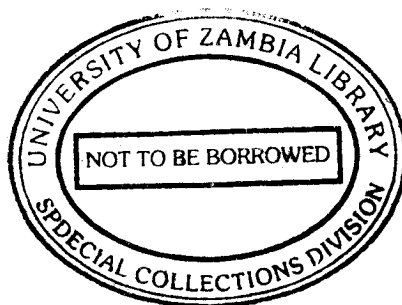


**THE EFFECTS OF A LIBERAL ECONOMY ON THE
PROTECTION OF THE RIGHTS OF THE WORKER**

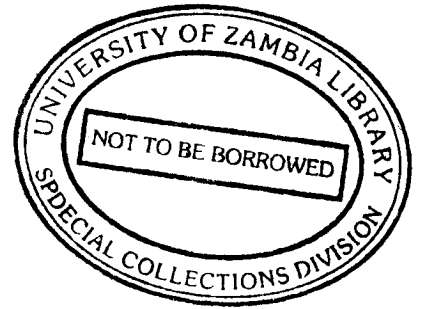


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UNZA

JANUARY 2007



THE UNIVERSITY OF ZAMBIA

School of law

**THE EFFECTS OF A LIBERAL ECONOMY ON THE
PROTECTION OF THE RIGHTS OF THE WORKER**

BY

BWALYA, JENNIPHER

(99547082)

**AN OBLIGATORY ESSAY, BEING A PAPER SUBMITTED TO THE UNIVERSITY OF
ZAMBIA SCHOOL OF LAW IN PARTIAL FULFILLMENT OF THE EXAMINATION
REQUIREMENTS FOR THE AWARD OF THE BACHELOR OF LAWS DEGREE
(LL.B) OF THE UNIVERSITY OF ZAMBIA**

January, 2007

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

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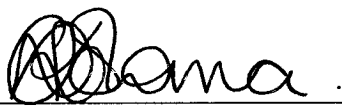
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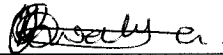
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DECLARATION

I, **Bwalya Jennipher**, (Computer No. 99547082) do hereby solemnly declare that I am the author of this work entitled: **The Effects of a Liberal Economy on the Protection of the Rights of the Worker**.

Save as herein expressly acknowledged, every piece of idea is a result of my ingenuity and the views herein expressed **do not necessarily** represent those of the University Of Zambia School Of Law or the Supervisor of this Directed Research.

Declared by the said **Bwalya, Jennipher** (99547082), this 8th day of January, 2007.



Signature

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DEDICATION

To the light that has always shone in my path of life, to my mother, **Miss Gladys Ciusha Nyalugwe**. Without your love, support, sacrifices and wisdom, I would not have made it this far. Yes mama, I've finished off where you left from, just like you asked me to, and by God's grace, I'm still going.

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My highest praise and gratitude go to **God Almighty** in whom I live and move and have my being, for I know that “Many are the plans in a man’s heart will but it’s only God’s Will that prevails....”

My heartfelt and sincere gratitude go to the one person whose guidance, patience, and valuable time spent on going through my work, commenting on it, and making suggestions, made this work of great pride. To my supervisor, **Mrs. Chanda Nkoloma Tembo**, ‘I believe I had the Best Supervisor and I am greatly indebted.’

Many thanks go to my **mother** and my **siblings**. Thank you very much for your patience, understanding and encouragement, without which I would have given up a long time ago. Your unforgettable and unfailing love has always been a source of inspiration in my life. The same goes for the rest of my family. I love you so much, don’t ever think otherwise.

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God bless you all!

GENERAL INTRODUCTION

Globalisation has been the dominant theme from the 1990s and it is celebrated by the resurgence of a *laissez faire* economic theory mostly explained by the benefits of expanded free trade, increased foreign investment and a greater scope for market forces. Most countries have adopted Neo liberalisation policies that advocate for a reduction in trade barriers and internal restrictions while using government power to enforce the opening up of the markets, thus embracing privatisation, private ordering, open economies and deregulation. The intended benefits are poverty reduction, enhanced economic stability and the realisation of economic development, but these are not always achieved and even when they are, they are unevenly distributed among nations. The investor's major concern is to make profits out of his enterprise in the foreign State and it is the aim of the government to make the environment conducive enough for the investor so as to keep him there because it is profitable for the economy and its development. This is evidenced in the regulations and policies adopted and adjusted by governments, as well as changes in the organisational set up of certain entities, so as to accommodate the investor.

