

NORTH WEST UNIVERSITY

**A COMPARATIVE STUDY ON THE IMPACT OF LABOUR LEGISLATION ON
THE ROLE OF TRADE UNIONS IN SOUTH AFRICA AND CAMEROON.**

BY

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**A Mini-dissertation submitted in partial fulfilment of the requirements for
the degree of Masters of Laws (Labour and Social Security Law) in the
School of Postgraduate Studies and Research in the Faculty of Law at the
Mafikeng Campus of the North- West University.**

Supervisor: Professor P.F. IYA

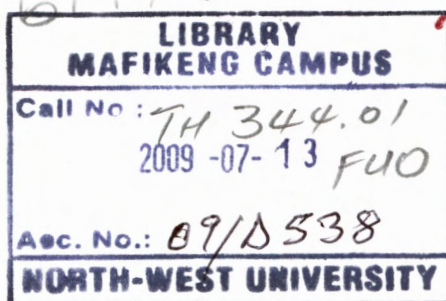
November 2008.

DECLARATION

I, the undersigned, hereby declare that the work contained in this minor Dissertation is my original work which has not been submitted before in whole or in part for any degree at any university. All materials used and quoted herein have to the best of my knowledge been properly acknowledged. I accept sole responsibility for any defects contained herein.

.....
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November 2008



SUPERVISOR'S DECLARATION

I, Professor Philip Francis Iya, recommend that this Minor Dissertation by OLIVER NJUH FUI (Student No. 2099410), entitled "A COMPARATIVE STUDY ON THE IMPACT OF LABOUR LEGISLATION ON THE ROLE OF TRADE UNIONS IN SOUTH AFRICA AND CAMEROON", for the award of the Degree of Masters of Laws be accepted for examination.

.....

Prof. PF Iya
Supervisor

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DEDICATION

This minor dissertation is dedicated to my father, Kpwa Samuel Fuo.

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LIST OF ACRONYMS

ANC	African National Congress
CA	Congress Alliance
CATTU	Cameroon Teachers Trade Union
CCATU	Committee of African Trade Unions
CCAWUSA	Commercial, Catering and Allied Workers Union of South Africa
CDC	Cameroon Development Corporation
CGTL	Confederation Generale des Travailleurs Libre
CNETU	Council of Non European Trade Unions
CNF	Cameroon National Federation
CNU	Union Nationale Camerounaise
COSATU	Congress of South African Trade Unions
CPDM	Cameroon Peoples Democratic Party
CSTC	Confederation Syndical de Travailleurs du Cameroun
CTE	Cameroon Tea Estate
CWDU	Cameroon Workers Development Union
CUSA	Council of Unions of South Africa CUSA
FAWU	Food and Allied Workers Union
FOSATU	Federation of South African Trade Unions
FNETU	Federation of Non European Trade Unions FNETU
FSC	Fédération des syndicats du Cameroun
ICA	Industrial Conciliation Act 1924
ICU	Industrial and Commercial Workers' Union
ICFTU	International Confederation of Free Trade Unions
IFP	Inkatha Freedom Party
ILO	International Labour Organisation
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
NEF	National Economic Forum
NEF	Non European Federation

NMC	National Manpower Commission
NTU	Nigerian Union of Teachers
NUM	National Union of Mine Workers
NUTW	National Union of Textile Workers
RDP	Reconstruction and Development Programme
SACTU	South African Congress of Trade Unions
SACCOLA	South African Employer's Consultative Committee
SACP	South African Communist Party on Labour
SAFTU	South African Federation of Trade Unions
SATUC	South African Trade Union Congress
SATUC	South African Trade Union Congress
SYNES	Syndicat National des Enseignants du Superieur
TAC	Teachers Association of Cameroon
TLC	South African Trades and Labour Council
TUACC	Trade Union Advisory and Coordinating Council
TUSCA	Trade Union Council of South Africa
TWIU	Textile Workers Industrial Union
TWU	Tiko Workers Union
UC	Union Camerounaise
UK	United Kingdom
USA	United States of America
UN	United Nations
UNTC	Union Nationale des Travailleurs du Cameroun
OSTC	Organisation Syndicale des Travailleurs du Cameroun
PAC	Pan African Congress
USCC	Union des Syndicats Croyant du Cameroun
USLC	Union des Syndicats Libres du Cameroun
WW I	First World War
WW II	Second World War
WCTUC	West Cameroon Trade Union Congress
WCUT	West Cameroon Union of Teachers



WTO

World Trade Organisation

ABSTRACT

Key Terms: South Africa, Cameroon, trade unions, labour legislation.

The purpose of this inquiry, as suggested by the topic and explained in the problem statement, is to investigate the impact of labour legislation on the role of trade union in the South Africa and Cameroon. In a bid to realize the aims and objectives of this study, particular emphasis was placed on their unique historical context, the legal obstacles and diverse challenges which trade unions in both countries face with the overall intention of identifying deficiencies needing reform. The deficiencies identified and the proposals submitted follow a rigorous analysis of what obtains in South Africa, Cameroon and at the international level in terms of tripartism within and standard setting by the International Labour Organisation. This study relied heavily on primary and secondary sources of information for a rigorous analysis. What emerged at the end of the study is a confirmation of the basic hypothesis that trade unions in South Africa are more proactive than those in Cameroon because of:

- The unique historical backgrounds of the trade unions including their levels of involvement in the liberation struggles of both countries;
- The different legal frameworks operational in both countries;
- The extent to which both countries have complied with their international law provisions regulating trade union activities;
- The varying political platforms in both countries; and,
- The relationship which unions enjoy or otherwise with the state in both countries.

CHAPTER I

INTRODUCTION

1.1 BACKGROUND TO STUDY

The Industrial and Agrarian Revolutions fundamentally changed the nature of work and employment. These led to an increase in production and a paid monetary wage. Despite the advantages of industrialization, the adverse effects were outstanding. It heralded an era in labour relations which was characterised by slavery and slave trade, dangerous working conditions, diseases, poverty, exploitation of labour and low wages based on the capitalist perception of labour as a commodity. One of the direct responses to this scenario was the development of trade unionism by workers who discovered that their plight could only be salvaged by their own united and collective efforts. These efforts yielded fruits in many ramifications. In Africa, there exists divergence of opinion as to the ability of trade unions to play a significant socio-economic and political role in the continent¹. In some countries, trade unions seem to be more engaged on issues of development while in others, they seem to exist only within the narrow confines of their offices². The purpose of this discussion is to investigate the impact of labour legislation on the role of trade unions in South Africa and Cameroon on a comparative perspective. In this regard, this inquiry will examine *inter alia*, the historical evolution of trade unions in both countries, the legal framework regulating union rights and activities in both countries as well as the enforcement mechanisms. This study will also look at the extent to which the various national legal frameworks comply with the relevant international standards. The choice of this topic was necessitated by several factors some of which are discussed in the problem statement.

¹ Piet, K 2006, "Assessing the Role of Autonomous Teachers' Trade Unions in Anglophone Cameroon, 1959-1972", *Journal of African History*, vol. 47: p 415.

² This appears to be the case of trade unions in South Africa and Cameroon respectively.

1.2 PROBLEM STATEMENT AND SUBSTANTIATION

Just as the protection and regulation of labour is vital for production, growth, livelihood, social justice, peace, progress and development, so too are trade union rights. The demise of the apartheid order in South Africa heralded the dawn of a new democratic dispensation centred on the concept of constitutional supremacy³. Under this dispensation, trade unions have enjoyed considerable trade union rights subject to few restrictions such as the limitation clause⁴. They make headline news on a daily basis⁵ and seem to have a voice on all aspects of national life including law making. On the contrary, trade unions in Cameroon, a decentralized unitary West-Central African democracy⁶ with a bijural legal system⁷ are less proactive despite the constitutional and statutory guarantees of trade union rights⁸. Their voices are hardly but spontaneously heard. The present researcher is bewildered by these differences and seeks to investigate the impact of labour legislation on the role of trade unions in both countries. However, since the law does not operate in vacuum, other external factors which may affect the role of trade unions will be considered. The present study therefore seeks to address questions relating to the history of trade unions in these countries and how this affects the role of trade unions. This researcher will further examine the laws regulating the activities of trade unions in these countries, their application and determine whether they are in conformity with the international law obligations of these countries. Shortcomings and other challenges will be identified and suggestions proffered. The overall intention is to

³ Section 2 of the Constitution of South Africa, Act 108 of 1996.

⁴ Section 36 of Act 108 of 1996 *supra*.

⁵ See for example 1. The Sowetan Friday June 8 2007: "Cosatu threatens to bring South Africa to its knees by Wednesday in solidarity strike action" indicates that South Africans took extra measures such as church prayers to end a month's strike action. 2. the Sowetan Wednesday 23 July 2008: "Strike Brings Joburg to a Halt: No buses today as drivers join Cosatu protest" by Lukotjolo, Getrude Makhafola and Busisiwe Mokwena. 3. Business Day, Friday, 1 August 2008: "Charter talks hit snag as Cosatu alleges banks' boycott" by Renee Bonochris.

⁶ Article 1(1) Constitution of the Republic of Cameroon Adopted on 18 January 1996, amendment to the Constitution of 2 June 1972.

⁷ Cameroon has a Common Law and Civil Law system owing to its colonial past. However, certain aspects of the law have been harmonised such as criminal law and criminal procedure.

⁸ Footnote one *supra*, especially the preamble and sections 3, 4, 5 and 22 of the Labour Code of Cameroon (Law No 92/007 of 14 August 1992).

determine the extent to which labour legislation impacts on the role of trade unions in both countries.

The above issues deserve much attention because of their sensitive and topical nature. In the proceeding paragraphs this researcher will isolate the specific problematic issues and discuss them seriatim.

1.2.1. A major problem that has confronted governments, capital and labour as far back as the Industrial Revolution relates to the role of trade unions. What is the importance of trade unions? Are trade unions really necessary? What role must trade unions play in any given political economy and particularly within the context of our current challenges? What challenges are faced by trade unions in their attempts to achieve their goals and objectives? These and other related questions are very important particularly for the government, capital, trade unions and the society at large. For government, it requires a lot of intricate balancing since the issues concern have a direct bearing on economic and sustainable development. This is particularly true of developing countries, which are facing the daunting task of attracting foreign investors and Multi-National Corporations, which sway easily to countries with a docile labour force with the intention of maximizing profits. These Multi-National Corporations and foreign investors will surely be dissuaded from investing in countries with very active trade unions that are over demanding. On the other hand, trade unionists have to strike an uneasy bargain with employers (including the government which in most developing countries is the biggest employer⁹) for an adequate wage, taking cognizance of their level of productivity and the profit margin of the investors. At times, their role is not *stricto sensu* limited to collective bargaining as they frequently advocate for social justice within the political economy. The quest for social justice gives unions a voice on all issues of national life affecting them as workers and as citizens. They contend that if those around them and their holistic conditions are

⁹ In Cameroon, the government is the biggest employer followed by the Cameroon Development Corporation (CDC).

not well catered for, their productive capacity will be limited. From the foregoing, what is noticeable is that striking a balance can be very difficult and challenging as a continuous friction is bound to occur amongst the divergent interests. The dynamic intricacies of these issues raises serious challenges to trade unions as evidenced by COSATU's assertion that: "More studies must be conducted to understand the developments in the region in particular and to understand the role of the trade union movement" in the current context.¹⁰

It is hoped that in the course of our study this researcher will revisit all the issues raised, paying particular attention to the situation in South Africa and Cameroon, appraise the arguments that have been advanced based on evidence, state our views and proffer recommendations for reform.

1.2.2. Equally important, topical and problematic are questions relating to compliance with the right to freedom of association and of particular importance within this broad right is the process of trade union registration as the former is most often used as a cloak or expressed as a blanket right. The importance of this right is partly because of its human rights orientation as well as its political nature and its restriction prevents trade unions from operating effectively. Governments treat issues relating to freedom of association with sensitivity partly because compliance with this right indicates the determination of the governments to practice and implement democracy and good governance. This right is closely related to the questions raised in the first problem above because they can determine the extent to which trade unions can successfully fulfil their basic functions. Non-compliance with these rights restricts the ability of unions to function properly. The present researcher intends establishing the presence or absence of this right as well as its enforcement in both countries and how this affects union activities.

¹⁰ COSATU Political Discussion Document: "Possibilities for Fundamental Social Change (2002)", viewed on 02-04-2008, www.cosatu.org.za/doc. This document was prepared and circulated to COSATU branches for consideration and discussion before their 2002 congress.

1.2.3. The right to collective bargaining is of fundamental importance to trade unions in their relationship with the employer and employer organizations mindful of their common but conflicting goals and interests. It is the principal means through which collective disputes are resolved. The guarantee and effective application of this right determines to a great extent the power of unions and their ability to act and defend the interests of its members. Non-compliance with this right restricts the ability of unions to function properly.

1.2.4. The right to strike is the greatest weapon of trade unions since when used as a last resort, it puts pressure on employers and governments to respond to their demands. This is also treated with seriousness by governments because of the potential damage this might have not only on the economy but on the political stability of the country.

The main questions which need to be addressed are: what are the laws regulating the rights to freedom of association, collective bargaining and the right to strike in the identified countries? What is the content of these laws? Are there particular international standards that must be adhered to? If yes, what are those standards? Have the countries under our study complied with those standards? If no, why and what are the shortcomings necessitating law reform.

It is hoped that in the course of this study, the questions raised above will be addressed through a rigorous investigation and analysis of available evidence, so as to provide answers to these questions, identify shortcomings and make the necessary recommendations for law reform.

1.3. RESEARCH AIMS AND OBJECTIVES.

1.3.1. Broad Aims

Issues relating to freedom of association, collective bargaining, the right to strike and the precise role trade unions should play in society are sensitive and topical especially because of their political implications. This is given more impetus by

the very active nature of trade unions in South Africa. They make headline news on almost a daily basis¹¹ and seem to express their views on all issues of national life. This has raised mixed feelings in some quarters especially amongst those who think that trade unions are overstepping their boundaries. These sentiments were expressed over our media especially during and after the June 2007 strike led by COSATU and its affiliates that lasted for almost a month¹². The effect of that particular strike action was a spiral of strikes by other trade unions demanding similar wage increases. These issues are critical not only because of their direct bearing on our economy but also because they are sentimental and affect national lives. By virtue of this, an in-depth study is necessary for a better understanding of the role of trade unions as well as whether these roles are in conformity with the regulatory legal framework.

Moreover, this study seeks to throw more light into this sensitive area for as Swanepoel warns that "it will be naïve to ignore the reality of trade unions playing an increasingly important role in shaping the social and political future of this country"¹³. Mindful of the important role trade unions play, we must continuously study and carryout in-depth research in this area so as to put our trade unions on the right rails in order to enhance socio-economic and political development. This quest is made imperative by Cosatu's call for more studies to be conducted to understand the developments in the region in particular and to understand the role of the trade union movement" in the wake of current challenges¹⁴.

This study is intended to benefit trade unions and their members, policy makers, law students and law lecturers as well as members of the public who are interested in trade unionism as well as in the profound impact that trade unions exert in society by generating further debate on the sensitive issues raised herein

¹¹ See (1) "Strike escalates in South Africa" BBC News 14 June 2007, viewed at <http://news.bbc.co.uk/2/hi/africa/6747061.stm>.

¹² See footnote 5 *supra*.

¹³ Swanepoel, J PA 1992, *Introduction to Labour Law*, 3rd edn, Lexicon, Durban, p 52.

¹⁴ COSATU Political Discussion Document: Possibilities for Fundamental Social Change (2002), viewed on 02-04-2008 at www.cosatu.org.za/doc.

and making recommendations to identified challenges. It shall further enable them appreciate the evolution of trade unionism and its role in accordance with the exigencies of time.

The aim of this study is to review the impact labour legislations have exerted on trade unions and the extent to which this has influenced their participation on labour legislative processes in South Africa and Cameroon as well as establish reasons for the sharp differences in terms of trade union activities in both countries. This will be beneficial to both countries since it seeks to analyze current trends and the role of some of the critical national actors on almost every facet of national life. Furthermore, it is hoped that at the end of this study, we will be able to explain the reasons for the somewhat 'less active' role, played by trade unions in Cameroon and attempt to suggest a more proactive approach.

1.3.2. Specific Objectives

Mindful of the above, therefore, the aims of this study are as follows:

1. To place the role of trade unions within the mainstream debate on its contribution to socio-economic and political development in the context of the current challenges;
2. To develop a framework for analysing the laws relating to the activities of trade unions as well as the magnitude of problems faced in advancing their cause;
3. To review documents which analyse the development of trade unions in Africa with particular emphasis on South Africa and Cameroon and identify the discernible shortcomings inherent in those analyses;
4. To advocate compliance with international standards so as to promote a harmonious labour relations system in both countries;
5. To draw up alternative suggestions for the consideration and implementation of the policy makers and of all concerned with trade union activities in both countries;

6. To provide a comprehensive document which can generate further debate within this area of the law; and
7. To contribute towards the general debate on the relevance of trade unions in Africa.

1.4 BASIC HYPOTHESIS

The main question to be addressed is: why are trade unions in South Africa more pro-active, apparently involved and have a voice on all issues affecting national life including law making processes while those in Cameroon are less active and only spontaneously heard? It is suggested that a considerable number of factors may account for the different levels of involvement or activities of trade unions in the Republics of South Africa and Cameroon. These reasons may include:

1. The historical backgrounds of the trade unions including their levels of involvement in the liberation struggles of both countries;
2. The different legal frameworks and labour relations systems operational in both countries¹⁵ ;
3. The extent to which both countries have complied with the international law provisions regulating trade union activities;
4. The varying political platforms in both countries; and
5. The relationship which unions enjoy or otherwise with the state in both countries.

The present study, therefore, intends to establish the existence of these factors, analyze them in the context of a comparative study, draw lessons from the comparative study and provide alternatives for the future development of the role and impact of labour legislation on trade unions and good labour relations practices in the two countries under the present study.

¹⁵ Finnemore, M et al 2000, *Contemporary Labour Relations*, Butterworth, Durban, pp 7-14. Also see pp 4-18, Finnemore, M et al 2002, *Contemporary Labour Relations*, 2nd ed Butterworth, Durban.

1.5. RESEARCH METHODOLOGY

1.5.1. General Method of Investigation

There exist two main methods of research. These are the qualitative and the quantitative method of analysis. Qualitative research has been broadly defined, as any kind of research that produces findings not arrived at by means of statistical procedures or other means of quantification and the main components or types of this method includes: case study, grounded theory, phenomenology, enography and historical analysis¹⁶. On the other hand, quantitative research simply refers to research that involves analysis of numerical data.¹⁷ It is worthy of note that the strengths and weaknesses of qualitative and quantitative research are a perennial, hot debate, especially in the social sciences¹⁸. We shall not revisit this debate since this is not the most appropriate avenue save to indicate that according to Wolcott H.R qualitative analysis has two main advantages:

Firstly, it produces more in-depth, comprehensive information; and Secondly, it uses subjective information and participant observation to describe the context, or natural setting, or of variables under consideration, as well as the interaction of the various variables in the context. It seeks a wide understanding of the entire situation.¹⁹ Despite these advantages, Wolcott is quick to point out three main disadvantages of qualitative research methods. He argues that such research is subjective in nature and leads to difficulties in establishing the reliability and validity of the approaches and information. Furthermore, it is very difficult to prevent or detect researcher-induced bias. Finally, he contends that, the scope of such research is limited due to the in-depth, comprehensive data gathering approaches required. Despite these drawbacks, the qualitative method of research is the most appropriate for our topic under investigation. It

¹⁶ Neil, J 2006, "Analysis of Professional Literature: Qualitative Research I", viewed on 09-08-2008, <http://wilderdom.com/OECourses/PROFLIT/Class6Qualitative1.htm>.

¹⁷ Neil, J 2007, "Qualitative Versus Quantitative Research: Key Points in a Classic Debate", viewed on 09-08-2008, <http://wilderdom.com/research/QualitativeVersusQuantitativeResearch>.

¹⁸ *Ibid.*

¹⁹ Wolcott, HR 1990, "Qualitative Inquiry in Education: The Continuing Debate". www.okstate.edu/ag/agedcm4h/academic/aged5980a/5980/newpage21.htm.

is also worthy of note that although the quantitative method of research has its advantages and disadvantages²⁰, it shall not be applied in our study.

This work is entirely dependent on a qualitative method of data collection as opposed to the quantitative method. Mindful of this, extensive use shall be made of the library. The researcher will make use of the inter campus library services which will enable access to primary and secondary sources of the law. Primary sources include statutes and decisions of various courts of law (precedents). Secondary sources include views of learned scholars as expressed in textbooks and journals.

In this age of information technology, we cannot neglect the internet, which is the most modern and most efficient research tool. Through it, we shall extensively gather information on the trade unions in Cameroon and South Africa. This is vital to this research since the present researcher due to time and financial constraints cannot afford to travel to all the trade union headquarters for updated information on the subject. Furthermore, this tool will enable me to access works of foreign writers and philosophers alike with ease.

