

**UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

I recommend that the obligatory essay prepared under my supervision.

By

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Entitled

TRADE UNIONS IN ZAMBIA: AN OVERVIEW

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing Obligatory Essays.

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THIS WORK IS DEDICATED TO

My late father Redson Caesar Simwanza and my beloved mother Love Nakazwe
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Introduction

The Trade Union has come a long way legally speaking from the days when it was treated by the courts of England as an adaptation of the social club to the environment of industrial relations. However, today, the Trade Union has been vested a special status at law and has been recognised in so many nations of the world as a necessary inclusion into the labour relations world.

“Capital is at once in unity and struggle with labour”¹. Herein the history and nature of capitalist production relations is efficiently summed up. In it the owners of the means of production as land and factories and other employers of labour will, in order to set their capital in motion and realise surplus value (profit), require the labour power of the working class. Unfortunately, as is the case with every other social-economic formation founded on private property, the relations between the employers of labour and the suppliers of labour are antagonistic. The insatiable appetite of the employers to realise maximum profits, most through mechanisms like underpayment of workers and provisions of poor conditions of work, has always met the resistance of workers usually in Trade Unions, struggling for better wages and improved working conditions².

In the face of this conflict and struggle the owners, representatives of capital have either tried to suppress, partially or wholly, the resistance of the workers, and/or, where they were forced to do so, to attempt to reconcile labour to capital through various systems of Industrial Relations.

The Trade Unions have thus become a necessity to promote and represent the workers' economic interests. The workers in turn have learnt through experience the need to

¹ Himwanga Paulsen, The Legal Constraints on the Right of Workers to Strike, (Obligatory Essay 1977 University of Zambia)pg1.

² Ibid

organise themselves into strong bodies. In other words, the capitalist conception of concentrated power of accumulated capital could only be substantially challenged by the concentrated power of labour, organised and acting in solidarity. Once organised, the workers exercise their power through various means, the most common being strike action.

The Trade Union therefore, is an indispensable constituent of the industrial relations system in society that permits a system of decentralised decision-making and growing interest to shape the rules of work. This is because Trade Unions are just one of the several sets of actions that together determine the nature of industrial relations³.

In Zambia, the law has been instrumental in the development of Industrial Relations culminating into the birth and growth of Trade Unions.

However the framework within which Trade Union activity develops and flourishes is entirely determined by and the prerogative of the state through active direction in accordance with the statute. It is thus true to question the extent to which government controls, intervenes or intrudes in industrial relations entailing that government and not infact employers are the key players in industrial relations.

This essay deals with the legal framework within which Trade Union activity is carried out and examines the impact, role and achievements of Trade Unions in Industrial Relations bearing in mind that it is government that regulates through legislation the labour environment. The Industrial and Labour Relations Act will be critically analysed in the hope of clearly assessing and determining the rights available to the worker vis-à-vis SRIKE ACTION.

³ Banda Darlington, Legal Aspects of Industrial Relations in Zambia with particular reference to the Right to Strike (Unpublished L.L.M. Dissertation 1988)

It also investigates the extent to which Zambia has applied International Laws of Labour in industrial relations and trade union affairs while an attempt is made, to discover whether or not the Trade Union operates, as an autonomous entity, a defacto political party and whether Trade unions enjoy certain of the rights guaranteed under the Zambian Constitution.

CHAPTER ONE

HISTORICAL BACKGROUND TO UNIONISM

It would be inappropriate to talk about the rise of Trade Unionism in Zambia without making references to the different phases before independence.

Some of the different phases maybe historical others political in character. The rise of Trade Union Movement cannot be divorced from both Politics and History. It cannot also be disassociated from the economy of the country.

BRITISH TRADE UNION HISTORY

It would be superfluous to trace the history of Trade Unionism in Zambia without a reference to its History in England from where Zambia's Trade Union Law originates.

In England, the first form of permanent organisation among wage earners was the local trade club of the eighteenth century found among skilled artisans like cotton spinners, bricklayers, printers etc. These trade clubs sought, mainly by appeals to Parliament, to protect the wage standards of their members based on custom and apprenticeship. In this they were destined to fail. These trade clubs were not only local and isolated but also illegal and their organisers were being prosecuted under the then common law for conspiracy, intimidation, threats and obstruction. Organisers were sued under the doctrine of "Restraint of Trade" i.e. combinations of workers were accused of impeding and interfering with the smooth course of trade. Furthermore, a series of Acts of Parliament

had made it a criminal offence for workmen in particular trades to combine in order to change their wages and conditions, leaving it the prerogative of the state to regulate such matters. The state showed little interest in this⁴.

It is to be noted that Industrialisation is usually one of the major factors in the development of trade unionism. Industry and commerce bring together employers on one hand and employees on the other, each side bent on improving its lot. Therefore, with the coming of the Industrial Revolution towards the close of the eighteenth century, a vast majority of workers were made practically slaves of the new machines. Organised workers redoubled their appeals to Parliament for protection and for better wages and conditions. Parliament once again showed little interest. Flanders comments and documents that instead the Combinations Acts of 1799 and 1800 were passed, clearly heralding a period of savage regression of trade union activity. "This piece of legislation was in response to the fears of the rich and an attempt to ensure that the consequences of the French Revolution do not encroach upon the shores of England⁵. For instance, in 1810 nineteen printers of The Times Newspaper were condemned to terms of imprisonment varying from nine months to two years for combining and conspiring together maliciously to injure their masters and employers by quitting their work on account of their demands for an increase in wages not being accede to⁶."

