *2.2.2 Current Labour Laws in Botswana in relation to civilian Trade unions: 1966-2012*

The colonial government in Bechuanaland (now Botswana) enacted the Trade Unions and Trade Disputes Proclamation No. 16 of 1942. This proclamation encouraged the formations of trade unions. This was the first piece of legislation to give birth to freedom of association in Botswana. The coming into being of this proclamation led to the formation of Bechuanaland Protectorate European Civil Service Association (BPECSA) in 1948. The BPECSA held its inaugural meeting in Mafikeng (the then Headquarters of Bechuanaland) in March 4, 1949. This was followed by the formation of the Bechuanaland Protectorate African Civil Service Association (BPACSA) in 1949.<sup>65</sup>

The proclamation was later repealed by Trade Unions Act, No. 24 of 1969 and Trade Disputes Act, No. 28 of 1969. The Trade Unions Act, No. 24 of 1969 was repealed by Trade Unions and Employer's Organization Act [Cap 48:01] which commenced on the 1<sup>st</sup> September 1984.

The civilian unions used to be called associations from 1942-2004. The associations were only consulted as a form of negotiations by the employer. Collective Bargaining was not part of the Botswana Labour Laws then. From

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<sup>65</sup> See note 45 *supra*, p. 99, wherein Mogalakwe states thus; "The first trade union in Botswana was the whites only European Civil Service Association, formed in 1948. It was followed by the formation of the African Civil Service Association in 1949. These two existed as parallel organizations, speaking on behalf of white and black employees respectively. See also pages 69- 71 of note 3 *supra*."

1942-2004 all strikes by workers were declared illegal. The procedures to stage a lawful strike were not only cumbersome but near impossibility. These cumbersome procedures were described by Takirambudde and Molokomme as follows;

The Trade Disputes Act, which came into effect in 1983, established a tight legal regime of legal control over trade disputes. ... Whilst industrial action was not illegal, its legality depended on the proper application of the elaborate rules prescribed by the Act. ... Moreover, strikes in the form of secondary action not strictly related to the employee-employer relationship of the parties concerned were outlawed. Solidarity and general strikes were therefore illegal and restrictions were also imposed on the scope of picketing.<sup>66</sup>

The cumbersome procedures contained in the Trade Disputes Act of 1983 were also described by Mogalakwe in the following words;

Another major area of contention with regard to the Trade Disputes Act is the length it takes to exhaust procedures in order to have a legal strike. Workers have always found themselves in a situation whereby it is impossible to follow all rules and regulations to be able to go on a legal strike. As a result of these cumbersome procedures, Botswana has never had a legal strike since independence in 1966, and all strikes have been declared illegal in terms of this Act.<sup>67</sup>

The above discussion is necessary to comprehend the fights and persuasions that preceded the ratification of C87 and C98 of the International Labour Organization (ILO), in order to permit workers in Botswana to unionize and stage legal strikes. Botswana ratified the ILO Conventions 87 (1948) and 98 (1949) in December 1997. After ratification of C87 and C98 in 1997, Parliament only started to amend relevant statutory laws in 2004. The ratification necessitated the amendment of Botswana labour laws to incorporate international labour standards contained in Conventions 87 and 98.

The following Acts were as a result of the ratification amended:

- Employment Act (Cap. 47:01) was amended by Act No. 14 of 2003, Act No. 6 of 2008 and Act No. 10 of 2010;

<sup>66</sup> Takirambudde and Molokomme, 'Recent Changes in Labour Legislation in Botswana' (1994) *ILJ* pp. 1215-1216.

<sup>67</sup> See note 45 *supra*, p. 90.

- Trade Unions and Employers' Organizations Act (Cap. 48:01) was amended by Act No. 16 of 2004 and Act No. 14 of 2005;
- Trade Disputes Act (Cap. 48:02) was amended by Act No. 15 of 2004 and Act No. 14 of 2005.

In 2008, Parliament enacted the new Public Service Act, No. 30 of 2008. The Public Service Act (PSA) came into effect on the 1<sup>st</sup> May 2010. The public service sector employees had to wait until 1<sup>st</sup> May 2010 for PSA, No. 30 of 2008, to be effected for purposes of establishing the Public Service Collective Bargaining Council. The Bargaining Council was registered in 2012 and it is yet to operate optimally. However in 2011, the employer and trade unions agreed to conduct negotiations under the terms of PSA and Trade Disputes Act as presently couched. Hence the two months public service strike which was staged from 18<sup>th</sup> April 2011 to 8<sup>th</sup> June 2011 was legal. The first strike in the public sector of Botswana since 1966 to be declared legal for non-essential service workers and illegal for essential service workers. Consequently 2378<sup>68</sup> health workers were summarily dismissed on the 16<sup>th</sup> May 2011 for partaking in an illegal strike. On the 21<sup>st</sup> May 2012, Justice Dingake, declared the dismissal unlawful and reinstated all the dismissed essential service workers. The government appealed the judgment of Justice Dingake to the Court of Appeal. The Court of Appeal heard the appeal in January 2013 and reserved its decision.

Section 3 of the PSA provides that the provisions of the Act shall not apply to members of (a) Botswana Defence Force, (b) Botswana Police Service, (c) Local Police Service, and (d) Prisons Service. However, other public employees who are essential services<sup>69</sup> (such as Health workers, Veterinary workers, Bank of Botswana employees, Fire services, Water services, Sewerage services, Education services, Transport and Telecommunications

<sup>68</sup> A comment, 'Kirby concedes some', No. 96 (28 June 2012), Vol. 29, *Mmegi Newspaper*, p.3.

<sup>69</sup> See section 45(1) of the Trade Dispute Act (Cap. 48:02). In South Africa the Constitutional Court approved the decision of the Labour Appeal Court that Police Officers are classified as essential services in the case of *South African Police Service v Police and Prisons civil Rights Union & Another* case CCT 89/10 (2011) ZACC 21, para. 9.

services etc),<sup>70</sup> unlike their counterparts in the disciplined forces, are permitted to form unions, to bargain collectively with the employer and to strike, albeit, they should be minimum service rendered during the industrial action.<sup>71</sup>

The civilian public service employees enjoy the right to form or to belong to trade unions.<sup>72</sup> They also enjoy the right to negotiate and bargain with the public sector employer.<sup>73</sup> They also enjoy the right to strike.<sup>74</sup> They have the latitude to prepare their Constitutions and elect their leaders without prior authorization of the employer. All the above rights enjoyed by civilian trade unions are consistent with section 13(1) of the Constitution. Since the government ratified Conventions 87 and 98 of International Labour Organization in 1997, the State has complied with Article 2 of C87. Article 2 of C87 reads thus;

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.<sup>75</sup>

However, the Trade Disputes Act (TDA) and Trade Unions and Employers' Organizations Act (TUEOA) do not apply to the disciplined forces [see *section 2 of TDA and section 2(1) of TUEOA*]. To this end, the amendments of TUEOA and TDA did not benefit members of the disciplined forces.

### 2.2.3 *Evolution of Freedom of Association at the International level*

<sup>70</sup> See schedule listing cadres which constitute essential services attached to Trade Dispute Act (Cap. 48:02) immediately below section 55(4) of TDA.

<sup>71</sup> Section 40(1)(b) of TDA provides that if the dispute between parties remains unresolved, the parties should reach an agreement for the provision of a minimum service.

<sup>72</sup> section 45 (1) of the PSA, No. 30 of 2008, provides that; "Every public officer shall have the right to belong to a trade union of his or her choice for the purposes of collective bargaining".

<sup>73</sup> Section 50 of PSA No. 30 of 2008, provides for the establishment of the Public Service Bargaining Council

<sup>74</sup> Section 39(1) of Trade Disputes Act (Cap. 48:02), as amended by Act no. 15 of 2004, provides that 'every party to a dispute of interest has the right to strike or lock-out'; see also, section 48(1) of PSA, No. 30 of 2008.

<sup>75</sup> Freedom of Association and the Protection of the Right to Organise Convention, 1948 (No. 87).

- *Freedom of Association and the birth of International Labour Organization (ILO)*

In 1491, workers in Finland waged the first strike as a collective.<sup>76</sup> In 1776, United States of America adopted the Declaration of Basic Rights and freedom of association was guaranteed therein. However, it covered a wide range of rights, such that it was not clear whether the right to form trade unions formed part of the declaration. In 1789, France, followed and adopted a Declaration called the Rights of Men. The French Declaration enshrined freedom of association.

In 1799, Great Britain enacted a statutory law prohibiting combinations or associations by workers. The Act outlawed freedom of association and those who would dare to combine or associate were seen as committing an offence of conspiracy and punishment was by imprisonment. The Act was repealed in 1824. In no time a wave of strikes hit Britain. Another Act was enacted in 1825 prohibiting strikes but did not revive the prohibitions against association of workers.<sup>77</sup>

The exploitation, oppression and abuse of child labour were not only appalling but rife in France. For instance, in 1840, Dr Vaillermé<sup>78</sup> presented a report to the Academy of Moral and Political Sciences and stated that five year old children were sometimes tied to machine work for 14 to 15 hours a day and were paid very low wages. These appalling conditions led to the 1871 Paris Commune Revolution. The 1871 strike upheavals saw the workers overthrow the French government and ruled Paris for two months. The strike upheavals continued up to the First World War and this resulted

<sup>76</sup> See *International Encyclopedia for Labour Law and Industrial Relations*, supplementary 224, (2000) vol. 5, London, Kluwer Law International, p. 31.

<sup>77</sup> Khan-Freud, O. *Labour and the Law* (1977) 2<sup>nd</sup> ed., London, Stevens & Sons, p 165.

<sup>78</sup> See Section 1881 of the French Civil Code of 1804; also cited in *International Encyclopaedia for Labour law and Industrial Relations*, suppl. 224, (2000) Vol. 5, London, Kluwer Law International, p. 34; see also Marx K., *Capital* (1867) Vol. 1, London, New Left Review, pp.596-597. Karl Marx wrote that; "It is not at all uncommon in Nottingham to find fourteen to twenty children huddled together in a small room, of, perhaps, not more than 12 feet square, and, employed for 15 hours out of the 24, at work that of itself is exhausting ... and carried under every possible unwholesome conditions".

in the adoption of the Treaty of Versailles in 1919 to pursue social justice and peace in the industrial relations.

The Treaty of Versailles led to the formation of the International Labour Organisation (ILO) in 1919 as a specialized agency of the League of Nations (presently called the United Nations). The Conference resolved that the universal and lasting peace could be established only if it was based upon social justice.<sup>79</sup> It further resolved that the labour conditions that existed, involved such injustice, hardship, and privation to a large number of people. The Conference recognised that the unrest that was prevalent in the workplace was so great that peace and harmony of the world were imperiled by such unrest. The Conference resolved that the following conditions at work required urgent attention; 1) regulation of hours of work, 2) maximum work day and week, regulation of the labour supply, prevention of unemployment, provision of an adequate living wage, safety at the workplace, recognition of the principle of freedom of association.

The ILO was correct to urge its members to urgently address appalling conditions of service pertaining to the welfare of their employees. Hence it was appropriate for ILO to adopt the principle of freedom of association to afford workers the right to form, join and participate in the trade unions for the common good of the individual's occupational interests.

Flowing from the above, the General Conference of the International Labour Organisation in 1944 at its 26<sup>th</sup> session in Philadelphia reaffirmed the fundamental principles of the organization, thus;

- (a)** Labour is not a commodity;
- (b)** Freedom of expression and of association are essential to sustained progress;
- (c)** Poverty anywhere constitutes a danger to prosperity everywhere, etc.

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<sup>79</sup> See Preamble of the Constitution of the International Labour Organisation (as amended in 1972).

The Philadelphia Conference led to the adoption of Convention on Freedom of Association and Protection of the Right to Organize<sup>80</sup> and Right to Organize and Collective Bargaining Convention.<sup>81</sup> Conventions 87 and 98 brought about reasonable peace and stability in the industrial relations of many countries of the world which extended the right to associate to its workers. The above catalogue paints a sorry state of affairs on how workers paid a heavy price to get the freedom to form, join and participate in trade unions in pursuance of matters of occupational interests.

It is imperative to state that by 1994, ILO had adopted 175 Conventions and 182 Recommendations since its inception.<sup>82</sup> This study explores whether prohibition of trade unions in the disciplined forces is compliant with section 13(1) of the Constitution and the two ILO core Conventions; namely, Freedom of Association and the Protection of the Right to Organize Convention, 1948 (C87) and the Right to Organize and Collective Bargaining Convention, 1949 (C98).

## 2.3 SUMMARY

In light of the above detailed discussion, it would appear Botswana did not conduct an empirical study to determine whether it was constitutional or not to prohibit trade unions in the disciplined forces. The prohibition is a coincidence of Botswana for having been a colony of the Great Britain and most of the laws enacted in Great Britain were bequeathed to Botswana *mutatis mutandis*.

It is amazing for Botswana to continue to behave as a colony after forty-five (45) years of self-rule. There is no reasonable justification for Botswana to be using the British strikes of 1918 and 1919, more so, that Europe and Western countries have long repealed their pieces of legislation to permit

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<sup>80</sup> Convention 87 of 1948, entered into force on 4<sup>th</sup> July 1950.

<sup>81</sup> Convention 98 of 1949, entered into force on 18<sup>th</sup> July 1951.

<sup>82</sup> See note 19 *supra*, p. 34.

trade unions in their police services.<sup>83</sup> Roy Adams states that Police are permitted to unionize and bargain collectively in several countries, such as Australia, Austria, Belgium, Cote d'Ivoire, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malawi, Netherlands, New Zealand, Niger, Norway, Portugal, Senegal, Spain, Sweden, Tunisia, United Kingdom, United States of America, Canada and South Africa.

Section 13 is couched almost in identical terms with Article 11 of the European Convention on Human Rights (adopted 4<sup>th</sup> November 1950). Article 11 provides that, everyone has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. Article 11 (2) of the Convention, provides that freedom of association may be restricted in the interest of national security or public safety, protection of health or morals or for the protection of the rights and freedoms of others.<sup>84</sup>

It is worth noting that Section 13 (2) (a) and (b) of the Constitution of Botswana contains similar exceptions with those of Article 11 (2) of the European Convention on Human Rights. The similarities are not surprising because the Great Britain has been a member of the European Union. It is therefore concluded that the Great Britain formulated Constitutions<sup>85</sup> of her colonies using the European Union Convention model. Hence Botswana Constitution resembles the European Convention of Human Rights, especially its Bill of Rights provisions. Therefore, the precedents of the European Court on Human Rights are relied upon in this study to aid the interpretation of sections 3, 12, 13, 16 and 17 of the Constitution of Botswana. Freedom of association in the disciplined forces still remains a legal taboo and may remain a pie in the sky for a longer period of time to

<sup>83</sup> See section 59 (1) of the British Police Act of 1996, which provides that Police Federations for England and Wales represent members of the police force in all matters affecting their welfare.