1.5.2. Literature Review

In any study of this nature, an elaborate literature review is imperative since it situates the study in context by providing a point of departure and identifying the lacuna to be filled. There exist considerable debate as to the role and impact of trade unions. This debate has been ongoing since the development of trade unions after the Industrial Revolution. Changing economic patterns have greatly influenced freedom of association in the field of industrial relations. Mboweni indicates that in the past, there were two competing, diametrically opposed

²⁰ Matveev, AV 2002, "Theory of Communication and Applied Communication", *Institute of Management, Business and Law Publishing*, vol. 168 no.1 pp 59-67.

positions on the relation between labour and capital²¹. The more dominant economic view portrayed trade unions as a distortion in the labour market.²² According to this view, trade union action drove up the price of labour and resulted in less employment than socially and economically optimal. Free Market Economists of the 18th and 19th century such as Adam Smith, Mill, Ricardo and Jeremy Bentham greatly criticized trade unionism since it was not easily reconciled with the individualistic view of society. They emphasized on individuals rather than groups. They argue further that, activities of trade unions violated basic Common Law principles of freedom of contract and prevent the free operation of the market forces of demand and supply inherent in a free economy. This, they contend inhibits economic growth. Some present day economists like F.A.Hayek, W.H.Hutt and Patrick Minford²³, argue that trade unions in practice prevent the exercise of free association, abuse their powers and become more intolerant. They contend that for the interest of individual liberty and economic growth, there must be legal intervention. They argue further that without legal intervention, unionism will stifle entrepreneurial investment, prevent the exploitation of productive assets and increase levels of unemployment.²⁴

On the other hand, prominent philosophers and social reformers have strongly argued in favour of trade unions. Karl Marx advanced what has been referred to as the radical approach.²⁵ His approach was based on his views on the ills of private ownership of the means of production and the position of the worker within the capitalist system. He argues that structures established within the capitalist system cannot solve these problems but rather perpetuate them. He

²¹ Mboweni, T 1992, "The Role of the Trade Union Movement in the Future South Africa", *South African Labour Bulletin*, vol. 16 no.8, p 24-25.

²² *Ibid.* Also see Finnemore and Vans Ransbourg *supra* p 04.

²³ Von Prondzynski, 1987, *Freedom of Association and Industrial Relations*, Manswell, London, pp3-4.

²⁴ *Ibid.*

²⁵ Bendix, S 1992, *Industrial Relations in South Africa*, 2nd edn, Juta & Co, Cape Town, pp29-30. See also Finnemore, M and Vans Ransburg, R 2000, *Contemporary Labour Relations*. Revised 1st edn, Butterworths, Durban p4.

contends that through trade unionism, workers can be conscientised to provide a continuous challenge to employers through collective bargaining. Karl Marx however went further to challenge the workers to organize politically and overthrow the capitalist system and establish an egalitarian society where workers will control the factors of production.

The Webbs and the Commons also criticized the Free Market Economists definition of labour as a mere commodity. They agreed with Marx on the need to improve the living conditions and uplifting the working class. But unlike Marx, they believed this could take place through a process of evolution rather than revolution. They regarded unions as an important vehicle for improving the wages of workers through collective bargaining and called for legislation protecting workers' right to join and form trade unions²⁶.

Mboweni equally dwells on the arguments of Market or Conventional Economists and Radicals on the role of trade unions in his article²⁷. He however carries this debate further by resolving that both approaches lack intellectual currency and therefore points to the conflictual and cooperative relationship between labour and capital in the market system in the production and distribution of economic surpluses²⁸. Amidst their conflicts, capital and labour will benefit to the maximum if they cooperate. He raises the question as to whether the labour movement will act responsibly if given greater power and influence. He debunks the view of cynical business people who think that under such circumstances, unions will go on a wage spree and destroy what is left of the South African economy. He argues further that in order to prevent the post colonial temptation to co-opt or crush the trade union movement, methods and institutions should be developed

²⁶ Bendix, S 1992, pp 31-32.

²⁷ Mboweni, T 1992, "The Role of the Trade Union Movement in the Future South Africa", *South African Labour Bulletin*. Vol. 16 no.8, pp24-29.

²⁸ Mboweni, T 1992, "The Role of the Trade Union Movement in the Future South Africa", *South African Labour Bulletin*. Vol. 16 no.8, at p 25.

which seek to increase mutual cooperation and join programs whilst ensuring the independence of trade unions and other organs of the civil society.²⁹

Hepple, called for a more pragmatic approach within the South African Democracy. He best addressed the justification, role and impact of trade unions in South Africa in this paragraph:

Trade unions cannot be looked upon merely as organizations to defend their members against capitalist exploitation. In South Africa they must be seen as part of the movement to educate and advance all the people to a better life...Trade unions are as much part of the movement towards democracy and freedom as parliament institutions are, and the still older institutions of self government. Organized labour has been the main source of the power, which fostered the development of free citizenship and became the mainstay of a democratic government. Racial fears may make many white trade union leaders afraid to support that view. Yet it is the true answer to the future of democracy in South Africa...Workers must not allow themselves to be duped by cunning appeals to racial prejudice and the cries of "communism". They should stand together and help to create trade union unity. If they fail to do that they would surrender themselves to slavery.³⁰

The views expressed above are shared in *S.A Chemical Workers Union & Others v Control Chemicals*³¹, where the judge stressed the importance of trade unions in labour relations. He asserted that

The idea of paternalism -that the employer is the best judge to decide on what is good or beneficial for his workers, or that he is the best person to protect them against their individual or collective folly-can certainly be regarded as antediluvian and therefore not acceptable for the conduct of modern industrial relations³².

The above not only underscores the topical nature of this topic but also the crucial role and impact which trade unions can exert.

Piet Konings is the most prominent writer on trade union activities in Cameroon. In one of his works he attempts to assess the role of autonomous teachers trade unions in Anglophone Cameroon during the period of 1959-72 and asserts that

²⁹ *Ibid.*

³⁰ Quoted by Hepple, B 1990, "The Role of Trade Unions in a Democratic Society", *ILJ*, vol. 11, Part 4-6, p 654.

³¹ 1998 9 *ILJ* 606.

³² *Ibid.*

the “emergence, development and dissolution of these trade unions appears to have closely followed the region’s political educational reforms”.³³ He has also examined the effect the Economic Crisis of the late 1980s and early 1990s had on Cameroon’s trade unions.³⁴ He has also written on the role that was played by trade unions within the Cameroon Development Corporation in the independence struggle of Anglophone Cameroon.³⁵

The above literature is extensive on the issues we raised in our problem statement but are wanting in many respects. First, none of the writers has examined the laws relating to freedom of association, collective bargaining and the right to strike in depth in both countries. Second, none of the writers has presented a coherent account on the history of trade unions in these countries. The accounts are fragmented and cover particular areas of interest to the writers. Further more, the debates highly centre on the importance or relevance of trade unions in our societies and not on what concretely these trade unions have been able to achieve over the years. Thirdly, there has been no comparative study between these countries to explain why trade unions in Cameroon are less active as compared to the ones in South Africa. Fourthly, there has been a clear failure to assess the role these unions have played in shaping the labour laws in these countries.

In view of the above, the present study aims at filling the gap by:

1. Providing a coherent historical overview of trade unionism in both countries, state the achievements and assess their impact on labour legislation from a comparative perspective.

³³ Piet, K 2006, “Assessing the Role of Autonomous Teachers’ Trade Unions in Anglophone Cameroon, 1959-1972”, *Journal of African History*, vol. 47: pp-415-436

³⁴ Piet, k “Plantation Labour and Economic Crisis in Cameroon”, viewed on 27-09-2007, <https://openaccess.laidenuniv.nl/dspace/bitstream>.

³⁵ It is worthy of note that after the defeat of the Germans in the Second World War, Cameroon was given to Britain and France to administer as a trust territory. Both countries divided Cameroon for the purpose of administration and the English speaking section is referred to as Anglophone Cameroon while the French speaking part is referred to as francophone Cameroon.

2. Examining and analyzing the laws regulating union activities in both countries from a comparative perspective as well as determine whether these laws comply with international standards.
3. Explain why unions in South Africa are proactive while those in Cameroon are largely dormant.

1. 6. SCOPE AND LIMITATION OF THE STUDY

1.6.1. Scope

This dissertation is concerned with the impact of labour legislations on the role of trade unions in South Africa and Cameroon. This choice is motivated by the idea that the active role of trade unions in South Africa which may be a result of the effective application of the current legal framework regulating the role of trade unions may enrich the experience of Cameroon.

To achieve the aims and objectives as stated above³⁶, this dissertation will be divided into six chapters. Chapter one deals with the introductory part of this work and is aimed at identifying the problem under investigation. It defines the aims and objectives of this study. It also carries the rationale, justification and literature review, data collection and research methodology as well as the scope of the study.

The second chapter deals with the historical evolution of trade unions in the Republics of South Africa and Cameroon. This chapter will examine the extent to which trade unions in both countries were involved in their national liberations, their achievements and current challenges as well as the extent to which they have been involved in the formulation of their labour legislations.

The third chapter will analyse the national application of the laws regulating trade union activities in both countries by looking at the law as contained in statutes and how these laws have been interpreted and enforced by the relevant

³⁶ See paragraph 1.3 of this chapter.

structures including the courts. This will lay the basis for a later determination of the level of compliance with relevant international standards by both countries so as to establish the extent to which compliance or non compliance has affected the level of trade union activities in both countries.

The fourth chapter will examine the international standards regulating trade union activities and how these standards have been interpreted at the international level with a view to laying the standards against which the various national legal and policy frameworks will be measured.

The fifth chapter will constitute our comparative analysis, taking into consideration the various national historical contexts within which trade unions evolved in the countries under this study, the national application of the laws regulating trade union activities as well as the relevant international standards and their application.

The sixth chapter will carry our general findings, conclusion and recommendations.

1.6.2. Limitations

This investigation is limited in certain aspects for particular reasons. Firstly, the discussion on Cameroon cannot be limited to one trade union or trade union federation because there is none that has been consistent since independence³⁷. To add flesh to this discussion, this researcher will cover union activities throughout the country with a greater focus on Anglophone Cameroon as Koning points out that trade unionism in Francophone Cameroon, especially in the

³⁷ By consistence this researcher means that no trade union has survived without a metamorphosis since independence. Most exist for a period of time and disappear or change their names.

educational sector was fragmented.³⁸ In South Africa, this discussion will concentrate more on COSATU, the leading trade union federation, despite the existence and active role of other trade union federations. The choice of COSATU is largely because it is the largest and most active trade union movement in South Africa.

Furthermore, the above delimitation of scope has been influenced by time and financial constraints. This researcher lacks the time and financial resources needed for extensive travels, for the purposes of consulting some important sources such as national archives in both countries as well as conducting both structured and unstructured interviews to shed more light on the discussion. For the same reasons, this researcher cannot access Cameroonian case law which is neither available on the internet nor readily published in law reports. However, it is hoped that in the nearest future, further research on the issues raised herein will close these gaps.

1.7 DEFINITIONS OF COMMONLY USED TERMS.

1.7.1 Trade union

Sidney and Beatrice Webb attempted the earliest description of a trade union as “a continuous association of wage earners for the purpose of maintaining or improving their working lives”³⁹. Bendix is of the view that this definition is limited and supports Salamon’s definition of a trade union as:

any organization whose membership consists of employees, who seek to organize and represent their interest both in the work place and society and in particular seeks to regulate their employment relationship through the direct process of collective bargaining with management⁴⁰.

³⁸ Piet, K 2005, “Assessing the Power of Newly Created Teachers’ Organisations During Cameroon’s Political Liberalisation”, *JHEA/RESA* vol.3, no.2, pp 140-141.

³⁹ Bendix, S 1992, *Industrial Relations in South Africa*, 2nd edn, Juta & Co, Cape town, p 55.

⁴⁰ Bendix, S 1992, *Industrial Relations in South Africa*, 2nd edn, Juta & Co, Cape town, pp 9-55.

His view is based on three aspects or characteristics highlighted by Salamon's definition: A trade union requires organization; a union constitutes more than a sum of its parts. A union as a body has a life on its own which is larger than the sum of its constituents or individual members and becomes a force within the society; Unions establish a position of equality with the employer and engage in collective bargaining with the employer.

The s.2.3 of the South African Labour Relations Act⁴¹ defines a trade union as "an association of employees whose principal purpose is to regulate relations between employees and employers, including employers associations or organizations". The definition of a trade union by the South African Labour Relations Act⁴² provides the basic function of a trade union. This definition leaves an open window as to the functions of trade unions. Their functions are not exhaustively defined. Their primary function is to engage in collective bargaining with their members' employers and to represent their members in grievance and disciplinary matters⁴³.

For the purpose of this discussion, we can draw that a trade union must be an association of employees or employees' association. The latter refers to confederation of trade unions. Secondly, the principal purpose must be to regulate relations between employees and employers. In the English case of *Midland Cold Storage Ltd v Turner*⁴⁴, Sir John Donaldson held that for the Committee to be considered a trade union, it must prove that (a) it is an organization; (b) consist wholly or mainly of workers; (c) its principal object include the regulation of relations between workers of that description and employers.

The above definitions have two basic characteristics in terms of membership and purpose. However, Salamon's definition is preferable since it is broader in scope: it recognizes the wider role of trade unions out of the workplace. Their role is not

⁴¹ Act 66 of 1995.

⁴² *Ibid.*

⁴³ Grogan, J 2007 *Workplace Law*, 9th ed, LexisNexis: Butterworth, Durban p 275.

⁴⁴ (1972) ICR 773

limited to collective bargaining with the employer but extends to exerting pressure in socio-economic and political circumstances where the welfare of their members and society as a whole is threatened. In this regard, we prefer Salamon's approach for purposes of this study.

1.7.2 Independent Trade Union

For trade unions to effectively execute their functions, they must be independent. What constitutes an independent trade union? The British Trade Union and Labour Relation Act (TULRA) of 1992 states that an independent trade union means a trade union which is not under the domination or control of the employer or group of employers' or one or more employers' association, and it is not liable to interference of an employer or any such group or association (arising out of provision of financial or material support by any other means whatsoever) tending towards such control⁴⁵. In the case of *Squibb UK Association v Certificate Officer*⁴⁶, the court held that the association was not independent because it relied on the employer for facilities and was in a weak financial position. Lord Denning MR held that:

One has to envisage the possibility that there may be a difference of opinion in the future between the employers and staff association. It does not matter whether it is likely or not-it may be completely unlikely-but one has to envisage the possibility...But when it arises, the questions have to be asked: What is the strength of the employers? What pressures could they bring to bear against the staff association? What facilities could they withdraw?

In *Blue Circle Staff Association v Certification Officer*⁴⁷, Cumming-Bruce J. laid down guidelines to determine a trade unions' independence. He stated that the union must be financially viable so that it does not get a direct subsidy from the employer. He further suggests that if the union is very small and weak and gets a

⁴⁵ Section 5 TULRA.

⁴⁶ (1980) IRLR 341 CA.

⁴⁷ (1977) IRLR 20.

good deal of help from the employer, then the likelihood of employer interference will be high. Furthermore, the history of the union is worth considering. A union that starts as a creature of management may suffer from lack of independence. An independent trade union should be able to bargain or negotiate with a robust attitude.

For the purpose of this study, we prefer the definition or approach of Cumming-Bruce J above because he outlines five crucial characteristic or factors that must be considered: the union must be financially viable; it must not depend on the employer for whatsoever; it must have sufficient representation; it must not be a product of management; and should be able to negotiate or bargain strongly.

1.7.3 Industrial action

There are two main components of industrial action. These include strikes and lockouts. Employers mostly use lockouts to counter the employees/trade unions' strike weapon. We shall however concentrate on strike action, which is the major weapon of trade unions. Section 213 of South Africa's Labour Relations Act⁴⁸ comprehensively defines a strike as:

"... the partial or complete concerted refusal to work, or the retardation or obstruction of work by persons who are or have been employed by the same or different employers for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory".

From the above definition, the following elements of a strike action have been identified: There must be a refusal to work; the refusal to work must be concerted; the refusal to work can be partial or simply a retardation or obstruction of work; it must be carried out by employees or persons who have been

⁴⁸ *Labour Relations Act* 66 of 1995.

employed by the same or different employers; the purpose of such an action must be to resolve a dispute of mutual interest between the employer(s) and employees⁴⁹. Generally, there are procedural requirements for a protected strike action such as conciliation failing which notice of the strike action can be given to the other party.⁵⁰The definitions of the Act will be used as a suitable notion of a strike for purposes of this research.

1.8. SUMMARY

In this chapter, the foundation upon which the entire dissertation will be centered has been laid. In so doing, this Chapter outlines the aims and objectives of this study, the rationale and justification, the research methodology as well as an analysis of the available literature with the view to identifying the problem under investigation. The basic hypothesis that this study seeks to establish are clearly stated and the scope and limitations acknowledged.

⁴⁹ Du Toit, D et al 2006 *Labour Relations Law: A Comprehensive Guide*, 5th edn, LexisNexis Butterworths, Durban, pp 299-302.

⁵⁰ *Ibid.*

CHAPTER 2

RELATING TRADE UNIONS TO DEVELOPMENT OF LABOUR LEGISLATION: HISTORICAL PERSPECTIVE

2.1. INTRODUCTION

Historical perspectives are of critical importance for a study of this nature mainly because it provides an opportunity to test the validity of some of the stated hypothesis. It further enables us to discover the past and to use that past to interpret and understand the present as well as use the present to map the way forward. Aptly put by eminent writers: "wisdom sometimes looks to the past for guidance in the future"⁵¹. Mindful of the above facts, this Chapter will examine the history of trade unions in South Africa and Cameroon taking into consideration the context within which they have evolved, the impact which the various labour legislations had on trade unions and the extent to which they have influenced the development of labour legislation in both countries. This task can be challenging as many writers have acknowledged the difficulty of trying to recount the labour history of South Africa⁵² and the apparent absence of any detail research on trade unionism in Cameroon⁵³.

However it is hoped that at the end of this chapter, this researcher will outline the history of trade unions and their influence in the development of labour legislation in both countries into such periods as he deems necessary so as to give chronology to the analysis. The current researcher will also examine the similarities and differences in the history of trade unions in both countries as well

⁵¹ Rossouw, G & Carabine, J 1999, "Introduction" in *Fraud and the African Renaissance* Martyrs University Press, Uganda.

⁵² Finnemore, M 1999, *Introduction to Labour Relations in South Africa*, 7th edn, Butterworths, Durban p20. See also Karl, E K 1997, "The Future of South African Labour Law " *ILJ* vol. 18, no.4-6 p 890.

⁵³ Piet, K 2007, "Trade Unionism in Cameroon: From Crisis to Revitalisation?" in Phelan, C (ed) 2007 *Trade Union Revitalisation: Trends and Prospects in 34 Countries*, Peter Lang, Oxford p 432.

as indicate the emerging challenges. For the purpose of chronology, this chapter will be divided into four main parts, namely, the pre-colonial, colonial, post colonial and current position.

2.2. THE CASE OF SOUTH AFRICA

2.2.1. Pre-Colonial South Africa

According to historical and archaeological evidence, the earliest indigenous inhabitants of present day South Africa were the San and Khoekhoe peoples (otherwise known individually as the Bushmen and Hottentots or Khoikhoi; collectively called the Khoisan). Both were resident in the southern tip of the continent for thousands of years before the arrival of European seafarers.⁵⁴ By at least the 8th century, Bantu speakers moving southward from East and central Africa had settled in the Northern region of present-day South Africa. These Bantu-speaking groups developed their own complex community organizations⁵⁵. These societies were agrarian in nature with the Khoisan mostly involved in nomadic-pastoral farming.⁵⁶

The importance of this period is the fact that, labour like in other parts of Africa was mostly communal and regulated by African cultural values such as ubuntu. There was no formal legislation regulating labour. Furthermore, although the regulation and usage of communal labour relied much on group solidarity and cohesion, there were no trade unions.

2.2.2. From the Colonial Era to the Pre-Democratic Dispensation

Prior to the discovery of gold and diamonds in South Africa, the society was mainly involved in trade (barter in essence) and agriculture. There was actually no industrial activity although machinery, in form of printing presses, was used by news papers established at that time. The Master and Servant Legislation of

⁵⁴ "A Short History of South Africa", viewed on March 29, 2008, <http://www.southafrica.info>.

⁵⁵ "South African: History", viewed on March 29, 2008, <http://www.infoplease.com>.

⁵⁶ *Ibid.*

1841 governed existing employment relationships. There were no collective labour relations and Bendix argues that no concerted attempts were made at organization by workers.⁵⁷ The discovery of precious stones in South Africa in the 1870s set in an unprecedented wave of industrialization and development. These discoveries spurred great economic development in South Africa during 1870–1900 as well as an influx of Whites who were mostly craftsmen.⁵⁸ They soon organized their brothers-in-craft into local branches of the unions to which they had belonged in their home countries and to which many of them had in the meantime continued to remit contributions.⁵⁹ Ringrose argues that the South African trade union movement was born from sentiment rather than for a need for joint bargaining.⁶⁰ In this regard, the Amalgamated Society of Joiners and Carpenters acquired branches in Cape Town in 1881 and in Durban in 1882.