A worker, for purposes of this paper, includes a permanent employee, a contractual employee, a casual worker and an independent contractor. Workers need protection from the exploitations of those they work for and, in any given nation; this is by and large the responsibility of the government. A responsive government will ensure that there are adequate laws, institutions, remedies and policies that will ensure the protection of the rights of its domestic people from the exploitation of the outsider as well as its own. People work in order to earn a living and provide for their families and if people are poor and cannot do this, their work will be affected and ultimately the interests of the economy will suffer, as the worker will not be able to advance them effectively. A worker is one of the prime movers of economic development because if his rights are protected and his burden is lessened, he will work hard to push development forward and as such, if he is liberated from poverty, so will the economy. The problem faced by some 'liberalised' countries like Zambia is high unemployment levels and the few who are employed are

subjected to job insecurity, precarious employment conditions and violation of their rights such as trade union and bargaining rights and the right to adequate remuneration, *inter alia*. These problems arise as a result of adopting and effecting liberalisation policies in pursuit of economic development without due regard to the rights of the workers.

A State's domestic regulatory and enforcement machinery plays a key role in the attainment of neo liberalisation and the protection of workers' rights. It would be in the interest of the economy to reduce the likelihood of further violation of workers' rights and holding those who do violate them accountable thereby ensuring that the rights are given full effect. Since workers undeniably play a major role in the economic field, it is of cardinal importance that equal or balanced importance is given to both macro and micro levels of the economy so as not to adversely affect them.

It is clear that third world countries usually sign, ratify or accede to treaties and embrace international policies without understanding or weighing the full implications of such action on their domestic economies. The effects are sometimes grave because the economy is not ready for the change and at times they may be discovered when it is too late. Liberalisation, as an economic concept, has improved many economies, but although it is a factor of economic growth, it is not in itself enough to guarantee progress but must be accompanied by certain social ground rules founded on common values so that those who have helped in generating the wealth share in it, and the major players in wealth generation are the workers and hence the need to protect the workers against excessive exploitation emanating from it.

One of the problems that Zambia is facing is in relation to its inability to adequately protect its workers' rights in its advancement of liberalisation policies and laws. The regulatory framework, found in legislation, operates to set the stage for the liberal economy and encourage foreign investment in the country. But regrettably, these pieces

of legislation do not make adequate provisions for the protection of workers' rights, and in the words of Riddal,¹ the State seems to be saying to the employers,

“Go ahead; pay what wages you like to your employees. But do not forget that if you pay them too high a level of wages, your products will cost more than those made by other industries, and so people will not buy your products and you will go out of business. And do not forget, also, that if you pay too low a wage, your workers will not stand for it, and will come out on strike, and disrupt your business. Or at least, they will drift away to other industries and you will be left without a workforce.”

The State also seems to be saying to the worker,

“Demand what you like, strike if you wish, stay out as long as you want, but do not forget, in the end, that you have to eat. And do not forget too, that if you extract higher wages from your employer than he can afford to pay you, then he will cease to be able to compete with other industries, and will go bankrupt and you will be out of employment and will starve.”²

This is done in order not to burden the investor-employers and in full awareness that the employees have a weak bargaining strength and will take a job even if the conditions are below the minimum decent living standards. Other than this, there is massive polarisation of labour as an economic influence of liberalisation and; as a corporate strategy in business decisions, workers are merely regarded as tools of production to their detriment. There is, therefore, urgent need to address the effects of liberalisation on the protection of the rights of the worker and this can mainly be attained through the strengthening of labour laws as well as the reformation of investment laws and policies so that workers' rights are not taken away from the worker or made more difficult to attain.

The objectives of this study are to analyse the implication of liberalisation in the context of workers' rights by presenting an overview of liberalisation and its main features

¹ Riddal, J.G., (1981), The Law of Industrial Relations. p2

² Ibid

particularly in relation to the protection of workers' rights; outlining and analysing the protection of workers' rights in Zambia; identifying, analysing and evaluating the enforcement mechanism with regard to rights of the worker in Zambia; analysing other countries' responses regarding liberalisation and the protection of workers' rights with a view to identifying practice examples/opportunities that would inform possible reform in Zambia and to recommend the possible formation, reformation and strengthening, with regard to protection of the rights of the worker, of law and/or policy that guide and govern the practice of liberalisation in Zambia with a view of reducing and/or preventing or controlling the incidences of exploitation of the worker and disregard of his/her rights.