<sup>84</sup> See Section 13 (2) (b) of the Botswana Constitution.

<sup>85</sup> For instance, section 21(1) of the Zambian Constitution provides; "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assembly freely and associate with other person and in particular to form or belong to any political party, trade union or other association for the protection of his interests". See also section 21 (1) and (3)(a)-(d) of Zimbabwean Constitution. The Botswana Constitution carries identical words verbatim in section 13(1) and (2)(a)-(d). Botswana, Zambia and Zimbabwe were British colonies.

come, unless there is either a policy shift at the government enclave or a change of government in 2014 general elections.

Given the historical factors discussed above, the subsequent chapter focuses on the analysis of the essential elements of section 13 of the Constitution, the basic rights set out in section 13(1), the exceptions or qualifications created by section 13(2) of the Constitution, derogations from fundamental rights vis-à-vis the declaration of emergencies, the constitutionality of prohibiting freedom of association in the disciplined forces and remedies available to parties who feel their basic rights have been infringed .

## **CHAPTER THREE: THE CURRENT LAW REGULATING FREEDOM OF ASSOCIATION IN THE DISCIPLINED FORCES OF BOTSWANA: COMPLIANCE WITH THE CONSTITUTION AND REMEDIES AVAILABLE TO THE AGRIEVED PARTIES**

### **INTRODUCTION**

The preceding chapter dealt extensively on the historical perspectives of the evolution of the disciplined forces in Botswana and current labour laws operational in civilian trade unions. Chapter three discusses freedom of association in detail by focusing on the constitutional provisions which promote or encourage expressive and associational activities in the collective group. This necessitates a full analysis of section 13 of the Constitution in relation to the essential elements of freedom of association. The chapter also explores instances where it will be appropriate to put in abeyance the exercise of fundamental rights in the disciplined forces. That is, the study examines instances where workers can simultaneously possess and exercise the right or where they can simply possess it but cannot exercise the right.

### **3.1 CONSTITUTIONAL ISSUES**

It is imperative to analyze the constitutional provisions which protect the freedom of association and the extent to which the said provisions protect the concept of freedom of association in the disciplined forces. The word 'extent' above denotes the degree or scope of freedom of association which should be protected by the supreme law of the land. It also denotes to a certain degree that freedom of association is not absolute and as such some of its elements may be justifiably limited in the interest of public safety, order, defence, health or morality. The following provisions of the Constitution are involved in protecting or limiting the enjoyment of freedom of association in the disciplined forces in Botswana; sections 3, 13, 16 and 17 are discussed in the order there appear above.

### 3.1.1 Analysis of Section 3 and the protection of fundamental rights and freedoms

Section 3 of the Constitution guarantees and protects fundamental rights and freedoms of the individual. The provision reads thus;

**Section 3:** *Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely-*

- (a) *Life, liberty, security of the person and the equal protection of the law;*
- (b) *Freedom of conscience, of expression and assembly and association; and*
- (c) *.....*

*the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*

It is imperative to reiterate that Section 3 guarantees and protects the fundamental rights and freedoms contained in Chapter II of the Bill of Rights of Botswana's Constitution (that is, Section 4-15). It is also crucial to state that fundamental rights and freedoms guaranteed and protected by the Constitution are qualified.<sup>86</sup> The Constitution of Botswana, unlike that of South Africa, does not contain a general limitation clause. In other words, each provision of the Constitution of Botswana contains its own limitations, otherwise known as special or internal limitation clauses.

The importance of Section 3 in relation to other provisions of chapter II of the Bill of Rights was discussed by the Court of Appeal of Botswana. The Court of Appeal held that Section 3 is the umbrella provision in chapter II such that all rights and freedoms contained and protected under the Bill of Rights must be subsumed. The State Counsel in the Dow<sup>87</sup> case argued that the words "*whereas*" in Section 3 renders it a mere preamble and not a

<sup>86</sup> *Botswana Railways Organization v Botswana Railways Crew Union* (2010) 1 BLR 240, p. 251 A-B.

<sup>87</sup> See note 6 *supra*, pp. 132 F-H and 133 E – G.

substantive provision which could confer rights on individuals. The Court of Appeal conclusively held that Section 3 is not only a substantive provision, but it is the key or umbrella provision in chapter II under which all rights and freedoms protected under that chapter must be subsumed.<sup>88</sup> Again, on the 29<sup>th</sup> January 2010, the Court of Appeal held that;

That section [that is section 3(b)] secures the right of every person in Botswana to freedom of conscience, of expression and of assembly and association.<sup>89</sup>

In a nutshell section 3 protects individual's rights against unreasonable and unjustifiable violations of fundamental rights and freedoms contained in Chapter II of the Bill of Rights. Any derogation or violation of fundamental rights and freedoms must be reasonably justified and in accordance with the exceptions contained in those provisions.

### *3.1.2 Analysis of section 13 and protection of freedom of association*

Section 13 is the pith of this study because it guarantees every person the enjoyment of the right to assemble freely and associate with other persons which the right holder so chooses, unless the said persons (both natural and juristic) are involved in unlawful acts. Section 13 is therefore secured by section 3 to the extent that it authorizes any person to form or belong to a trade union to protect his or her interests. Section 13 provides as follows:

- (1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.*
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-*
  - (a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health;*

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<sup>88</sup> See note 6 *supra*, p 133F.

<sup>89</sup> See note 86 *supra*, p. 250 G-H.

- (b) *That is reasonably required for the purpose of protecting the rights or freedoms of other persons;*
- (c) *That imposes restrictions upon public officers, employees of local government bodies or teachers; or*
- (d) *.....*

*and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*

The following constitute essential elements of freedom of association as gleaned from section 13(1) of the Botswana Constitution:

- (a) The right to form a trade union or association
- (b) The right to belong to a trade union or association
- (c) The right to protect his or her interests

The above elements will be discussed *ad seriatim* hereunder.

*(a) The right to form or join a trade union*

Paragraphs (a) and (b) above will be collapsed into continuous and overlapping facets of freedom of association in this study. As pointed out above, the right to freely associate is possessed by an individual, not a group, to freely exercise the freedom to choose and to form a union of his choice or to join an existing union. The individual must be free to exercise the right without any interference or compulsion exerted on him or her. This notion of freedom to choose, presupposes that they should be a variety of unions or associations to choose from or to be free not to join an existing union but rather to form a union, if the individual(s) so wishes.

The right to form or join a trade union is given to an individual to use it to act through a group or a collective to protect his economic and social interests. The phrase "*for the protection of his interests*" refers to the right to form or to join trade unions on his own volition. The right to form trade unions includes the right of trade unions to draw up their own rules, to

administer their own affairs free of state interference, to establish and join union federations or confederations.<sup>90</sup>

The right to form or join trade unions is the nerve centre or a special facet of freedom of association. In the absence of the right to join or form a trade union, freedom of association becomes hollow or illusory. Similarly, if employees are compelled to join a particular association, freedom of choice becomes non-existent. In the case of *Young*, the European Court of Human Rights held that;

Another facet of this case concerns the restriction of the applicants' choice as regards the trade unions which they could form on their own volition. An individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value.<sup>91</sup>

The foregoing quotation will be used throughout this study when discussing the reasonable justification of infringement of the right to associate freely. The presumption hereof is that the right to form or join a trade union is a sacrosanct right, that is, it is protected by the Constitution, especially Section 3 as read with Section 13(1) of the Constitution of Botswana. Any prohibition to enjoy this special content of the freedom of association may fall foul of the aforesaid constitutional provisions.

*(b) The right to protect his or her interests*

The purpose of forming or joining a union is to defend, protect and promote an individual's (worker's) interests. An individual promotes or defends or protects his or her interests by participating in the day to day activities of the collective, either by electing people to represent him in the structures of the union or by being elected to serve in the structures of the organization. This essential element of freedom of association inherently contains the right to collective bargaining and the right to strike. The reason it is inferred

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<sup>90</sup> Article 3 of C87 of ILO; See also note 26 *supra*, p. 750.

<sup>91</sup> *Young, James and Webster v The United Kingdom*, (1981) EHRR 38, para. 56.

that it contains those elements is because employees require a platform to negotiate as a collective with the employer. That forum or platform in the labour relations is called collective bargaining. Moreover, a collective of employees requires a weapon to enforce its demands or brandish it as a threat for the employer to compromise lest the collective unleash the 'mighty nuclear weapon' – the industrial action (strike). So the vehicles which employees can use to protect their interests as a collective are collective bargaining and industrial action. These vehicles are what section 13(1) of the Constitution refers to as "for the protection of his or her interests".

The right to form or belong to trade unions will be hollow if the employees are not permitted to enjoy the right to collective bargaining and the right to resort to industrial action to protect their occupational interests.<sup>92</sup> It is therefore submitted that the right to protect his or her interests contains two elements, namely; (i) collective bargaining and, (ii) the right to strike.

#### **(i) Collective bargaining**

It is important to state that collective bargaining is the cornerstone of freedom of association. It gives the right to associate the purpose for which the right to hear the other side was formulated [to express members' occupational interests]. The right to form or to join an association becomes meaningless and illusory if collective bargaining is prohibited or restricted. The purpose is to hear the views of the employees and employers in a symbiotic relationship based on trust and respect for each other's viewpoint. Its function is to collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest and to promote the effective resolution of labour disputes.<sup>93</sup> The importance of collective bargaining was summed up by Nihal Jayawickrama thus;

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<sup>92</sup> *National Union of Metal Workers of SA and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA (3) 513 (CC), para.59 (also available at <http://www.saflii.org/za/cases/ZACC/2002/30.html>).

<sup>93</sup> See Section 1 (c) (i) and (d) of South African Labour Relations Act, Act No.66 of 1995.

Collective bargaining (or consultation machinery) is another of the means by which a trade union protects the economic and social interests of its members. It seems essential that a trade union should be able to make known its opinions on all matters concerning the profession it represents, including staffing and procuring status of staff and recruitment and promotion conditions, considering that the union is eminently suited for this purpose and directly concerned in these matters. Failure to recognize the existence of such a right, which falls within the more general framework of freedom to bargain collectively and which may form a stage in such bargaining, would be to condemn trade union action to sterility, and to deprive trade union organizations of an essential means of protecting the professional interests of their members.<sup>94</sup>

The above quotation cannot be gainsaid because it eloquently defines the meaning of the words 'to form or belong to trade unions ... for the protection of his or her interests'.

(ii) *The right to strike*

The right to strike is one of the elements of freedom of association.

The right to strike is an important vehicle in the labour market and trade union members employ the right to strike to protect their occupational interests.<sup>95</sup> Strike action is the 'silver bullet' to the collective bargaining process in the labour relations between trade unions and employers or employers' organization. The right to strike is entrenched in International, Regional and National legal instruments as a means to aid collective bargaining process to bear fruits. For instance, the right to strike is provided in Article 8(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Section 23(2) of the South African Constitution and the Botswana Trade Dispute Act, 2004<sup>96</sup> which provides that "every party to a dispute of interest has the right to strike, if after 30 days of the referral to the Commissioner, the dispute remains unresolved".

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<sup>94</sup> See note 26 *supra*, p. 755.

<sup>95</sup> *Schmitt and Dahlstrom v Sweden*, European Court, (1976) 1 EHRR 632, para. 36 provides that; "the court recalls that the convention safeguards freedom to protect the occupational interests of trade union members by trade union action.

<sup>96</sup> See Section 39 of Act No. 15 of 2004; see also Article 8(2) ICESCR which provides that "workers have the right to strike provided that it is exercised in conformity with the laws of the particular country".

The ILO Committee on Freedom of Association<sup>97</sup> has interpreted Article 2 of Convention No. 87 of 1948 to inherently embody the right to strike. The 270<sup>th</sup> Report of the committee on Freedom of Association held thus;

Strikes are one of the essential means that workers and their organizations should have to further and defend their economic and social interests.

The purpose of the right to strike by trade unions was eloquently explained by the Labour Appeal Court of South Africa thus;

The very reason why employees resort to strikes is to inflict economic harm on their employer, so that the latter can accede to their demands. A strike is meant to subject an employer to such economic harm that he would consider that he would rather agree to the workers' demands than have his business harmed further by the strike.<sup>98</sup>

Notwithstanding the fact that the right to strike is an important vehicle to exert pressure on the employer to consider unions' demands, the researcher would not propose that the right to strike be afforded to the disciplined forces. The limitation on this right would not offend the right to freedom of association. In fact, the researcher advocates that the disciplined forces should be denied the right to strike but availed the right to form or to join trade unions of their choice, within their occupational terrain in order to pursue their occupational interests. The issue in question is not whether the disciplined forces should form or join trade unions of their choice (within the force), but what contents or elements of the right to freedom of association should be limited or restricted.

### **(c) Organisational Rights**

The Constitution does not contain this right in its text. However the right is normally accorded to sufficient representative unions. The content of the

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<sup>97</sup> *The International Confederation of Free Trade Unions v China*, International Labour Organisation, Case No. 1500, 270<sup>th</sup> Report of the Committee on Freedom of Association, 1989 (also covered by footnote 26<sup>supra</sup>, p. 754).

<sup>98</sup> *Stuttafords Department of Stores (Pty) Ltd v South African Clothing and Textile Workers Union* (2001) 22 ILJ 414 (LAC), P. 422 E – G.

right include collection of subscription fees of union members by the employer on behalf of the union. It also confers the privilege to unions to have access to the premises of the employer to pursue the objectives of the collective or to hold meetings.<sup>99</sup>

The collective also has the privilege to be furnished with information to conduct meaningful collective bargaining processes. The right is exercised by the collective on behalf of the individual members. The organizational right further entails representation at the disciplinary hearing by a co-worker or a unionist. This content of freedom of association is required to carry out day to day business of the unions, albeit, it is availed to representative unions.<sup>100</sup> So there will be no harm in availing this content of freedom of association to the disciplined forces.

The Constitution of Botswana protects freedom of association. It also guarantees this precious right to every person in Botswana to form or belong to or to maintain trade unions once formed. The Constitution also says to form a trade union is not an end in itself but a means to protect an employee's socio-economic interests. The spirit and object of the constitution can be summed up in the words of Jayawickrama as follows:

The essence of this right is the freedom to associate. It is therefore, an individual, and not a group, right. In the exercise of this right, a number of individuals may combine to form a group, but such individuals do not, by virtue of that fact, exact their enjoyment of the right. Freedom to associate implies not only the right to commence an association, but also the right to continue that association. But while the freedom of association protects the collective pursuit of common goals, such protection is afforded ultimately to further individuals aspirations.<sup>101</sup>

### 3.1.3 *Analysis of a nexus between freedom of association and freedom of expression*

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<sup>99</sup> Article 3(1) of Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) provides thus; Workers' and employers' organisations shall have the right to draw up their constitutions, and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes".

<sup>100</sup> See Note 92 *supra*, para. 60.

<sup>101</sup> See note 26 *supra*, p. 738.