It was in these harsh and savage conditions that trade unionism in England, took root secretly and often in the form of secret club organisation among craftsmen persisted. The struggle between the workers and employers continued until 1925 when following the repeal of the Combination Act, an Act was passed which made it possible for workers for

⁴ Flanders A. Trade Unions (Hutchinson and Company Ltd (1952)) pg10

⁵ Ibid

⁶ Grunfeld C. Modern Trade Union Law (Sweet and Maxwell, London (1966)) pg5

workers to organise without committing an illegal act. New workers' organisations sprung up with this solidarity and growing power alarming the governing classes and owners of capital. Thus between 1871 and 1876 a number of Acts were passed which defined the legal status and powers of unions which forms the pillar of common law Trade Union Law. The Trade Union Act, 1871 later amended in 1876 maintained that a trade union was lawful and not to be held as unlawful simply because its objects were in restraint of trade. Further, the Conspiracy and Protection of Property Act 1875, established the legality of collective bargaining.

It is stated among other things that if two or more people agreed to do something "in contemplation or furtherance of a trade dispute" it was not indictable as a criminal conspiracy unless the same act committed by one person only would have been criminal. Peaceful picketing was also legalised, provided there was no violence, intimidation and other aggressive acts⁷. Thus a trade union had come to be recognised as a social institution essential to the emergent capitalist system though it still remained very much vulnerable and threatened to be undermined as was evidenced in 1901 in the Taff Vale Railway Co v Amalgamated Society of Railway servants⁸. In this case the company had sued the union for damages in consequence of loss inflicted upon them by the strike, and the court gave judgement in favour of the company. This decision was unfavourable to trade union because it expanded their vulnerability under the law. However, there was a strong recognition as to the importance of collective bargaining through various methods such as labour withdrawal strike action and peaceful picketing and these methods were later recognised as legitimate by virtue of 1906 Trade Dispute Act. The effect of this Act

⁷ Opcit

⁸ (1901) AC 426.

was such that it attempted to remove this vulnerability of Trade Unions under the law, which was further, reduced by a subsequent amendment to the 1906 Trade Dispute Act of 1965.

It is observed that throughout history, the British method of protecting the freedom to strike and engage in other methods of collective bargaining consisted in the enactment of immunities from criminal prosecutions as seen in the Conspiracy and Protection of Property Act 1875, and from civil action for tort as showed by the Trade Dispute Acts 1906 and 1965.

ZAMBIAN TRADE UNION HISTORY.

Article 11 of the British Southern Africa Charter of 29 October, 1889 maintained and acknowledged that the company as may be practicable and to the best of its ability shall abolish by decrees any systems of slave trade or domestic servitude in its territories which included today's Zambia. The implication of this provision was that labour was to be given voluntarily. However, employers used chiefs as a source of obtaining labour either by paying cash or by exchange with gifts. The company however, did attempt to put an end to this trend by ensuring that the native commissioners was in the know with regards to any labour recruitment transaction⁹. Therefore, the early labour policy did not support compulsion to render labour. But as more settlers settled in the territory, chiefs were under pressure to provide workers and both indirect and direct methods were used to extract labour from every employable African. One such measure was tax payable by

⁹ Mtopa A Labour Laws of Zambia (Kenneth Kaunda Foundation, Zambia (1980))pg13

every male above the age of 18 years or face imprisonment. Most of the natives opted to offer their labour so as to earn enough to pay their taxes¹⁰.

The British Colonial Policy in Zambia on employment of African labour was that of control of the utilisation of labour. Thus chiefs were taxed with the duty of ensuring that taxes were paid and not evaded and it was to this effect that the chiefs control over his tribesmen continued through elected representatives in the different social, tribal groupings wherever the native workers offered their labour. This control extended on to farms, mines e.t.c. It was this tribal control by chiefs and their representative that became the genesis of the Trade Union in Zambia.

The chiefs' representatives undertook duties beyond the mere observance of tax payment but also assumed other tribal duties pertaining to the tribal groups such as burial ceremonies e.t.c. Through this, tribal clubs were set and it was from their tribal clubs that the great emerging majority of African workers began to organise themselves and elect representatives to press for better working conditions in urban areas. The chiefs and headmen slowly began and surely lost grip of the emerging urban labour force. The ultimate effect was that the workers began to elect competent representatives to head the workers organisations beyond tribal clubs and lines. The workers' organisations are now led by leaders chosen because their outstanding contribution among the workers.

The most significant step to an emerging Trade Union in colonial Zambia could be traced back to the 1930's. This period marked the opening up of the copper mines on the Copperbelt and a rise in concentrated populations along the line of rail of mostly miners. The object and in human conditions of work, low wages and racial discrimination the Africans lived under bred discontent. Despite the absence of the Trade Union Movement,

¹⁰ Ibid

the mineworkers went on strike represented by heads of the various workers' organisations that were formally tribal clubs. The colonial Government's response to these strikes went as far as setting up a Natives Relations Advisory Board. But in so far as the conditions of the African had not improved, the Board had failed to harmonise the mining industry.

The impasse between the mineworkers and their white employers continued throughout 1940 and 1948. As political pressure mounted on the colonial government to grant Zambia independence, these mineworkers' organisations united into the African National Congress, the first African Political Organisation.¹¹

It was the general view that the economic plight of the miners was a consequence of the colonial domination by the colonial Government. The mineworkers were in league with the broader political stratum.

Finally, this pressure brought to bear and in 1949, the National Rhodesia African Mine Workers Union was formed symbolising an emphatic emergence of the Trade Union Movement in Zambia¹².