The study seeks to answer these research questions in attaining the objectives: whether liberalisation affect the protection of the rights of the worker and if so, to what extent; whether government has a role to play in the impact of a liberal economy on the protection of the rights of the worker; and whether there are opportunities for reform in Zambia's jurisprudence in the area of the protection of the rights of the worker in a liberal economy.

The significance of the study is that it is intended to and will contribute to, and provoke, thought regarding liberalisation in Zambia, and secondly, it attempts to respond to, with a view to addressing, the injustices suffered and continued to be suffered by the workers as a result of the liberalisation of the Zambian economy. The study is important because it does not advocate for the protection of workers' rights at the expense of the economy but rather that a balance be struck between workers' rights protection and the equally important economic development through liberalisation. This, the study seeks to put across, can be done through addressing the impact of liberalising the Zambian economy, with due regard given to both the interests of the worker and those of the economy.

The methodology to be adopted in this study is data collection by way of desk research; identification of Key informants for purposes of collecting data and also; the employment of Internet search, which has proved to have invaluable information for this research.

In view of the foregoing, this essay is divided into five chapters:

Chapter one will attempt to discuss liberalisation and the protection of workers' rights in general, while specifically looking at issues affecting workers' rights protection in Zambia and the extent of appreciation of workers' rights protection in relevant Zambian Legislation.

Chapter two will attempt to discuss the relationship between liberalisation and the protection of workers' rights. More specifically, it will give a background to liberalisation in Zambia; discuss the implication of liberalisation on the protection of Workers' Rights and also discuss the role of national and international preventive measures to the violation of workers' rights.

Chapter three will endeavour to discuss the Institutional framework of the Protection of workers' rights in the liberal economy of Zambia.

Chapter four will attempt to take a comparative study of countries that have responded to the problems caused by liberalisation to the protection of their workers' rights, with a view to identifying opportunities that would inform possible reform in Zambia.

Chapter five will comprise of the conclusions of the study and recommendations based on the same.

CHAPTER ONE

LIBERALISATION AND WORKERS' RIGHTS PROTECTION IN GENERAL

The purpose of this chapter is to introduce and discuss the concept of liberalisation and the protection of workers' rights in general, and this will be done in various parts. To this end, a brief analysis of the extent of appreciation of workers' rights protection in relevant Zambian legislation, and other institutions and organisations, will be given after taking an overview of liberalisation.

1.1 DEFINITION OF LIBERALISATION

Liberalisation refers to the relaxation of previous government restrictions, usually in areas of social or economic policy.¹ It is as such the opening up of economies to domestic and foreign private investment and the aim is to “frame an efficient private sector driven economic system, which would translate into an accelerated rate of economic growth.”² Following the devastating impact of the world wars on their economies, most countries have opted for a liberal economy while abandoning the commandist economic system,³ as a tool for economic rebuild.

Prior to the twentieth century, the theory of economic liberalisation only stressed the importance of a free market and free trade and sought to limit government intervention in both the domestic economy and foreign trade... Modern liberalisation, however, takes into account macro-level phenomena and calls for a mixed economy involving significant State intervention.⁴ Neo liberalisation, which is a modern liberalisation concept, falls between the

¹ <http://en.wikipedia.org/wiki/Liberalisation> 16/07/2006

² Globalisation: The Trade Union Challenge in Zambia

³ A commandist economy is a State controlled economy whereas a liberal economy is a market controlled economy where the market forces are the major determinants of the economic issues and activities.

⁴ http://en.wikipedia.org/wiki/Liberal_theory_of_economics 18/10/2006

two extremes of a State controlled economy and a liberalised economy. The concept accepts a certain degree of government involvement in the domestic economy. According to Economic theorists, it is rare to find a total system of State control and even harder to find a fully liberalised economy to the exclusion of any State intervention in some aspects of the economy *vis-à-vis* industrial relations.⁵ And this is what makes the study, in relation to Zambia, worthwhile considering that the Zambian government has not excluded itself but actually does do something and can do more to protect its workers and avoid the concentration of power and wealth in the hands of the few.