The importance about this period is the fact that it indicates that the unskilled position of the black employee was already entrenched as they were mostly employed as servants and labourers on farms and in the towns while Whites and Asians performed skilled work.⁶¹

Several factors initially retarded the growth of trade unions in South Africa including the lack of industrial tradition by whites of Dutch origin and the lack of interest by non-whites in trade union movements at this time. However, as time went on trade unions became more organized and diversified, covering various sectors like craft, engineering and mining. However, these unions developed along racial lines as the skilled white worker tried to protect their elite status.⁶² They showed an increased interest in politics, as they needed the help of politicians to protect their interest via legislation and also frequently resorted to

⁵⁷ Bendix, S 1992, *supra* ip at 324.

⁵⁸ "South Africa: History" *supra*.

⁵⁹ Ringrose, HG 1983, *The Law and Practice of Employment* 2nd edn, Juta & Co, Cape Town p 5.

⁶⁰ *Ibid*.

⁶¹ Bendix, S 1992, *Industrial Relations in South Africa*, 2nd edn, Juta & co Cape Town at p 324.

⁶² Finnemore, M 1999 *Introduction to Labour Relations in South Africa* 7th edn, Butterworths Durban p 23.

strike actions. However, no concessions were extracted from management by these strikes since mine owners had not recognized trade unions.

South Africa was also affected adversely by the economic depression which followed the First World War and there was rising discontent amongst the working class. In January 1922, South Africa witnessed its first major strike as miners, followed by engineering workers and power station personnel went on strike. The situation rapidly deteriorated and the government of Smuts acted high handedly and after 70 days, squashed the "rebellion".

As a direct response to the 1922 Rand Rebellion, the 1924 Industrial Conciliation Act⁶³ of South Africa was enacted. It was the first comprehensive piece of labour legislation that was enacted in the Republic of South Africa. It introduced a dual labour relations system in South Africa. Under this Act, white trade unions were granted statutory recognition with a limited right to strike. Pass bearing blacks were omitted from the definition of "employee". According to Ringrose⁶⁴, the introduction of the Act made 1924 notable in industrial relations sphere because by virtue of its provisions, trade unions in South Africa acquired a status equivalent to that which British trade unions had attained in 1871: that is, the acquisition of legal personality and that the introduction of comprehensive arrangements for dispute resolution by voluntary or compulsory conciliation indicated a recognition by the South African government that industrial disputes could not be eliminated by merely declaring strikes to be illegal.

The ascendancy of the Nationalists to power in the late 1940s and their firm commitment to apartheid policies had an impact on the trade union movement in South Africa. Soon after coming to power, the consideration given the South African Trade and Labour Council (TLC) to the establishment of parallel black unions caused small craft unions to split from South African Federation of Trade Unions (SAFTU). The Suppression of Communism Act of 1950 also deprived

⁶³ Industrial Conciliation Act 11 of 1924.

⁶⁴ Ringrose, HG 1983, *supra* at p7.

many militant unions within the TLC of their officials and leaders. In 1954, the TLC, SAFTU and the Amalgamated Engineering Union established a joint committee known as the Trade Union Unity Committee to consolidate the gains of the trade union movement. This eventually led to the establishment of the South African Trade Union Congress (SATUC), which changed its name in 1962 to the Trade Union Council of South Africa (TUSCA).

It is worthy of note that despite the collapse of the Industrial and Commercial Workers Union (ICU) of Clement Kadlie in the 1930s due several reasons such as internal divisions and poor leadership⁶⁵ and the exclusion of black trade unions from the statutory system, there was a steady growth of independent black trade unions from the late 1920s onwards. Several trade union federations were established including the Committee of African Trade Unions (CCATU) and the Council of Non European Trade Unions (CNETU) which dominated the black trade union movement for almost a decade, organized several strike actions and gained a lot of concessions from the employers. In 1955, CNETU joined other trade unions to form the South African Congress of Trade Unions (SACTU), constituting the first formal alliance between black trade unions and those representing other races. SACTU aligned to the African National Congress (ANC) and espoused a militant factory floor approach, mobilizing its affiliates to campaign against low wages and lack of union recognition and engaged in political activism. These trends were geared towards not only black emancipation but also towards the development of non racial labour legislation for South Africa.

By 1956, it became apparent that the 1924 Act was inadequate to cater for the changes that had occurred in the South African labour relations system. In this regard, the 1956 Industrial Conciliation Act⁶⁶ was enacted. The most important features of this Act were the exclusion of Bantus from its ambit, the prohibition to

⁶⁵ Finne more, M & Van Ransburg, R 2000, *Contemporary Labour Relations*, LexisNexis Butterworths, Durban p30.

⁶⁶ .The South African Industrial Conciliation Act No.28 of 1956. This Act is also referred to as the Labour Relations Act of 1956.

register mixed unions, the introduction of statutory collective bargaining and the introduction of a system of job reservation.⁶⁷ In 1960, the apartheid government outlawed the ANC and the Pan African Congress (PAC). SACTU eventually collapsed since many of its leaders were imprisoned for political activism, while many others fled to exile. This led to the lull of trade unionism for the next decade. From 1960 to 1970, there was a shift of the South African labour scene. It marked a departure from a time of heightened action by unions across the racial and political spectrum in the 1930s and 1940s to a period of relative albeit imposed peace. It further marked the disappearance of the black trade union movement and a greater polarization of workers of different races.⁶⁸

The relative peace that was experienced by the South African labour relations from the 1950s was short-lived because of a number of reasons. Firstly, the intensified apartheid policies of the Nationalist government made the blacks in general and black workers in particular more conscientised of their rights. Secondly, the growing economy continued to absorb more black workers into the industries thereby entrenching their positions. As whites moved up in occupational hierarchy, blacks came in to take their places. With this increasing economic power, it became difficult to maintain the labour relationships as structured by the Labour Relations Act of 1956⁶⁹ and finally, there was a revival of black employee's interest in trade unions.⁷⁰ The 1973 strikes that erupted in Durban and spread to other parts of the country underlined the shortcomings of the existing labour legislation for blacks. For the first time, the real power of black workers was demonstrated and it was shown that even without the backing of any trade unions, the workers were able to bring pressure to bear on labour issues. It was clear that a dangerous vacuum existed because of the absence of a formal structure and procedure for the resolution of labour disputes. The government reacted swiftly to these strike waves. In 1973, it amended the Black

⁶⁷ Bendix, S 1992, *supra* at p 335.

⁶⁸ Bendix, S 1992, *supra* at p 337.

⁶⁹ Act 28 of 1956.

⁷⁰ *Ibid.*

Labour Relations Regulation Act⁷¹ which providing for the creation of liaison committees at the plant level as an alternative means of solving disputes. This replaced the already existent Workers' Committee. The main aim of this Act was to improve communication between the employers and the Black employees. It is worthy of note that although these strikes were not led by trade unions, the solidarity of workers was demonstrated which had a direct impact on legislative enactment.

Despite these changes, the government realized that the legislative changes were inadequate and appointed the Wiehahn Commission to investigate the entire labour scenario and make recommendations for law reform⁷². The Government responded to the Commission's Report and Recommendations by enacting the 1979 Amendment⁷³ to the Industrial Conciliation Act of 1956. The 1979 Act included black employees in the definition of an "employee" and black trade unions could be registered. The registration of mixed unions was forbidden with a few exceptions and registration of unions was at the discretion of the Registrar. Due to mounting internal and international pressure, the government in 1980 passed a new amendment to the Industrial Conciliation Act of 1979.⁷⁴ By virtue of this amendment, full union rights were extended to all workers in South Africa; full autonomy was granted to trade unions and racial restrictions removed and the Bantu Labour Relations Regulations were repealed. These developments are clear indications of the pressure and influence exerted by trade unions on the labour legislative process.

In November 1985 Cosatu, South Africa's biggest and most powerful trade union federation ⁷⁵ was launched with the amalgamation of 33 trade unions of various sectors of the economy. It was the end product of the trade union unity talks that

⁷¹ Black Labour Relations Regulation Act 48 of 1953.

⁷² See Wiehahn, NE 1982, *The Complete Wiehahn Report: Parts 1-6*, Lex Patria Publishers, Johannesburg.

⁷³ Industrial Conciliation Amendment Act 94 of 1979.

⁷⁴ Industrial Conciliation Amendment Act 95 of 1980.

⁷⁵ Yunus, C 1987, "Cosatu: Towards Disciplined Alliances". *Journal: Review of African Political Economy*, vol. 14, no. 40, pp 87-95.

took place from 1981 to 1985, a period of “four solid years of painstaking deliberations”⁷⁶ marked by mistrust and conflict. Differences of interest, of political outlook, of organisational methods and of personality had to be overcome before Cosatu could be born.⁷⁷ At its launch, Cosatu identified itself with the socio-economic and political struggles of South Africans and indicated firmly that these problems could not be separated from the struggles of workers on the shop floor. It indicated its readiness to enter into political alliance with progressive forces that took workers interests into consideration.⁷⁸ Cosatu adopted a number of resolutions amongst which were demands for the right to strike and picket as well as a national minimum living wage; A call for international disinvestment; A call for the lifting of the state of emergency, withdrawal of troops from the townships and release of political prisoners; The unbanning of all restricted individuals and organizations; The mounting of international pressure on the Apartheid government including disinvestments in defiance of the law and; The condemnation of exploitation and discrimination of women in terms of employment. The very conception of Cosatu and its adoption of a radical stance as well as its close ties with the ANC were ill received by government and other organisations as Baskin points out that the birth of Cosatu was accompanied by blood and pain.⁷⁹

The year 1985 saw the highest number of strikes in ten years as workers gained confidence in their power to use strike action to influence outcomes.⁸⁰ In response to the growing unrest in the country, the government imposed a state of emergency in 1985 and 1986. Although unionists suffered repression under the state of emergencies, it has been argued that these state of emergencies elevated the importance of the union movement in the political struggle as unions and shop stewards became the centre of political activity following the restrictions

⁷⁶ Baskin, J 1991, *Striking Back: A History of COSATU*, Verso, London, p 34.

⁷⁷ “Years of Forging Unity’ at: [//www.cosatu.org.za/shop/](http://www.cosatu.org.za/shop/), viewed on 15-04-2008.

⁷⁸ Baskin, J 1991, *supra* at p 54.

⁷⁹ Baskin, J 1991, *supra* at pp 34.

⁸⁰ Baskin, J 1991, *supra* at p 77.

imposed on community and other organizations.⁸¹ Despite the violent repression including the bombing of Cosatu House on May 1987, agitations continued and from the 9th to the 30th August 1987, the largest strike in South African history up to this period took place. The strike was ruthlessly suppressed and some of the strike actions by Cosatu affiliates received support from political organizations such as *Umkhonto we sizwe*, ANC's armed wing⁸².

In 1987, a Bill was published proposing far reaching amendments to the LRA. This was followed by a declaration of a state of emergency in 1988 that placed serious restrictions on the political activities of Cosatu. Cosatu organized a massive anti-LRA Campaign and from 6 to 8 June 1988, the biggest stay away campaign in the history of South Africa took place. The Proposed Bill restricted trade union rights and reversed the gains that had been achieved in the last decade.⁸³ Following fierce resistance from SACTU and Cosatu, an agreement was reached between the above two unions and the South African Employer's Consultative Committee on Labour (SACCOLA) to return to the dispensation before the Amendment. These parties agreed that future changes to labour legislation would be negotiated with all major actors. D Du Toit et al assert that the trade unions had breached the realm of policy formulation outside the parliamentary process and in doing so, almost inadvertently started a trend towards tripartism⁸⁴.

The willingness of Cosatu to work with progressive forces towards the political liberation of South Africa as indicated during its launch was officially formalized on 09 May 1990, when the ANC-SACP and Cosatu alliance was formally constituted based on agreed principles which recognized the independence of each organization in developing its own positions, the task of the alliance to formulate a joint programme on agreed issues; the strategic nature of the alliance with a central objective of dismantling apartheid and building a non-racial,

⁸¹ Du Toit, D et al 2003 *supra* p 13

⁸² Read Baskin, J 1991, *supra*.

⁸³ DuToit, D et al 2003 *supra* p 13.

⁸⁴ Du Toit, D et al 2003 *supra* at p 15.

democratic and unitary South Africa; and its foundation on democratic principles and practices with consultation and consensus as the basis of decision making. The ANC was also recognized as the overall leader of the national democratic movement. It has been pointed that the strength and unity of these partners can be explained by the fact that its members most often shared the same leadership, fought together, were imprisoned together, survived together and died together for a common vision.⁸⁵

The significance of this period to this study is the fact that it created a system of labour legislation that was based on race and excluded workers of certain sectors such as those in the domestic and tertiary education sectors, undermined principles of workplace democracy, created an adversarial labour relations system, promoted decentralized bargaining at the shop floor level and gave birth to a fragmented system of industrial councils. It was a period which laid the seeds for its eventual destruction. It is also important to note that during this period, both organised and unorganised labour significantly influenced the development of labour legislation as evidenced by the circumstances which led to appointment of the Wiehahn Commission as well as the 1979⁸⁶ and 1980 amendments to the 1956 Labour Relations Act.⁸⁷

2.2.3. Transition to Constitutional Democracy.

Following mounting international and domestic pressure, apartheid was dismantled in the early 1990s. Nelson Mandela was released from prison and the ban on the ANC and other liberation movements was lifted. Protracted and often tense negotiations on the political front eventually led to agreement on an Interim Constitution.⁸⁸ Chapter 3 referred to as the “Bill of Rights” entrenched certain fundamental rights amongst which were the “Labour Relations Rights” in section 27. This section guaranteed the right to fair labour practices, to form and join

⁸⁵ Baskin, J 1991 *supra* at p 430.

⁸⁶ Act 94 of 1979.

⁸⁷ Act 28 of 1956.

⁸⁸ Act 200 of 1993.

trade unions, to bargain collectively and strike as well as the employer's recourse to lockout. In view of this, one of the compelling reasons for reforming the LRA was the need to bring it in line with the Interim Constitution. The Interim Constitution also paved the way for the first democratic elections of 1994 in the country. The ANC joined forces with COSATU under the banner and pre-election commitment to implement the Reconstruction and Development Programme (RDP), COSATU's brainchild.⁸⁹ The outcome of that election was an ANC victory which added impetus to the new democratic dispensation in South Africa founded on fundamental rights and freedoms.⁹⁰ However, these watershed events resulting in what has been referred to as a miracle transition to democracy were not immediate.⁹¹ The various agreements arose from negotiations that were in many instances forged against a background of serious strikes, stayaways, community conflicts and violence. All parties utilized power strategies and tactics to strengthen their positions at the bargaining tables.⁹²

2.2.4. Current Position

The Interim Constitution was adopted in 1996 after few modifications and thereafter referred to as the Constitution.⁹³ Section 27 of the Interim Constitution was replaced by section 23 of the Constitution and contains the fundamental labour rights provided for in the Interim Constitution except the employer's right of recourse to a lockout which was dropped from the Constitution due to the strong protest of Cosatu. However, it is worth noting that the right to a lockout is provided for in the LRA. These constitutional obligations have been given legal effect by many pieces of labour legislation including the Labour Relations Act⁹⁴,

⁸⁹ Du Toit, D et al 2003 *supra* at p 17. You can also read DuToit, D et al 2006, *Labour Relations Law : A Comprehensive Guide*, 5th edn, LexisNexis Butterworths, Durban, pp 16-17.

⁹⁰ See Chapter 3 of the Interim Constitution and Chapter 2 of the 1996 Constitution Act 108, which contain a Bill of Rights.

⁹¹ Finnemore, M & Vans Ransburg, R 2000, *supra* p at 42.

⁹² *Ibid.*

⁹³ Act 108 of 1996.

⁹⁴ Act 66 of 1995.

the Basic Conditions of Employment Act⁹⁵, the Employment Equity Act⁹⁶ and the Skills Development Act.⁹⁷

Unions have achieved much under the new dispensation as they have consolidated their organizational gains and won many concessions from employers and the state such as:

The creation of the National Economic Development and Labour Council (NEDLAC). This was a consolidation of the tripartite process that was initiated by business and labour. The National Economic Forum (NEF) and the National Manpower Commission (NMC) were merged and transformed into NEDLAC in 1995.⁹⁸ NEDLAC negotiates all legislation relating to labour, economic and development policy before going to Parliament and Government. Organized labour and organized business are all equally represented in this body. The first task of NEDLAC was the negotiation of the Labour Relations Bill which was eventually enacted as the Labour Relations Act⁹⁹; and

The enactment of the LRA in 1995 extended labour rights to all employees and employers in South Africa with a limited exclusion.¹⁰⁰ It grants the right to freedom of association¹⁰¹, to collective bargaining¹⁰² and to strike to trade unions¹⁰³, as well as ample protection to workers against unfair dismissals¹⁰⁴. It further created mechanisms for workplace democracy such as workplace forums, and the Commission for Conciliation Mediation and Arbitration (CCMA) for the speedy resolution of disputes. At the instance of trade unions, the Act favours centralized collective bargaining although it does not include a duty to bargain.

⁹⁵ Act 75 of 1997.

⁹⁶ Act 55 of 1998.

⁹⁷ Act 97 of 1998.

⁹⁸ Act 35 of 1994.

⁹⁹ Act 66 of 1995.

¹⁰⁰ See section 2 of the LRA.

¹⁰¹ Section 4 of the LRA, Act 66 of 1995.

¹⁰² See section 1(a), (c) and (d) of the LRA, Act 66 of 1995.

¹⁰³ See sections 64 and 65 of the LRA, Act 66 of 1995.

¹⁰⁴ See section 185 of the LRA, Act 66 of 1995.

The significance of the current dispensation can be better understood in the context of the Preamble to the South African Constitution which unequivocally speaks of the country's determination to move away from its obnoxious past as well as heal the wounds and divisions created by it. It symbolizes a great leap forward in which trade unions played a significant role in negotiating and passing labour laws, ensuring that their interests are taken into consideration.

2.3. THE CASE OF CAMEROON

2.3.1. Pre-colonial Period

Historical evidence suggests that indigenous people settled in Cameroon as early as the 5th century.¹⁰⁵ With the intrusion of migrants from North Africa and other parts of the world, the people shifted focus from a predominantly agrarian society to one based on trade and agriculture and this trend continued even after the territory was annexed by the Germans in 1884.¹⁰⁶

The importance of this period lies in the fact that, it indicates the use of labour in agricultural and commercial settings without any formal regulations. Furthermore, although the traditional regulation and usage of communal labour relied much on group solidarity and cohesion, there were no trade unions.

2.3.2. The Colonial Period: From 1884-1960

Cameroon was annexed by the Germans in 1884.¹⁰⁷ It remained a German territory until after the First World War when it was handed to and shared between Britain and France.¹⁰⁸ It is important to note that up to this period, the economy of Cameroon was still based on agriculture as the Germans had embarked on large agricultural plantations at the fertile foot of Mount Cameroon and evidence suggest there was no trade union in the territory at this period.

¹⁰⁵ "The History of Cameroon" from Encycloedia Britannica, viewed on 08-08-2008, <http://www.sfu.ca/archaeology/museum/ndi/History.html>.

¹⁰⁶ *Ibid.*

¹⁰⁷ The territory was called Kamerun throughout German rule.

¹⁰⁸ 1914-1918.

Following the establishment of the League of Nations, Cameroon was entrusted to France and Britain as Mandated Territories.¹⁰⁹ The larger part of the country was eventually colonised by France and referred to as East Cameroun¹¹⁰ while the smaller portion was colonised and ruled by Britain through Nigeria and referred to as West Cameroon¹¹¹.

The above territories later became mandated territories under the United Nations (UN) and administered respectively by France and Britain until 1961 when they were reunited as the Federal Republic after a UN conducted plebiscite. It is suggested that due to the French colonial policy of assimilation and the slow pace of industrialisation, trade unions did not develop early in East Cameroun and it has been indicated that the development of trade unions in this region of the country was extremely fragmented.¹¹² On the contrary, in West Cameroon, due to the British colonial policy of Indirect Rule, free but responsible trade unionism¹¹³ and its administration as part of Nigeria, trade union activities in Nigeria coupled with the enactment of the 1938 legislation which allowed for the establishment of legally recognized trade unions in West Cameroon gave impetus to the formation of legal trade unions.¹¹⁴ Teachers in West Cameroon were members of the Nigerian Union of Teachers (NUT) that was established in 1933. West Cameroon teachers who left the NUT later established the West Cameroon Union of Teachers (WCUT) in 1959.¹¹⁵

¹⁰⁹ See http://en.wikipedia.org/wiki/League_of_Nations_mandate.

¹¹⁰ This section of the country is also referred to as Francophone Cameroun.

¹¹¹ This section of the country is also referred to as Anglophone Cameroon.

¹¹² Piet, K 2005, "Assessing the Power of Newly Created Teachers' Organisations during Cameroon's Political Liberalization", *JHEA/RESA*, vol.3. no.2, p 140.

¹¹³ Piet, K 1993, *Labour Resistance in Cameroon*, James Currey, London p 107. Free but responsible trade unionism in this context refers to the fact that the labour laws provided for the free operation of trade unions while union leaders were trained to resolve labour disputes through dialogue with management.

¹¹⁴ Piet, K 1993, *supra*, p 109.

¹¹⁵ Piet, K 2006, "Assessing the Role of Autonomous Teachers Trade Unions in Anglophone Cameroon 1959-1972", *Journal of African History*, vol. 47, no. 3, Cambridge University Press.