¹¹ Munangu K.C. The Rise of Trade Unionism in Zambia (Obligatory Essay 1976/77) pg 4

¹² Ibid

CHAPTER TWO

DEFINITION

One of the most fundamental attributes of a labour force is the capacity of its participants to form voluntary associations that are at once stable and effective. They may be said to be the bearers of power representing collective interests of the workers. The creation therefore, of the Trade Union Movement in Zambia can be sounded as one of the great achievements of the people and thereby a significant contribution to the Industrial Relations set up. A Trade Union has been defined as being,

“Any combination whether temporary or permanent, the principle objects of which are under its constitution statutory objects, namely the regulation of the relations between workmen and workers, or between masters and workers, or the improving of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members.”¹³

The test of the existence of a Trade Union is in its objects, which it ought to pursue. Grunfeld emphasises that the object of a Trade Union is primarily labour oriented. This signifies that the Trade Union has as its priority the regulation of the relations between employees and their employers and among employees themselves.¹⁴

¹³ Trade Unions Act 1871 S23 and 1878 Trade Union Acts S16

¹⁴ Grunfeld C, Modern Trade Union Law (Sweet and Maxwell, London,(1966)) Page 8

The duty bestowed on the Trade Union invariably seems to ensure that individuals' competition is restrained among the workers and out rightly substituted for collective negotiations for better conditions and wages from their employers.¹⁵

It must be mentioned that a Trade Union that displays more than one principal statutory object in its constitution does not deprive it of its legal status as a Trade Union. Its object apart from the primary object thus mentioned already in this chapter, can enhance its contribution to the workers' well being further, for instance under the Industrial and Labour Relations Act, a Trade Union may acquire and own property and so deal with such property as the Act specifies e.g. sell, mortgage, exchange etc.¹⁶

What the Act is implicitly driving at is that a Trade Union can engage into enterprise or subsidiary business to implement any lawful purpose authorised by law.

Thus it remains the object of the *Zambian Trade Union Movement* to 'regulate' the relations between employers and employees. The method of regulation, whichever lawful method elected, must take into active consideration the vital function and practice of collective bargaining and persuasion.

LEGAL FRAMEWORK OF TRADE UNIONS AT INTERNATIONAL LAW

It has been observed world over that a legal right conferred on an individual or group of individuals derives its force or weakness principally from the manner in which it is conferred through some valid legal document such as a statute. Further, the formation of Trade Unions has been held to be the counterpart of the accumulation of capital and thus

¹⁵ Ibid

¹⁶ Industrial Labour Relations Act Cap 269 of the Laws of Zambia, s24

there can be no labour relations without the Trade Unions.¹⁷ It follows therefore, that for Trade Unions, that is the organisation of labour, to exist, the providers of labour must be free to form and join them. There has to be an enjoyment or exercise of the freedom of association. This fundamental right, a civil liberty, must be explicitly enshrined in some form of statute or constitution, as is the practice in several nations. The right to join or affiliate to a Trade Union ranks with other Human Rights such as freedom of Assembly, freedom of Speech. The right of freedom of Association is thus the *conditio sine qua non* of Industrial relations alongside collective bargaining.¹⁸

The freedom to Organise, if it exists, will manifest itself in the ease at which workers form associations, this implies that the legal ordering in which the Industrial Relations occur must be such that there should be an absence of restraints or prohibitions substituted for the categorical and positive guarantee of its exercise. Such protection includes the adequate protection of the workers from dismissals, victimisation, threats and intimidations, arrests, marginalisation, etc. as a result of their involvement in Trade Union activities.

Freedom of Association represents the point of contact between industrial relations and human rights. Without being an end in itself, freedom of Association for Trade Union purposes is a major postulate of Democratic Government in an industrial society. Under the Universal Declaration of Human Rights,¹⁹ this conceptual relationship between Democracy, Human Rights and the Industrial Society has been adequately recognised hence the provisions that everyone has the right to freedom of peaceful assembly and

¹⁷ Otto Kahn- Freund *Labour and the Law* (Steven and Sons, London (1977))pg161

¹⁸ Otto Kahn Freund *Labour and the law* (Steven and Sons, London(1977))pg162

¹⁹ Universal Declaration of Human Rights 1948 (UDHR)

association and that everyone has the right to form and join a Trade Union for the protection of his or her interests.²⁰

Further, the International Labour Organisation has adopted two major conventions since World War Two dealing with freedom of Association and the Right to Organise. These are the freedom of Association and Protection of the Right to Organise Convention 1948 and the Right to Organise and Collective Bargaining Convention 1949.

Freedom of Association and Protection of the Right to Organize Convention 1948 of the International Labour Organization.

This comprehensive charter grants workers and employers without distinction whatsoever, the right to form and join organisations of their own choosing without previous authorisation and specifies that workers shall have the right to draw up their constitution and rules, to elect their representatives in full freedom, to organise their administration and activities and formulate their programmes. Further, the charter stresses that public authorities shall refrain from any interference, which would restrict this right or impeded the lawful exercise thereof...²¹

However, what the convention does not balance is the relationship between an absolute freedom of Association and respect for the internal law of the land in terms of social responsibility. Governments have since argued that no state can be expected to accept a Right of Association unqualified by an obligation to respect law. Hence national law has been in the forefront in determining the extent of such right. This has invariably

²⁰ Art 20(1) 23(4) of UDHR

²¹ Charter on Freedom of Association and Protection of the Right to Organise 1948

and to a greater degree tended to erode the guarantee of adequate protection of the workers in the exercise of their fundamental right.

However, the convention noted that in exercising the rights provided for in the convention, workers and employers should respect the law of the land but that the law of the land shall not be such as to impair nor shall it be so applied to impair the guarantees provided for in the convention.²²

The Right to Organize and Collective bargaining Charter 1949 of the International Labour Organisation.

This convention as evidenced by this charter recognises that collective bargaining is the principal means of fixing wages and conditions of work and of regulating the relations between employers on one hand and workers and their organisation on the other. The convention provides that the workers shall enjoy adequate protection against acts of discrimination in respect of their employment. Simamba B.H²³, has documented that there are important advantages exhibited and enjoyed once Trade Unions engage in Collective Bargaining.

Firstly there is the creation of employer employee relations. This entails and enables that both the providers of labour (workers) and the accumulators of capital (employers) to decide together actively on decisions affecting them.

Secondly, there results an increase in productivity by improving conditions of work. The workers are motivated and inspired to perform at the workplace.