Freedom of expression is a distinct and independent right from freedom of association. It is enshrined in the Constitution. However, freedom of expression in the words of Pothier “is closely intertwined with the exercise of freedom of association”.<sup>102</sup> Section 12(1) of the Constitution provides thus;

Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom interference with his or her correspondence.

The aforementioned provision confers the right to express oneself on every person lawfully resident in Botswana, subject to public safety, public order, defence, public morality or public health.<sup>103</sup> As discussed above under Section 3, each constitutional provision contains its own internal limitations. Similarly, section 12 (2) (a) limits freedom of expression in the interests of public safety, public morality, public order and defence of the country.

The issue is, is it reasonably justifiable in a democratic society to prohibit members of the disciplined forces in Botswana to express themselves through collective bargaining platforms. Freedom of expression in this study will focus on voicing out occupational grievances at the workplace. This begs the following questions: How does conveying complaints on appalling conditions of work to the employer prejudice public safety or defence of the nation? How does negotiating hours of work with the employer prejudice public order, public safety or defence of the country? How does negotiating salaries, wages and commuted allowances with the employer prejudice public order or defence of the nation?

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<sup>102</sup> Pothier, D. ‘Twenty Years of Labour Law and the Charter’ (Nos. 3 & 4) (2002), Vol. 40, Canada, *Osgoode Hall Law Journal*, p. 387.

<sup>103</sup> Section 12 (2) (a) of the Constitution.

To the contrary, compelled silence may lead to utter despair and despondence and consequently torching of buildings and wildcat strikes. For instance, in May 2001 some skirmishes erupted at the 2<sup>nd</sup> Brigade Francistown following the discovery of some questionable write-ups at the military barracks at No. 1 and 2 military garrisons, in Francistown, and some around town, which was later followed by setting on fire a kitchen at the camp. A shirt was found attached to the pedestrian bridge bearing pictures of the President and the Commander of the Botswana Defence Force together with images of a group of infantry men in a single line formation and in a lying-loading position together with some wording.<sup>104</sup> In the absence of collective bargaining mechanisms in the workplace, compelled silence can manifest itself through guerilla tactics and nocturnal expressive paintings, graffiti and burning of property, so as to prompt the powers that be to attend to their occupational interests.

On the other hand, collective bargaining platforms may give members of the disciplined forces a voice to settle occupational disputes peacefully through dialogue. The essentiality of freedom of expression in the workplace was discussed by Khan-Freund as follows;

By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonable secure.<sup>105</sup>

The conflict between freedom of expression and the notion of the chain of command in the disciplined forces was resolved by the South African Constitutional Court by holding as follows;

I agree that, important though a communal esprit de corps may be for the armed forces, the mystique that any military force requires cannot take away the need for soldiers to be able to speak in their own distinctive voices on mundane but meaningful questions of service.<sup>106</sup>

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<sup>104</sup> *Molefe v The Attorney-General and Others* (2001) 2 BLR 550 (HC), pp. 551-552.

<sup>105</sup> See note 77 *supra*, p. 69.

<sup>106</sup> See note 1, para. 48.

It is trite that freedom of expression is vital and forms an integral supplement to freedom of association through collective bargaining and industrial action. Trade Unions and any other collective bodies worth their names will be sterile or useless if they cannot be allowed to utilize their right to express their socio-economic interests. Hence, protection of the freedom for any person to hold an opinion, to receive ideas and information without interference. It has been stated under Section 3 of the Constitution of Botswana that constitutional rights and freedoms are not absolute but qualified. That notwithstanding, freedom of expression also entails propagation of disturbing and shocking ideas.<sup>107</sup>

To this end, allowing members of the disciplined forces to belong to trade unions to promote and protect their occupational interests by speaking on their own distinctive voices will not prejudice public order or defence of the country. It is imperative to state that the European Court of Human Rights explained the meaning of Article 10 (1) of the Convention which is similar with Section 12 (1) of the Constitution of Botswana in the case of *Handyside* as follows;

Freedom of expression constitutes one of the essential foundations of such society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (equivalent of Section 12 (2) (a)); it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.<sup>108</sup>

The import of the above quotation is that credible evidence<sup>109</sup> is required to justify the limitations or restrictions the enjoyment of the protected basic rights and freedoms entrenched in the Constitution. To this end, speculating or conjuring images of public disorder or public insecurity will not meet the constitutional muster. Vulnerable workers such as the disciplined forces require trade unions for purposes of communicating matters relating to their terms and conditions of work. The importance of freedom of expression in

<sup>107</sup> *Handyside v UK* (1976) 1 EHRR 737, para. 49.

<sup>108</sup> See note 107 *supra*, para. 49.

<sup>109</sup> *R v Secretary of state for the Home Department, Ex parte Ruddock* (1987) 1 W. L. R. 1482, the court held that; credible evidence which shows that there is a question of national security at stake is required.

the workplace was conclusively stated by the Supreme Court of Canada in the following words:

It follows that workers, particularly those who are vulnerable, must be able to speak freely on matters that relate to their working conditions. For employees, freedom of expression becomes not only an important but an essential component of labour relations. It is through free expression that vulnerable workers are able to enlist the support of the public in their quest for better conditions of work. Thus their expression can often function as a means of achieving their goals.<sup>110</sup>

#### 3.1.4 *Exception to section 13 (1) of the Constitution*

Section 13 has two legs to stand on to maintain equilibrium between public order or public safety and the enjoyment of fundamental rights by the right holder. The tension between the “*hard core*” essential elements of freedom of association and the exceptions to the enjoyment of fundamental rights should maintain equilibrium through a balancing exercise. The essential elements of freedom of association have already been examined above and it is time to examine the exceptions to section 13 of the Constitution. The exceptions are as follows:

- (i) The individual right and freedom to non-association;
- (ii) Limitation of freedom of association by fundamental rights of other persons; and,
- (iii) In the interests of defence, public safety, public order, public morality or public health.

The aforesaid exceptions are examined hereunder in the order there appear above.

##### (i) *The individual right and freedom to non-association*

The Constitution in section 13(1) thereof permits an individual to decide whether to join or not to join a trade union of his or her choice. The Constitution does not permit any person to be compelled to associate with any trade union against his or her belief or his or her interest. The

<sup>110</sup> *United Food and Commercial workers, Local 1518 v Kmart Canada Ltd* (1999) 2 S.C.R. 1083, pp.1101 -1102.

Constitution confers the right to associate on individual person by using the words “except with his or her own consent” no person shall be hindered to enjoy freedom of association. The import of the constitutional norms is that an individual possesses the right to form or belong to trade unions at all the times, and it is up to the individual to decide when to exercise his or her right to associate or to dissociate.

The position stipulated in section 13(1) of the Constitution relating to non-association and dissociation is elucidated in unambiguous terms by the Public Service Act, No. 30 of 2008 as follows:

An employee who is eligible for the membership of a trade union shall not be prevented (except by the trade union itself acting in accordance with its rules) from becoming or remaining a member of the union.<sup>111</sup>

It has been stated above that members of the disciplined forces are excluded from the application of Public Service Act (PSA). However, section 45(3) of PSA was cited to demonstrate that the constitutional norms do not permit forced association and by the same token forced association is not countenanced by any law in Botswana. Unlike Botswana, South African Constitution permits ordinary legislation<sup>112</sup> to espouse provisions which may limit an individual right to non-association. The limitation on the right to associate is commonly called Agency shop agreement.<sup>113</sup> An agency shop agreement is defined as

A written agreement concluded between a representative trade union and an employer in terms of which the employer is required to deduct an agreed agency fee from the wages of all employees, exempting only those with conscientious objection, who are identified in the agreement and who are not members of the union.<sup>114</sup>

<sup>111</sup> Section 45(3) of PSA, No. 30 of 2008.

<sup>112</sup> See section 23(6) of South African Constitution, Act No. 108 of 1996.

<sup>113</sup> See Sections 25 (3) of the South African Labour Relations Act, No. 65 of 1995; provides for Agency shop agreement and agency fee arrangements.

<sup>114</sup> Landman, A. 'No Free Ride: The Agency Shop in South Africa' (No.1) (1996) vol. 6, *Contemporary Labour Law*, p. 2.

Those employees who abstain from joining or belonging to a trade union on account of conscientious belief may request the employer to pay an agency fee in a separate fund administered by the Department of Labour.<sup>115</sup> The agency fee is meant to curb the problem of free-riders in the workplace. The purpose of agency fee is to make the free-riders to contribute to collective bargaining.<sup>116</sup>

This study does not examine the merits and demerits of Botswana Constitution for not tackling the issue of free-riders. Suffice to state that individual employees may choose to forgo this right and pick it up as and when they deem it appropriate.

(ii) *Limitation of freedom of association by other fundamental rights of other persons*

According to Joachim Wolf, collision of rights occurs when two or more fundamental rights of different entities come into conflict.<sup>117</sup> For instance, if members of union X want to embark on a procession and motorists want to use the same road, there will be a clash of two opposing rights. Each right has to give effect in a relative way without sacrificing the other, that is, motorists will use one lane of the road and demonstrators will use the other lane. Hence, Section 13(2) (b) as read with Section 3 of the Constitution qualify or restrict the right to freedom of association by ensuring that where the rights of an individual ends, another person's rights begins. Hence, the fundamental rights are either limited by other fundamental rights or in terms of the immanent limits (exceptions) set by the norms of the Constitution.<sup>118</sup> The Court of Appeal in Dow case held that no ordinary legislation can override the grants or norms set out in the provision of the Constitution, except the Constitution limiting itself.<sup>119</sup>

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<sup>115</sup> See note 114 *supra*, p. 3.

<sup>116</sup> *Ibid.* p.5.

<sup>117</sup> See note 11 *supra*, p. 273.

<sup>118</sup> See note 11 *supra*, p. 273.

<sup>119</sup> See note 121 below.

The principle of interpreting and resolving clashes between freedoms and rights of two or more parties was explained in the case of *Garden Cities Incorporated Association not for Gain v Northpine Islamic Society*.<sup>120</sup> The respondent argued that the calls to prayer (calls to prayer were made through loudspeakers from a minaret) was one of the basic tenets of Islam and that the clause in the contract prohibiting him from installing sound amplification offended section 15(1) of the 1996 Constitution, which guaranteed religious freedom. On the other hand, the appellant argued that he had no objection against calls to prayer by the unassisted human voice.

The Court found that in the past calls to prayer had been made without sound equipment and that the use of sound equipment was not essential to calls to prayer. The Court gave an order prohibiting the use of sound equipment, but also stated that the respondent was free to use unassisted human voice.

The Northpine Islamic Society's case is a classic case demonstrating tension between two opposing fundamental rights. Rautenbach summarised the clash of rights as follows:

The facts of this case serve as an example of two opposing rights and freedoms in terms of the Bill of Rights. On the one hand, contracting parties should be bound to the provisions of a contract based on the principle of freedom of contract. On the other hand, the parties should not be entitled to exclude fundamental rights by means of a contract. In other words, parties should not be able to forego their fundamental rights by means of a contract.<sup>121</sup>

The lesson emerging from the foregoing case is that two opposing rights were clashing; namely the right to religious freedom and the right to peaceful occupation of private property. The Court had to balance and weigh the merits of the rights of the parties using the proportionality test and give

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<sup>120</sup> 1999(2) SA 268 (C), p. 272F – H.

<sup>121</sup> Rautenbach and Pienaar, 'Culture (And Religion) In Constitutional Adjudication' [revised paper delivered at the 5<sup>th</sup> Colloquium on Constitution and Law, Johannesburg, 16<sup>th</sup> November 2002], p. 12.

each right a relative effect, without totally sacrificing the other.<sup>122</sup> That is, parties are not entitled to exclude fundamental rights<sup>123</sup> by means of a contract but may stipulate conditions to qualify reasonable limitations of their rights.

The Constitution of Botswana provides that no person shall be hindered in the enjoyment of his or her freedom of assembly and association, "except with his own consent".<sup>124</sup> Upon being hired, members of the disciplined forces make an attestation and swear allegiance to protect the country from external and internal threats.<sup>125</sup>

The consent that is required by section 13(1) of the Constitution excludes consent to prohibit the enjoyment of fundamental rights.<sup>126</sup> The consent that is required during the period of attestation or hiring of members of Police service refers to matters under section 23(a) – (t) of the Police Act. In relation to the military officers, the consent required is contained in Part VII of Defence Force Act and include, inter alia, aiding the enemy, communicating with the enemy, cowardly behaviour, offences against morale, prisoner of war, looting, mutiny, failure to suppress mutiny, insubordinate behaviour, disobedience to particular orders (provided they are lawful), desertion, absence without leave, malingering, drunkenness, theft, injurious disclosures, making false statement on enlistment, scandalous conduct of an officer and disgraceful and discreditable conduct.<sup>127</sup>

It will be unconstitutional for a statutory law to seek to abolish absolute rights guaranteed by section 13(1) of the Constitution. It has been established in this study that the right to join or form a trade union is an

<sup>122</sup> See note 11 *supra*, p. 279.

<sup>123</sup> See note 121 *supra*, p. 12.

<sup>124</sup> Section 13 (1) of the Constitution.

<sup>125</sup> See sections 9 and 25 of the Police Act and Defence Force Act respectively.

<sup>126</sup> See note 121 *supra*, p. 12.

<sup>127</sup> See sections 27 – 62 of the BDF Act (Cap. 21:05).

absolute right<sup>128</sup> and no legislation can take that right away without being declared invalid and unconstitutional.<sup>129</sup>

In the words of Rautenbach, freedom of contract does not entitle parties to the contract to exclude fundamental rights by means of a contract.<sup>130</sup> Hence, the words “*except with his own consent*” in section 13(1) of the Constitution should not be construed to mean entitlement to forego fundamental rights to form or join trade unions by means of a contract; but it should be construed to mean that an individual cannot be compelled to join or form a trade union.<sup>131</sup> It also means that an individual is the possessor of the right and freedom to form or join trade unions and can exercise his or her freedom at his or her own spare time, save during the currency of a declaration of emergency.

(iii) *Limitation of freedom of association in the interest of defence, public safety, public order, public morality or health*

The exception on this ground entails a list upon which freedom of association could be regulated or upon which a declaration of emergencies could be made in terms of section 16 and 17 of the Constitution. For instance, an industrial action (strike) which from the outset was peaceful and legal may degenerate into a chaos or become riotous to the extent of threatening public personal safety, safety of public property, public order and public health without threatening the national defence of the country. A riotous situation may be caused by a protest or a strike waged by civilian trade unions and as such the police may be called in to quell or control the crisis situation. Such a riotous situation may lead to a situation where the employer approaches the Industrial Court seeking the relief to interdict the

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<sup>128</sup> See pages 21 and 47-48 *supra* for the discussion of absolute rights and the finding that joining or forming a trade union is an absolute right.

<sup>129</sup> See note 6 *supra*.

<sup>130</sup> See note 121 *supra*.