Evidence attests that a few years before the establishment of the Cameroon Development Corporation (CDC)¹¹⁶ in 1947, plantation workers were making a determined effort to establish a trade union on an industry wide basis. It was however, only shortly after the foundation of CDC that this effort succeeded with the creation and registration of the Tiko Workers Union (TWU) and the Cameroon Plantation Workers Union. In 1947, the latter changed its name to the Cameroon Workers Development Union (CWDU) and its membership amounted to 10,850. Before and after the formation of these unions on the CDC plantations, workers frequently resorted to various forms of collective action including strikes, riots, demonstrations and go-slows. Reasons for their strong militancy included their feeling of exploitation and subordination in the labour process, their striking solidarity and the need for protection against severe disciplinary measures. The strikes were not mostly led by Union leaders but by the workers themselves under the guidance of spokesmen and most of the strikes were illegal because they did not comply with the legal procedure.¹¹⁷

Labour resistance in this giant agro-plantation (CDC) was managed using various strategies depending on the various eras. During the colonial era, a trade union model was introduced, designated as free but responsible trade unionism which allowed a reasonable degree of trade union autonomy after educating and supervising union leaders to stand aloof from politics and articulate the grievances of the rank and file in a “responsible” manner and unionist were asked to solve their problems with employers in a cordial manner through negotiation and collective bargaining without involving strike action. The colonial administration believed this was the best way to tame labour. There was also the establishment of a hierarchical and military-like organization of production.¹¹⁸ The CWDU maintained good relationship with management and the administration and grew rapidly. By 1952, membership had grown to 19,700 which made it

¹¹⁶ This is an agro-plantation whose roots can be traced to the German period of colonization. It is the second largest employer today in Cameroon after the state. For more on this Corporation, read Piet, K 1993, *Labour Resistance in Cameroon*, James Currey, London.

¹¹⁷ Piet, K 1993, pp 94-95.

¹¹⁸ Piet, K 1993, p 107.

probably the largest workers trade union in West Africa at the time. It was recognized as one of the best trade unions in Nigeria and dominated the industrial scene in Cameroon during the trusteeship period. Between 1949 to 1953, the union affiliated to a political party, the Cameroon National Federation (CNF). Piet K has argued that affiliation of unions to political parties during this period was an exception and not the rule.¹¹⁹ However, in the hit of the political transition of West Cameroon from its administration as part of East Nigeria to its federation with East Cameroon after the plebiscite of 1961, the union distanced itself from any political party based on advice from the International Confederation of Free Trade Unions that political involvement may lead to internal political factionalism thereby endangering its autonomous bargaining position.

The importance of this period to the present study is the indication that trade unions developed faster and were very organized in West Cameroon due to encouragement of the colonial administration through its policy of indirect rule and responsible trade unionism as opposed to East Cameroon where the development of trade unions was slow and extremely fragmented arguably partly due to the colonial policy of assimilation. This period also reveals a strong stand of trade unions to distance themselves from politics for fear of endangering their autonomy.

2.3.3. The Post Colonial Period

On 11 February 1961, Cameroon was reunited in a United Nation's supervised plebiscite and after negotiations at Foumban, adopted a Federal Constitution¹²⁰ which created a federal government with a certain degree of autonomy. With the dawn of independence, the new African leaders had to come to terms with the role that trade unions were to play in the newly independent states. Contrary to the colonial experience, many of them did not believe trade unions were willing to

¹¹⁹ Piet, K 1993, p 113.

¹²⁰ The 1961 Constitution.

play a constructive role in the national development efforts in terms of cooperation with the state and management to increase output and accumulate capital. They therefore embarked on the move of replacing the autonomous trade unions with a model of state controlled trade unionism.¹²¹ Despite this view, the Federated state of West Cameroon was an exception as it preserved the inherited colonial system of autonomous trade unions for a long time. In return, the trade unions including the Cameroon Development Corporation (CDC) Workers Union assured the government in principle that they were prepared to play a constructive role in nation building by cooperating with management and maintaining union autonomy. However, the refusal of management to consult labour over important issues, to concede to justified workers demands and respect long established workers rights made the workers to loss faith in the moderate and responsible leadership of trade unions and resorted to unofficial strikes. In January 1962, the four existing unions in West Cameroon formed a united trade union movement and avoided any political alliance to preserve its autonomy and collective bargaining power.

The period from 1966 to 1972 was a period of transition for the trade unions as the Federal state tightened its grip on the Federated State of West Cameroon and intensified its struggle to establish control over the autonomous unions in West Cameroon.¹²² In 1966, Cameroon became a one party state after all political parties in the Federated states were forcefully merged to the ruling Union Camerounaise (UC) to form the Union Nationale Camerounaise (CNU). In 1972, a Unitary Constitution¹²³ was adopted putting an end to the loose federation that was established in 1961. In his bid to complete his "hegemonic Project", the then president, Ahidjo, called for trade union unity in the Republic and argued that in a country like Cameroon "where class conflict does not exist" and where the state seeks to ensure social justice, the role of the trade union should be constructive rather than contentious. Trade unions could therefore only make demands where

¹²¹ Piet, K 1993, p120.

¹²² Piet, K 1993, p 135.

¹²³ The 1972 Constitution of the United Republic of Cameroon.

possibilities were available in the economy, where progress depends on sacrifice by the entire nation".¹²⁴ A step towards this direction was earlier taken with the promulgation of a Federal Labour Code in 1967 which was revised in 1974. The president set out a new mission for trade unions as indicated above and called on union leaders to establish one united trade union, cut ties with all international trade union movements and replace irrelevant ideologies with principles of the ruling party, the CNU. Following this calls, trade unions in East Cameroon (Federation des syndicats du Cameroun (FSC) and the Union des Syndicats Croyants du Cameroun (USCC)) and the union federation in West Cameroon, the West Cameroon Trade Union Congress (WCTUC) were dissolved and in 1971, a single trade union was formed for the whole country called the Union Nationale des Travailleurs du Cameroun (UNTC) and subordinated to the ruling CNU party for the sake of national reconstruction and unity. This *statusquo* remained unchanged throughout Ahidjo's regime.

When President Paul Biya ascended power in 1982, he continued with the same trend that was set by his predecessor. He converted the CNU to the CPDM (Cameroon Peoples Democratic Party) and the UNTC to the Organisation Syndicate des Travailleurs du Cameroun (OSTC), respectively the sole political party and trade union in Cameroon for almost a decade. The OSTC was subordinated to the ruling CPDM party and because of this, refused calls from the civil society in the late 1980s for political liberalization and a multi-party system and its leaders participated in anti democracy protests organized by the ruling government in 1990.¹²⁵ Following the forceful introduction of democracy in Cameroon in 1990 which ushered in a process of political liberalization¹²⁶, disenchanted rank and file of the OSTC denounced the continuous alliance of the union with the ruling party and the OSTC leadership in April 1990 recognised their right to join political parties of their choice.

¹²⁴ Piet, K 1993, pp 135-136.

¹²⁵ Piet, K 2007, in "Trade Unionism in Cameroon: From Crisis to Revitalisation?" *supra* p 432.

¹²⁶ See Mbuagbo OT and Akoko RM 2004 "Roll-Back: Democratisation and Social Fragmentation in Cameroon". *Nordic Journal of African Studies*, vol.13, no.1.

In 1992, the OSTC changed its name to the Confederation Syndicale de Travailleurs du Cameroun (CSTC). The government maintained control of the Union by ensuring that those loyal to it were maintained at the helm of office and those who were seen to be in opposition to government's views were harshly dealt with. One of such members, Louis Sombes, the Secretary General was dismissed and jailed for organizing a public service strike in 1993. He was later released after intense pressure from the ILO, the international community and the ICFTU.¹²⁷ The government went further to sponsor the formation of rival trade unions such as the Union de Syndicats Libres du Cameroun (USLC). From 1997 onward, internal leadership conflicts in the CSTC almost paralysed trade union activities as the leaders lost sight of the interest of its members. This internal fighting enabled the government to take control of the union and co-opted its leaders into the ruling government, giving them executive posts. A disgruntled faction broke away in 2002 and formed the Confederation Generale des Travailleur Liberte (CGTL). However, much did not change as the fragmentation of trade unions continued as its leaders became driven by opportunism and the desire for power¹²⁸.

It is worth noting that following the political wind of change that blew across the country, several trade unions sprang up both in the public and private sectors with little or no impact on the labour legislative process. Prominent amongst these were teachers unions such as the Syndicat Nationale des Enseignants du Supérieur (SYNES), the Teachers Association of Cameroon (TAC) and the Cameroon Teachers Trade Union (CATTU). Faced with clear government insensitivity to their demands, the repressive, divisive and clientelist government strategies, these unions demonstrated a higher degree of militancy, engaging in several protest actions, stay ways, strikes and negotiations with the government. These unions made a few gains and concessions from government such as the creation of the General Certificate of Education Board in accordance with the demands of TAC, the signing of a special statute for public service teachers in

¹²⁷ Piet, K 2007, p 434.

¹²⁸ Piet, K 2007, *supra*, p 436.

Cameroon as requested by CATTU and other unions and the redress of some of the long standing grievances of university lecturers as requested by SYNES.¹²⁹

The relevance of post independence trade union history in Cameroon is its portrayal of continuous government attempts to weaken, subjugate and co-opt trade union leaders into the ruling governments thereby making them inseparable from the ruling party. Through these and other arbitrary strategies, the successive governments have been able to reduce trade unions to associations of collective beggars with little or no powers to effectively engage in collective bargaining or exert any real influence in the development of labour legislation.

2.3.4. Current Position

The regulation of trade unions in Cameroon is informed by the government's autocratic drive that has been evident since after independence in the guise of national unity, the need to preserve territorial integrity and the various "hegemonic projects" of the various heads of states coined differently. The Preamble to the Constitution of Cameroon¹³⁰ grants the right to freedom of association, the right to form and join trade unions as well as the right to strike subject to the law. These rights including the right to engage in collective bargaining are given legal effect by the Labour Code of Cameroon¹³¹ which applies to all workers and employers with the exception a few categories including public servants. Formation and registration of trade unions within the public service however requires the prior approval of the Minister of Territorial Administration¹³².

2.4. SIMILARITIES, DIFFERENCES AND EMERGING CHALLENGES

The preceding paragraphs examined the historical evolution of trade unions in the Republics of South Africa and Cameroon. What has emerged is evidence

¹²⁹ See Decree No 2002/041 of 4 February 2002 which addressed some of the grievances.

¹³⁰ Adopted on 18 January 1996, amendment to the Constitution of 2 June 1972.

¹³¹ Law N0 92/007 of 14 August 1992.

¹³² Article 2 of Law N0 68/LF/19 of 18 November 1968.

that trade unions in both countries have suffered repression in the conduct of their activities and maintained certain levels of political affiliation at one time or the other in their history. Despite this similarity, there appear many differences including the following:

- Trade unions in post colonial Cameroon operate under an exclusionary authoritarian system, relying on the military and the police to curtail trade union activities. They have suffered from disastrous state intervention that left the movement subordinate to the ruling party, leaving it powerless to effectively respond to neo liberal challenges.¹³³ On the other hand, trade unions in post apartheid South Africa are engaged in social partner unionism, representing the pursuit of strategic input into national economic and social policy in concert with state and employer associations on a national tripartite body, NEDLAC. They seek to negotiate social and welfare issues with the aim of finding consensus among social partners.
- While trade unions were directly involved in the development of current labour legislations in South Africa through the various negotiations and consultation talks within NEDLAC as well as submissions in the South African Parliament¹³⁴ there is no evidence of active union involvement in the development of the current labour legislations in Cameroon.
- Trade unions in South Africa, particularly the Congress of South African Trade Unions (COSATU), have achieved most of objectives for which they were created and fought for¹³⁵ while those of Cameroon have achieved very little.
- Trade unions in South Africa were subjected to racial legislations and engaged in the political liberation of South Africa. On the contrary, trade

¹³³ Phelan C(ed) 2007, "World Wide Trends and Prospects for Trade Union Revitalisation", Phelan C (ed) 2007, *Trade Union Revitalisation:Trends and Prospects in 34 Countries*, Peter Lang Oxford, p 13.

¹³⁴ COSATU has a Parliamentary Office in Cape Town which actively represents labour in the parliamentary and other policy processes. Some of their parliamentary submissions can be accessed at <http://www.cosatu.org.za/docs/2001/consti.htm>. Accessed on 27/03/2008).

¹³⁵ Read Baskin, J 1991, *supra* pp447- 466.

unions in Cameroon were not subjected to any racial legislation nor did they actively engage in the independence struggle of the country.

- Trade unions in South Africa, especially COSATU enjoy cordial relationship with the ruling Government (despite some ideological differences) as evidenced by the Tripartite Alliance that bind them together with the SACP. Furthermore, they are regarded as a strategic partner that can contribute positively to the development of South Africa. On the contrary, trade unions in Cameroon have been in constant conflict with the government save those whose leaders have been bought over by the government or during the existence of the one party system when the trade unions could not be distinguished from the ruling parties. This conflict is partly explained by the negative perception of trade unions by post colonial leaders.

The above analysis indicates that trade unions in Cameroon are faced with the pressing challenge of political interference in union activities. Despite this specific challenge, trade unions in both countries are confronted with a new set of challenges arising from and related to globalization, particularly, the decline in union membership and collective bargaining power due to the increasing growth of the informal sector of the economy arising from retrenchments and the growing rates of unemployment. These are further compounded by the ever increasing cost of living, poverty, the scourge of the HIV/AIDS pandemic and other changing labour patterns which should strengthen the determination of trade unions to influence labour legislation.

2.5. SUMMARY

This Chapter has traced the history of trade unions in South Africa and Cameroon from the pre-colonial to the current period with the aim of understanding how the past has informed the present and how the present can inform the future. It has been observed that trade unions in both countries developed during the period of colonization following exposure to white settlers

and subsequent industrialization. It was also observed that trade unions in both countries were subjected to repression at various moments and are apparently confronted with several challenges. It has further been observed that contrary to the cordial relations which trade unions enjoy with the government in South Africa in terms of the strategic political alliance borne by their role in their liberation struggle and the tripartite relationship within NEDLAC, trade unions in Cameroon are in continuous conflict with the government and did not participate in the independence struggle of the country nor do they participate actively in the shaping of economic, social and labour policies. The next chapter will analyse the national application of the laws regulating trade unions so as to ascertain the extent to which these laws provide room for active union involvement in the development of labour legislation as well as set the basis for a future determination on the extent to which these laws conform to the relevant international labour standards.

CHAPTER 3

NATIONAL APPLICATION OF THE LAWS REGULATING TRADE UNIONS AND THEIR EFFECT ON TRADE UNIONS' INVOLVEMENT IN LABOUR LEGISLATIVE PROCESSES

3.1. INTRODUCTION

In the previous Chapter, the history of trade unions in the Republics of South Africa and Cameroon was examined, taking into consideration the context within which they evolved and the extent to which these unions have influenced the development of labour legislation in both countries. Their similarities and differences were also examined in the context of their historical development as well as the emerging challenges confronting unions in both countries. The purpose of that Chapter was to lay a historical foundation upon which some of the stated hypothesis could be tested as well as to use our knowledge of the past to interpret and understand the present so as to map the way forward.

Mindful of the above facts, it becomes necessary for us to focus this Chapter on national application of the laws regulating trade unions in both countries and their effect on trade unions' involvement in the labour legislative processes. It is worthy to note that by national application, this researcher refers to the law as contained in statutes and the law in action, that is, how the laws contained in statutes have been interpreted, applied and enforced by the appropriate structures including the courts. This is important because for trade unions to be able to exert significant influence on the labour legislative processes there must be effective application of core union rights such as the right to freedom of association, collective bargaining and the right to strike. Without such an application, trade unions are reduced to a cog in the wheel and become practically useless.¹³⁶ This Chapter will examine and analyse the application of the laws regulating trade unions in the Republics of South Africa and Cameroon as well as compare and contrast important features with the intention of testing

¹³⁶ See Galligan J in *Lavigne v Ontario Public Service Employees' Union* (1986) 55 at 449.

the validity of some of our basic hypothesis. However, the above analysis cannot be done without a brief discussion on the right to work which is not only a fundamental human rights but also the mother of all labour rights.

3.1.2. The Right to Work as a Fundamental Right

The importance of labour as a means of production, growth, livelihood, social justice, peace, progress and development necessitated the putting in place of national and international rules, legal instruments and structures to regulate labour relations. These legal rules and instruments acknowledge and seek to safeguard labour rights as human rights. This approach, can be argued, is not solely based on the importance of labour stated above but also on the historical origins of labour and its relationship with human dignity. It has been indicated that from time immemorial, we have had to work to secure what we needed to survive or improve our living standards and that our needs cannot be satisfied without human efforts that results in successful production.¹³⁷ The term labour in its most general use refers to productive human work. Through much of history, it was not treated as a commodity that was paid for. Our ancestors laboured together and accordingly shared the profits according to the custom of time. Today, in some communities in Africa, members still rely on communal labour arrangements¹³⁸ .

As society became more complex, so too did labour become more specialized, leading to changing labour patterns. This situation has been further compounded by globalization.¹³⁹ The need *inter alia* to regulate unfair competition amongst countries¹⁴⁰ , promote social justice and human rights¹⁴¹ through the putting in

¹³⁷ Muana, PK 1995, "Comparative Labour in Africa". *University of Sheffield*, viewed 16-08-07, www.hartford-hwp.com/archives/30/016.html.

¹³⁸ *Ibid.*

¹³⁹ Mark, T 2005, "Globalisation under fire", *Labour/Le Travail* 55, viewed on 16-08-2007, www.historycooperative.org/journals/lt/55/thomas.html.

¹⁴⁰ Kachelhoffer, GC. *et al* 1988, *Labour Law*, University of South Africa, Pretoria, p 361.

place of minimum labour standards led to the creation of the International Labour Organisation. According to Professor Valticos, the conventions and recommendations of the ILO have created an "international labour code" which has led to an "international common law on human rights."¹⁴² The relationship between labour rights and human rights is further strengthened by the fact that both centre on human dignity and are aimed at improving human worth. Although most of the broad-based human rights do not constitute labour rights, they are a *conditions sine qua non* for the realisation of labour rights. The right to work as a fundamental human right in its broader sense is a right which embodies a variety of rights which are essential for an individual who is engaged, should be engaged or about to be engaged in work. It incorporates rights such as the right not to be subjected to forced or compulsory labour, freedom to work, right to free employment services, right to protection of employment and right to protection against unemployment.¹⁴³ It has been argued that the right to work constitutes the first of all human rights, if not for its place in the hierarchy of rights then for its importance as a means by which other rights are realized.¹⁴⁴ The above view stated which emphasizes the right to protection of employment can arguably be extended to include the rights to freedom of association and collective bargaining, strengthened by the unequal bargaining power that exist between employees and those seeking employment as opposed to the employer.

The relationship between human rights and labour rights is topical. Since the adoption of the Universal Declaration of Human Rights in 1948, there has been a lot of scholarly effort to examine the relationship between the rights it embodies and international labour standard framed by ILO.¹⁴⁵ Interestingly, part of this concern has been the extent to which labour standards are part of human rights

¹⁴¹ Valticos, N 1969, "Fifty Years of Standard Setting Activities by the ILO ", *International Law Review*, vol. 201, p 220.

¹⁴² Kachelhoffer, GC *et al* 1988, *supra* at 352.

¹⁴³ Mpedi, LG 2006, "Redesigning the South African unemployment protection system: A Socio-Legal Inquiry" *LL.D Thesis submitted at University of Johannesburg (UJ)*.

¹⁴⁴ Mpedi, LG 2006 *supra* at pp 62-65.

¹⁴⁵ Valticos, N 1998 "International Labour Standards and Human Rights: Approaching the year 2000", *International Labour Review*, vol. 137, no.2.

per se. This relationship between international labour standards and human rights has always been a major concern to the ILO. All Conventions and Recommendations of the ILO contribute to the protection of human rights. This view is buttressed by the adoption of the ILO Declaration on Fundamental Principles and Rights at Work in 1998 by which member states committed themselves to respect, promote and realize in earnest amongst others the fundamental trade union rights to freedom of association and collective bargaining.

3.2. SOUTH AFRICA

3.2.1. Background

The transition which occurred in the 1990s changed significantly the legal framework regulating both individual and collective labour relationships in South Africa. The Constitution¹⁴⁶ came with a bundle of labour rights¹⁴⁷ which have been given legal effect in various pieces of legislations such as the Labour Relations Act (LRA) of 1995¹⁴⁸, the Basic Conditions of Employment Act (BCEA) of 1997¹⁴⁹, to mention but a few. The purpose of the Labour Relations Act of 1995¹⁵⁰ is to advance economic development, social justice, labour peace and the democratization of the workplace. The primary objective is to give effect to the fundamental rights conferred by section 23 of the Constitution, including the right to freedom of association, the right to strike and to engage in collective bargaining; the need to give effect to obligations incurred by South Africa as a member state of the ILO; to provide a framework within which trade unions and employers' organizations can collectively bargain, formulate industrial policy; and promote orderly collective bargaining at sectoral level.¹⁵¹ It is important to note that the Act applies to every employer and employee engaged in a labour

¹⁴⁶ 108 of 1996 herein referred to as the Constitution.

¹⁴⁷ See s.23 of the Constitution.