²² Freedom of Associate and Protection of the Right to Organise Charter 1948 Convention No 87 Art 8

²³ Trade Union Rights and the ILO, An African Perspective (Unpublished LLM Thesis of Ottawa (1986)
pg11

Lastly, it permits adaptation to the many economic and social changes that have occurred in recent years. The workers are not marginalized but are treated as partners in the labour environment and hence are adequately catered for in the event of such changes.²⁴

The Right to Strike under ILO and Other International Law Conventions

As early as 1952 the committee on Freedom of Association asserted the importance of the Right to Strike. The committee declared the right to strike as one of the essential elements of trade union rights. Simamba notes that it must be emphasised that the Right to Strike under ILO system is well established and falls within its competence.²⁵

On the other hand it is not expressly provided for in any of its two conventions. In 1966, the International Covenant on Social Economic and Cultural Rights expressly provided for the right to strike though with limitation, provided it is exercised in conformity with laws of the country. Such as could in fact, subdue the right to strike. It is trite to state that the organisations supervisory body do recognise the right to strike, it is by no means well respected in the laws and practices of many member countries.

Strike action plays a major role in the operation of Trade Unions; it is a way of expressing support of demands by the workers. Such demands relate to their terms and conditions of employment directly e.g. wages, health, housing, overtime and other matters.

²⁴ Trade Union Rights and the ILO, An African Perspective (unpublished LLM Thesis University of Ottawa (1986) page 122.

²⁵ Ibid 161

However, the committee on Freedom of Association has allowed member countries to prohibit strikes in the public service and essential services because of the serious hardships such an action would cause to a nation.

Also, nations may during a time of war or similar hostilities place restrictions on Trade Union activities so as to allow the nation to be able to muster all available resources be it financial or human. This state of affairs should only be for a limited period of time.

Operation of the Trade Union at International law

Unions have a right to organise their activities. It must enjoy independence regarding its internal affairs. It must be free to hold its congress of members, have experts and decide on remuneration if any of its leaders. It must be free basically to draw up its own rulebook. Its premises and property are inviolable. Therefore any provision, which gives the authorities the right to restrict the objects that may be pursued by a Trade Union, is incompatible with the principle of Freedom of Association.

Conclusion

This chapter while defining and describing a Trade Union and its role in the Labour relations environment has attempted to investigate the legal framework providing for the Trade Union at International law. This chapter will also serve as an introduction to the next chapter, which will endeavour to show how far Zambia as a nation has applied International standards of labour under the ILO and to what extent has Zambia's

domestic legislation on Trade Unions provided for the free exercise and enjoyment of the right to Freedom of Association and the Right to Organise and to strike.

CHAPTER THREE

Freedom of Association and assembly with particular regard to the Trade Union in Zambia.

This chapter explores the extent to which Zambia has endeavoured to implement international standards ensuring a free and stable trade union movement with regards to the freedom of assembly and association. It also provides the legal framework creating or governing trade unions in Zambia. Lastly, the chapter will reflect on the right to strike whether or not it is a realisable right.

Freedom of Assembly and Association in Zambia: The Zambian Constitution

A legal right conferred on an individual or group of individuals derives its force or weakness principally from the manner in which it is conferred through some valid legal document such as a statute. In Zambia the whole concept of fundamental rights and freedoms is highly recognised as a necessity in a democratic dispensation and successive governments have attempted to guarantee the free and progressive enjoyment of these right. However, the extent to which these fundamental rights and freedoms have been put to practical use leaves much to be desired.

In the earlier chapter it was carefully noted that the freedom of association and assembly is the condition sine qua non of industrial relations and ranks highly among other human

rights such as freedom of expression liberty, life, e.t.c.²⁶ The 1991 Zambian constitution as amended guarantees the protection of the right to freedom of association and assembly.

It recognises and declares that

every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedom of the individual, that is to say, the right whatever his race origin sex, colour, creed martial status or political opinion, but subject to the limitation contained in this part to each and all of the following, namely: (for the purposes of this essay)

b. freedom of conscience, expression, assembly, movement, and association.²⁷

The constitution is even more specific and provides that,

Exept with his own consent a person shall not be hindered in the enjoyment of his freedom of assembly freely and associate with outer persons and in particular to form or belong to any... trade union or other association for the protection of his interest.²⁸

Under international law and in particular the two International Labour Organisation conventions alluded to it was generally accepted that these rights in order to be exercised

²⁶ Supra chapter 3

²⁷ Article 11 (b)

²⁸ Article 21

and enjoyed must confer upon the individual the freedoms in the interest of safety defence, and ultimately respect for the laws of the land.

The Zambian constitution attempts to maintain this balance. It does this by subjecting the freedom to several derogations in the interest of public safety or security, defence, public order, rights are not infringed and also for the registration of political parties or trade unions. It further justifies any other limitation provided it can be shown to be reasonably justifiable in a democratic society.²⁹

Some significant points can thereby be concluded.

- i. The freedom of association and assembly though very explicitly protected in the constitution is by no means absolute but is subject to limitations.
- ii. Wide range drafting techniques used and undefined terminologies of such limitations have ensured that the extent to which these limitations operate cannot be predicted.³⁰

The resultant effect of the above observations (i) and (ii) draw an undoubted conclusion that while the freedom of association and assembly is legally conferred on an individual or group of individuals its enjoyment and practical realisation is greatly curtailed hence it can be said that the right is given in one hand and taken in the other, thereby conferring

²⁹ *ibid*

³⁰ Lecture notes: Constitutional Law (lecturer Sangwa JP1998/99 UNZA)

on the individual a somewhat cosmetic impression of freedom of association and assembly. The freedoms are merely illusory.

Freedom of Association and the formation of Trade Unions Under the industrial and Labour Relations Act. Cap 269.

The Zambian Constitution qualifies the right to freedom of association as the right to freely associate with other persons and in particular to form or belong to any political party or trade union. The freedom to form trade unions is essential if the workers' interests are to be protected. The Industrial and Labour Relations Act provides the legal framework for the creation of trade unions.