<sup>131</sup> See note 28 *supra*, p. 663.

strike for being violent and likely to breach peace<sup>132</sup> or public order. Similarly an employee who alone or in combination with others endangers human life or public health or cause bodily injury to any person or to expose valuable property, to the risk of destruction or serious damage, commits an offence and is liable to a fine not exceeding P2000=00 or to imprisonment for a term not exceeding 12 months or to both.<sup>133</sup>

The Trade Dispute Act (TDA) does not apply to the disciplined forces. However, the notion of public order, safety, public health or morality covers both civilian and disciplined forces' employees alike. Section 13(2)(a)-(c) of the Constitution apply to any persons acting as a collective or alone (if possible) and "any law" may be invoked to restrict the enjoyment of freedom of association in line with exceptions contained in section 13(2)(a)-(c) of the Constitution, until the breach of peace or disorder or riotous situation has normalized.

The term "any law" contained in section 13(2) of the Constitution was defined by the Court of Appeal in the case of *Kgosikgolo Kgafela II Kgafela and Another v The Attorney-General of Botswana and Others*<sup>134</sup> as follows:

The expressions "any law" or "any other laws" clearly refer to laws having effect in Botswana, and not to the tapestry of foreign laws worldwide governing the lives and conduct of a multitude of foreign and exotic nations and faiths. These are, first, the statute laws of Botswana promulgated prior to the enactment of the Constitution, which were retained in force by section 4 of the Botswana Independence Order No. 1171 of 1996 which had its Second Schedule the Constitution of Botswana; second, the statutes and instruments enacted by Parliament since the promulgation of the Constitution, as authorized by section 86 of the Constitution; third, the customary law of Botswana, as applied by section 3 of the Customary Law Act (Cap.16:01), but subject to the limitations contained therein; and fourth, the common law (derived from the Roman Dutch Law) as applied by section 3(b) of the General Law (Cape Statutes) Revision Act (Cap.14:04). But all of these laws are themselves subject to the Constitution as the grundnorm or supreme law.

<sup>132</sup> Section 42(1)(a)(ii) of the Trade Dispute Act (Cap. 48:02).

<sup>133</sup> Section 43(1)(b) of the Trade Dispute Act (Cap. 48:02).

<sup>134</sup> CA Cri.App. No. CLCGB-027/12 (unreported), paras. 52-53.

The expressions "any law" or "any other law" will be used in this study as defined above. To that end the Police Act (Cap. 21:01), Prison Act (Cap. 21:03) and the Defence Force Act (Cap. 21:05) constitute 'any law' as stipulated in section 13(2) of the Constitution.

The 'national defence' exception applies to situations that may make the country's defence system vulnerable. However, that does not mean that total ban of trade unions in the military forces is reasonably justified. The restriction relating to the national defence carries the same weight with other restrictions. The Supreme Court of America provided a test to invoke either national security or national defence to restrict freedom of association. The dispute revolved around Section 5 (a) (1) (D) of the Act which provision prohibited members of the Communist Party to be employed in factories and plants on which the national defence depended. Communists were considered as risks to national defence or security by the executive and legislative branches of the government. The Court held as follows;

This concept of "national defence" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defence" is the notion of defending those values and ideals which set this nation apart.....It would be ironic if in the name of national defence, we would sanction the subversion of those liberties-the freedom of association, which makes the defence of the nation worthwhile. But it cannot be doubted that the means chosen to implement that government purpose in this instance cut deeply into the right of association.<sup>135</sup>

The foregoing confirms the test contained in the *Ruddock's* case above wherein the Court<sup>136</sup> required credible evidence to justify that the national defence of a country was at stake in order to limit protected rights and freedoms.

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<sup>135</sup> *United States v Robel* 389 US 258 (1967) p. 264, See also *Home Building and loan Association v Blasdell*, 290 US 398 (1934), p 426, wherein the Supreme court held that the phrases "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. Even the "war power" does not remove constitutional limitations safeguarding essential liberties.

<sup>136</sup> See note 109 *supra*.

The decisions of the Courts above ably demonstrate that freedom of association is not absolute and to limit it on the basis of national defence requires reasonable justification or credible evidence. Justice Dingake opines whether the exclusion of trade unions in the disciplined forces in Botswana is constitutional when measured against section 13 of the Constitution; which clearly stipulates that no person shall be hindered to enjoy his freedom to assembly and associate.<sup>137</sup> The observation made by Dingake that section 13 of the Constitution regulates freedom of association and the exclusion or the abolition of the enjoyment of the right may be considered constitutional offensive, is correct when measured against the dicta of Coleman (see note 138 below) and Robel (see note 135 supra) cases. It has been shown above that any Act which prohibits soldiers to speak on their distinctive voices on mundane employment issues may not be reasonably justified in a democratic society.

The Supreme Court of India distinguished the terms restriction or limitation from abolition of the right or freedom in the following words:

Permissible restrictions on any fundamental right, even where they are imposed by duly enacted law – must not be excessive, or, in other words, they must not go beyond what is necessary to achieve the objects of the law under which there are sought to be imposed. The power to impose restrictions on fundamental rights is essentially a power to “regulate” the exercise of these rights. In fact, “restriction” and not extinction of that which is to be regulated is generally speaking the extent to which permissible restrictions may go in order to satisfy the test of reasonableness. The term “regulate” has come up for interpretation on several occasions before American Courts which have held that the word “regulate” means “to adjust by rule, method, or established mode; or to direct by rule or restriction; subject to governing principles or laws.”<sup>138</sup>

Flowing from the above quotation, foreign decisions or laws are persuasive but may help us understand and appreciate challenges facing Botswana when it comes to the interpretation of untested constitutional norms. The following cases; namely: -Union of Indian *supra*, Robel *supra*, Northpine

<sup>137</sup> See note 19 *supra*, p. 96.

<sup>138</sup> *Bennett Coleman & Co. and Others v Union of India & Others* (1973) 2 SCR 757, p. 830. (available at <http://indiankanoon.org/doc/125596.pdf> accessed on 27th June 2012).

Islamic society's *supra*, Wolf's article and Rautenbach's article *infra*, all confirm the decision of the Court of Appeal of Botswana in the Dow case that fundamental rights granted and secured by the Constitution cannot be extinguished by ordinary legislation without that legislation running the risk of being fouled or declared invalid.

It is therefore submitted that the exceptions stipulated in section 13(2)(a)-(c) of the Constitution were meant to regulate the exercise of freedom of association in times of emergencies or deny an individual the right to enjoy some elements (not hard core elements) of freedom of association depending on the nature of the job. Hence, the Constitution enshrines sections 16 and 17 as safeguards which may be utilized to derogate from the fundamental rights during the course of emergencies. The derogation is not permanent as it depends on the duration of the declaration of emergencies as will be shown below.

#### *3.1.5 Derogation from fundamental rights and freedoms and declarations of emergencies*

The Constitution of Botswana contains provisions which give the legislature power to make laws derogating from fundamental rights and freedoms. The Constitution at section 16 provides as follows:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 or 15 of this Constitution to the extent that the law authorizes the taking during any period when Botswana is at war or any period when a declaration under section 17 of this Constitution is in force, or measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period.

The above provision is clear that a law may be made to derogate from fundamental rights and freedoms only when Botswana is at war or when a state of emergency has been declared in terms of section 17 of the Constitution. Botswana can be at war when under attack by foreign powers or through internal civil war, and then the President is mandated to declare a state of emergency. Section 17(1) of the Constitution clearly

states that the President may at any time, by Proclamations published in the *Gazette*, declare that a state of public emergency exists. Section 17(2)-(4) of the Constitution provides an elaborate procedure required to derogate from the fundamental rights and freedoms. A declaration made by the President and published in the *Gazette*, shall cease to have effect:-

- a) After seven (7) days beginning from the date it was published when Parliament is sitting and fails to approve it within seven days;<sup>139</sup>
- b) After twenty-one (21) days beginning from the date of publication presumably when Parliament is in recess and fails to approve it within twenty-one days;<sup>140</sup>
- c) After six months beginning from the date Parliament adopted it through a resolution voted for by simple majority;<sup>141</sup>
- d) At any time when the National Assembly resolve by simple majority to revoke the declaration.<sup>142</sup>

A closer examination of sections 16 and 17 show that the Constitution does not in any way sanction the President or the National Assembly to enact a law under the supervision of those sections to wipe out fundamental rights and freedoms stipulated at sections 3-15 of the Constitution. The ambit of sections 16 and 17 empowers the President or the National Assembly to make laws or emergency regulations which only operate within a limited period of time subject to the extension of the declaration if the emergencies sought to be dealt with remain in place.<sup>143</sup> To that end, the National Assembly enacted the Emergency Powers Act (Cap.22:04) in 1966 to enforce the provisions of the Constitution. Section 2 of the Act defines “emergency proclamation” to mean a proclamation under the Constitution, declaring that a state of public emergency exists.

<sup>139</sup> Section 17(2)(a) of the Constitution.

<sup>140</sup> Section 17(2)(b) of the Constitution.

<sup>141</sup> Section 17(3) of the Constitution.

<sup>142</sup> Section 17(4) of the Constitution.

<sup>143</sup> See proviso to section 17(3) of the Constitution.

The object of the Act is contained at section 3(1) as follows:

Whenever an emergency proclamation is in force, the President may make such regulations as appear to him to be necessary or expedient for securing the public order and suppression of mutiny, rebellion and riot, and maintaining supplies and services essential to the life of the community.

The question that arises is, whether sections 16 and 17 of the Constitution as read with section 3(1) of the Emergency Powers Act (Cap. 22:04), authorize the extinction of constitutional protected fundamental rights and freedoms. The language of section 3(1) echoes that of sections 16 and 17 of the Constitution. The Constitution says derogation from fundamental rights and freedoms can only happen during the currency of an emergency. The President or the National Assembly may make regulations or resolutions to suspend any fundamental right or freedom enjoyed by an individual only during the period of mutiny, rebellion, and riot in order to secure public order.

Therefore exceptions contained in section 13(2) of the Constitution cannot be used to justify extinction of protected fundamental rights. Sections 16 and 17 of the Constitution, more specifically section 3(1) of the Emergency Powers Act, gives the President wide powers to declare a state of emergency in the interests of defence when there is mutiny threatening the security of the nation or riot and rebellion threatening public order (safety) or riot threatening public health of the people of Botswana. The test to determine whether a state of emergency exists for the President to issue a declaration of emergency<sup>144</sup> in the interests of defence, public order, safety, public health or morality and any other situation that is in the public interest can be found in the Indian case of *Romesh Thappar v The State of Madras*<sup>144</sup> where the Supreme Court held thus;

We are therefore of the opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19 (of the Constitution), although the restrictions which it seeks to impose may have been conceived

<sup>144</sup> (1950) 124 SCR 594, pp. 600-603 (available at <http://indiankanoon.org/doc/456839.pdf> , accessed on 27/06/2012).

generally in the interests of public order. It follows that section 9(1-A) which authorizes imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of authorized restrictions under clause (2), and is therefore void and unconstitutional.

In light of the above quotation, sections 16 and 17 of the Constitution of Botswana do not empower anybody to prohibit trade unions in the disciplined forces in the name of public order, defence, safety or public health. Neither does section 13(2)(a)-(c) of the Constitution authorizes anybody to extinguish fundamental rights and freedoms guaranteed by section 13(1) and secured by section 3 of the Constitution. Hence, this begs the question whether the prohibition of trade unions in the disciplined forces is constitutional.

### **3.2 CONSTITUTIONALITY OF PROHIBITION OF TRADE UNIONS IN THE DISCIPLINED FORCES**

*... where the legislature has to harmonise a fundamental right, which may be restricted with a legitimate public interest that has been provided for explicitly by the Constitution; the court tries to optimize the fundamental rights and the public interest in a relative way, each is given effect to only partially, without totally, sacrificing the other.<sup>145</sup>*

The Constitution does provide latitude for exceptions and derogation from the fundamental rights and freedoms, not extinction of same. The foregoing quotation emphasizes the importance of balancing national security with individual human rights, such that each is given effect to only partially restrict, without totally, sacrificing the other. Contrary to the above quotation; Section 24(2) of the Police Act, Section 35(1)-(4) of Prisons Act and Regulations 75(2)(a)-(b) and 75(4) of the Defence Force Act have been couched in a manner that extinguish the fundamental rights and freedoms rather than regulating the scope of the rights in question.

The abolition of the rights of members of the disciplined forces to form or join trade unions of their choice calls for the examination of the object of the

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<sup>145</sup> See note 11 *supra*, p. 279.

pieces of legislation to determine whether the extinction of fundamental rights and freedoms is reasonably justified in a democratic society.

In order to determine the constitutionality of the prohibitions, it is necessary to do so in accordance with the test laid down by section 13(2) of the Constitution. The test is whether the extinction of fundamental rights secured by section 3 and guaranteed by section 13(1) of the Constitution, is reasonably justified in a democratic society. That is to say, is the prohibition necessary and reasonably justified in a democratic society such as Botswana? To determine whether the extinction is reasonably justified, there is a need to establish whether the prohibition is necessary, proportionate and reasonably justified in a democratic society. The legal boundaries of the reasonableness test are conflated with the proportionality principle in the discussion hereunder.

### 3.2.1 *The reasonable test*

The term reasonableness is hard to attach a fixed definition to it. Some jurisdictions have described it as elusive and opted to consider prevailing circumstances in order to balance public order and enjoyment of fundamental rights. The Supreme Court of Zimbabwe held as follows:

What is reasonably justifiable in a democratic society is an elusive concept- one which cannot be precisely defined by the Courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.<sup>146</sup>

So what really does the term reasonableness mean? The foregoing question is apposite because the Supreme Court of India also agrees with what the Supreme Court of Zimbabwe said. The Supreme Court of India stated that;

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<sup>146</sup> *In Re Munhumeso and Others* (1995) 1 SA 551 (ZSC), p. 562E.

It is not possible to formulate an effective test which would enable the Court to pronounce any particular restriction to be reasonable or unreasonable *per se*.<sup>147</sup>

In order to determine whether the impugned provisions are reasonably justified, both the Courts suggested that one has to examine the effects of the impugned law in relation to fundamental rights and freedoms in issue. The Supreme Court of Zimbabwe put it thus;

The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject-matter. If the effect of the impugned law is to abridge a fundamental freedom, its object or subject-matter will be irrelevant.<sup>148</sup>

Similarly, the Indian Supreme Court agrees with its Zimbabwean counterpart that the object of the impugned law is irrelevant when it comes to determine whether the impugned law is reasonable or unreasonable. In the case of *Maneka Gandhi v Union of India*<sup>149</sup> the Court held that;

First, it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the Court to grant relief.

The next challenge is to determine whether the effect of the impugned laws is reasonably justified in a democratic society. The analysis is predicated on the proportionality doctrine to determine the constitutionality or otherwise of the impugned laws. The proportionality doctrine is a balancing exercise which evaluates the tension between two or more opposing interests; with a view to reach a logical compromise where each of the interests partially gives effect to the rights of the other without totally sacrificing the exercise of the right or freedom concerned.