¹⁴⁸ 66 of 1995. Herein referred to as the LRA.

¹⁴⁹ 75 of 1997.

¹⁵⁰ 66 of 1995.

¹⁵¹ See section 1 (a) to (d).

relationship with the only exception of members of South Africa's National Defence Force, National Intelligence Agency, National Academy of Intelligence and the Secret Service.¹⁵² This has the important effect of standardizing labour rights and labour processes resulting in greater opportunity for consistency and efficiency.¹⁵³

3.2.2. The Right to Freedom of Association

The right to freedom of association is a fundamental right both in the general sense of word and as a specific labour law fundamental right.¹⁵⁴ The Constitution provides that everyone has the right to freedom of association.¹⁵⁵ Within the context of trade unions, section 23 provides that every worker has the right to form and join a trade union and to participate in the activities and programmes of a trade union.¹⁵⁶ This Constitutional provision is given effect by section 4 of the LRA which makes the exercise of this right subject to the constitution of a trade union.¹⁵⁷ The same rights conferred on trade unions apply to trade union federations.¹⁵⁸ It is important to note that in *SANDU v Minister of Defence*¹⁵⁹, the Constitutional Court of South Africa extended the right to freedom of association (including the right to strike) to members of the Permanent Force by declaring the provisions of section 126B(1)-(4) of the Defence Force Act¹⁶⁰ which prevented them from forming trade unions or participating in a strike or public protest to be inconsistent with the Constitution¹⁶¹ and therefore invalid.

¹⁵² See section 2 of the LRA.

¹⁵³ For a detailed discussion on this, see Mosae RN and Fuo ON "Public International Law and Constitutional Law Protection of Specific Labour Rights With Regard to Civil Servants", *LLM Seminar Paper presented on 18 October 2007 at the Faculty of Law, Mafikeng Campus, North West University* pp 11-20.

¹⁵⁴ Olivier, MP and Potgieter, O 1994, "The Right to Associate Freely and the Close Shop", *TSAR* vol.2 pp 289-305 at pp 290.

¹⁵⁵ Section 18.

¹⁵⁶ Section 23(2)(a) and (b).

¹⁵⁷ Section 4(1) and (2).

¹⁵⁸ Section 4(3)(a), (2) and (c).

¹⁵⁹ Case CCT 27/98.

¹⁶⁰ 44 of 1957.

¹⁶¹ 108 of 1996.

The Labour Relations Act¹⁶² further protects employees and persons seeking employment against anti-union discrimination.¹⁶³ This section provides that no person may require an employee or a person seeking employment not to be a member of a trade union nor shall an employee or person seeking employment be prejudiced because of past, present or anticipated membership of a trade union or for participation in the formation or lawful activities of a trade union or trade union federation.¹⁶⁴ Section 5(3) provides that no person may be advantaged or promise to advantage an employee or person seeking employment in exchange of the person not exercising any right conferred by the LRA including the right to freedom of association and participation in union activities. This provision is intended to prevent members of trade unions from being bought over by employers thereby safeguarding unions' independence. Section 8 of the LRA further confers certain rights to trade unions including the right to determine its own constitution and rules; to conduct elections for office bearers; to join a trade union federation and participate in its activities subject to its constitution; and to participate in the activities of international workers organizations or the ILO and contribute to or receive financial assistance from those organizations. It is trite to note that any contradiction or limitation of these rights is invalid except such limitation is in accordance with the law.¹⁶⁵

Another important aspect of the right to freedom of association is the registration of trade unions. The LRA provides a simple registration process for trade unions.¹⁶⁶ Requirements for the registration of trade unions are clearly set out in section 95 of the LRA. It provides inter alia that any trade union may apply for registration once it has adopted a name and a constitution that meets the requirements set out in section 95(4), (5) and (6) of the LRA; it is independent¹⁶⁷; and has an address in the Republic of South Africa. Upon submission of the

¹⁶² 66 of 1995.

¹⁶³ Section 5(1), (2) and (3).

¹⁶⁴ Section 5(2)(c).

¹⁶⁵ Section 5(4).

¹⁶⁶ Du Toit, D et al (2003) *supra* at p 183.

¹⁶⁷ Section 95(1)(d). This is a critical requirement for a trade union to function freely and effectively.

relevant documents to the registrar¹⁶⁸, he may register the applicant and issue a certificate of registration. If the registrar is not satisfied that the requirements of registration have been met, the registrar must send the applicant written notice of the decision and the reasons for that decision. If the applicant complies with the requirements as indicated in writing by the registrar, the registrar then registers the union. However, if the registrar is not satisfied that the registration requirements have been met, he must further notify the applicant of the reasons in writing of such a decision. It is worthy of note that an applicant who is not satisfied of the registrar's decision not to register may appeal to the Labour Court against the decision within the prescribed period.¹⁶⁹

It is worthy of note that under the LRA, the registration of trade unions is not compulsory as unregistered unions have the right to function and carry out their activities but the Act places legal and organizational inducements to registered trade unions such as the enjoyment of organizational rights set out in Chapter 3 as well as the acquisition of legal personality.¹⁷⁰

3.2.3. The Right to Collective Bargaining

This right is given great importance as a means of negotiating wages and conditions of employment as well as other matters of mutual interests between workers' representatives and employers in the LRA as an entire chapter is dedicated to it.¹⁷¹ This is not surprising, taking into consideration the industrial history of South Africa and the desire to move away from an adversarial system of collective bargaining to a coherent and co-operative collective bargaining system. One of the most important features of this legislation is voluntarism. Although subject to a few exceptions, collective bargaining is voluntary and there is no duty to bargain.¹⁷² This notwithstanding, some writers are of the view that

¹⁶⁸ Section 96(1).

¹⁶⁹ Section 111(1), (2), (3) and (4).

¹⁷⁰ See section 97 of the LRA. See also D du Toit et al (2003) supra pp 167 and 183.

¹⁷¹ Chapter 3, sections 11-63.

¹⁷² See *ECCAWUSA & others v Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC). See also *SANDU v Minister of Defence*, Case CCT 27/98.

section 23(5) imposes an obligation to bargain but no ultimate duty to conclude a bargain.¹⁷³ This classical pluralist approach however creates mechanisms to encourage collective bargaining. The process created leaves three scenarios: In the first place, the power imbalance between employers and employees is addressed by equipping employees and trade unions with an avalanche of rights, including organizational rights and a right to strike to permit them persuade employers to bargain and influence bargaining outcomes. Grogan posits that "...the threat of industrial actions, as well as the desire to avoid it, is intended to induce the parties to bargain"¹⁷⁴; Secondly, the use of power play should be a last resort. Industrial action therefore follows only after failures at conciliation followed by the giving of a prior written notice. Where the dispute concerns a refusal to bargain the strike will not be protected unless an advisory award is first obtained in accordance with s. 64 (2) LRA. The effect of such an award is to exert more pressure on the other party to bargain; thirdly, de facto bargaining is required in a number of situations where unilateral action is considered inappropriate without a prior consensus seeking exercise, for example, regarding the manner in which organizational rights shall be exercised in specific workplaces¹⁷⁵.

The LRA also favours centralized collective bargaining at national and sectoral bargaining forums. The bargaining forums created by the LRA are the workplace forums¹⁷⁶, bargaining councils¹⁷⁷, statutory councils¹⁷⁸ and within the public sector, there is the Public Service Coordinating Bargaining Council¹⁷⁹ which may perform all the functions of a bargaining council in respect of matters inter alia that are regulated by uniform rules, norms and standards that apply across the public service. Despite the fact that these forums are intended to encourage

¹⁷³ Read Landman, A.A. 2003, "The Duty to Bargain: An Old Weapon Pressed into Service: SANDU v Minister of Defence" 24 *ILJ* 2101 (T).

¹⁷⁴ Grogan, J 2003, *Workplace Law*, 7th edn, Juta & Co, Cape Town p 304.

¹⁷⁵ S.21 (3).

¹⁷⁶ Sections 79 to 80 of the LRA.

¹⁷⁷ Section 27 to 30 of the LRA.

¹⁷⁸ Sections 39 to 43 of the LRA.

¹⁷⁹ Sections 36 to 38.

democratization of the workplace, it has been argued that the LRA does not draw a clear line between issues over which parties may legitimately bargain and those that management is unilaterally entitled to decide on. The Act provides that collective bargaining should take place over matters of "mutual interest". This may lead to a situation where unions may support demands for greater participation in matters traditionally reserved for management with threats of strike action if their demands are not met. This may explain the view held by some people that unions strike at the slightest provocation thereby disturbing industrial harmony.¹⁸⁰ In addition Shane Godfrey *et al* argue that the scheme for Collective Bargaining in the New LRA has not worked as the Act does not appear to have promoted bargaining at the central level or fused the fragmented system of bargaining councils into a more coherent whole and that plant level bargaining is in decline, and seems to have largely disappeared within the jurisdictions of bargaining councils.¹⁸¹ This, they suggests indicates that organizational rights have not been an adequate substitute for the duty to bargain.¹⁸²

In South Africa centralized bargaining in a national bargaining forum occurs within NEDLAC, where organised labour, organised business and government are equally represented in all the four chambers. However, NEDLAC is not formally described as a collective bargaining forum but as a consensus seeking body promoting employee participation in socio-economic policies. In practice, NEDLAC provides a forum where peak employer federations such as Business South Africa (BSA) and peak trade unions such as COSATU meet and attempt to come to agreement over labour legislation and socio-economic policy matters.

¹⁸⁰ COSATU Political Discussion Document: Possibilities for Fundamental Social Change" circulated for discussion in preparation for its 9th National Congress 2002. Accessed at www.cosatu.org.za/docs.

¹⁸¹ "The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining", viewed on 21-06-2008 at www.commerce.uct.ac.za/research_unit.

¹⁸² *Ibid.*

3.2.4. The Right to Strike

The right to strike is the biggest weapon available to trade unions and it has been argued that without the right to resort to strikes, “employees are confined to collective begging rather than collective bargaining”.¹⁸³ This right is provided for in section 23(2) (c) of the Constitution and is given legal effect by section 64(1) of the LRA provided the procedural requirements have been met.¹⁸⁴ These requirements include referral of the issue in dispute to a bargaining council or the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation¹⁸⁵, followed by the issuing of a certificate of non conciliation if the dispute cannot be resolved or a period of 30 days must have elapsed from the date of referral of the dispute¹⁸⁶ and the parties to the dispute must be given appropriate written notice of the commencement of the strike.¹⁸⁷

It is further worth noting that apart from the procedural requirements for a protected strike action, there are also substantial limitations such as the prohibition of strikes by those engaged in essential services¹⁸⁸. It has been indicated that, in most countries, including those with a constitutional right to strike, strike action in essential services is restricted and that the extent of the restriction varies greatly as does the notion of what constitutes an essential service.¹⁸⁹ In South Africa, the LRA prohibits strikes in essential services.¹⁹⁰ This therefore places importance in the process of designating essential services. The LRA enumerates only Parliamentary and police services¹⁹¹ and creates an Essential Services Committee, to designate a particular service as essential if it falls within the definition of essential services. Essential services have been

¹⁸³ Finnemore, M & Van Ransburg, R 2000, *supra* at p 451.

¹⁸⁴ Section 64(1) (a), (b), (d) and (2).

¹⁸⁵ Section 64(1)(a).

¹⁸⁶ *Ibid.*

¹⁸⁷ See Du Toit, D *et al* 2003, *supra*, pp 282-289 for a detailed discussion on procedural requirements of a protected strike action in South Africa.

¹⁸⁸ Du Toit, D *et al* 2003, *supra*, pp 289-294. See also section 65(1) (d) of the LRA.

¹⁸⁹ Du Toit, D *et al* 2003, *supra*, pp 310.

¹⁹⁰ Section 65(1)(d).

¹⁹¹ Section 71(10) read with section 213.

defined as one whose interruption endangers the life, personal safety or health of the whole or any part of the population.¹⁹² It had been argued that there is no justification for the inclusion of Parliamentary Services in this category and that the blanket coverage of the police force constitutes a limitation of the right to strike which cannot be justified in terms of section 36(1) of the Constitution, since the interruption of services by certain categories of police like those involved in the clerical section may not endanger life, personal safety or health.¹⁹³ It is important to note that those involved in a protected strike action enjoy immunity from civil liability.¹⁹⁴

3.2.5. Interpretation and Enforcement Mechanisms

To achieve the purpose and objectives of the LRA, provision has been made for the interpretation of the relevant laws as well as the establishment of several structures¹⁹⁵ and mechanisms¹⁹⁶ which have resulted in the effective protection, regulation and enforcement of the rights conferred by the Constitution, the LRA and other relevant statutes.¹⁹⁷ Section 3 of the LRA provides that the provisions of the Act must be interpreted to give effect to the primary objects of the Act and in compliance with the Republic's constitutional and international law obligations. This means that in case of ambiguity or uncertainty, a forum, tribunal or court must seek guidance from the Constitution and international law.¹⁹⁸ The Constitution is arguably the most important source of labour law in South Africa¹⁹⁹ and enjoins all courts, tribunals and courts to interpret all laws with due regard to the spirit, purport and object of the Bill of Rights which aims at

¹⁹² Section 213.

¹⁹³ Du Toit, D et al 2003, *supra* p 312.

¹⁹⁴ Section 67(2) and (6) LRA.

¹⁹⁵ The most prominent are the Labour Court, the CCMA, workplace forums and bargaining forums in the public and private sectors.

¹⁹⁶ The mechanisms include organizational rights conferred on registered trade unions as well as the provision of the right to strike and lockout in the LRA, all intended to be used for purposes of power play and as such induce the parties to bargain and conclude an agreement.

¹⁹⁷ See Schedule 1 of the BCEA and section 21 EEA which requires the employer to bargain under certain circumstances.

¹⁹⁸ *Business South Africa v COSATU & Others* (1997) 18 ILJ 474.

¹⁹⁹ See section 23.

promoting the values which underlie an open and democratic society based on human dignity, equality and freedom²⁰⁰.

The LRA encourages that parties resolve disputes amongst them through privately agreed procedures and where this is not possible, through established structures like the Commission for Conciliation Mediation and Arbitration (CCMA) as well as through the appropriate courts. The CCMA is entrusted with dispute resolution mandate especially over disputes referred to it in terms of section 115(1)(a). It must attempt to resolve these disputes through conciliation and if unresolved, arbitrate the dispute in accordance with section 115(1)(b) or refer the dispute to adjudication.

According to section 157(1) of the LRA, “the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court”. This means the Labour Court has exclusive jurisdiction over matters that the LRA require the court to adjudicate. However, section 157(2) confers concurrent jurisdiction on the High Court and the Labour Court with regards to any labour matter involving the violation of a constitutional right arising from employment and from labour relations or disputes “over the constitutionality of any executive or administrative act or conduct, by the state in its capacity as an employer” as well as “the application of any law for the administration of which the minister is responsible”. The provision of section 157(2) is problematic and has generated a lot of debate as to the dividing line between the jurisdiction of the Labour Court and the High Court over labour matters²⁰¹. This problem of concurrent jurisdiction opened the door to forum shopping and disputing parties began to frame their disputes in the form that will enable them bring their claim to the court of their choice²⁰². Zondo J shared the above view and called for legislative intervention to clear what he

²⁰⁰ *South African National Security Employers Association v TGWU & Ors* (1) [1998] 4 BLLR.

²⁰¹ Strydom, E 2003, “Changing the Labour Court: The Superior Courts Bill 2003”, *Contemporary Labour Law*, vol.13, no.3, p 22.

²⁰² *Ibid.*

called a jurisdictional mess²⁰³. In the more recent case of *Petronella Nellie Nelisiwe Chirwa v Transnet Ltd & Others*²⁰⁴ Skweyiya J shared the same sentiment even though the Court made it clear that there is no conflict of jurisdiction between the Labour Court and the High Court since the issue of concurrent jurisdiction must only be confined to those instances where the party relies directly on the Bill of Rights. According to Skweyiya J, the Labour Court has exclusive jurisdiction over disputes that are based on alleged violations of the LRA and that in such cases, the procedures and remedies provided for by the Act (LRA) which specifically regulate these types of disputes must be followed²⁰⁵.

The Constitutional Court constitutes the most important enforcement mechanism. According to section 167 (3) (a) of the Constitution, the Constitutional Court is the highest court in all constitutional matters. According to section 169 (a) of the Constitution, when deciding a constitutional matter within its powers, a court must declare any law or conduct which is inconsistent with the Constitution as invalid to the extent of such inconsistency and may make any order that is just and equitable. Mindful of this, in *SANDU v Minister of Defence*²⁰⁶ the Constitutional Court found that section 126B(1)-(4) of the Defence Act²⁰⁷ which prohibited members of the National Defence Force from joining trade unions and from engaging in public protest constituted an unjustifiable limitation on their right to freedom of association. The Act was declared unconstitutional and invalid to the extent of the inconsistency.

It is important to note that apart from the restrictions of these rights in the LRA as discussed above, they can be limited provided such limitations fall within the ambit of section 36 (1). This clause provides that the rights in the Bill of Rights may be limited only in terms of a law of general application provided the limitation is reasonable and justifiable in an open and democratic society based on human

²⁰³ See *Lange Veldt v Vryburg Transitional Local Council & others* (2001) ILJ 1116 (LAC).

²⁰⁴ [2007] ZACC 23.

²⁰⁵ *Ibid.*

²⁰⁶ [1999] 6 BCLR 615 (CC).

²⁰⁷ 44 of 1957

dignity, equality and freedom. In *S v Zuma*²⁰⁸ the court stated that the relevant factors to be considered in this instance are whether the limitation serves a legitimate purpose; whether there is a sufficient relationship between the limitation and the purpose, that is, does the limitation not restrict the right in question more than is necessary; and whether there is no other reasonable alternative through which the objective can be attained.

3.3. CAMEROON

3.3.1. Background

The Constitution of the Republic of Cameroon²⁰⁹ provides in its preamble *inter alia* that "...freedom... of association and of trade unionism, as well as the right to strike shall be guaranteed..." Although this guarantee is contained in the preamble, it is justiciable as the Constitution further provides that the preamble shall be part and parcel of the Constitution.²¹⁰ The Labour Code of Cameroon²¹¹ remains the principal piece of labour legislation despite the application of some old and contradictory pieces of regulations and Legislations.²¹² The purpose and application of the Labour Code is set out in Part 1. It is intended to govern labour relations between workers and employers²¹³ and excludes from its ambit, staff of the public service, the judiciary and the legal service, servicemen, the National Security, prison administration and auxiliary staff.²¹⁴ As earlier indicated, we shall in the following paragraphs examine specific aspects of the law regulating trade union activities in Cameroon.

²⁰⁸ 1995 (4) BCLR 401 (CC) at 414. See *Ferreira v Levin* 1996 (1) BCLR (CC) as well as *Moonsammy v The Mailhouse* 1999 ILJ 464 (CCMA).

²⁰⁹ Adopted on 18 January 1996, amendment to the Constitution of 2 June 1972.

²¹⁰ See article 65.

²¹¹ Law N0 92/007 of 14 August 1992.

²¹² A good example remains Law No 68/LF/19 of November 1968 regulating the right to freedom of association in the public service.

²¹³ Section 1.

²¹⁴ Section 1(3).

3.3.2. The Right to Freedom of Association

Sections 3 and 5 respectively of the Labour Code and Law No 68/LF/19 of November 1968 recognize in accordance with the Constitution the right of workers in the private and public sectors to freely and without prior authorization establish trade unions for the study, defence, promotion and protection of their interests, “particularly those of an economic, industrial, commercial or agricultural nature, and for the social, economic, cultural and moral advancement of their members”. It can be argued that the phrasing of this section is deliberately intended to exclude trade unions from any activities of a political nature. This view is further strengthened by the outright prohibition of all activities not connected with the furtherance of the above objectives.²¹⁵ The Code further protects workers from acts of anti-union discrimination in respect of employment.²¹⁶ The right of trade unions to draw up their constitutions and rules as well as to organize their administration is equally guaranteed.²¹⁷

As earlier indicated above, the process of registration constitutes an important aspect of the right to freedom of association. In Cameroon, a trade union of applying for registration is required to submit with the registrar, its constitution, internal regulations, signatures and certificates on non conviction of the at least 20 of its founding members.²¹⁸ A trade union is not required to have a physical address before registration but must do so within three months of registration failing which it shall be liable to a penalty. It is worth noting that section 11(b) provides that upon the submission of an application for registration, if the registrar does not respond after one month, the trade union is considered to have been registered. This appears inconsistent with the liability of trade union leaders for prosecution if they operate as if they are registered mean while they are not. Although it is indicated that the main purpose and effect of trade union

²¹⁵ See section 3 of the Labour Code of Cameroon.

²¹⁶ Section 4(1) and (2).

²¹⁷ Section 5.

²¹⁸ See sections 8 and 11.

registration is to acquire legal personality²¹⁹, section 6(2) warns that any person forming a trade union that has not yet been registered who acts as if the trade union has been registered shall be liable to prosecution.²²⁰ The Code further provides that a decision of the registrar not to register a trade union that has applied for registration is subject to appeal to a competent court and that the judgment is subject to further appeal.²²¹

It is important to note that registration of trade unions within the public service requires the prior approval of the Minister of Territorial Administration.²²² Unlike private sector trade unions which are registered with the Ministry of Labour, Employment and Social Insurance, trade unions in the public sector are required to register with the Minister of Territorial Administration.²²³ The rationale for this distinction is questionable and can be viewed with suspicion.