The Act defines a trade union as,

An organisation of employees, which is registered as a trade union under this Act and whose principal objects regulate collective relations between employees and employers, or between employees and organisations of employers, or between employees and employees.³¹

The Act further confers on the employee the right to take part in the formation of a trade union and the right to be a member of any trade union of his or her choice, not withstanding anything to the contrary contained in any other written law and subject to the Act. Other notable rights conferred on the employee are

³¹ S3

- a) The right to participate with view of becoming an officer or official of the trade union. That means to contest for an elected post in the union seek selection or accept appointment and hold such office.
- b) The right to absent himself from without leave of the employer for the sole purpose of participation in trade union activities.³²

Every Trade Union formed under the Act must be registered with the labour commissioner within six months of its formation. Such application shall be in the prescribed form signed by one hundred supporters and accompanied by a copy of its constitution. Notice of application for registration shall be published in three consecutive issues of the gazette. Interested parties who for some reason object to the registration of a trade union must submit their objections to the commissioner not less than ninety days of the last notice appearing in the gazette. Provide the proposed trade union has complied with provisions of registration, submitted its constitution to the commissioner and that the commissioner is satisfied that the trade union is capable of implementing its principal objects. The commissioner shall register such trade union by issuance of a certificate of registration.³³

The labour commissioner is really a government official reporting to the minister on trade union affairs. This poses a threat to the freedom of association to form and freely belong to a trade union. The freedom is to some extent controlled and regulated by the

³² S5(1)a, b

³³ S 9

government through its agents. The commissioner has further powers after consultation with the Minister to deregister a trade union on the following grounds.³⁴

- a) Consensual request by the trade union to be deregistered
- b) Fraud or mistake in obtaining of a certificate of registration by the trade union.
- c) Wilful violation of provisions of the Act.
- d) The trade union is dormant

The Act also provides that trade union activities such elections, accounts, and other activities are monitored by government through the commissioner. In as much as the Act allows for the freedom to associate and form trade union this right is greatly interfered with through legislature rules and procedure with regards to the operation of the trade union. The trade union is thus heavily policed in its endeavour to protect the workers' interest. Therefore a freedom of association that is heavily regulated is no freedom at all.

The Right To Strike and Freedom of Assembly for Trade Union Purposes

Having expressed the position of International law on the aspect of strike action. It is trite to state that the right of workers to withdraw their labour is one of the essential means by which workers and their organisation can effectively promote and defend their interests. It appears to be the Trade Union's major tool of persuasion. **In Crofter Harris Tweed and Company v Veitch** it was held that

The right of workmen to strike is an essential element

³⁴ S 12

in the principle of collective bargaining. Industrial conflict as thus mainly been expressed through the medium of strikes.³⁵

In Zambia, the law recognises this right but is hardly capable of being meaningfully exercised as shall be explained. The Act defines a strike as

A cessation of work or withdrawal of labour contrary to the terms and conditions of a contract by a body of persons employed in any undertaking acting in combination; or a concerted refusal under a common understanding of any number of persons who are so employed to continue to work to provide their labour.³⁶

The Act also stipulates that any person acting in contemplation or furtherance of the settlement of a collective dispute any attend at or near a dwelling house or place where another person resides or happens to be for the purpose of peacefully obtaining or communication information or of persuading or inducing the other person to take part in a strike action or demonstration.³⁷

The requirement that a strike can only take place where workmen withdraw labour in combination is significant in that one workman cannot go on strike unless where this is done in combination with others. This is because a strike being a furtherance of the settlement of a collective dispute must reflect the collective rights of the parties in issue

³⁵ (1942) AC pg 463

³⁶ S 3

³⁷ S 103

or portray the interests of a collectively. Section 101 (2) contemplates a situation where strike action will be resorted to and so implicitly confers this right.

It is right to point out that the Act does not prohibit strike actions. However, this right is beset by two critical factors that pose a serious impediment to the enjoyment or free exercise of the right to strike.

Firstly it is not legally possible for a majority number of employees in various industries to go on strike this is squarely as a result of wide ranging drafting of the definition of the essential services.³⁸

Secondly, the mandatory and very elaborate channels or machinery parties will have to exhaust in the settlement of a collective dispute before strike action can be taken makes it virtually impossible for this right to be exercised.³⁹

i) Essential Services

The Act does not define an essential service but has proceeded to describe what constitutes service⁴⁰. Essential service is therefore

- a) Service relating to the generation, supply or distribution of electricity.
- b) Hospital or medical fees.
- c) Service of supply and distribution of water.

³⁸ S 107(10)

³⁹ Banda D.A The Legal Aspect of Industrial Relations in Zambia with reference to the right to Strike ((1998) LLM Thesis UNZA) at 59

⁴⁰ S 107 (10)

- d) Sewerage service.
- e) Fire brigade
- f) Service for maintenance of safe and sound conditions in a mine of
 - i) underground working and drainage
 - ii) shafts and shaft installations
 - iii) machinery plant.

Workers engaged in these service are prohibited from taking part in lockouts and strikes which by their very nature operate to disturb the carrying on of any service be it essential or nonessential services. The right to strike by essential workers has been taken away by penalties such as forfeiture of his or her salary as a result of participating in strike action. Furthermore, the Act criminalizes strike actions by workers engaged in essential services by imposing a fine or a six month jail sentence upon conviction and prohibition from holding a trade union office, this affecting ones right to freedom of association mentioned earlier in this chapter⁴¹.

It is particularly interesting to not that under section 107 (6) a police officer may arrest without warrant any person who he has reasonable grounds to believe is acting in contradiction of the law on essential service workers. Although this is the case, however, this sanction against essential service workers has hardly been used in Zambia. There is hardly been any reported case of a worker being prosecuted for going on a strike while being engaged or employed as an essential service worker.

⁴¹ S 107(3) (4)

ii) Mandatory Machinery

Section 75 of the Industrial and Labour Relations Act is instructive. A collective dispute to exist must refer to terms or conditions of employment and such claims and demands must be reduced in writing. This being done a collective dispute will not be deemed to exist unless one of the three things, or a combination of them takes place first, where there is failure to answer the claims or demands within fourteen days renders the existence of a collective dispute.