1.2 ELEMENTS AND POLICIES OF LIBERALISATION

A liberalised economy advocates a ‘hands off’ economic stance in which the State stands aside and lets economic processes take their natural course as the laws of supply and demand determine the wage and price levels appropriate in the light of the totality of a nation’s economic circumstances.⁶ There is free exchange of ideas, news, goods and services between people, freedom of travel within and among all countries and also opposition to restrictive quotas, protective trade barriers, and exchange regulations.⁷ When it comes to industrial relations, the government stands aside and lets the employer and employee regulate their own affairs through their own bargains. The problems that result from this stance will be discussed in chapter two.

The *laissez faire* policies of liberalisation are various. There is Privatisation of the economy,⁸ for example, decentralisation⁹, and de-control of domestic prices and exchange rates, leaving

⁵ <http://geocities.com/hostster/theeconomist/> 18/10/2006

⁶ Sichone Frightone (2000). The Role of Government in regulating Industrial relations in A Liberalised Economy. LL.B Obligatory Essay UNZA: Lusaka. p.2

⁷ http://en.wikipedia.org/wiki/Liberal_theory_of_economics 18/10/2006

⁸ The selling of government owned industries or organisations into private ownership

⁹ Government does not directly control industrial production through state owned enterprises

these to the market forces. There is also deregulation, which means that the laws placing limitations on the private sector, and consequently trade, are relaxed. Unrestricted trade and investment is another feature of a liberal economy as the governments put into place measures that will encourage investment. In Zambia, for instance, the Privatisation Act¹⁰ and Investment Act¹¹ were enacted for the purposes of enabling increased private sector participation and foreign direct investment. The measures and policies Zambia has adopted in its achievement of a substantially liberalised economy will be amplified on in chapter two.

1.3 INDUSTRIAL RELATIONS LEGAL REGIME OF A LIBERALISED ECONOMY

In order to effectively implement liberalisation policies and to create an enabling environment, it logically follows that a legal regime to support the same be adopted. Liberalisation is capital intensive and aims at cost minimisation and profit maximisation and since the government and private sector are partners, it is the duty of government to provide an industrial system most favourable to the attainment of the goal. A country tends to provide good investment and competition laws in order to enhance productivity and there is harmonisation of labour laws to make them less strenuous on the investor-employers so as to encourage investment.

A commandist economy reflects a pluralist industrial relations legal regime, which takes the stance that in any production are divergent or symmetrical interests and thus a need for compromise.¹² The workers are seen to be at one end and the employers at the other, and the Trade Unions, Employer Associations and collective bargaining are very important as they provide a reconciling mechanism between the two. Liberalisation, on the other hand, reflects

¹⁰ Chapter 386 of the Laws of Zambia

¹¹ Chapter 385 of the Laws of Zambia

¹² Farnham, David (1990). Understanding Industrial relations (4th ed) Cassell: London. p.6

a unitary legal regime, which asserts that the interest of the organisation is one with that of an individual worker.¹³ Since only one interest is acknowledged, only minimum third party forces are tolerated as bargaining of the employment contract is between the worker and employer. This approach, in effect, undermines the importance of trade union involvement, and coupled with the reality that workers have a weaker bargaining strength; it has led to a lot of workers' rights being compromised. The legal framework of a country reflects the kind of regime being celebrated and this issue will be exhaustively discussed in chapter three of the study.

1.4 SPECIAL STANDARDS OF A LIBERAL ECONOMY

The prime objective of any given country is to maintain and enhance the productivity and stability of its economy and this can be achieved through the pursuit of four important and easily compatible goals: full employment, price stability, favourable balance of payments and protection of the exchange rate.¹⁴ Liberalisation offers a way to the achievement of this as it has the potential to contribute to the overall objective of sustainable development in all its dimensions, that is, economic, social and environmental.

The international community, through such organisations as the World Trade Organisation (hereinafter referred to as WTO), has set out standards that an economy that calls itself liberalised must meet. The International Labour Organisation (ILO) was founded on the need to protect workers' rights in a liberalised economy and it has set out international labour standards that must be adhered to by its member countries.¹⁵ This includes the need to provide the greatest degree of freedom within a society and curb sectional marginalisation in

¹³ Ibid p.4

¹⁴ Sichone Frightone (2000). The Role of Government in regulating Industrial relations in A Liberalised Economy. LL.B Obligatory Essay UNZA: Lusaka. p.1

¹⁵ These standards are provided for in the ILO Constitution and summarized in the preamble thereto

terms of economic freedom, which also means that, the employers should not be enriched at the expense of workers. A liberal economy must maintain prices and wage levels which are in accord with the nation's economic capabilities and adequate for the maintenance of a decent living standard for its citizens. This is because as employers compete in the sales and production of better quality goods, profits are enhanced and should be reinvested thereby creating employment for those without employment, better wage packages for those in employment and lower prices for the commodities produced. Such an economy ought to respect and adequately protect the fundamental dignity and autonomy of every individual, under law.