3.3.3. The Right to Collective Bargaining

The right is not expressly provided for in the Code but can be implied from its ample provisions on collective agreements and collective disputes.²²⁴ In fact, no effective structures or mechanisms are put in place whereby collective bargaining can take place even though the Code provides for the election of staff representatives in any establishment (public or private)²²⁵ where at least twenty workers are employed with their functions limited to making suggestions and not engaging in the decision making process²²⁶ and that collective disputes should be solved through conciliation and arbitration²²⁷. It is important to note that the

²¹⁹ Section 6 (1).

²²⁰ Section 6(2).

²²¹ Section 14.

²²² Article 2 of Law N0 68/LF/19 of 18 November 1968.

²²³ "Country Report on Human Rights Practices: Cameroon 2001", *U.S. Department of State*, viewed on 18-08-08, www.terrorismcentral.com.

²²⁴ Section 52 to 60 and sections 157 to 165 respectively.

²²⁵ This indicates the contradictory nature of the Labour Code as it now seeks to cater for those in the public sector.

²²⁶ See sections 122 to 128.

²²⁷ Sections 158 and 164.

National Labour Advisory Board created in terms of section 117 of the Code examines matters relating to conditions of employment, labour migration, trade unions and employer organizations and makes recommendations and proposals relating to laws and regulations to be made in these areas. What is interesting in the composition of the Board is the fact that although an equal number of substantive and alternate representatives of workers and employers participate in the processes of the Board, they are “appointed by an order of the minister in charge of labour at the proposal of the most representative workers’ and employers’ organizations”. This implies that such proposals might not be followed by the Minister as he may select those he wants to be represented in the Board. This renders the whole process not very effective as representatives of independent trade unions that are not loyal to the government can simply be sidelined from the process. Unions should be able to select and delegate their members to participate in the Board without the approval and appointment of the Minister of Labour. It has been argued that no formal collective bargaining negotiations have taken place in Cameroon since 1996 and that when labour disputes arise, the government chooses which labour unions to invite into the negotiations, selectively excluding some trade union representatives²²⁸.

There is no clear articulation of the various bargaining levels in the Code. The definition of collective agreements in section 52(1) leaves the impression that collective bargaining can take place at a decentralized company level or at a centralized sectoral or multi sectoral level at regional or national levels²²⁹.

3.3.4. The Right to Strike

The right to strike is expressly contained in the Preamble to the Constitution “under the conditions fixed by law”. Under the Labour Code, strikes can only be deemed legitimate after conciliation and arbitration have failed and workers who

²²⁸ “Country Report on Human Rights Practices: Cameroon 2001”, *supra*.

²²⁹ See section 53.

contravene this requirement can be dismissed on grounds of serious misconduct²³⁰ the only requirements stated in the Labour Code but it is important to note that many strike actions in Cameroon are treated heavy handedly by the government and forces of Law and Order are frequently used to quell strikes. An example which can be cited is the 2006 severe and prolonged strike action by workers of the Cameroon Tea Estate (CTE)²³¹.

Interesting to note is the provision of section 19 of the Code to the effect that "An act done by a person duly authorized by a union in furtherance of a trade dispute may be actionable only if it induces some other person to break a contract of employment or interferes with the right of some other person to dispose of his capital or his labour as he wished". This provision seems to limit the ability of unions to rely on solidarity action and can be implied to restrict strikes actions.

3.3.5. Interpretation and Enforcement Mechanisms

Neither the constantly amended Constitution of Cameroon²³² nor the Labour Code provides any hints on interpretation of the core trade union rights discussed above. It can be argued that since there is no provision to this effect, the Labour Inspectors, arbitration boards and the competent courts²³³ are bound by general rules of interpretation as applicable in both civil and common law jurisdictions taking into consideration the fact that Cameroon has a bi-jural legal system inherited by virtue of its colonial past. This notwithstanding, article 45 of the Constitution provides that duly approved or ratified treaties and international agreements shall override national laws, provided the other party implements the said treaty or agreement. This indicates the importance attached to public

²³⁰ S.165(1)(b)

²³¹ Opio A & Nana W W (2006) "After Meeting with Minister: Striking Tole Tea Workers Unblock Road". *The Post News Line*. Viewed on 8-05-2008 at www.postnewsline.com.

²³² The Constitution has been amended 4 times from 1961 to 2008.

²³³ The jurisdiction of a court handling a labour matter is determined in accordance with the law on judicial organization whereby the jurisdiction of a court in a civil claim is determined by the amount of compensation or damages claimed by the plaintiff.

international law as further strengthened by the assertion of the Preamble that “We ...Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and the African Charter on Human and Peoples’ Rights and all duly ratified international convents relating thereto...”. These, to my mind, must be taken into consideration when interpreting and applying any standards which flow from the country’s international law obligations.

There exist no specialized labour courts in Cameroon and individual labour disputes are resolved through conciliation and arbitration by the Inspector of Labour²³⁴ or through the competent court whose jurisdiction is determined in accordance with the legislation on judicial organisation.²³⁵ Section 157 provides that collective disputes shall lie outside the jurisdiction of the courts²³⁶ (157(1)(b)) and shall be subject to conciliation and arbitration²³⁷ conducted by an Inspector of Labour and Social Insurance and an Arbitration Board respectively.²³⁸

3.4. COMPARING AND CONTRASTING IMPORTANT FEATURES

The examination and analysis of national application of the laws regulating trade unions in the Republics of South Africa and Cameroon indicate similarities and differences in some important features. In terms of similarities, it has been noted that the fundamental trade union rights are deeply rooted in the constitutions of both countries and enforceable. While fundamental trade union rights are safeguarded by section 23 of the South African Constitution and enforceable by virtue of sections 1(c), 2 and 8 of the Constitution which categorically state its supremacy and binding nature, the Preamble to the Constitution of Cameroon guarantees the rights to freedom of association, trade unionism as well as the right to strike. Article 65 of the Constitution of the Cameroon declares that the

²³⁴ See sections 139 to 156 of the Labour Code.

²³⁵ See section 131 of the Labour Code.

²³⁶ Section 157(1)(b).

²³⁷ 157(2).

²³⁸ Sections 158 to160 and 161to165.

Preamble is part and parcel of the Constitution and therefore justiciable. The point to note here is that, in this attempt to provide constitutional protection and unlike the situation in South Africa where the right to collective bargaining is expressly contained in section 23(5) of the Constitution, the Constitution of the Republic of Cameroon does not expressly guarantee the right to collective bargaining which constitutes a core trade union right. One wonders if this right is deliberately omitted or implied in the right to freedom of "trade unionism". This trend is followed by the Labour Code of Cameroon as discussed above. Another similarity is that, in both countries, all the fundamental trade union rights are subject to limitations as discussed above.

One of the differences noted is the fact that unlike South Africa where a single piece of legislation (the Labour Relations Act²³⁹) regulates trade union activities in both the private and public sectors, in Cameroon, separate and sometimes confusing pieces of legislations regulate trade union activities in the private and public sectors (the Labour Code and Law No 68/LF/19 of November 1968 respectively) and unions in these sectors for example follow different procedures for registration.

Another difference noted is the overt provision of criminal liabilities in the Cameroonian Labour Code against union leaders. A good example is section 6(2) which warns that any person forming a trade union that has not yet been registered who acts as if that union has been registered shall be liable to prosecution. On the contrary, trade unions that have not registered in South Africa operate freely but for the fact that they do enjoy neither organizational rights nor legal personality.²⁴⁰ Generally, the Labour Relations Act²⁴¹ does not provide for criminal liabilities even though union members involved in serious misconduct such as vandalism during a strike action can be criminally charged.

²³⁹ 66 of 1995.

²⁴⁰ See section 97 of the LRA. See also D du Toit *et al* (2003) *supra* at pp 167 and 183.

²⁴¹ 66 of 1995.

Furthermore, in addition to the many structures created to resolve labour disputes including those relating to the fundamental trade union rights, there exist a specialized Labour Court and Labour Court of Appeal in South Africa which is supposed to be presided over by experts in the area of labour law thereby applying their relevant expertise in resolving the disputes that come before the court. This is contrary to the situation in Cameroon where there exist no specialized court which can more effectively interpret, protect and enforce labour laws in general and those regulating trade union activities in particular.

A close scrutiny of laws regulating trade union activities in Cameroon precludes them from any direct involvement in activities of a political nature. In South Africa, the window is open for trade unions involvement in political activities as the LRA mentions only the *principal purpose* of trade unions.²⁴²

Moreover, it appears the process of registering a trade union in South Africa appears to be easier than in Cameroon. In South Africa, once a union has adopted a name and a constitution that meets the requirements in section 95(4), (5) and (6) of the Labour Relations Act²⁴³, has an address in South Africa and it is independent, it will be registered. In Cameroon, in addition to a constitution, signatures and certificates of non conviction of at least 20 of the founding members must be submitted. Also important is the fact that separate procedures are followed in registering unions in the public and private sectors. Those in the public sector need the approval of the Minister of Territorial Administration and are registered with the Ministry of Territorial Administration while those in the private sector are registered with the Minister of Labour and Social Insurance²⁴⁴. It is worthy of note that trade union independence which is a vital requirement for effective trade unionism is not a prerequisite for registration in Cameroon.

²⁴² Section 213 of LRA. Italicized words represent my emphasis.

²⁴³ 66 of 1995.

²⁴⁴ See footnote 193 and 194 respectively.

As indicated earlier, the National Labour Advisory Board of Cameroon differs from NEDLAC in certain respects. For instance, the National Labour Advisory Board simply makes recommendations and proposals relating to labour laws and regulations in the areas covered by section 117(2)(a) while NEDLAC seeks to arrive consensus on labour and socio-economic policies before submission to the South African Parliament to be considered for enactment.²⁴⁵ Acknowledging the cardinal role of NEDLAC, it has been pointed out that the principal institution in which social tripartism takes place in South Africa is NEDLAC and that it constitutes the heart and pulse of socio-economic policy formulation in the country²⁴⁶.

3.5. SUMMARY

This Chapter examined and analyzed national application of the laws regulating trade union activities in the Republics of South Africa and Cameroon as well as the various enforcement mechanisms. What has emerged are a number of similarities, differences and challenges. It has been observed that in both countries attempts have been made to give fundamental trade union rights constitutional and legislative protections. While the South African protections appear to be more generous, those of Cameroon are to some extent restrictive particularly with regards to the imposition of criminal liability on trade union leaders, the requirement of the approval of the Minister of Territorial Administration for the formation and registration of trade unions in the public service, the absence of an express right to collective bargaining and the apparent lack of structures in which effective collective bargaining can take place. It is further reiterated that trade unions in Cameroon in the public and private sectors are regulated by different pieces of legislation unlike those of South Africa which are regulated by the same piece of legislation. What is clear from this analysis is the fact that, the application of the laws regulating trade unions in Cameroon

²⁴⁵ Section 5 read with section 9(8) of Act 35 of 1994.

²⁴⁶ Speech given by Mdladlana M, Minister of Labour, in her address at the 11th NEDLAC Annual Summit at Midrand on 09-09-2006.

restricts the ability of the trade unions to exert any significant influence in the labour legislative processes as opposed to South Africa where the application of the laws in this area give trade unions considerable influence in the labour legislative processes. With regards to challenges, the lack of a specialized labour tribunal in Cameroon was identified as well as the inadequate articulation of bargaining levels and subjects and whether a duty to bargain should be imposed in South Africa. It is hoped that the purpose of this Chapter as set out in the introduction has been achieved. Mindful of this, the next chapter will focus on the relevant international standards which regulate trade union activities with the intention ascertaining the exact scope of these standards and determining the extent to which the countries under the present study have complied with their public international law obligation.

CHAPTER FOUR

RELEVANCE AND APPLICATION OF INTERNATIONAL STANDARDS REGULATING TRADE UNION ACTIVITIES

4.1. INTRODUCTION

The previous chapter discussed the right to work not only as a fundamental human right but also as the basis upon which all labour rights are predicated. It further examined and analyzed the national application of the laws regulating trade union activities in the Republics of South Africa and Cameroon with the aim of ascertaining the scope, interpretation and enforcement of these laws in both countries so as to determine the extent to which such application permits unions to influence the labour legislative processes. What emerged are a number of similarities, differences and challenges. Mindful of the above, the purpose of the present Chapter is to examine the relevance and analyse the application of international standards regulating trade union activities with the aim of determining the extent to which both countries have complied with their public international law obligations flowing from the ratification these standards. The present Chapter will also examine the background that led to adoption of the relevant international standards as well as its significance, analyse in detail provisions relating to the broad objectives of these standards and those specific provisions relevant to the present study.

The importance of the rights to freedom of association, collective bargaining and the right to strike as fundamental human and trade union rights are acknowledged by their inclusion in most international instruments that touch on labour rights²⁴⁷. This is true of ILO Conventions, Recommendations and Resolutions, as well as United Nations Covenants, regional instruments and other instruments of general application. These international instruments impose

²⁴⁷ It is worthy of note that the only international instrument which expressly recognizes the right to strike is the International Covenant on Economic, Social and Cultural Rights. See article 8(1) (d).

obligations on states that have ratified them to bring the rights contained therein to fruition for the purpose of advancing human dignity and human rights, ensuring social justice, freedom and peace in the world.

4.2. BACKGROUND

The industrial and agrarian revolutions significantly changed the nature and pattern of work from a largely unpaid agricultural labour system to an industrialised and paid labour system. Despite the advantages of industrialization, the adverse effects were outstanding. It heralded an era in labour relations which was characterised by slavery and slave trade, dangerous working conditions, diseases, poverty, exploitation of child labour, continuous industrial unrest, and low wages based on the capitalist perception of labour as a commodity. These ills could not go unnoticed and were some of the preoccupations that occupied the minds of world leaders towards the end of the nineteenth century. This concern led to a number of international gatherings where critical labour matters were discussed. The first of such gathering was convened in Berne in 1905. At this conference two important international conventions were adopted. The first dealt with the prohibition of night work for women in individual employment. The second one dealt with the prohibition of the use of white (yellow) phosphorus in the manufacturing of matches.

After the First World War the Paris Peace Conference entrusted the examination of the international regulation of labour matters to a special commission, the Commission on International Labour Legislation²⁴⁸. The work of this commission led to the inclusion in the Treaty of Versailles as well as all the other treaties Part XIII which dealt with labour matters. This section of the treaties provided for the establishment of an international labour organisation, which might adopt conventions and recommendations in this field. In October 1919, the International Labour Conference met in Washington to adopt the first conventions and to

²⁴⁸ Kachelhoffer, GC. *et al.* 1988, *Supra* at pp 347.

appoint the Governing Body. Since then, the international labour conference has met regularly, in general once a year, except during the Second World War. At the end of the Second World War the international labour conference adopted in May 1944 the Philadelphia Declaration which defined the aims and purposes of the organisation. This Declaration reaffirmed in particular that:

- Labour is not a commodity;
- Freedom of expression and association are essential to sustained progress;
- Poverty anywhere constitutes a danger to prosperity everywhere and that ;
- The war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare²⁴⁹.

The Declaration affirmed that all human beings, irrespective of race, creed or sex, have the right to pursue their material wellbeing and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. It defined a number of specific objectives of the ILO including the promotion and realization of standards and fundamental principles and rights at work and the strengthening of tripartism and social dialogue²⁵⁰. Pursuant to its specific objectives, the ILO has adopted numerous Conventions and Recommendations. We will herein discuss only the ones that are relevant to our study: These include the Freedom of Association Convention²⁵¹, the Right to Organise and Collective Bargaining Convention²⁵² and the Public Service

²⁴⁹ Strydom, EML et al 2001, *Essential Social Security Law*, Juta & Co, Lansdowne, p 266.

²⁵⁰ See <http://www.ilo.org/>, viewed on 06-10-2008.

²⁵¹ ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise of 1948. Adopted on July 9, 1948.

²⁵² ILO Convention No. 98 on the Right to Organise and Collective Bargaining of 1949. Adopted on July 1, 1949 and entered into force on July 18, 1951.

Convention²⁵³. Furthermore, important United Nations Instruments which have a direct bearing on these rights from a human rights perspective such as the International Covenant on Economic, Social and Cultural Rights²⁵⁴ and the International Covenant on Civil and Political Rights²⁵⁵ as well as other instruments of general application.

4.3. APPLICATION OF INTERNATIONAL STANDARDS REGULATING TRADE UNION RIGHTS

4.3. 1. The Right to Freedom of Association

The right to freedom of association is a fundamental human and trade union right and it has been argued that “freedom of association is the *conditio sine qua non* of tripartism that is enshrined in the Constitution of the ILO and that without it, the concept of tripartism is meaningless”²⁵⁶. The right to freedom of association constitutes the very foundation of society. In the case of *Shelton v Tucker*²⁵⁷ Stewart J. in a US Supreme Court ruling reiterated the fact that the “right of free association” is “a right closely allied to freedom of speech and a right which like free speech lies at the foundation of a free society”. These assertions not only indicate the critical nature and importance of this right but also justify its regulation by almost all major international instruments regulating labour and human rights.

The most important international labour law instrument protecting and regulating the right to freedom of association is Convention No.87 on Freedom of

²⁵³ Adopted on June 27, 1978 and entered into force on February 25, 1981. It is worthy of note that this Convention is intended to complement Conventions No. 87 and 98. See Preamble of the Public Service Convention.

²⁵⁴ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 03 January 1976 in accordance with Article 27.

²⁵⁵ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 1966.

²⁵⁶ “Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO” (2006) ILO, 5th ed, Geneva, Switzerland, p 1.

²⁵⁷ (1960) 364 US 473.

Association and the Protection of the Right to Organise (1948)²⁵⁸. This Convention enlarges one of the founding statements of the Declaration of Philadelphia and the Constitution of the ILO that freedom of association and expression are essential for sustained progress.²⁵⁹ The Convention provides that workers without distinction shall have the right to establish and join trade unions of their choice without prior authorisation subject only to their internal regulations²⁶⁰, to draw their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities as well as to formulate their programmes²⁶¹. The International Covenant on Economic, Social and Cultural Rights also guarantees this fundamental right but goes a bit further than Convention No 87 to provide that the purpose of trade unions is to promote and protect the economic and social interests of its members.²⁶² One wonders why Convention No 87 does not specify the purpose of trade unions as has been done by the Covenant and also the implied exclusion by the latter of trade unions from politics. However, the inclusion of the right to form trade unions in the International Covenant on Civil and Political Rights indicates that trade unionism cannot be divorced from politics and the interests of trade unions can be political as well since they do not operate in a vacuum.²⁶³ This view is further supported by the argument that the socio-economic interests of workers do not only concern working conditions or collective claims of an occupational nature but also the seeking of solutions to socio-economic policy questions, trends and problems which have an impact on the standard of living of workers. As such, protest actions aimed at criticising governments economic and social policies fall within the ambit of Convention No 87 if they are not of a "purely" political nature²⁶⁴. The Committee on Freedom of Association has recognised that it is

²⁵⁸ Adopted on 09 of July 1948 by the General Conference of the International Labour Organisation.

²⁵⁹ See Preamble of the ILO Constitution. Viewed on 06-10-2008 at www-old.ilo.org/actrav.

²⁶⁰ Article 2.

²⁶¹ Article 3(1).

²⁶² See Article 8(1) (a) of the ICESCR of 1966.

²⁶³ See Article 22(1).

²⁶⁴ See Paragraphs 526, 527 and 529 of "Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO" (2006) *supra*.

difficult to draw a clear distinction between what is political and what is strictly trade union in character as these two notions overlap and sometimes inevitable for trade unions to take a stand on questions having political aspects as well as socio-economic issues²⁶⁵.

Public authorities are prohibited from any interference which will restrict or impede the lawful exercise of the right to freedom of association including the suspension or dissolution of trade unions²⁶⁶. Article 5 of Convention No 87 accords workers the right to form and join federations or confederations and any such organisations have the right to affiliate with international organisations. The rights conferred on trade unions are applicable to federations and confederations²⁶⁷.

It is important to stress that this Convention guarantees workers the freedom to establish trade unions and gives trade unions the right to operate or function without previous authorisation without fear of dissolution by administrative authorities. It has been held that the principle of freedom of association will often remain a dead letter if workers were required to obtain any form of previous authorization to enable them establish a trade union and that previous authorisation in practice often amounts to outright prohibition²⁶⁸. The Convention further provides that the procedure for the registration of trade unions for the purpose of acquiring legal personality should be simple and that registration should not be made a prerequisite for the enjoyment of the rights conferred by the Convention²⁶⁹. The ILO Committee on Freedom of Association has held that in cases where the registrar wields enormous discretionary power to refuse

²⁶⁵ See paragraph 131 of the Freedom of Association Digest *supra*.

²⁶⁶ Article 3(2) & 4.

²⁶⁷ Article 6.

²⁶⁸ Case No 2282, cited in Paragraph 272 of "Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO" (2006) *supra*.

²⁶⁹ See Article 7.

registration, this is restrictive to the right to freedom of association and not different from cases where previous authorisation is required²⁷⁰.