Secondly a rejection of the claims or demands, then a collective dispute exists. When the other party merely makes a counter offer it does not bring about a collective dispute.

Banda D.A.⁴² makes an observation on this point that, the rationale for this position is not clearly known because under contract law the effect of a counter offer operates to terminate the original offer and, in this way operates in the same way as a rejection of an offer. The difference between a counter offer and an outright rejection is only in theory but in substance the counter offer is a rejection of the demand except that a new offer is made. It must be pointed out that in Industrial Relations it is difficult to imagine or envisage a situation where a dispute will not be deemed to exist just for the sole reason that the employer has made a counter offer of the demanded terms and conditions of service.

Thirdly, where the parties to the dispute have held at least one meeting with a view of reaching a settlement and such parties have either wholly or partially failed to reach such settlement then a collective dispute is deemed to be in existence. It seems that the law

⁴² Legal Aspects of Industrial Relations (1988) at 63

requires one meeting as a minimum requirement for the purposes of declaring a collective dispute. It is irrelevant therefore whether or not the other party insists on having another meeting.⁴³ What the law here seems to implicitly permit is that parties even if they had more than one meeting or and so by as, during these meetings, they fail to reach a settlement, further meetings can be dispensed with in order to declare a collective dispute.⁴⁴

The collective dispute once lawfully declared in compliance with section 75, must be referred to a councillor or a board of conciliation. If within a period of 7 days after it has been referred to conciliation no settlement has been made then the commissioner must be informed.⁴⁵

As has been stated, the channels are elaborate because after the commissioner has received a report he shall then request the minister appoint a conciliator or chairman of the board of conciliation. This process refers to some kind of third party intervention for purposes of promoting settlement of disputes once the parties have been summoned of which the parties are obliged to attend.⁴⁶

Upon all mediatory or conciliatory channels failing the parties to the dispute may refer the dispute to the Industrial Relations Court or conduct a ballot to settle the dispute by a strike provided a simple majority decision of employees present, and voting is made in

⁴³ Ibid

⁴⁴ Op cit at 64

⁴⁵ S 75 (2)(3)

⁴⁶ S 75 (4)(5)

favour of a strike and only then will such strike commence ten days after so deciding.⁴⁷

The process of mediation and conciliation are compulsory, the rationale for both processes is to afford the parties an opportunity through and by the assistance of independent third party intervention, to find their own solution without having to impose a solution on them. The imposition of a settlement on them should be the last resort only. Power is thereby given directly to the negotiating parties to resolve the impasse and the law merely compels them to so act, whether they agree or not is not concern of the law. The law encourages favourable and conducive Industrial relations, it does not permit one dispute to remain unsettled even after conciliation has failed It is this underlying ideal of the law that, in its implementation, erodes the workers rights to strike.

Impact On The Right To Strike

What can be rightly observed is that the right to strike cannot be legally exercised due to the fact that,

- a) Authorisation of a strike be by ballot of majority of employees
- b) It should be in contemplation or furtherance of a collective dispute.
- c) Where conciliation is in progress or the dispute has been referred to the Industrial Relations Court a strike ballot can be taken.

To this effect any strike action not complying to the act is illegal and subject to be met with the strong force of the law. The Vice President, in his September, 3 address, on radio

⁴⁷ S 78 (1)(3)(4)

and TV to the nation, stated “that strikes not in compliance with the Act are wild cat strike thereby illegal and subject to the discipline of the strong force of the law.”⁴⁸

Freedom Of Assembly and Trade Union Vs The Public Order Act

The Public Order Act cap 113 continues to be used as a tool to erode the free enjoyment of the freedom of assembly. Landmark Supreme Court Ruling of Christine Muludika and seven others v the people SCA No. 1 of 1996 where the court held that section 5(4) was a recipe for arbitrariness and abuse and asserted that democracy would wither without a free flow of ideas. The court was alive to the constitutional theory that the two freedoms; speech and assembly are critical to the communication, expression and reception of ideas and information without Government interference. The court declared that despite the illegal prior restraint that this legislation imposes on constitutional rights, the lack of proper guidelines rendered the law “seriously flawed”. The result was that section 5 of the Public Order Act was declared unconstitutional and null and void.⁴⁹

It was interesting to note that the government’s response was such that section 5 of the public Order Act (104) was amended. An examination of the new amendments discloses that they are even more undemocratic than the previous one by requiring any person intending to assemble or to convene a public meeting, procession, and demonstration to “notify” police in writing within 7 days. The conveners are then requested to make an undertaking as to the planned events safety. The police will notify the conveners whether

⁴⁸ Source: Times of Zambia 4th September 2003, pg 1. Public service workers went on strike. The vice president stated that there was no collective dispute as stated by section 75 of the Industrial and Labour Relations Act and that essential workers broke the law when they went on strike contrary to section 101

⁴⁹ Per Chief Justice Mathew Ngulube

or not they are able to police such an event. Where police are unable to police such event, it will not be held or shall be moved to another date.⁵⁰

The police still have the final say as to whether the demonstration can proceed by simply stating whether or not they can police the event. This has become a classical excuse in order to frustrate the exercise of the freedom to Assemble, police simply state that they are short of manpower and will not give any reasons for that. However, it is surprising to note that where such conveners, with impunity, proceed to stage such event the police have been on hand to stop the occurrence of the event⁵¹

The Public Order Act in its present state and form remains an albatross around the people's necks restraining them from the free enjoyment of the right to assemble.

⁵⁰ The Public Order (Amendment) Act, 1996, Act No. 1 of 1996

⁵¹ The Anti Third Term Rally April 2001

CHAPTER FOUR

Trade Union and Politics

The relationships between workers organisations and politics are a matter of great interest. We saw in the previous chapter how workers organisations took a political inclination in Britain to influence and compel Parliament to legalize the formation of Trade Unions⁵². A historical look at Zambia will reveal that because of discriminatory treatment of black Africans by the white colonial masters, African Unions did not only confine themselves to purely industrial matters.