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<sup>147</sup> *State of Bihar v K.K. Misra & Others* (1970) 3 SCR 181, p. 196 (available at <http://indiankanoon.org/doc/1957417.pdf>, accessed on 27/06/2012).

<sup>148</sup> See note 146 *supra*, p. 561 D-E.

<sup>149</sup> 1978 (2) SCR 621, p. 688.

The object of the law refers to the legitimate aim of a government policy or law, whilst the effect of the law relates to the impact the law has on the individual right-holder. For instance, if the government has a valid purpose to formulate a law to restrict the basic rights of the whole or part of the population, that restriction will be valid, if and only if, when measured against the interests of the affected people is found to be proportionate in limiting their basic rights. If the purpose is valid but not proportionate or being outweighed by the victims' rights, the law is invalid, regardless of the good intentions of the government.

In the words of Dickson CJ,<sup>150</sup> the law which produces obnoxious effects or deleterious effects is invalid, notwithstanding the fact that, its purpose was to serve a public good. The impact of the law or policy on the whole or part of the population constitutes what is called the *effect test*. If the results of the impugned law or policy are deleterious, the law or policy would fail the *effect test* and Courts will declare it invalid and unconstitutional.

The Courts normally apply the principle of proportionality<sup>151</sup> to determine whether a restriction or prohibition of a fundamental right is to be permitted or not. The determination of the constitutionality of the prohibition is based on whether the effect of the impugned law extinguishes the essential contents of the rights and freedoms contained in section 13(1) or whether the effect of the impugned law leaves the essential contents of the right intact.<sup>152</sup> That is to say, does the law in issue impact minimally or substantially on the freedom of association?

It is also noteworthy that the phrase "*no person*" is inclusive of any person (natural or juristic) lawfully resident in the Republic of Botswana. Therefore, members of the disciplined forces constitute persons who are eligible to enjoy the right to form or belong to trade unions in order to protect their

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<sup>150</sup> *R v Oakes* [1986] 1 S.C.R. 103, para. 71.

<sup>151</sup> *S v Makwanyane* (1995) 3 SA 391 (CC), para. 105.

<sup>152</sup> See note 30 *supra*, p.21.

economic and social interests at their workplaces. Hence, the total exclusion or prohibition from forming or belonging to trade unions of their choice in their workplaces offends section 13 of the Constitution. To this end, sections 24, 35 and Regulation 75 of Police Act, Prisons Act and Botswana Defence Force Act respectively conflict with the protected freedom of association.

The essence of forming a trade union is to confer a voice on unions to speak on behalf of their members' occupational interests. This conferment is done pursuant to section 12 as read with section 13 of the Constitution. Section 13(1) gives an individual the right to associate whilst section 12 deals with freedom of expression. So unions are formed to give individuals platform to express their occupational grievances at bargaining councils, to picket or protest and also confer the power on employers to lock-out employees during the period of industrial action. The centrality of forming a union is to promote meaningful collective bargaining. The essentiality of collective bargaining by a union does not only include issues such as wages and working conditions, but also employment equity and job security.

The Supreme Court of Canada stated that the essence of collective bargaining is to promote the rule of law, industrial democracy, voice, dignity and job security.<sup>153</sup> So in a sense, denying or prohibiting formation of trade unions in the disciplined forces is an attack on the rule of law, industrial democracy, freedom of association and expression (voice), dignity and job security (that is, equal protection before the law).

It is trite that Regulation 75 of the Botswana Defence Force Act, section 24 of the Police Act and section 35 of the Prisons Act (*as discussed above*) prohibit formation of trade unions in the disciplined forces. These provisions interfere with freedom of association substantially by abolishing same. This grave infringement invites a strict scrutiny to be applied on the State

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<sup>153</sup> *United Food and Commercial Workers, Local 1518 v Kmart Canada Ltd and others*, [1999] 2 S.C.R. 1083, para. 26.

objectives to determine whether the impugned provisions reasonably restrict the protected rights and freedoms. The total prohibitions on forming or joining trade unions substantially interfere with the enjoyment of the right to associate freely in the disciplined forces. The question that arises is whether the prohibitions pursue reasonably justified objectives in extinguishing fundamental rights and freedoms.

### *3.2.2 Is the prohibition of trade unions in the disciplined forces in Botswana necessary?*

The exceptions for restricting fundamental rights and freedoms in relation to the formation of trade unions in the labour market are regulated by Section 13(2) (a) and (b) of the Constitution. The restrictions pursue a number of legitimate government's aims, namely; ensuring national defence, security, public safety, public order, public morality or public health [s 13(2) (a)]. The government also aims to protect the rights and freedoms of others [see s 13 (2) (b)]. The other ground for restriction, that is often harped on, is that the disciplined forces should *maintain a good discipline*. This notion presupposes that permitting formation of unions by the disciplined forces would lead to lawlessness and indiscipline in the disciplined forces. This notion is wrong as it loses sight of the fact that collective bargaining promotes peace in the labour market or labour relations.<sup>154</sup> It affords parties to the bargaining table a platform to exchange views and compromise to sustain peace and progress in the work place. In the absence of trade unions and collective bargaining structures in the disciplined forces renders the prohibition unnecessary. It is unnecessary because it violates the Constitution as well as denying members of the disciplined forces a platform to air their occupational grievances to their employers.

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<sup>154</sup> See note 1 *supra*, para. 35; O'Regan wherein she says "this case is concerned primarily with the right to form and join trade unions. Section 126B (1) constitutes a blanket ban on such a right. There can be no doubt of the constitutional imperative of maintaining a disciplined and effective Defence Force. I am not persuaded, however, that permitting members of the Permanent Force to join a trade union, no matter how its activities are circumscribed, will undermine the discipline and efficiency of the Defence Force. Indeed it may well be that in permitting members to join trade unions and establishing proper channels for grievances and complaints, discipline may be enhanced rather than diminished'.

In the end, the proportionality test is invoked usually by the Court to determine whether and to what extent a restriction is to be permitted. In the words of Wolf it requires that the means adopted by the State must be appropriate, necessary and proportional.<sup>155</sup> To this end, Wolf says that the three steps must be fulfilled regarding the principle of proportionality in order for a restriction or prohibition to be considered legal. The three steps are; a) the restriction must be appropriate or suitable in order to achieve the intended objective, b) the measure must be necessary to achieve the specified goal under given circumstances, and, c) the restriction must be essential and have a nexus to the fundamental right.<sup>156</sup>

### *3.2.3 Does the effect of the impugned laws have a nexus to the fundamental right in issue?*

The issue is, whether the State action is arbitrary, unfair and based upon irrational considerations.<sup>157</sup> Ex facie Regulation 75 of Botswana Defence Force Act, section 24 of the Police Act and section 35 of Prisons Act prohibit the formation of trade unions. The issue is whether there is a nexus between the extinction of fundamental rights and the maintenance of public order, public health or safety and the defence of the nation. This begs the question of establishing the harm that will be caused to the security of the State by allowing the disciplined forces to form trade unions. Will it be harmful to public morality if soldiers, police and prisons officers were to form trade unions to bargain collectively with their employers on occupational mutual interests? I doubt whether there will be any harm because already there are safeguards in place to deal with rebellion, mutiny and public disorder. Will it be harmful to the public health to allow soldiers, police and prisons officers to form trade unions to defend and negotiate their condition of services with their employers? Again, there is none.

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<sup>155</sup> See note 11 *supra*, p. 279.

<sup>156</sup> *Ibid.* 280.

<sup>157</sup> *Ibid.*, p 291.

Furthermore, will it be harmful to the public order, public safety, national security and national defence of the country, if soldiers, police, and prison officers were to form trade unions. It is far-fetched to imagine that to permit members of the disciplined forces to form or belong to trade unions that will harm the defence and security of the country because it has been demonstrated above that sections 16 and 17 of the Constitution provide checks and balances to section 13(1) of the Constitution. In the event of public unrest or mutiny or riot breaks out, the President is adequately empowered to declare a state of emergency in order to derogate from fundamental rights and freedoms during the currency of the declaration of emergency.

In light of Wolf's proposition the criterion to test the validity of restrictions or prohibitions imposed on fundamental rights and freedoms, is to explore, whether such prohibitions are appropriate, proportional and necessary to achieve a reasonably justified governmental goal. This is done by restricting (not prohibiting) some contents of freedom of association such that the effects of the impugned provisions on fundamental rights and freedoms are minimized. If there is no connection between the effect of the impugned provisions and retention of the essential elements of the fundamental right in issue; then no further inquiry is needed to establish whether the impugned provisions meet the minimum impairment test. The reason being that the impugned provisions extinguish all essential elements of the right, thereby exuding deleterious consequences. Therefore the impugned provisions lack any rational connection between the extinction of fundamental rights and freedoms and the deleterious effects of the impugned provisions are irreversible. Due to the foregoing findings further inquiry on the reasonableness of the impugned provisions becomes academic. However, for purposes of tidiness, it is compelling to exhaust all issues by examining whether the extinction of trade unions is reasonably justifiable in a democratic society.

### 3.2.4 *Is the extinction reasonably justifiable in a democratic society?*

As already stated above, banning or prohibiting members of the disciplined forces from establishing trade unions to be able to speak in their own distinctive voices on mundane but meaningful questions of service is unreasonable. It then follows that banning of the unions in the disciplined forces constitutes an attack on the basic tenets of industrial democracy. Hence such action will never be reasonably justifiable in an open, transparent and democratic society. The same message is also echoed in Section 13 (2)(a) of the Constitution which states that whatever limitation or restriction imposed on freedom of association by any law must be done in pursuance to national defence, public order or public health and also to be shown to be reasonably justifiable in a democratic society. The right to form unions does not threaten public order nor does it threaten national defence, it simply enhances trust, service delivery and confers platform for workers and employers to talk face to face about terms and conditions of service as well as promoting industrial democracy.

Again the Constitutional Court held in favour of the military trade union when the union challenged the constitutional validity of some regulations of Military Bargaining Council (MBC).<sup>158</sup> In the 2007, *SANDU* case *supra*, Justice O'Regan held thus;

In summary, the purpose the SANDF seeks to assert is adequately achieved by the provisions of item 46 of the Code. To the extent that reg. 8 (b) extends beyond item 46, it has no justification. In the light of the above, it is concluded that reg. 8 (b) is inconsistent with the constitution and must be declared invalid.

Banning or prohibiting means total denial of enjoying a right guaranteed by the Constitution, whilst restrictions or limitations refer to targeted exclusion on certain contents of the right. In casu,

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<sup>158</sup> Reg. 8 (b) of MBC reads; members have the right to peaceful and unarmed assembly, demonstration, picket, and petition, and to present petitions in their private capacity: Provided that such right shall not be exercised –

(a) in respect of any matter concerning either the employment relationship with the Department of Defence or any matter related to the Department of Defence”.

the disciplined forces are prohibited to form or belong to trade unions. In the words of Johan De Waal:

...banning amounts to the state effectively 'killing' an association or a political party and in the process the essential content of, among others, the right of association is denied.<sup>159</sup>

I wholly associate myself with the viewpoint of Johan De Waal, that banning of trade unions in the Botswana Defence Force, Botswana Police Service and Prisons Service amounts to the state effectively '*killing*' the right to associate by soldiers, police and prisons officers in Botswana. The banning does not only kill the right to associate but offends constitutional norms contained in Section 13. It has been established above that the right to form, join and maintain a trade union is absolute. The possession of the right to form a trade union is different from the exercise of the right. An individual has an absolute right to form a trade union but that does not mean that he or she has an absolute right to industrial action or collective bargaining. An individual can be denied temporarily the right to assembly, protest or hold a union meeting during the currency of state of emergency. But temporary denial to stage a protest or hold a meeting during the currency of the state of emergency is not the same as permanently extinguishing the enjoyment of the right; because during the currency of the state of emergency trade unions remain in place minus the right to hold meetings or stage protests, such that after the lapse of the state of emergency; individuals can resume their union activities.

Finally, it is submitted that totally extinction of fundamental rights and freedoms cannot be held to be reasonably justifiable in a democratic society. I therefore summon the words of Justice Arden DBE to speak on my behalf;

No measures will make us absolutely secure from terrorism. It would seem pointless so to restrict individual liberties in the hope of making people more secure if the result is to destroy the essential characteristics of a free and democratic society. To preserve those characteristics, therefore, we may have to accept some risks will remain.<sup>160</sup>

<sup>159</sup> See note 30 *supra*, p. 22.

<sup>160</sup> Arden, DBE. 'Balancing Human Rights and National Security' (2007) vol. 124 *SALJ*, 74.

The message is crystal clear that it cannot be reasonably justified in a democratic society to destroy human rights in the name of being absolutely secure. No matter how much we try, there will always be room for occurrence of risks some day, and when that day comes sections 16 and 17 of the Constitution empower the President to derogate from fundamental rights and freedoms to achieve peace and security. Hence the effects of the impugned provisions render such provisions inconsistent with the tenets of section 13(1) of the Constitution.

### *3.2.5. Can obedience of chain of command reasonably justify extinction of fundamental rights and freedoms?*

In ancient times, the notion of chain of command superseded fundamental rights because the military and police force were considered a calling. The belief was that members of the armed forces joined the army or police force because they wanted to serve their nations without any entitlement to hefty remunerations.<sup>161</sup> Hence the armed forces were commonly referred to as institutional place not occupational one. In modern day age soldiers are regarded as '*citizens in uniform*' and are entitled to enjoy their human rights like any other citizen. Hence in an occupational era the chain of command is balanced with fundamental rights and freedoms of the soldiers as '*citizens in uniform*'. Moskos Jr. contrasted the occupational model from the institutional model as follows:

In modern industrial society, employees usually enjoy some voice in the determination of appropriate salary and work conditions. Such rights are counterbalanced by responsibilities to meet contractual obligations. The occupational model implies that priority inheres in self-interest rather than in the task itself or in the employing organization.<sup>162</sup>

The tension between chain of command and human rights of the '*citizens in uniform*' was explained by Justice Sachs in the *SANDU case supra* as follows:

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<sup>161</sup> Moskos, C.C. 'The All-Volunteer Military: Calling, Profession, or Occupation'? (1977) New York, *Parameters*, p.24. DR Moskos Jr. defines calling as "a purpose transcending individual self-interest in favour of a presumed higher good. A calling usually enjoys high esteem from the larger community because it is associated with notions of self-sacrifice and complete dedication to one's role".

<sup>162</sup> See note 161 *supra*, p. 25.