The Convention on Freedom of Association and the Protection of the Right to Organise of 1948 created ambiguities as to its application to public sector workers especially as the only categories of public sector workers who were mentioned therein are police and members of the armed forces. This difficulty was further compounded by the rapid expansion of the public service, the diversity of political systems and the need for a sound labour relations system for this sector²⁷¹. These led to the adoption of the Public Service Convention.²⁷² Article 1 provides that this Convention applies to all persons employed by public authorities or the state. It further provides that the extent to which the guarantees provided in this Convention shall apply to high level employees whose functions are normally considered as policy making or managerial or highly confidential shall be determined by national laws and regulations. Article 1(3) specifies that the application of the guarantees in this Convention to police and armed forces shall be determined by national laws or regulations²⁷³. An article 4 and 5 extends and protects the right of public servants to establish trade unions and prohibits anti-union discrimination in respect of employment on grounds of membership. Article 5 provides for complete independence of public employee organisations from public authorities as well as non interference by same in the establishment, function or administration of public employees' organisations.

4.3.2 The Right to Collective Bargaining

The Convention on Collective Bargaining²⁷⁴ supplements Convention N0 87 on Freedom of Association. The former, protects employees against acts of anti

²⁷⁰ See footnote 22 supra.

²⁷¹ See Preamble of Public Service Convention No. 151, 1981.

²⁷² *Ibid.*

²⁷³ Therefore, limitation is placed on police, members of the armed forces and high profile public servants.

²⁷⁴ ILO Convention No. 98 on the Right to Organise and Collective Bargaining.

union discrimination in respect of their employment and safeguards the independence of trade unions by offering protection against interference by employer organisations in their establishment, functioning or administration.²⁷⁵ The Convention also places an obligation on ratifying states to take appropriate measures to encourage and promote the full development and utilisation of machinery for voluntary collective bargaining between trade unions and employer organisations for the purpose of regulating terms and conditions of employment by means of collective agreements, taking into considerations national conditions.²⁷⁶ This Convention deals in more concrete terms with measures to be taken to ensure freedom of association and free collective bargaining.

Article 5 provides that the extent to which the rights guaranteed in this Convention shall apply to the police and members of the armed forces shall be determined by national laws or regulations. These are the only categories of workers who are expressly mentioned as possible exceptions to the direct or full application of this Convention. However, to avoid prejudicing these categories of workers, the Convention further provides that its ratification by a member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which these categories of workers enjoy any rights guaranteed by this Convention.

It is important to note that the rights to freedom of association and collective bargaining conferred on workers argueably in the private sector by Convention No 87 and 98 have also been extended to those in the public sector by Convention No 151. Article 7 which deals with the procedure for determining terms and conditions of employment in the public sector requires, subject to national conditions, the provision of machinery for negotiation of terms and conditions of employment between public authorities concerned and public employees' organisation. Article 8 provides for the settlement of disputes through

²⁷⁵ Articles 1 and 2.

²⁷⁶ Articles 3 and 4.

negotiation between the parties or through independent and impartial machinery such as mediation, conciliation and arbitration. Article 9 provides that public employees shall enjoy the same civil and political rights like any other worker as is necessary for the normal exercise of freedom of association subject only to the status and nature of their functions. However, this Convention does wholly apply to public servants engaged in the administration of the state as well as the police and members of the armed forces as the extent to which the guarantees provided therein apply to these categories of workers shall be determined by national laws and regulations²⁷⁷.

4.3.3. The Right to Strike

Although the right to strike constitutes an essential aspect of trade union rights, only one international instrument, the International Covenant on Economic, Social and Cultural Rights expressly provides trade unions the right to strike. Article 8(1) (d) accords the right to strike “provided that it is exercised in conformity with the laws of the particular country”. The Committee on Freedom of Association has emphasized that the procedure and conditions that any law imposes to be met to render a strike lawful must be reasonable so as to avoid substantial limitations on the means open to trade unions in resolving matters affecting their interests.²⁷⁸ In a number of cases, the Committee on Freedom of Association has pointed out that the granting of the right to form trade unions in the public service does not automatically mean the granting of the right to strike for public service workers particularly those employed in essential services and the senior managerial staff and that the right to strike can be restricted or even prohibited in the public service or in essential services in so far as a strike there could cause serious hardship to the national community and provided that the

²⁷⁷ See Article 1(2) of Convention no 151, Article 9 of Convention NO 87 and article 5 of Convention No 98.

²⁷⁸ See paragraph 547 of “Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO”, 2006 *supra*.

limitations are accompanied by certain compensatory guarantees²⁷⁹. What constitutes essential services is debatable and varies from one jurisdiction to the other.

4.3.4. Limitations to the Core Trade Union Rights

Although the various international instruments provide that no restrictions may be placed on the exercise of these rights, they are subject to such limitations as prescribed by law only in so far as this is compatible with the nature of these rights, and which are necessary in a democratic society in the interest of national security or public order or general welfare or for the protection of the rights and freedom of others²⁸⁰.

Apart from the general limitation above, specific limitations apply to certain identified categories of workers such as the police, the armed forces, senior public servants engaged in the administration of the state²⁸¹ as well as those employed in essential services. Article 9 of Convention No 87 provides for example that the extent to which the rights provided in this Convention shall apply to the police and members of the armed forces shall be determined by national laws or regulations. Although the extent to which the relevant Conventions shall apply to the armed forces and the police is the discretion of the of the member states of the ILO, it has been held by the Committee on Freedom of Association that civilian workers in military establishments should have the right to establish organisations of their choosing without previous authorisation in conformity with Convention No 87²⁸². This reasoning favours the view that the

²⁷⁹ *Supra* at Paragraph 573 and 574.

²⁸⁰ See Article 4 and 8(1) (a) of the ICESCR and Article 21 and 22(2) of the ICCPR of 1966. See also Article 8 and 9 of Convention No 87 and Article 10 of the African Charter on Human and People's Rights, adopted in 1981.

²⁸¹ See Article 1(2) of Convention No 151 which provides that the "extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations".

²⁸² See paragraph 225 of the "Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO" (2006) *supra*.

blanket exclusion of the police and members of the armed forces from the application of Conventions No 87 and 98 is too restrictive.

However, to avoid prejudicing these categories of workers, the Conventions further provides that their ratification by a Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which these categories of workers enjoy any rights guaranteed by these Convention²⁸³.

It appears the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) are too generous and too flexible in their wordings. This may be supported by the provision of Article 8(3) and 22(3) respectively to the effect that nothing in Article 8 of the Covenant shall authorise State Parties to the ILO Convention No 87 to take legislative measures which would prejudice, or to apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

4.4. SIGNIFICANCE AND ACHIEVEMENT OF INTERNATIONAL STANDARDS IN THE AREA OF STUDY

International labour standards serve as a general guide and as a source of inspiration to governments by virtue of their authority, as texts adopted by an assembly composed of representatives of governments, employers and workers of nearly all countries of the world. They set objectives for national policy and thereby guiding the process of labour law reform²⁸⁴. These standards give us an idea precisely on what the laws regulating trade union activities ought to be. Furthermore, they encourage tripartism, protect basic human rights and reflect a

²⁸³ Articles 9(2) and 5(2) of Conventions No 87 and 98 respectively. This protection is clearly worded in Article 5(2) of the International Covenant on Economic, Social and Cultural Rights of 1966.

²⁸⁴ Mwamadzingo, M. & Eguli, L. 2003, "The Rationale and Impact of International Labour Standards". *Paper Presented at World Bank Institute Labor Market Policies Course, Washington DC, March 3-14, 2003* viewed on 06-10-2008, info.worldbank.org/, pp 4-5.

broad consensus on how to regulate universally acceptable minimum protection for workers. Some writers have argued that the role of labour standards is two-fold:” they have to ensure that competition is not primarily based on squeezing labour but rather on promoting the productive capacity of the workforce” and by so doing, improving chances for a fair competition which in turn promotes socio-economic development²⁸⁵. It has also been argued that the ratification of conventions by countries whose labour legislation or practice has reached a certain desirable level, could contribute to the consolidation of national labour legislation by acting as a guarantee against backsliding.

Without necessarily over stating the achievements of international standards in this area of study, we can posit that they have contributed enormously towards the establishment of relative universal peace through the putting in place of minimum standards as well as mechanisms of enforcement based on the ideals of social justice, peace, development and human rights by emphasising the importance of certain values including human dignity, liberty and equality.

4.5. LESSONS AND CHALLENGES FOR COUNTRIES UNDER STUDY

Despite the ideals and tasks set by the ILO and achievements recorded in that regards, there exists a number of challenges for the Organization, the Member States of the ILO and other partners involved in the quasi legislative processes inherent in tripartism. However, we shall limit ourselves to lessons and challenges that relate directly to our study.

The most important lesson and challenge that has emerged in our analysis relates to the flexibility in the wordings of the international instruments regulating trade union activities. Article 19(3) of the ILO Constitution makes it mandatory that in framing international law standards, regard must be given to the need for flexibility so as to give due consideration to the differences in the levels of

²⁸⁵ See Mwamadzingo, M. & Eguli, L. 2003, *supra*, pp 10-17.

development and varying circumstances of the Member States of the Organisation. The desire for flexibility is problematic particularly within the framework of Conventions relating to basic human rights and fundamental freedoms and also to the extent of the universal applicability of standards designed to protect workers²⁸⁶. The very fact that Member States are given the opportunity to tailor ratified standards to suit national conditions makes uniformity unattainable and leaves room for ambiguities and manipulative interpretations.

A major problem related to the issue of flexibility above concerns the purpose or basic functions of trade unions in the international instruments examined. As earlier indicated Convention No. 87 provides for freedom of association but does not expressly indicate the purpose of trade unions. The International Covenant on Economic, Social and Cultural Rights also guarantees this fundamental right but goes a bit further than Convention No 87 to provide that the purpose of trade unions is to promote and protect the economic and social interests of its members.²⁸⁷ One wonders why Convention No 87 does not specify the purpose of trade unions as has been done by the Covenant and also the implied exclusion by the latter of trade unions from politics. However, the inclusion of the right to form trade unions in the International Covenant on Civil and Political Rights indicates that trade unionism cannot be divorced from politics and the interests of trade unions can be political as well since they do not operate in a vacuum.²⁸⁸ The Committee on Freedom of Association has recognised that it is difficult to draw a clear distinction between what is political and what is strictly trade union in character as these two notions overlap and sometimes inevitable for trade unions to take a stand on questions having political aspects as well as socio-economic issues²⁸⁹. This difficulty of drawing a dividing line and eliminating the ambiguity created by these standards can be a potential source of conflict in national jurisdictions.

²⁸⁶ *Ibid.*

²⁸⁷ See Article 8(1) (a) of the ICESCR of 1966.

²⁸⁸ See Article 22(1).

²⁸⁹ See paragraph 131 of the Freedom of Association Digest *supra*.

Furthermore, enforcement to ensure compliance with the relevant international standards is problematic. It has been asserted that "...the drafters of the ILO Constitution failed to put in place the mechanisms necessary to do the job" assigned to it²⁹⁰. This view is supported by the fact that Member States are not obliged but encouraged to ratify the various Conventions that are adopted. They only impose obligations on Member States once they have been ratified. This situation is further compounded by the fact that apart from bringing a Member to shame or ridicule, the Organisation can at most expel a Member for non compliance²⁹¹.

4. 6. SUMMARY

This Chapter examined the background that led to adoption of the relevant international standards regulating trade union activities as well as their broad objectives. It also examined the relevance of these standards with particular attention on the application of the rights to freedom of association, collective bargaining and the right to strike. What has emerged is the fact that these rights are fundamental rights and are protected and regulated in ILO Conventions and human rights instruments. Another point noted is that despite the fundamental nature of these rights and the guarantees provided to guide against their violations, they are not cast in stone and are subject to certain restrictions. This explains the flexible approach adopted in most of the international instruments examined, that measures put in place to ensure the fulfilment of the rights to freedom of association and collective bargaining should be appropriate to national conditions. It is our view that such flexibility creates ambiguities as these international standards may be interpreted differently. Equally noted is the absence of an adequate enforcement mechanism that can police compliance with the international standards.

²⁹⁰ Langille, B 2005, "What is International Labour Law For?", *International Institute for Labour Studies (ILS) Geneva*, p 14.

²⁹¹ See Article 33 of the ILO Constitution.

CHAPTER FIVE

A COMPARATIVE ANALYSIS OF NATIONAL AND INTERNATIONAL APPLICATION OF LAWS REGULATING TRADE UNION ACTIVITIES

5.1. INTRODUCTION

In the previous Chapter, the significance and application of relevant international standards regulating trade union activities were examined and analysed. That Chapter also examined the background that led to the adoption of these international standards, analysed provisions relating to the broad objectives of these standards and those specific provisions relevant to the present study. The over all intention of that chapter was to lay a foundation for the present chapter, which will compare the application of the law regulating trade union activities at the national and international level, so as to determine the extent to which the countries under the present study have complied with their international law obligations²⁹². The paragraphs that follow will compare, contrast and analyse the right to freedom of association, collective bargaining and the right to strike taking into consideration the national and international applications discussed respectively in Chapters Three and Four.

5.2. A COMPARATIVE ANALYSIS OF NATIONAL AND INTERNATIONAL STANDARDS REGULATING TRADE UNION ACTIVITIES

5.2.1. The Right to Freedom of Association

A critical look at the application of the right to freedom of association at the international and national levels²⁹³ portrays certain similarities and differences. In terms of similarities, fundamental trade union rights including freedom of association are protected at all levels. At the international level, the right of freedom of association is protected by a number of instruments including

²⁹² It is worthy of note that the Republic of South Africa and Cameroon have ratified ILO Conventions No. 87 and 98 but have not ratified the Public Service Convention No. 151 of 1981. Refer to www.ilo.org/ilolex/english, viewed on 20-10-2008.

²⁹³ The national levels referred hereto are those of the Republics of South Africa and Cameroon.

Convention No. 87 on Freedom of Association²⁹⁴, Convention No.151 on the Public Service²⁹⁵, the International Covenant on Economic Social and Cultural Rights (ICESCR)²⁹⁶, the International Covenant on Civil and Political Rights (ICCPR)²⁹⁷ and the African Charter of Human and People's Rights²⁹⁸. However, ILO Convention No. 87 is the most significant especially as it has been ratified by both countries.²⁹⁹ At the national levels, this right is equally protected. The constitutions of South Africa³⁰⁰ and Cameroon³⁰¹ guarantee these rights³⁰². These constitutional imperatives are given legal effect respectively by the Labour Relations Act³⁰³ of South Africa and the Labour Code of Cameroon³⁰⁴ as well as Law No.68/LF/19 which regulates freedom of association in the Cameroonian public service amongst others.³⁰⁵

The common features discussed above in relation to the regulation of the right to freedom of association at the national and international levels should not be equated to uniformity as there exist a number of differences in this area. For example, only the Labour Code of Cameroon overtly provides for criminal liabilities, threats of prosecution and imposition of heavy fines against trade unionists forming a union or those involved in the administration of a trade union who act as if the union has been registered³⁰⁶. This is against the spirit of Article 2 of ILO Convention No. 87 on Freedom of Association. This explains the

²⁹⁴ Adopted on 09 of July 1948 by the General Conference of the ILO. See Article 2-9.

²⁹⁵ Adopted on 7 June 1978 and entered into force on February 25, 1981. See Articles 4-5.

²⁹⁶ Adopted in December 1966 by the General Assembly of the United Nations Organization. See Article 8.

²⁹⁷ Adopted in December 1966 by the General Assembly of the United Nations Organization. See Article 22.

²⁹⁸ Adopted on 27 June, 1981 and entered into force on 21 October 1986. See Article 10.

²⁹⁹ See www.ilo.org/ilolex/english. Viewed on 20-10-2008. For a detail analysis on the application of international standards on freedom of association see Chapter Four of this study.

³⁰⁰ Act 108 of 1996.

³⁰¹ Adopted on 18 January 1996.

³⁰² See section 2 and 23(2) (a), (b) of the South African Constitution and the Preamble to the Cameroon Constitution which is justiciable by virtue of section 65 which makes the preamble part and parcel of the Constitution.

³⁰³ Act 66 of 1995. See sections 4, 5 and 8.

³⁰⁴ The 1992 Labour Code. Read sections 3-14.

³⁰⁵ Refer to chapter 3 for a more thorough discussion on the national application of laws regulating the right to freedom of association.

³⁰⁶ Section 6(2) and 166 respectively of the Labour Code.

persistent requests by the ILO Committee on Freedom of Association that this particular provision of the Cameroon Labour Code should be deleted³⁰⁷. This is not the case in South Africa where unregistered unions are induced to register through the provision of organisational rights for registered trade unions³⁰⁸. Cases reported to the ILO Committee on Freedom of Association and conclusions reached from those complaints suggests government manipulation and discrimination in the process of trade union registration in Cameroon and that court cases can be subject to lengthy delays and adjournments.³⁰⁹ It is also worth noting that registration of trade unions in the public sector require the prior approval of the Minister of Territorial Administration.³¹⁰ This is not in accordance with the spirit and purport of article 5 of Convention No. 151.³¹¹

It is worth noting that to clear the ambiguities created by Convention No. 87 as to its scope, the same floor of rights contained therein are extended to public servants by ILO Convention No. 151³¹² subject to the exception of few categories³¹³. It is also important to note that although Cameroon and South Africa have not ratified this Convention as of 2008³¹⁴, South Africa Complies with this Convention since it makes no distinction between public and private sector employees with regards to the application of labour rights including the

³⁰⁷ See "CEARCR: Individual Observation Concerning Right to Organise and Collective Bargaining Convention, 1949(No. 98) Cameroon (Ratification: 1967) Published 2008." Or "Document No. (ilolex):062008CMR098" viewed on 20-10-2008, www.ilo.org/ilolex/english. Other cases and complaints against the government of Cameroon can be obtained on the same site. For example, Report No. 350, Case(s) No(s). 2476.

³⁰⁸ See section 97 of the LRA and D du Toit et al (2003) supra at pp 167 & 183.

³⁰⁹ See complaint against the government of Cameroon presented by the confederation of Independent Trade Unions of Cameroon (CSIC) Report No.340, Case(s) No(s).2439. Accessed on 20-10-2008 at www.ilo.org/ilolex/english.

³¹⁰ See section 2 of Law No.68/LF/19 of 10-12-1968. This law has not been repealed.

³¹¹ This convention has not been ratified by Cameroon.

³¹² See the Preamble to the Public Service Convention of 1978.

³¹³ Article 1(2) & (3) provides respectively for restriction in the extent to which this Convention will be applied to high level employers involved in policy-making or the management of the state and to members of the police and armed forces.

³¹⁴ Visit www.ilo.org/ilolex/english.

right to freedom of association³¹⁵. However, the Cameroon Labour Code makes a distinction as public servants are governed by “the General Rules and Regulations of the Public Service” such as Law No. 68/LF/19 of 18 November 1968 which makes it imperative for unions in the public service to obtain ministerial approval before registration³¹⁶. Although Convention No. 151 is not one of the fundamental conventions of the ILO³¹⁷, one will logically expect that it is respected by members since it merely augments and clears the ambiguities created by Convention No. 87.

5.2.2. The Right to Collective Bargaining

The right to collective bargaining is a fundamental right. This explains why at international and national levels, there is recognition to safeguard this right. ILO Conventions No.98 and No.151 respectively on the Right to Organise and Collectively Bargain and on the Public Service are the only universal international instruments that regulate this right³¹⁸. Article 6 of Convention No. 98 provides that the said Convention does not deal with the position of public servants engaged in the administration of the state nor shall it be deemed to prejudice their rights or status. This is suggestive of the fact that this convention was envisaged to cover public servants and particularly those not involved in the administration of the state. It is worthy of note that article 4 of Convention No. 98 and article 8 of Convention No.151 which supposedly extends the right to collective bargaining to employees in the private and public sector respectively almost have the same wording save that the parties to whom the conventions apply differ and that while the former encourages “voluntary” collective

³¹⁵ See section 2 of the LRA.

³¹⁶ See Article 5.

³¹⁷ See the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Available at www.ilo.org/ilolex/english.

³¹⁸ For a better analysis of this right under these international instruments refer to Chapter 4.

bargaining, the latter is mute as it does not use the word “voluntary”³¹⁹. One wonders the rationale for this omission or variation.

Although South Africa and Cameroon have ratified ILO Convention No. 98, there exist some sharp differences over the application of the said Convention. In South Africa, the right to collective bargaining is given great importance. This right is not only guaranteed by the Constitution³²⁰ but also has a Chapter of the Labour Relations Act (LRA) dedicated to it³²¹. One of the principal objects of the LRA is to provide a framework within which collective bargaining and industrial policy formulation can take place³²² as well as promote orderly collective bargaining³²³. It is worthy of note that in line with Article 4 of Convention No. 98, one of the most important features of collective bargaining in South Africa is voluntarism. Although subject to a few exceptions, collective bargaining is voluntary and there is no duty to bargain³²⁴. This notwithstanding, some writers are of the view that section 23(5) imposes an obligation to bargain but no ultimate duty to conclude a bargain³²⁵. Unlike the situation in South Africa, Cameroon places little value on this right. This opinion is informed by the fact that this right is neither expressly protected in the Constitution of Cameroon³²⁶ nor the Labour Code. The Labour Code does not provide any objective related to the regulation of collective bargaining save for the regulation of relations between employers, wage earners (employees) and apprentices³²⁷. The right to collective bargaining can however be implied in the Labour Code from its ample provisions on collective agreements and collective disputes³²⁸.