The Unions, as an expression of the hatred for the colonial system, involved themselves with the political struggle for independence in the belief that a government of their own was more likely to pursue a vigorous policy of African advancement⁵³. Economic exploitations and political oppression both become the concern of the Trade Union as both were seen as synonymous evils. The workers basically fought against,

- i) The absence of Political Representation for Africans to enable them influence political and economic decisions.
- ii) The low wages and the bad conditions of work for the African worker as well as the subjugation of them as an exploited group.
- iii) The colour bar practices preventing the equality of black workers and white workers.⁵⁴

The first aspect of the need for political representation is quite significant in that in Britain, it was this desire by the workers to have political representation that the Labour

⁵² Chapter One

⁵³ Mtopa AM, *Labour Laws in Zambia* (Kenneth Kaunda Foundation, Lusaka, 1989) at 24.

⁵⁴ Enoch Mulembe, *Trade Unions in Multiparty Politics* (Obligatory Essay UNZA 1992) at 36

Party was birthed.⁵⁵ The point here made is that parliamentary representation is a vital weapon to influence political and economic policies which affect the worker, generally looked upon as belonging to the less privileged class of citizens. The Unions involvement in politics was underscored by the secretary General of the United Trade Union Congress Mathew Mwendapole⁵⁶, he said that,

“The struggle for self Government and independence is the struggle for the workers.... The role of the Trade Union will be to cooperate with the new Government in its efforts to create conditions and the necessary climate for social, economic, political and cultural progress of the new nation.... If Trade Unions are to continue to play an effective part in the country’s affairs it might be assisted to function in conditions which will be done to protect and advance the interests of the working class movement”.

As industrial relations took foothold, Trade Unions had the desire to achieve political influence to ensure that their demands were properly represented within the realms of political power. In Osborne V Amalgamated society of Railway Servants⁵⁷ it was held that “so long as the Union constitution allows, the Union can have certain political objects, it can pursue objects and to exercise powers of any kind provided it remains a Trade Union. This decision led to the passing of the Trade Union Act 1913 a response to the need for representation by Trade Unions in Parliament.

⁵⁵ Supra, chapter 2

⁵⁶ UNIP Party conference Magoye August 1962

Source: Paulsen Himwiinga, Legal Constraints on the Rights of workers to strike (obligatory essay Essay UNZA 1977/78) at 10.

⁵⁷ (1911) ICH 540

The importance of the Trade Unions in fighting against social – political injustices are evident in the words of the first republican president Kenneth Kaunda when he addressed an International Confederation of Free Trade Unions at Mulungushi conference centre⁵⁸. He urged especially the black South African workers to fight injustice and oppression with all the means at their disposal. It is evident that history has shown us the role that Trade Unions play in the political arena. Very little or nothing has changed today, countries of the world and Zambia in particular remain dogged by the hurdles of socio-political pressures resulting in the labour force to remain an unprivileged group. Recently government spokes person Mutale Nalumango lashed out vehemently at the civil servants and teachers that went on strike. She described their actions as “political and bearing the signs of a political movement anti government in nature”⁵⁹. Is the labour movement unlike any other sector in Zambia not entitled to speak out on policy matters? What has changed from the times of pre – independence when the labour movement was used as an instrument to spearhead the independence struggle?

Justification for Trade Union Political Inclination.

Government policy affects the person at the foot of the ladder and therefore the decisions the executive and legislative arms of government make are the concerns of every citizen; rich, poor, literate or illiterate. They are the “workers interest” and Trade Unions as the custodians of the interests of the workers should participate in ensuring policies do not run contrary to the wishes of the common worker where he would otherwise sustain a

⁵⁸ Source: Times of Zambia, May 2 1986, pgl.

⁵⁹ Source: Times of Zambia 10th September 2003 p2.

healthy standard of living. The law does not inhibit the Trade Union from voicing out on issues of a political nature. The Industrial and Labour Relation Act defines a Trade Union as one registered under the Act and one whose **principle object** is to regulate collective relations between employer and employee interse.⁶⁰ The Trade Union so long as it's authorised under its constitution, can have objects other than the principle objects⁶¹. Naturally, as long as an organization is registered as a Trade Union it can voice out on political matters that are affecting either directly or indirectly the workers conditions of service for instance its alleged that Zambia is currently experiencing a large budget over run million (6.6 billion kwacha) hence the workers demands for better wages cannot be effected. This is a policy issue and thereby political and directly affects the workers. They are thereby justified to make the necessary responses to ensure that their demands are met.

Trade Unions are seen as an eye soar for Government and have arisen and are now considered to be major stakeholders in both political and economic development of the country. They are not free from political interference because of the power they wield. In 1990, in view of the growing tension in Zambia opposing one party rule, the Zambia Congress of Trade Unions was at the helm of the workers revolt against the infringement of the worker's bargaining rights and against the corruption associated with the one party state. Intimidated by the Unions rising populist support the UNIP Government sought to divide and weaken the larger Unions and undermine the ZCTU by legalising non-affiliation⁶².

⁶⁰ Section 3 cap 269 of the laws of Zambia.

⁶¹ Section 24 cap 269.

⁶² Fredrick Chiluba, *The Challenge of Change* (Multi Media Publications 1995) at 70

Trade Unions in Zambia have come a long way since the One party rule in which they were seen as the unofficial opposition to UNIP⁶³. Under the Multiparty rule nothing has changed. Trade Union leaders continue to speak out on a range of public policy matters that affect the economy and therefore the interest of labour as well as the autonomy of the Trade Union Movement. It is not surprising that Zambia's second State President rose from among the Trade Union Movement.⁶⁴

Third World Experience

Trade Unions in third world areas have proved to be highly political in nature. It is apparent that in newly developing countries non – political unionism is rare. What is expected is a highly political form of unionism with a radical ideology. It is submitted that the presumption is so strong that where this pattern of unionism is absent can only be attributed to state machinery's involvements meddling in Union affairs.