A blindly obedient soldier represents a greater threat to the constitutional order and the peace of the realm than one who regards himself or herself as a citizen in uniform, sensitive to his or her responsibilities and rights under the Constitution. The Constitution proclaims that national security is not simply directed towards the maintenance of power but must reflect the resolve of South African, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want to seek a better life.<sup>163</sup>

The government cannot use the notion of discipline, to justify the extinction of a right conferred by the Constitution on the disciplined forces. Discipline is desirable, but not reasonably justified in infringing the basic rights of soldiers, police and prisons officers to form or join a trade union. In the final analysis, prohibiting the right to strike in the disciplined forces will be reasonably justified and necessary whilst banning the right to form or join trade unions is not reasonably justified; neither is it necessary in a democratic society. The final challenge is to determine whether Police and Prisons' Associations mitigate the impairment caused by banning of trade unions. The issue is, do these Associations engage in any meaningful negotiations with the employer such that any impairment resulting therefrom (due to banning of trade unions), would be minimally.

### 3.2.6. *Minimum impairment test*

The minimum impairment test requires the State to interfere as minimally as possible where fundamental rights and freedoms are concerned. The State action or law must have a rational connection (that is, it must be proportionate), between the impugned provisions and the affected individual's fundamental rights and freedoms. The impugned provisions will not pass the constitutional muster if there impair substantially on the rights and freedoms in question. The Courts<sup>164</sup> have time without number held that if the purpose of the law is legitimate and the impact of the law on

<sup>163</sup> See note 1 *supra*, p. 489 J – 490 A – B, para. 47.

<sup>164</sup> See note 150 *supra*, para. 71; see also *Frontiero v Richardson*, 411 US 677 (1973), p.690; where the Court held that administrative convenience, although clearly a legitimate state interest, is not sufficiently important to warrant the "compelling label".

fundamental rights and freedoms produces deleterious effects, such a law will be declared invalid to the extent that it contravenes the Constitution.<sup>165</sup>

In casu, section 24(2) prohibits police officers to form or join trade unions of their choice and peculiar to their workplace. The Act also provides that any police officer who forms or joins a trade union will be liable for an offence punishable by expulsion from the service [section 24(3)]. Similarly, the Prisons' Act prohibits officers to form or join trade unions of their choice, regardless of whether its membership will be drawn only from the Prisons' officers [section 35(1)]. In addition, the Act provides that any officer who forms or joins a trade union is not only liable for dismissal from work, but shall forfeit his or her pension or gratuity. In terms of Regulation 75(1) and (4) of the Defence Force Act, trade unions are not only prohibited, but the Act does not provide for professional or vocational associations.

The government's legitimate aim is prescribed by law [s 13(2) (a) of the Constitution]. The State has a legitimate aim to restrict the scope of freedom of association as per the enumerated conditions in section 13 (2) (a) of the Constitution. However, exception to freedom of association must be narrowly interpreted,<sup>166</sup> such that the rights or freedoms in issue are not abolished by the restriction.

The main issue is whether banning of trade unions in the disciplined forces, is reasonably justified in a democratic society and if it is not, does the law provides meaningful alternatives that will minimally impact on the fundamental rights and freedoms. The European Court held that citizens should be able to form a legal entity in order to act collectively in a field of mutual interest. The Court further said that collective participation by members constitute one of the most important aspects of freedom of association, without which that right would be deprived of any meaning.<sup>167</sup>

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<sup>165</sup> See note 150 *supra*, para. 71.

<sup>166</sup> *Sidiropoulos and others v The Greece*, European Court, (1998) 27 EHRR 663, para. 38. (available at [http://www.incl.org/knowledge/inl/vol3iss1/art\\_6.htm.pdf](http://www.incl.org/knowledge/inl/vol3iss1/art_6.htm.pdf) accessed on 25/05/2011).

<sup>167</sup> See note 166 *supra*, para. 40.

Similarly the Police and Prisons Associations are not effective in that Commissioners in both instances direct when to hold elections, how to hold them, who should preside over the elections and in the case of the Commissioner of Prisons, he appoints members of the Central Committee. The fact that the laws give the Commissioners of Police and Prisons to be in charge of the Associations is indicative of the dysfunctionality or lack of effectiveness of the consultative mechanisms inherent in the said Associations.<sup>168</sup> The ineffectiveness of Police Association was exposed recently by junior officers who lodged an unsigned petition with a human rights organization called Botswana Network on Ethics, Law and Hiv/Aids (BONELA), alleging that *"the Botswana Police Service has neglected them for decades and they do not have a forum where they can raise their concerns"*.<sup>169</sup>

According to Letswamotse's report the junior police officers are concerned about inconsistencies riddling promotions in the Police Service. It is alleged that some favoured officers are promoted without writing proficiency tests in line with the police practice. It is further alleged that some 'sacred cows' are promoted yearly yet other officers can stay in one rank for fifteen (15) years without any promotion; notwithstanding their good performances. The junior officers allegedly accused their bosses of upgrading their salary scales twice and left theirs intact as if they do not work in the same organization. Finally, the report paints a gloomy picture for law enforcement agency by alleging that corruption is rife in the Police Service.<sup>170</sup> If police officers were allowed to form trade unions of their choice which are empowered to bargain with the employer, junior officers will not communicate with their employer through unsigned petition addressed to BONELA; because their unions would be their mouthpiece. Hence the Police and Prisons Associations do

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<sup>168</sup> When the researcher was a Mayor and Councillor for Village ward in Gaborone, Prisoner, police and army officers would confide to him that they were not interested in those Associations because there are used to "spy vocal employees and sabotage their occupational progression".

<sup>169</sup> Letswamotse, P. 'We are neglected: Junior Police Officers Claim' (15-21 August 2012), Gaborone, *The Botswana Gazette Newspaper*, p. 3.

<sup>170</sup> See note 169 *supra*, p. 3.

not mitigate the deleterious effects of banning trade unions in the disciplined forces.

In light of the above findings, it is safely deduced that the Police Act (s 24), the Prisons Act (s 35) and the Botswana Defence Force Act (reg. 75), all are inconsistent with the norms of section 13 of the Constitution. Notwithstanding the fact that, government has a legitimate objective to ensure that public order and military chain of command are maintained, the Acts went beyond the threshold set out in section 13(2)(a) of the Constitution. The impact of the above-stated provisions is deleterious and substantially impact on the minimum 'hard core' essential contents of freedom of association; namely, the right to form a union without previous authorization,<sup>171</sup> the right to join a union of one's choice provided the unions are politically neutral (not partisan), the right to organize freely without State interference and the right to promulgate a Constitution that governs members' conduct. The European Union Court explained the minimum threshold test as follows:

As regards the alleged infringement of personal freedom to join or remain a member of the applicant union, every member of the municipal police retains this freedom as of a right, notwithstanding the Royal Decree of 2<sup>nd</sup> August 1966.<sup>172</sup>

The importance and meaning of freedom of association was crisply and succinctly stated by Harold Laski as follows:

Without freedom of mind and association a man has no means to self-protection in our social order.<sup>173</sup>

In light of Laski and the European Court statements on the essentiality of freedom of association, any extinction of the right to form and join trade unions will not be consistent with Section 13 of the Constitution of Botswana. Section 13 gives every person in Botswana the right to associate freely with other persons to form or belong to trade unions in order to

<sup>171</sup> See Article 2 cited at note 75 *supra*.

<sup>172</sup> *National Union of Belgian Police v Belgium*, European Court, (1975), para. 41. (available at [http://www.incl.org/knowledge/inl/vol3iss1/art\\_6htm.pdf](http://www.incl.org/knowledge/inl/vol3iss1/art_6htm.pdf) accessed on 25/05/2011).

<sup>173</sup> Laski, H. *Liberty in the Modern State* (1948), London; George Allen and Unwin Ltd, p. 195, cited in Okene O.V.C. 'Freedom of Association' (2008) Lagos, ICNL, p.3.

protect his or her interests. So the prohibition of trade unions in the disciplined forces leaves them with no means to protect their employment interests.

It is therefore submitted that the impugned provisions fail the minimum impairment test and as such the extinction of trade unions in the disciplined forces in a democratic society is not reasonably justified and inconsistent with section 13(1) Constitution. The question that arises is, whether the impugned provisions are consistent with the ILO labour standards.

### **3.3 ILO LABOUR STANDARDS**

The ILO labour standards refer to Conventions, Treaties, Recommendations, Declarations, and Protocols. For the purpose of this study only two Conventions are relevant. These Conventions are:

#### *3.3.1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).*

This Convention enforces the founding statement of the Declaration of the Philadelphia, namely that; “freedom of expression and of association are essential to sustained progress”. Convention 87 (C87) concerns the right of workers and employers to form and join trade unions and employers’ organizations,<sup>174</sup> to draw their Constitutions and rules independently of the State,<sup>175</sup> organize their administration and elect their representatives independently of any interference by the employer.<sup>176</sup> The C87 also protects

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<sup>174</sup> See note 75 *supra*.

<sup>175</sup> Article 3 of C87 provides thus “workers and employers organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes”

<sup>176</sup> See note 175 *supra*.

the right of workers and employers' organisations<sup>177</sup> not to be dissolved by the administrative authority.

The most ideal provision for C87 for this study is Article 9 (1) which provides as follows:

The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

The supreme law of Botswana is the Constitution. Section 13 (1) of the Constitution of Botswana protects and promotes freedom of association in the disciplined forces. It has been concluded above in this study that the effects of Regulation 75 of the BDF Act, section 24 of the Police Act, and section 35 of the Prisons Act are not consistent with section 13 of the Constitution of Botswana. Therefore, the said impugned provisions cannot be expected to comply with article 9(1) of C87. For instance, Regulation 75(4) of the BDF Act says a trade union or employers' organisation shall be deemed as a movement of a political character such that anyone who attempts to form a trade union shall be discharged from work.

On the Contrary Article 10 of C87 says

In this Convention the term "organisation" means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

The national laws or regulations fall foul of meeting the requirements of article 9(1) of C87 of ILO since the same impugned provisions are not consistent with section 13(1) of the Botswana Constitution.

It is imperative to note that the Police and Prisons Associations fail to meet Articles 2, 3, 4, 5, 8, and 9 of C87. Article 8 (2) of C87 directs ILO member States not to enact laws that impair the guarantees of C87. In terms of the Police Regulations the Commissioner directs senior officers to establish

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<sup>177</sup> Article 4 of C87 states that; "workers and employers' organisation shall not be liable to be dissolved or suspended by administrative authority".

associations for junior officers.<sup>178</sup> This violates Article 3 of C87 which says workers shall elect their representatives in full freedom.

The Prisons Association is worse than the Police Association because the Commissioner is the ultimate authority in deciding items for the Annual membership Conference. Regulation 10(3) provides that the Central Committee shall prepare a draft agenda for the Central Conference thereafter submit a copy of the draft to the Commissioner of Prisons within 30 days prior to the commencement of Central Committee meeting. Regulation 10(4) says the Commissioner shall consider the draft agenda and may approve it, alter it or delete any resolution contained in it or insert a new resolution as he thinks desirable, whereupon the draft agenda, as so approved, shall be the agenda for the Central Conference. To make matters worse, Regulation 8(4) says; the Commissioner shall appoint from among the delegates to the Central Conference a Chairman and a Secretary of the Conference. In addition, Regulation 9(1) says; the Commissioner shall appoint two other delegates to the Conference who, together with the Chairman and the Secretary, shall constitute a committee of the Association, to be called the Central Committee.

As if that is not enough, Regulation 9 (2) concludes by saying; the Central Committee shall remain in being until the appointment by the Commissioner of a new Central Committee from among the delegates to the next Central Conference. It is clear that the delegates to Central Conference have no power<sup>1</sup> to elect their representatives in full freedom. Furthermore, the Central Conference appears to be of no use because it is doubtful whether the Conference has power to amend or revoke a new resolution added into the draft agenda by the Commissioner.

In the final analysis, the Prisons and Police Associations violate C87 of the ILO.

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<sup>178</sup> See Regulation 57 (2) – (9) of the Police Regulations (Cap. 21:01).

3.3.2. *The Right to Organise and to Bargain Collectively Convention, 1949 (No. 98)*

The Convention protects workers from victimization for trade union membership and activities. There is no need to examine the boundaries of C98 to determine whether the Police and Prisons Associations meet the requirements therein. It has been shown that the Commissioners, not the workers, are in charge of the Associations.

Therefore, the Associations are just a smokescreen and do not comply with section 13(1) of the Constitution. Hence, their effectiveness in promoting freedom of association is in doubt.

### 3.4 REMEDIES

The essential contents include inter-alia; the right to form a union, the right to join a union, the right to participate in union activities (that is, to elect and be elected, industrial action, protest march, petition etc), to formulate unions' Constitution and rules (which regulate union's activities), the right to anti-union discrimination, the right to organize and the right to strike. The impugned laws totally prohibit forming or joining a trade union in the disciplined forces.

There are usually two types of remedies to be considered when deciding how to deal with the problem infringing sections 3-16 of the Bill of Rights. The two types of remedies are legislative and judicial interventions. Legislative intervention entails repealing or amending the impugned provisions to incorporate the required legal reforms, whilst judicial intervention refers to a process whereby the Court declares the impugned provisions invalid or unconstitutional. The judicial intervention is empowered by section 18(1) which provides thus;

*subject the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation*

*to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.*

The procedure to lodge a claim under section 18(1) alleging violation of one's fundamental rights and freedoms has been stated in the Dow case as follows:

Under section 18(1), an applicant has the right to come before the Courts for redress if he declares with some foundation of fact that the breach he complains of has been, is in the process of being, or is likely to be committed in respect of himself or herself.<sup>179</sup>

The Court in Dow case further stated that a litigant who alleges that his or her fundamental rights secured by the Constitution have been or are likely to be infringed need not bring tangible proof<sup>180</sup> that it has actually occurred, except to give a fact that the State action infringes his or her protected rights or freedoms. In the present study, it is trite that the impugned provisions prohibit soldiers, police officers and prison officers from forming or joining trade unions, whilst section 13(1) of the Constitution guarantees the right to form or join trade unions to any person lawfully resident in Botswana. To this end, the prohibition is inconsistent with the norms of section 13 of the Constitution and same constitute a foundation to lodge an application seeking relief in terms of section 18(1) of the Constitution.

Notwithstanding the fact that the Constitution provides a vehicle for aggrieved persons to approach the High Court for redress, none of the members of the disciplined forces have ever approached the Courts to challenge the impugned provisions of BDF Act, Police Act and Prisons' Act since 1966 to date.

In spite of the paucity or lack thereof of case law pertaining to ligation against provisions which prohibit trade unions in the disciplined forces; the Court of Appeal has laid down a test that ordinary laws cannot amend or define provisions of the Constitution. The ordinary legislation can enforce

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<sup>179</sup> See note 6 *supra*, p. 156 C.

<sup>180</sup> See note 6 *supra*, p. 156 A-B.

the provisions of the Constitution within the ambit of the set conditions. The Court eloquently held as follows;

What a constitutional provision can do, however, ordinary legislature cannot necessarily do. The same limiting provision which the Constitution places on a grant, if put into ordinary legislation may be open to review on the ground of vires, and if found to infringe any of the provisions of the Constitution will be declared invalid, unless it could otherwise be justified under the Constitution itself.<sup>181</sup>

In the ultimate analysis members of the disciplined forces have two options. Firstly, they may approach the government to amend the impugned statutory laws. Secondly, they may invoke section 18(1) of the Constitution for redress in the High Court seeking relief to declare sections 24, 35 and Regulation 75 of the Police Act, Prisons' Act and Botswana Defence Force Act respectively, unconstitutional.