³¹⁹ See Part IV and Part V concerned respectively with procedures for determining terms and conditions of employment and settlement of disputes.

³²⁰ See section 23(5) of the 1996 Constitution.

³²¹ Act 66 of 1995. See sections 11-63.

³²² See section 1(c)(i)&(ii).

³²³ See section 1(d)(i)&(ii).

³²⁴ See *ECCAWUSA & others v Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC)

³²⁵ Read Landman, AA 2003, “The Duty to Bargain-An Old Weapon Pressed into Service: *SANDU v Minister of Defence*” 24 ILJ 2101 (T).

³²⁶ Adopted on 18 January 1996.

³²⁷ See section 1(1).

³²⁸ See sections 52-60 and 157-165 respectively.

The international instruments mentioned above also impose obligations on states that have ratified them to put in place mechanisms appropriate to national conditions through which this right can be exercised and enforced³²⁹. It is opined that South Africa has complied fully with these provisions taking into consideration the mechanisms and structures put in place to ensure the effective realisation of this right both within the public and private sectors of employment³³⁰. On the contrary, in Cameroon, there exist no effective structures and mechanisms for collective bargaining for private and public sector employees. This partly explains why there has been no effective collective bargaining in Cameroon since 1996³³¹.

5.2.3. The Right to Strike

Although the right to strike constitutes an essential aspect of trade union rights, only one international instrument, the International Covenant on Economic, Social and Cultural Rights expressly provides trade unions the right to strike. Article 8(1) (d) accords the right to strike "provided that it is exercised in conformity with the laws of the particular country". This right is also expressly guaranteed in the Constitutions of the Republics of South Africa³³² and Cameroon³³³ and given legal effect in the South African context by the Labour Relations Act³³⁴. In Cameroon, the Labour Code also recognises this right³³⁵. The Committee on Freedom of Association has emphasized that the procedure and conditions that any law imposes to be met to render a strike lawful must be reasonable so as to avoid substantial limitations on the means open to trade unions in resolving matters affecting their interests.³³⁶ In a number of cases, the

³²⁹ See Articles 4 and 7 of ILO Convention No. 98 and 151 respectively.

³³⁰ For a discussion on this area, refer to Paragraph 3.2.5 of Chapter 3.

³³¹ See Paragraph 3.3.3 for details.

³³² Section 23(2)(c).

³³³ See the Preamble which is justiciable by virtue of Article 65.

³³⁴ See section 64(1) of Act 66 of 1995.

³³⁵ See sections 157 (3) & 165(1)(b).

³³⁶ See paragraph 547 of "Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO", 2006 *supra*.

Committee on Freedom of Association has pointed out that the granting of the right to form trade unions in the public service does not automatically mean the granting of the right to strike for public service workers particularly those employed in essential services and senior managerial staff engaged in policy formulation and that, the right to strike can be restricted or even prohibited in the public service or in essential services in so far as a strike there could cause serious hardship to the national community and provided that the limitations are accompanied by certain compensatory guarantees³³⁷. In South Africa, the right to strike is enjoyed by employees in both the private and public sectors³³⁸. However, apart from the procedural requirements³³⁹ for a protected strike action, there are also substantial limitations such as the prohibition of strikes by those engaged in essential services³⁴⁰. It is trite noting that any limitations in South Africa must be in accordance with the provisions of section 36(1) of the Constitution as interpreted in the case *S v Zuma*³⁴¹. In Cameroon, the Labour Code provides that, strikes can only be deemed legitimate after conciliation and arbitration have failed and workers who contravene this requirement can be dismissed on grounds of serious misconduct³⁴².

5.3. COMPARING AND CONTRASTING IMPORTANT FEATURES

In the preceding paragraphs, we compared, contrasted and analysed the right to freedom of association, collective bargaining and the right to strike taking into consideration the national and international standards discussed in Chapter 3 and 4. The over all intention was to determine the extent to which the countries under the current study have complied with their international obligations. What has emerged are a number of similarities and differences.

³³⁷ *Supra* at Paragraph 573 and 574.

³³⁸ Section 2 of the LRA.

³³⁹ See section 64(1)(a),(b),(d) &(2) of the LRA.

³⁴⁰ Du Toit, D et al 2003, *supra* at pp 289-294. See also section 65(1) (d) of the LRA.

³⁴¹ See Paragraph 2.3.5 above.

³⁴² Section 165(1)(b).

The most striking similarity is that the countries under the current study are apparently committed to implementing the obligations incurred from their ratification of the relevant conventions. This view is supported by the fact that all the rights discussed, except the right to collective bargaining³⁴³, are given constitutional and statutory protection and as such, are justiciable. Another similarity is the fact that, the rights discussed are not absolute as they are subject to various limitations.

Despite these similarities, the following differences were noted:

- Unlike the situation in South Africa where no distinction is drawn between unions in the public and private sectors, trade unions in Cameroon are distinguished and those in the public sector need the prior approval of the Minister of Territorial administration before registration.
- Unlike the situation in South Africa where the LRA encourages trade unions to register so as to enjoy organisational rights, the Labour Code of Cameroon imposes criminal and civil penalties on trade unionists who act as if their unions have already been registered.
- Unlike South Africa where effective mechanisms have been put in place to regulate collective bargaining, there exists no effective structures in Cameroon through which effective collective bargaining can take place.

5.4. SUMMARY

In view of the above, it is submitted that South Africa has complied fully with its public international law obligations arising from the ratification of Convention No. 87³⁴⁴ and Convention No.98³⁴⁵. It is also submitted that, in accordance with the spirit of the ILO Fundamental Declaration of Principles and Rights at work which seek to promote the respect of fundamental labour rights including freedom of

³⁴³ As indicated above the right to collective bargaining is neither expressly guaranteed by the Constitution nor Labour Code of Cameroon.

³⁴⁴ Ratified on 19-02-1996.

³⁴⁵ Ratified on 19-02-1996.

association and collective bargaining, South Africa extended the same floor of rights to those employed in the public sector even though it has not ratified the Public Service Convention³⁴⁶. It is further submitted that despite attempts by Cameroon to honour its public international law obligations flowing from the ratification of Convention No. 87³⁴⁷ and Convention No.98³⁴⁸, there are still discernable shortcomings. It has not fully complied with Article 2 of Convention No. 87 on Freedom of Association and Article 4 of Convention No. 98 on Collective Bargaining as discussed above.

³⁴⁶ Convention No. 151 *supra*.

³⁴⁷ Ratified on 07-06-1960.

³⁴⁸ Ratified on 03-09-1962.

CHAPTER 6

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

6.1. INTRODUCTION

The purpose of this inquiry as suggested by the topic and explained in the problem statement is to review the impact labour legislations have exerted on trade unions and the extent to which this has influenced their participation on labour legislative processes in South Africa and Cameroon as well as establish reasons for the sharp differences in terms of trade union activities in both countries. In a bid to realize the aims and objectives of this study, particular emphasis was placed on their unique historical context, legal obstacles and diverse challenges which trade unions face in both countries with the overall intention of identifying deficiencies needing reform. The deficiencies identified and the proposals submitted follow a rigorous analysis of what obtains in South Africa, Cameroon and at the international level in terms of tripartism within and standard setting by the ILO. This analysis relied heavily on primary and secondary sources of information. In the paragraphs that follow, the findings and observations at the country and international levels as well recommendations for policy and statutory or law reform will be presented.

6.2. CAMEROON: IDENTIFIED FEATURES, SHORTCOMINGS AND RECOMMENDATIONS

With regards to the situation in Cameroon, it was observed that the government has made legislative efforts to comply with its international obligations flowing from the ratification of the ILO Conventions No. 87 and 98. The Preamble to the Constitution of Cameroon guarantees the rights to freedom of association, trade unionism as well as the right to strike. Article 65 of the Constitution of Cameroon declares that the Preamble is part and parcel of the Constitution and therefore justiciable. However, neither the Constitution nor the Labour Code expressly

provides for the right to collective bargaining. Despite these achievements, some important features and a number of shortcomings were identified including:

- Trade unions in Cameroon were not subjected to any racial legislation nor did they actively engage in the independence struggle of the country.
- Trade unions in post colonial Cameroon are not autonomous. They have suffered from disastrous state intervention that has left the movement subordinate to the ruling party, leaving it powerless to effectively respond to neo liberal challenges.³⁴⁹
- Trade unions in Cameroon have been in constant conflict with the government save those whose leaders have been bought over by the government or during the existence of the one party system when the trade unions could not be distinguished from the ruling parties. This conflict is partly explained by the negative perception of trade unions by post colonial leaders.
- There is no evidence of active union involvement in the development of the current labour legislations in Cameroon
- Trade unions in Cameroon have achieved very little³⁵⁰.
- A close scrutiny of laws regulating trade union activities in Cameroon precludes them from any significant influence in the legislative labour processes as well as any direct involvement in activities of a political nature³⁵¹
- In Cameroon, separate and sometimes confusing pieces of legislations regulate trade union activities in the private and public sectors (the Labour Code and Law No 68/LF/19 of November 1968 respectively) and unions in these sectors for example follow different procedures for registration.

³⁴⁹ Phelan C "World Wide Trends and Prospects for Trade Union Revitalisation", Phelan C ed (2007) *Trade Union Revitalisation: Trends and Prospects in 34 Countries*, Peter Lang Oxford pp 13.

³⁵⁰ An example of a trade union in Cameroon that has made some reasonable achievements is SYNES. Read Piet K, "Trade Union Activism Among University Teachers During Cameroon's Political Liberalisation" (2004) *Nordic Journal of African Studies*, Vol. 13, No.3. pp 289-301, particularly paragraph 2 on p 298.

³⁵¹ See Paragraph 3.3. of Chapter 3.

Trade unions in the Public Sector require prior ministerial approval before registration³⁵².

- Section 6(2) of the Labour Code provides for criminal prosecution while section 166 imposes heavy fines against trade union leaders who act and manage unions as if they have been registered.
- In Cameroon there exist no specialized court which can more effectively interpret, protect and enforce labour laws in general and those regulating trade union activities in particular.
- There are no structures that ensure effective collective bargaining in Cameroon. At the national level, the National Labour Advisory Board simply makes recommendations and proposals relating to labour laws and regulations in the areas covered by section 117(2)(a) of the Labour Code and the appointment of members to this Board by the minister leaves room for manipulation³⁵³.
- Bargaining levels and subjects are not adequately defined

In view of the shortcomings identified above, we submit the following recommendations:

- Trade unions must change their policies and approach by cutting existing ties with the authoritarian government so as to give credibility to union leadership and gain the lost confidence in the rank and file. They should further strengthen alliances with civil organisations, social movements and international organisations that are committed to the ideals of freedom of association, democracy and good governance³⁵⁴. Trade unionists must take into consideration the welfare of its members, avoid excessive political greed and ambitions as well as personal as opposed to class interests which makes them susceptible to political baits.

³⁵² *Ibid.*

³⁵³ See section 117 of the Labour Code.

³⁵⁴ See Piet K, "Trade Unionism in Cameroon: From Crisis to Revitalisation?" in Phelan C ed (2007) *Trade Union Revitalisation: Trends and Prospects in 34 Countries*, Peter Lang Oxford pp 440-442.

- To ensure compliance with the international right to freedom of association, sections 6(2) and 166 of the Labour Code which respectively imposes criminal and civil penalties on trade unionist should be scrapped. This also applies to Article 2 of Law No 68/LF/19 of November 1968 which requires ministerial approval before a trade union in the public sector can be registered.
- To clear the ambiguities created by the existence of several statutes and regulations governing fundamental trade union rights in the public and private sectors, we recommend that there should be only one statute applicable to workers in the public and private sectors. This will also avoid inconsistency and unnecessary duplication of resources. We further recommend that the same rights enjoyed by workers in the private sector should be extended to those in the public sector.
- To ensure effective collective bargaining in Cameroon, appropriate collective bargaining structures must be established in accordance with the obligation imposed by Article 3 and 4 of ILO Convention No. 98. Furthermore, to ensure effective tripartism, members representing trade unions in the National Labour Advisory Board should not be appointed by the minister but chosen according to internal trade union rules and delegated to represent the interests of workers.
- To ensure that the effective interpretation, protection and enforcement of labour laws in general and those regulating trade union activities in particular, we recommend the creation of a specialised labour court which will have jurisdiction over labour matters.

6.3. SOUTH AFRICA: IDENTIFIED FEATURES, SHORTCOMINGS AND RECOMMENDATIONS

With regards to the situation in South Africa, it has been observed that the South African government has complied fully with its international law obligations flowing from the ratification of ILO Convention No.87 and 98. Fundamental trade

union rights such as the rights to freedom of association, collective bargaining and the right to strike are deeply rooted in the Constitution of South Africa³⁵⁵, are enforceable³⁵⁶ and structures have been put in place to ensure the full enjoyment of these rights. Furthermore, a single piece of legislation (the Labour Relations Act) regulates trade union activities in both the private and public sectors.

In addition to the above, the following features and shortcomings were identified:

- Trade unions in South Africa were subjected to racial legislations and engaged in the political liberation of South Africa.
- Trade unions in post apartheid South Africa are engaged in social partner unionism, representing the pursuit of strategic input into national economic and social policy in concert with state and employer associations on a national tripartite body, NEDLAC. They seek to negotiate social and welfare issues with the aim of finding consensus among social partners.
- Trade unions were directly involved in the development of current labour legislations in South Africa through the various negotiations and consultation talks within NEDLAC as well as submissions in the South African Parliament³⁵⁷.
- Trade unions in South Africa, particularly COSATU, have achieved most of objectives for which they were created and fought for³⁵⁸.
- Trade unions in South Africa, especially COSATU enjoy cordial relationship with the ruling Government (despite some ideological differences) as evidenced by the Tripartite Alliance that bind them together with the SACP. Furthermore, they are regarded as a strategic partner that can contribute positively to the development of South Africa.

³⁵⁵ See section 23 of Act 108 of 1996.

³⁵⁶ See sections 1(c), 2 and 8 of the Constitution.

³⁵⁷ COSATU has a Parliamentary Office in Cape Town which actively represents labour in the parliamentary and other policy processes. Some of their parliamentary submissions can be accessed at <http://www.cosatu.org.za/docs/2001/consti.htm>. Viewed on 27/03/2008).

³⁵⁸ Read Baskin B *supra* pp447- 466.

- In South Africa, the window is open for trade unions involvement in political activities as the LRA mentions only the *principal purpose* of trade unions.³⁵⁹
- In addition to the many structures created to resolve labour disputes including those relating to the fundamental trade union rights, there exist a specialized Labour Court and Labour Court of Appeal in South Africa which is supposed to be presided over by experts in the area of labour law thereby applying their relevant expertise in resolving the disputes that come before the court. Despite this advantage there exist problems of interpretation pertaining to the concurrent jurisdiction of the Labour Court and the High Court over labour matters.

In view of the shortcoming identified above, pertaining to the concurrent jurisdiction of the Labour and High Court over labour matters, were recommend in accordance with the views expressed by Zondo J³⁶⁰ and Skweyiya J³⁶¹ that the legislature should statutorily intervene to put a finality to the confusion. This can be by way of an amendment to the LRA.

6.4. TRADE UNIONS: COMMON CHALLENGES AND RECOMMENDATIONS

Trade unions in both countries are confronted with a new set of challenges arising from and related to globalization, particularly, the decline in union membership and collective bargaining power due to the increasing growth of the informal sector of the economy arising from retrenchments and the growing rates of unemployment. These are further compounded by the ever increasing cost of living, poverty and the scourge of the HIV/AIDS pandemic.

As a solution to the decline in union membership due to the ever growing informal sector and unemployment which in turn impacts negatively on their

³⁵⁹ Section 213 of LRA. Italicized words represent my emphasis.

³⁶⁰ *Lange Veldt v Vryburg Transitional Local Council & others* (2001) *supra*.

³⁶¹ *Petronella Nellie Nelisiwe Chirwa v Transnet Ltd & Ors* [2007] *supra*.

bargaining power, it has been suggested that unions must intensify their efforts to organise those in the informal sector of the economy. Delvaux has pointed out that contrary to traditional expectations, experiences in some countries has shown that unionization of workers in the informal economy is an achievable goal and that it can have mutual benefits for unions and workers alike. It allows the former to improve their standard of living, their working conditions and social protection and the latter to bolster their bargaining power as a force that truly represents all workers.³⁶²

Another major challenge identified is that of unemployment. The existing levels of unemployment are further exacerbated by large redundancies in the public service³⁶³. However, this requires concerted action involving government, business, labour and the civil society. As part of the solution to this problem, it is suggested that African governments invest heavily in labour intensive sectors such as road and railway construction which will generate jobs and lay the much needed infrastructure for development. It has also been suggested that efforts on skills development must be intensified³⁶⁴.

Furthermore, HIV/AIDS is now considered "the most formidable development challenge of our time"³⁶⁵. This challenge has not been surmounted by any single government or individual effort. This therefore calls for collective efforts at the national and international level involving governments, trade unions and civil society organisations.

³⁶² Delvaux E, "The Challenge to the Informal Economy". *Labour Education (2001/2002) No 123* at p15.

³⁶³ Kiggunda M, "Retrenchment Program in Sub-Saharan Africa: Lessons for Demobilization". (1997) Obtained on 5-5-2008 at www.bicc.de/publications/papers.

³⁶⁴ Teal F "Employment and Unemployment in Sub-Saharan Africa: An Overview". (2000) *Centre for the Study of African Economies, Oxford University*. Viewed on 5-5-2008 at <http://www.csae.ox.ac.uk/conferences>.

³⁶⁵ Egulu L, "A New Approach to Adjustment". (2001/2002) *Labour Education No123* p 21.

6.5. THE ILO: SOME OBSERVATIONS

At the level of the ILO, the most important lesson and challenge that has emerged in our analysis relates to the flexibility in the wordings of the international instruments regulating trade union activities. Article 19(3) of the ILO Constitution makes it mandatory that in framing international labour standards, regard must be given to the need for flexibility so as to give due consideration to the differences in the levels of development and varying circumstances of the Member States of the Organisation. The desire for flexibility is problematic particularly within the framework of Conventions relating to basic human rights and fundamental freedoms and also to the extent of the universal applicability of standards designed to protect workers³⁶⁶. The very fact that Member States are given the opportunity to tailor ratified standards to suit national conditions makes uniformity unattainable and leaves room for ambiguities and manipulative interpretations. It is suggested that the conventions and recommendations of the ILO should constitute a floor of minimum standards that must be adhered to.

Furthermore, enforcement to ensure compliance with the relevant international standards is problematic. It has been asserted that "...the drafters of the ILO Constitution failed to put in place the mechanisms necessary to do the job" assigned to it³⁶⁷. It is opined that the mechanisms put in place by the ILO to ensure compliance are lengthy and largely ineffective and can at most lead to the ridicule or expulsion of a member from the Organization³⁶⁸. It is suggested that in-depth research that could come with viable alternatives be carried out on this particular area so as to enhance the role of the ILO.

³⁶⁶ Mwamadzingo, M & Eguli, L 2003, *supra* at pp 10-15.

³⁶⁷ Langille, B 2005, "What is International Labour Law For?", *International Institute for Labour Studies (IILS) Geneva*, p 14.

³⁶⁸ For more on the enforcement of ILO standards, you can read articles 19 to 33 of the of the ILO Constitution.

6.6. CONCLUSION AND FURTHER RECOMMENDATIONS

The purpose of this inquiry as suggested by the topic and explained in the problem statement was to investigate the impact of labour legislation on trade unions in South Africa and Cameroon as well as the extent to which trade unions in both countries have impacted on the process of labour legislation. In that quest, we set out our basic hypothesis in Paragraph 1.4. What emerged at the end of our study is a confirmation of our basic hypothesis that labour legislation has a significant impact on the role of trade unions. Apart from the above, it is established that the role or activities of trade unions in South Africa and Cameroon is influenced by:

- The unique historical backgrounds of the trade unions including their levels of involvement in the liberation struggles of both countries;
- The different legal frameworks operational in both countries;
- The extent to which both countries have complied with the international law provisions regulating trade union activities;
- The varying political platforms in both countries; and
- The relationship which unions enjoy or otherwise with the state in both countries.

Mindful of the above facts, it may be useful to note the assertion of Craig Phelan to the effect that, trade unions are the most idiosyncratic institutions in society and that their “structure, strategies and even their goals reflect the unique historical development in countries in which they operate” and that trade union movements in any country “represent a distinctive and ever changing accommodation to a nation’s political and legal traditions, its industrial relations system and labour market” leaving each with a discrete of opportunities and challenges³⁶⁹.

³⁶⁹ Phelan, C 2007, *supra* at p 11.

It is hoped that despite the limitations indicated in Paragraph 1.6.2, above, we have achieved the objectives of our study. However, we suggest further research on this topic which will enable:

- Better consultation of policy documents;
- Consultation and analysis of relevant Cameroonian case law on this subject which this researcher could not access at this level as indicated in the Limitations in Paragraph 1.6.2;
- Consultation of national archives to add flesh to the historical analysis;
- The use of unstructured interviews; and
- Better development of the themes discussed in this study.

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