Historical and social factors increase the political influence political activity of the labour movement in third world nations like Zambia. These factors include the degree of politicisation of the Unions derived from their connection with nationalist movements. These Unions generally did not confine themselves to purely industrial matters and contributed to the political struggle in the belief that a government controlled by their

⁶³ Ibid

⁶⁴ Fredrick J T Chiluba was chairman general of the Zambia Congress of Trade Unions and also the chairman of National Union of Building and General Workers

“Kith and Kin” was more likely to pursue policies favourable to them.⁶⁵ Another major factor leading to active political militancy on the part of Third World Trade Unions, especially in Africa, are the oppressive dictatorial regimes that have characterised politics in this part of the globe. An “animal farm” style of governance characterised by greed, corruption, and human rights abuses have been created in most countries resulting in discontentment amongst governed masses as to their political order.

Conclusion

It is submitted that the distinction between Trade Unionism and Politics is still undefined in view of the above proposition. What is definite is that Trade Unions must guard against watering down the age-old role that it plays in the industrial and labour relations environment namely the regulation of the collective interests of employers and employees, inter se.

⁶⁵ Titus Nsemwa Zambia Congress of Trade Unions- Government Feud Why?(UNZA Obligatory Essay 1983/84)pg4

PROPOSALS AND CONCLUSION

Zambia and The International Labour Organisation (ILO)

One of the hot issues with the labour movement in Zambia has been the question of ratifying certain ILO conventions particularly conventions number 87- The Freedom of Association and Protection of the Right to Organise of 1948- and number 98. The Right to Organise and Collective Bargain Convention, 1949.⁶⁶

Zambia's International image has got to be protected and as a member of the ILO she needs where possible, to ratify and respect any convention of the organisation that will ensure that Zambia is not seen as suppressing workers rights but implementing ILO standards.

Trade Unions with regards to ILO conventions, must be seen to actively play the role of ensuring that Government complies with its obligations under Article 19 (5) (b) of the ILO constitution stating that.

“in the case of a convention, each of the members undertakes that it will, within the period of one year at most from the closing of the session of the conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the conference, bring

⁶⁶ Chapter 2 at 3-4

the convention before the authority or authorities within whose competence this lies, for the enactment of legislation or other action.⁶⁷

Trade Union movements must press their governments for early ratification.⁶⁸

Zambia's Economic Policies

Zambia needs to consider the need for a comprehensive economic policy, which will see the integration into it of the opinions of the labour movement. There is no clear wage policy especially in view of Zambia's adoption of a market economy. John Corina observes that,⁶⁹

“The significance, form and functioning of an incomes and wage policy differ according to the type of economy and its social setting.”

Trade Union Autonomy and Self Reliance

Trade Unions can only defend their members adequately and promote their interests for whom they were formed if they are independent and self-reliant. The right to strike is by

⁶⁷ Brownlie, Basic Documents in International law, 3rd Edition, at 59-60.

⁶⁸ Issue of the International Labour Office on Labour Education No. 85 (1991/4) at 12

⁶⁹ John Corina, Can an Incomes Policy be Administered?

Source; (Vol. 3 British Journal of Industrial Relations, 1967) Pg 287 at 288

and large dependent on this autonomy, which if absent undermines the legitimate exercise of this right.

There remains two factors that operate to erode Trade Union autonomy, namely legal and Political factors. The legal aspect tends to emphasise the anti strike philosophy. Despite the requirement for strike ballot, this practice is hardly observed by Trade Unions. The wide definition of essential workers and the compulsory mechanisms for collective dispute settlement to all intents and purposes erode the independence of Trade Unions in organising their members in a way that guarantees the exercise of the right to strike.⁷⁰

Political factors tend to sway Trade Union attention from workers interests to political militancy and advocacy thereby blurring the Trade Unions principal objects⁷¹.

There is urgent need to radically amend the Industrial and Labour Relations Act especially on the question of Trade Union autonomy vis-à-vis the right to strike. This is only possible where Government and Trade Unions embrace as cooperating partners and that the true value of this cooperation rests on the freedom and independence of the Trade Union movement as an essential promoter of social advancement⁷². This can be achieved through the process of wide consultation with the key Trade Unions before any legislative measures are put in place, which will operate to regulate and check the affairs of the trade union.

It is also proposed that Zambia should enact a Trade Union Act which squarely deals with trade union affairs and which must be monitored by an independent body appointed from among the various stake holders in the industrial sector and not necessarily the worker. By so doing the unions will steer clear of any political motivations as they will

⁷⁰ Supra Chapter 3

⁷¹ Supra Chapter 2 Definition of a Trade Union

⁷² Evans Kalula. Some Aspects of Zambian Labour Relations, (UNZA 1975) at 19

comprise of a body of personnel who though not directly affected but are in one way or another affected by Trade Union activity.

The Right To Strike And Essential Services

Due mainly to the numerous legal inroads already noted, the right to strike is highly legally in exercisable⁷³. Having almost every employee designated as being engaged in essential services further compounds the problem. It is recommended that there is an urgent need for the government of Zambia to re-examine the definition of essential services as the present one abolishes the right to strike. Legislative action and political will is the only way to do it.

Furthermore it is recommended that strike action should be taken any time after a collective dispute has been declared this paralleled by any conciliatory and arbitratory mechanisms.

Conclusion

The development of Trade Unions has brought to the surface their need to be accepted as legitimate organisations. Zambia still has one further step to take; accepting trade unions as organisations, which if properly organised, can be integrated into the economic process.

⁷³ Supra Chapter 3

On the whole, Trade Unions in this multiparty climate need to be accepted and not merely as organisations only fighting for improved wages, while creating conflict between employers and employees or as threatening defacto political parties but as a welcome form of pressure group there to participate in the political and economic maturity of Zambia. The labour movement must as their principal object represent workers interest and should not be transformed into defacto political movements.

True Democracy naturally entails the existence and expression of different opinions and regardless of whether their source is a political party or Trade Union; the Government should give an ear to them for the sake of achieving compromise.

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