### 3.5 SUMMARY

The above discussion shows that freedom of association is not absolute and can be regulated in the interests of defence, public safety, public order, public morality or health. The term regulation is not synonymous with extinction. Hence, to regulate in this study means "to adjust by rule or law" in order to satisfy the test of reasonableness. Notwithstanding that, the right to form and join trade unions of one's choice is absolute and its limitation is not reasonably justified.<sup>182</sup> The right to strike is qualified in the disciplined forces but the right to peaceful and unarmed assembly is permitted. It is submitted that the right to strike in the disciplined forces is not morally appropriate and it is reasonably justified to prohibit it.

The next chapter compares and contrasts the laws and practices regulating freedom of association in the disciplined forces of Botswana and South Africa.

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<sup>181</sup> See note 6 *supra*, p 150H-151A.

<sup>182</sup> See note 11 above, p. 276; where Wolf argues that 'the right to form or belong to a trade union constitute an essential 'hard core' content and must remain absolutely intact'.

## **CHAPTER FOUR: FREEDOM OF ASSOCIATION- A COMPARATIVE ANALYSIS BETWEEN BOTSWANA AND SOUTH AFRICAN LEGAL SYSTEMS**

### **INTRODUCTION**

Having determined that the effects of the impugned provisions were not reasonably justified; the next task is to compare and contrast legal rules regulating freedom of association in Botswana with those prevailing in South Africa, to gauge the level at which labour relations are promoted in the security services of both countries. Consideration will be made to the practice of human rights law in relation to the security services of other countries. Experiences from other jurisdictions will enrich Botswana's envisaged law reform proposal.

#### **4.1 THE SOUTH AFRICAN PERSPECTIVE**

It will be in order to commence this chapter by examining the provisions of South African Constitution relating to freedom of association in general and in particular concerning the security services in South Africa. The term "security forces" refers to the defence force, police service and any intelligence services established in terms of the Constitution.<sup>183</sup>

##### *4.1.1 Freedom of association and labour relations in the security services of South Africa*

Freedom of association in South Africa is constitutionally protected. Section 18 of the constitution provides thus; "everyone has the right to freedom of association". It is trite law that no right or freedom is absolute, except the right to freedom from slavery, servitude or forced labour,<sup>184</sup> torture and inhuman and degrading treatment.<sup>185</sup> Freedom of association in South Africa (like in Botswana), forms an integral part of the Bill of Rights under

<sup>183</sup> Section 199(1) of South African Constitution, Act No. 108 of 1996.

<sup>184</sup> Section 13 of the Constitution, Act No. 108 of 1996.

<sup>185</sup> Section 12(1)(d) and (e) of the Constitution, Act No. 108 of 1996.

chapter two of the Constitution. The Bill of Rights obliges the South African State to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>186</sup> However, in South Africa all rights<sup>187</sup> contained in the Bill of Rights and other provisions of the Constitution are limited by section 36 of the Constitution as a general limitation clause.

The South African Constitution contains a separate provision (from section 18) enshrining labour rights, in relation to forming or joining trade unions (section 23). The said provision is captioned "Labour Relations".<sup>188</sup>

Section 23 (2): every worker has the right-

- (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike.*

Section 23(4): every trade union ... has the right-

- a) to determine its own administration, programmes and activities; (b) to organize; and (c) to form and join federation.*

Section 23(5): every trade union ... has the right to engage in collective bargaining

Section 23(6): *National legislation may recognize union security arrangements contained in collective agreements.*

The import of section 23 is elaborate and specific as to the essential elements of freedom of association. The provision confers the right to form and join a trade union for purposes of participating not only in the activities and direction of the union, but to engage the employer in collective bargaining. The provision also gives trade unions the power to include closed shop and agency shop agreements in their collective agreements with the employer, if they so wish [See section 23(6)]. In a nutshell, the essential elements of freedom of association in the South African labour market are not only constitutional protected but well tabulated. The issue for determination is whether all elements stipulated in section 23(2)-(6) are

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<sup>186</sup> Section 7(2) of the Constitution, Act No. 108 of 1996.

<sup>187</sup> Section 7(3) of the Constitution, Act No. 108 of 1996.

<sup>188</sup> See section 23 of the Constitution, Act No. 108 of 1996.

applicable to the security services of South Africa given the nature of their jobs.

#### 4.1.2 Functions of the security services

It is imperative to make a brief overview of the functions of the security services prior to the examination of which elements of freedom of association are applicable in the security services. Section 200(2) of the Constitution sets out the mandate of the South African defence force as follows:

The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

The police service mandate is enshrined in section 205(3) of the Constitution in the following terms:

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

What can be deduced from the above-mentioned functions of the security services is that the defence force and police service are charged with the responsibility to defend the sovereignty of South Africa, secure the public order and safety of the inhabitants. The foregoing is the universal primary mandate of all security services around the globe. The main issue that arises for discussion is the application of freedom of association in the security services of South Africa.

#### 4.1.3. *Enforcement of freedom of association in the security services*

From the onset, the examination of the issue of enforcement of the freedom of association considers case law to find out what the Courts said about the tension between enjoyment of fundamental rights and

maintaining public order and the national defence of Republic of South Africa.

**SOUTH AFRICAN NATIONAL DEFENCE UNION v MINISTER OF DEFENCE 1999(4) SA 469 (CC)**

The brief facts of the case are that section 126B of the Defence Act, No. 44 of 1957 prohibited members of the South African National Defence Force (SANDF) from forming and joining a trade union. The offensive provision read as follows:

Section 126B (1): *A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, No. 28 of 1956; provided that this provision shall not preclude any member of such Force from being or becoming member of any professional or vocational institute, society, association or like body approved by the Minister.*

Section 126B (2): Without derogating from the provisions of ss 4(h) and 10 of the Military Discipline Code, shall not strike or perform any act of public protest or participate in any strike or act of public protest or conspire with or incite or encourage, instigate or command any other person to strike or to perform such an act or to participate in a strike or such an act.

Section 126B (3): A member of the South African Defence who contravenes ss (1) or (2), shall be guilty of an offence.

Section 126B (4): For the purpose of ss (2)- "act of public protest means any act, conduct or behavior which, without derogating from the generality of the foregoing, includes the holding or attendance of any meeting, assembly, rally, demonstration, procession, concourse or other gathering and which is calculated, destined or intended to influence, support, promote or oppose any proposed or actual policy, action, conduct or decision of the Government of the Republic of South Africa or another country...

The issue that the Court was called upon to determine was, whether it is constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions.<sup>189</sup>

The banning of trade unions in the defence force was legal permissible during the apartheid era until the High Court declared section 126 B (1) invalid and unconstitutional on the 25<sup>th</sup> November 1998. Justice Hartzenburg declared section 126 B invalid and unconstitutional to the extent that it prohibited members of the armed forces to join trade unions and participate in public protest.<sup>190</sup>

On the 26<sup>th</sup> May 1999, the constitutional court unanimously held that section 18 of the Constitution, Act No. 108 of 1996, provides for freedom of association to everyone and Section 23 (2) (a) provides for every worker to form and join a trade union of his or her choice. Justice O'Regan, writing the majority decision for the Court, held that, section 126 B (1) constituted a blanket ban on the basic right to form and join trade union and the ban was not justifiable in a democratic society.<sup>191</sup> O'Regan further held that permitting members of the security services to join trade unions and establishing proper channels of dispute resolutions may enhance rather than diminish discipline.

The Constitutional Court confirmed the application of freedom of association in the armed forces by holding in the following terms;

That the total ban on trade unions in the Defence Force clearly goes beyond what is reasonable and justifiable to achieve the legitimate state objective of a disciplined military force.<sup>192</sup>

The decision of the Court (unbanning of trade unions) led to members of the South African National Defence Force (SANDF) spoilt for choice. An

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<sup>189</sup> See note 1 *supra*, p. 473 I-J.

<sup>190</sup> See note 1 *supra*, p. 474 A-D.

<sup>191</sup> See note 1 *supra*, p. 486 D-F.

<sup>192</sup> See note 1 *supra*, p. 486 I-J.

additional military union was formed and increased the total number of military trade unions in SANDF to two (2). The second military trade union to be formed after the unbanning of trade unions is called, the South African Security Forces Union (SASFU).

It is imperative to state that on the 13<sup>th</sup> May 2001, the Department of Defence and the South African National Defence Union (SANDU) adopted the Constitution of the Military Bargaining Council (MBC). The Constitution, inter alia, provides for collective bargaining to prevent and settle disputes between the employer and military trade unions by means of negotiation, consultation or otherwise. The South African National Defence Union (SANDU) clashed with the then Minister of Defence over the approach the Minister took in formulating the regulations without the input of the unions. The dispute resulted into SANDU instituting a lawsuit as shown in the case hereunder.

**SOUTH AFRICAN NATIONAL DEFENCE UNION v MINISTER OF DEFENCE.<sup>193</sup>**

On the 20<sup>th</sup> August 1999, immediately after section 126B (1) of the Defence Force Act, No. 44 of 1957, had been declared unconstitutional, the Minister issued Regulations to regulate labour relations in the SANDF.<sup>194</sup> The Minister and SANDU held several meetings without reaching any agreement. The then Minister decided to go ahead and adopt the Regulations unilateral. This sparked exchange of hot letters between the Minister of Defence and SANDU.

On the 4<sup>th</sup> October 2001, the SANDF introduced a new staffing policy without prior consultation or negotiation with SANDU. SANDU only became aware of the new staff policy on 15<sup>th</sup> October 2001. SANDU then launched a lawsuit challenging the Regulations and the staff policy. The Department of Defence withdrew the staff policy before the hearing was heard by the High

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<sup>193</sup> 2007 (5) SA 400 (CC).

<sup>194</sup> See note 193 *supra*, p. 404 F-H.

Court. The only dispute remained was one concerning the Regulations. The main issue for the determination of the Court was whether the Regulations under challenge were inconsistent with the Constitution. The Court held that; some parts of the Regulations were inconsistent with the Constitution and others were lawful made. In the final analysis the Court held that the duty to bargain was voluntary but made an order to the effect that the SANDF was not entitled to withdraw unilaterally from the Military Bargaining Council (MBC) and to impose preconditions for its return.<sup>195</sup>

The current practice and law operating in South Africa permit formation of trade unions in the military forces. Hence freedom of association as per section 18 of the Constitution is applicable to the soldiers.

#### 4.1.4 *Freedom of association in the South African Police and Correctional Services*

Police unions were prohibited in South Africa during the apartheid era. In 1989, brave men and women, formed a trade union called Police and Prisons Civil Rights Union (POPCRU) to fight for labour rights in the workplace. The formation of POPCRU in 1989 was in contravention of the then existing laws and practices. The violation of the law and practice resulted into many of its leaders being suspended from work, whilst others were arrested.<sup>196</sup>

In November 1993, the South African Police Labour Relations Regulations were promulgated to provide for the unbanning of trade unions in the South African Police Service (SAPS). Hardly two years thereafter, the regulations were repealed and replaced by the Labour Relations Act, No. 66 of 1995 (LRA). The 1995 Labour Relations Act applies to all employees, with the exception of the National Defence Force, Secret and Intelligence Service.<sup>197</sup> Since the advent of the unbanning of unions in the Police, two unions have

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<sup>195</sup> See note 193<sup>supra</sup>, p. 435 H.

<sup>196</sup> Marks and Fleming, 'The Untold Story: The Regulation of Police Labour Rights and the Quest for Police Democratisation' (No. 4) (2006), Vol. 7, Canada, *Police Practice and Research Journal*, p. 315.

<sup>197</sup> See section 2 of LRA, No. 66 of 1995.

been formed legally. These unions are the Police and Prisons Civil Rights Union (POPCRU), and the South African Police Unions (SAPU).<sup>198</sup> SAPU and POPCRU are members of the Public Service Coordinating Bargaining Chamber (PSCBC).<sup>199</sup> The South African Public Service Bargaining Chamber operates maximally.

POPCRU and SAPU have litigated extensively following the unbanning of trade unions in 1993. For instance, in 2010 POPCRU, interdicted the Minister of Correctional Services and the National Commissioner preventing the respondent from implementing the new housing policy due to lack of consultation. The Court held that the Minister approved the new housing policy thereby contravening section 158 (1) (h) of the LRA. The interdiction process bears testimony to the fact that statutory laws and practices in South Africa promote and enforce the norms and objects of the Constitution as provided for in section 18 and 23 (2) (a) of the said Constitution. Can SAPU members exercise the right to strike as provided in section 23(2)(c) of the Constitution? The answer to the foregoing question can be distilled from Courts' decisions.

#### **SOUTH AFRICAN POLICE SERVICE v POPCRU AND ZIZAMELE CEBEKHULU.**<sup>200</sup>

A national general public service strike involving several trade unions ensued in June 2007 after the wage dispute reached a deadlock. The leadership of POPCRU expressed an intention to call on its members to go on a strike. The employer (SAPS) lodged an urgent application against members of POPCRU interdicting them from embarking on a strike. South African Police Service (SAPS) had about 163 000 employees.<sup>201</sup> Of these, 129 000 were functional police officers who performed duties to combat and prevent crime, while about 33 000 performed support functions.

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<sup>198</sup> See note 196 above, p. 315.

<sup>199</sup> Marks and Fleming, *loc. cit.*

<sup>200</sup> Case CCT 89/10 [2011] ZACC 21.

<sup>201</sup> See note 200*supra*, para. 2.

The issue was whether the support employees of the SAPS who are employed under the Public Service Act, No. 103 of 1994 (as opposed to SAPS Act) are, in the contemplation of the LRA, engaged in an essential service. It was common cause that police officers are essential service cadres as employees engaged in the essential service. The issue was whether a support staff working at the SAPS office could be termed an essential service cadre merely due to the fact that he or she works in police offices.

In making a determination on the matter the Labour Appeal Court held that;

While employees under the PSA serve an important support function, they cannot be deemed to render an essential service, and are therefore not prohibited from striking.

The Constitutional Court upheld the decision of the Labour Appeal Court.

The crux of Cebekhulu case is that members of the SAPS employed under the South African Police Service Act are essential service and not allowed to exercise their constitutional right to strike due the nature of their job, which is to protect and secure the inhabitants of the Republic of South Africa (s 205(3) of Constitution). But the denial of the right to strike does not take away their fundamental rights entrenched in section 23 of the Constitution. The prohibition is reasonable and justifiable in a democratic society and meets the limitation criteria set out in section 36 of the Constitution.

#### **4.2 COMPARING AND CONTRASTING THE LAWS AND REGULATING LABOUR RELATIONS IN SECURITY SERVICES BETWEEN BOTSWANA AND SOUTH AFRICA**

The purpose of comparative analysis is to compare and contrast laws, practices and processes of two or more legal systems of two or more countries. According to Monika Ambrus, comparative analysis entails three

questions, namely; why, what and how to compare. Ambrus argues that the first question (why to compare), necessitates the identification of the aim of comparison, the second question (what to compare) refers to the sources of comparison, and the third (how to compare) examines the way in which the comparison is carried out.<sup>202</sup> The study considers similarities and differences between the statutory laws that regulate the disciplined forces in the two countries with a view to find out whether Botswana is doing badly or better than South Africa in promoting freedom of association in her disciplined forces.

#### *4.2.1 Similarities in laws regulating security services between Botswana and South Africa*

Both legal systems prohibited trade unions in the Police as far back as 1957. The South African Police Force was not allowed to unionize. The South African Government enacted the Defence Force Act No. 44 of 1957 to prohibit unions in the security services whilst Botswana Defence Force was founded in 1977. The Botswana Defence Force Act of 1977 also bans trade unions.

The police in South Africa did not enjoy their freedom of association during the apartheid era. Similarly, Botswana currently prohibits formation of trade unions in the Police and Prisons Services.

#### *4.2.2 Differences in laws regulating the security services between Botswana and South Africa*

In 1999, the Constitutional Court of South Africa declared section 126B (1) of the 1957 Defence Force Act unconstitutional, whilst Regulation 75(1) and (4) of Botswana Defence Force Act remains intact and prohibits trade unions.

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<sup>202</sup> See note 39 *supra*, pp 355 – 356.

It is noteworthy to state that POPCRU currently enjoy the right to associate and bargain collectively with the employer whilst Botswana Police and Prisons officials are allowed to join ineffective professional associations.

The Constitutions of both countries provide for freedom of association yet Botswana prohibits trade unions in the disciplined forces. The South African Police Unions belong to the membership of the Public Service Coordinating Bargaining Chamber (PSCBC), whereas Botswana provides for various Boards which do not have collective bargaining power.

South African security services have the latitude to institute legal redress in Civil Courts in defense of their occupational interests. In Botswana members of the disciplined forces cannot institute legal redress on occupational interest matters, except where a member is suing for unlawful dismissal in his or her personal capacities. Both Police and Prisons Associations have never challenged sections 24 and 35 of the Police and Prisons Acts respectively on the grounds that the said provisions infringe their fundamental rights.

South African military and police unions have power to make rules, Constitutions and elect office-bearers independent of the employer. On the contrary, in Botswana the Prisons' Commissioner appoints members of the Central Committee and also has power to delete agenda items for the Annual membership Conference.

The major difference between the South African security services and Botswana disciplined forces is lack of courage and determination to tackle the impugned provisions. The fear to tackle the impugned provisions head-on; emanates from the fact that the Regulations of the Botswana Defence Force Act (Cap. 21:05), outlaw any attempts to brainstorm ideas. Regulation 75(4) of the Botswana Defence Force Act provides that a trade union ... shall, be deemed to be a movement of a political character. To add salt to an injury, Regulation 75(2)(b) of BDF Act says that canvassing any person in

support of or otherwise actively assisting a movement of a political character is a criminal conduct.<sup>203</sup> Hence, employees of the BDF have been reluctant to form trade unions because canvassing other BDF employees to form a trade union amounts to participating in a movement of a political character. Regulation 75 is very wide, excessive and arbitrary and prohibits conducts which are otherwise lawful. Botswana can take a leaf from the South African Constitution which makes partisan conduct clearly explained beyond any shadow of doubt. Section 199(7) provides that "neither the security services, nor any of their members, may, (b) further, in a partisan manner, any interest of a political party". In 1999, SANDU was faced with a similar situation wherein section 126B (3) provided that forming a trade union was a criminal act. SANDU averred in Court as follows:

It acted in its own interest and in the interests of its members. It also sought to act on behalf of those defence members who were not members of the applicant but wished to join. It asserted that the criminal sanction for which members of the Permanent force would be liable if they joined the applicant deterred many potential members from joining.<sup>204</sup>

In terms of the Police Act, Prisons Act and Botswana Defence Force Act, forming or joining a trade union is a criminal act such that members are liable to be punished by being discharged from employment. Hence, reluctance to invoke section 18(1) of the Constitution as a collective. But if they want to enjoy their fundamental rights and freedoms they should bite the bullet and emulate their South African counterparts.

#### 4.3 LESSONS FROM OTHER COUNTRIES

The disciplined forces perform highly sensitive functions and care must be exercised in dealing with them. A brief examination of the best practices from other countries becomes necessary to gauge whether South Africa is the only country observing freedom of association in its security services.

<sup>203</sup> Section 67(2)(a) and (d) of the BDF Act says any offence covered by the Act are punishable by death or expulsion from employment.

<sup>204</sup> See note 1 *supra*, p. 475 G-H.

## **Sweden**

According to Yvonne Burns<sup>205</sup> Sweden has as at September 1994, three military unions. The military unions are integrated into the Swedish collective bargaining system. Military unions are allowed to strike in Sweden and the government has the right to lock-out.

## **Germany**

According to Christian Schulze,<sup>206</sup> being a member of the armed forces and substitute services in Germany can entail the restriction of certain basic rights, but it may never lead to an absolute curtailment of the basic rights of the soldier. Schulze says Article 17 (a) of the Basic Law, only restricts the exercising of the basic rights in exceptional circumstances (declaration of emergency), but the enjoyment of basic rights are fully guaranteed to the soldier to the same extent as to an ordinary citizen. The right to strike is not allowed in the Germany armed forces.

It is submitted that exceptions contained in section 13(2) of the Constitution of Botswana should not be interpreted in a way that would lead, in the words of Wolf, to the public interest totally sacrificing fundamental rights and freedoms. Wolf argues that the public interest and fundamental rights should be interpreted in such a way that each is given effect partially, without totally sacrificing the other.<sup>207</sup>

## **4.4 SUMMARY**

The discussion above shows that freedom of association in South Africa is extended to members of the security services without endangering the national defence of the nation. Lessons from Germany and Sweden corroborate the practice prevailing in the South African security services. Such practices or lessons are in compliance with Article 9 (1) of the ILO

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<sup>205</sup> Burns, Y, 'Freedom of Association, the Right to fair Labour Practice and Collective Bargaining in the Defence Force'(1994), (available at [http://www.iss.co.za/Pubs/other/defence\\_legislation/3\\_Burns.pdf](http://www.iss.co.za/Pubs/other/defence_legislation/3_Burns.pdf) accessed on 31/10/2011).

<sup>206</sup> Schulze, C. 'A Comparative Study of the German and British Defence Legislations' (1994) (available at <http://www.iss.co.za/Pubs/other/Defence-legislation/4schulze.pdf> - accessed on the 31st October 2011).

<sup>207</sup> See note 11 *supra*, p. 279.

Convention, 1948 (No. 87) and are commendable. Botswana can benchmark countries such as Sweden, Germany and South Africa in her endeavour to extend freedom of association to her disciplined forces in a manner that suits her conditions; subject to exceptions enumerated in section 13(2) of the Constitution.

## CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

### Introduction

It has been found that the objective of the government of the Republic of Botswana may be laudable in so far as to protect and secure its territorial defence and public order. That notwithstanding, the impugned provisions are wide, excessive and arbitrary as they seek to extinguish “hard core” essential elements of protected fundamental rights and freedoms. Therefore, the extinction of basic rights and freedoms is not reasonably justified in a democratic society. The said impugned provisions need to be amended so as to extend the frontiers of freedom of association to the disciplined forces.

### 5.1 BROAD CONCLUSIONS OF THE STUDY

The armed forces, police and prisons officers are regarded as essential services in view of the peculiar duties they perform. Downey opines that, the armed forces are first and foremost emergency services, needing physiology analogous to those animals who are never completely relaxed to potential danger.<sup>208</sup> The notion of military discipline, the chain of command and partisan (political) neutrality were popularly utilized in the past as the rallying point to deny members of the disciplined forces the right to unionise. The globe is currently embracing a culture of human rights and the world is abandoning the gospel of the chain of command and extends fundamental rights and freedoms to members of the disciplined forces.

According to Lindy Heinecken,<sup>209</sup> the constitutional rights of members of the armed forces might well be restrained if there is evidence that deterioration

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<sup>208</sup> Downey quoted in Malan, M. 'The Implications of Unionization for the Combat-effectiveness of the Armed Forces' (1994) [available at [http://www.iss.co.za/Pubs/Other/Defence\\_legislation/3Malan.pdf](http://www.iss.co.za/Pubs/Other/Defence_legislation/3Malan.pdf), accessed on 31<sup>st</sup> October 2011].

<sup>209</sup> Heinecken, L. 'Military Unionism in South Africa: Legality and Potential for Development', (No. 5) (1995) Vol. 4, *African Security Review*, p. 3.

in discipline could lead to a compromise of a higher public interest. Heinecken further argues that limitations must be reasonable and where it is restricted, alternative provisions need to be put in place. Heinecken further avers that, the essential contents of a right or freedom in question must not be negated by limitations. In 1999, the European Court on Human Rights also held that the mere fact of joining the armed forces voluntarily does not result in a waiver of human rights.<sup>210</sup> In other words, restriction is allowed on some aspects of the scope of the contents of the right but not total exclusion of all contents of the right or freedom.

Flowing from the foregoing, it is pellucid that an ordinary legislation cannot prohibit a right guaranteed by the Constitution, except to regulate the right in issue in accordance with the exceptions contained in the Constitution itself. Exceptions contained in the Constitution should not be misconstrued as giving the State unlimited power to wipe out the basic right to associate freely without State interference. Once an Act of Parliament or administrative subsidiary legislation is couched in a broad and arbitrary manner to surpass or suppress the exceptions contained in the Constitution, such an Act or Regulation (as the case maybe) will be inconsistent with the Constitution and invalid.

Effectively, the right to strike enjoys relative protection. That is, it may be prohibited without impairing the basic rights depending on the identity of the right-holder in issue. On the other hand, the right to form or join unions without prior authorization, the right to function independently without State interference and the right to protect unions against acts of anti-union discrimination enjoy absolute protection, save for unlawful activities (*that is, unlawful conduct such as rape or terrorism will not be protected at all*). The distinction between relative and absolute protection is that the essential content which falls within the scope of relative protection may be limited (e.g. right to strike in essential services) whilst those that fall within the

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<sup>210</sup> *Lustig-Prean and Beckett v United Kingdom*, (2000) vol. 29 EHHR, p. 548.

scope of absolute protection are unlimited regardless of whether the State has a legitimate and reasonably justified interest. The test to determine whether the impugned provisions in issue are unconstitutional has been affirmed by the Courts as the *effect test*. The effect of the impugned provisions of the disciplined forces abolishes freedom of association in the disciplined forces of Botswana. Hence, such provisions are not reasonably justified in a democratic society.

Police and Prisons Associations are just sterile organizations with no power to elect their leadership in full freedom. They do not have the power to collectively bargain with the employer. As such, the Associations have been rendered sterile contrary to the constitutional norms enshrined in section 13(1) of the Constitution. The norms of section 13(1) were succinctly stated by Molatlhegi in the following terms:

It cannot possibly be argued that the framers of the Botswana Constitution intended to give workers the freedom to form sterile organizations. The framers of the Constitution have deliberately specified the purpose of workers' organizations in the Constitution. As Smith J., pointed out in another Canadian case, freedom to associate includes the freedom to organize, to bargain collectively and as a necessary corollary to strike.<sup>211</sup>

In the quest for democratization and unionization of the disciplined forces, it is proposed that the impugned provisions be amended to comply with section 13 of the Constitution. In the event, the State intends to amend those laws; she should consider the proposal made for law reform contained in the recommendations hereunder. However, if the government continues her intransigent position (as she did pronounce on the 3-5<sup>th</sup> August 2009 POPCRU symposium in Gaborone through Minister of Defence, Justice and Security- Honourable Ndelu Seretse), that she does not have any plans to unionize the armed forces and the police; it is suggested that members of the disciplined forces should approach the High Court and seek legal redress in terms of the Constitution.

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<sup>211</sup> Molatlhegi, B. 'Workers' Freedom of Association in Botswana' (No. 1) (1998) Vol. 42, London, *Journal of African Law*, Cambridge University Press, p. 65.

## 5.2 CHALLENGES AND RECOMMENDATIONS

### *Law Reform Proposal*

The first challenge is to examine whether Regulation 75 of Botswana Defence Force Act (Cap. 21:05) requires to be repealed or to be pruned of the offensive ‘tentacles’ such that thereafter the mischief will be addressed. It will not be feasible to sever the offending portion of Regulation 75.

It is recommended that:

- Regulation 75(1) of the BDF Act be recast to be unambiguous. The recast version may be in the following terms: *No officer shall further in a partisan manner, the interest of a political party.*
- Regulation 75(4) of the BDF Act be replaced with the one that gives every soldier the right to form and join a trade union, to participate in the activities of a trade union, to organize and to engage the employer in collective bargaining.
- To repeal Regulation 75(2)(a)-(b) of BDF Act as it is inconsistent with section 13(1) of the Constitution and recasting or severing it will not keep the intended objective.

The second challenge relates to the role of court-martial.<sup>212</sup> The Court martial deals with military offences and military disciplinary transgressions, such that no distinction is made on the seriousness of the transgressions. To this end, offences stipulated under Section 27-62 of the Act should be within the ambit of military offences whilst matters pertaining to conditions of work, dispute of interests and disputes of rights could be dealt with outside the ambit of the Court-martial.

In light of the foregoing, it is recommended that the Defence Force Act be amended to create a clear distinction between criminal offences justifiable to be heard in the Court-martial and minor disciplinary misconduct falling

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<sup>212</sup> See Section 79-101 of the Botswana Defence Force Act (Cap 21:05).

under Regulation 75 of the Act to be mediated by an impartial military tribunal or body or military bargaining council.

The third challenge pertains to total exclusion of members of the Botswana Police Service from forming or joining trade unions by section 24 of the Police Act (Cap. 21:01). Section 24(1) of the Act is *intra vires* the Constitution. However, section 24(2) of the Act can be corrected by recasting it.

It is recommended that the new section 24(2) should read thus; “*every police officer has the right to form and join a trade union, to organize, to participate in the activities and programmes of a trade union and the right to strike should be prohibited*”. It is further recommended that section 24(3) of the Police Act be repealed altogether because once the police officers are allowed to form and join trade unions, to expel them for forming or joining a trade union will not make sense.

By the same token it is recommended that, Prisons Act (Cap. 21:03) should be amended, especially section 35(1) to read thus; “*every prisons officer has the right to form and join a trade union, to organize, to engage in collective bargaining with the employer and to participate in the activities and programmes of the trade union*”. It is further recommended to repeal altogether section 35(2)-(4) of the Act.

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