A liberal economy, therefore, encourages efficiency, fosters initiative, promotes national prosperity and permits freedom in the labour sector so that workers are not under-utilised and are allowed to reach their maximum potential or self-determination. A liberal economy must, however, balance between government and private responsibilities and government should be limited to those responsibilities that cannot be carried out by the private sector instead of leaving everything in the hands of the private sector. A global free and fair market also needs players that will respect a set of common minimal social and national or international instruments and organisations and as such each country must provide an effective enforcement mechanism to see to this end. The enforcement mechanism, in the case of Zambia, will be dealt with in Chapter three of the study.

In a speech to the ILO¹⁶, WTO stated, *inter alia*, that the main business of WTO is to help member States reap gains from international trade by observing WTO rules for the orderly conduct of trade between member countries. It was stated that liberalisation results in the

¹⁶ WTO News: Speeches-DG Mike Moore. Geneva. 18th March 2002 (www.wto.org)

lowering of prices and increase in consumer choice and workers, being consumers, benefit from that. It was also stated that liberalisation leads to increased demand for services provided by the workers and as such increase their job opportunities. But it was also conceded that trade liberalisation may result in a permanent reduction in demand for certain types of labour services; that some workers in import-competing sectors may lose their jobs and temporarily be unemployed before finding a new job; and that it may lead to adjustment costs and may affect income distribution. But, it was stated, with appropriate domestic policies, everyone can gain from liberalisation. We see here that WTO throws the responsibility of workers' protection to domestic laws, policies and institutions and as such makes it the responsibility of government.

1.5 WORKERS' RIGHTS PROTECTION IN A LIBERAL ECONOMY

The International Labour Organisation (hereinafter referred to as ILO) and the Organisation for Economic Cooperation and Development (hereinafter referred to as OECD) provide the international framework for the protection of workers' rights in a liberal economy. However, this seems to be a fallacy to a large extent because they are essentially voluntary structures, which are inadequate to meet the current needs of workers and business. Their guidelines are based on an artificial notion of the symmetry of obligations between employers and employees, they give labour rights less protection than the firm's entitlement to 'fair competition', their rules on governing investors are not legally binding and their application not enforceable, and also, they defer to national practice and as such fail to create a truly international framework.¹⁷

¹⁷ Murray, Jill in an Article entitled Corporate Codes of Conduct and Labour Standards (March 15, 1998)

The OECD Declaration on International Investment and Multinational Enterprises, created in 1976, for purposes of providing guidance and setting standards for the operation of multinational enterprises, requires that no less favourable treatment be accorded to multinational enterprises than is accorded, in like situations, to domestic enterprises (WTO principle of National Treatment). The Employment and Industrial Relations Guidelines of the instrument, sets out a framework for multinational enterprises' behaviour as 'within the law, regulations and prevailing labour relations and employment practices, in each of the countries in which they operate.'¹⁸

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policies (1977) is addressed to governments of member States of ILO, workers and employer organisations as a guide. It places great emphasis on the primacy of national sovereignty as it states that, "All parties concerned by this declaration should respect the sovereign rights of States, obey the national laws and regulations, give due respect to local practices and respect international standards."¹⁹ This shows that governments have a mandate to provide labour laws and regulations to which the multinational enterprises or investors will conform if the rights of the workers are to be protected. And it further implies that if the national labour laws and institutional framework are weak, recourse to the international framework will not help much because compliance is voluntary even if it was possible for the instruments to have made compliance enforceable. There still remains the need for a binding and consistent set of labour standards which are subject to appropriate monitoring and enforcement and a common legal framework for all world economic activities.

¹⁸ Ibid

¹⁹ Ibid

1.6 GENERAL RIGHTS OF THE WORKER

“Human rights represent demands or claims which individuals or groups of individuals make on society, some of which are protected by law and have become part of *lex lata* while others remain aspirations to be attained in the future.”²⁰ Workers’ rights are, in this regard, human rights claimed by workers as a group by virtue of being individual human beings. A right belonging to an employee entails a duty on an employer to forbear or perform so as not to disturb the enjoyment of that right and non-forbearance or non-performance is a violation of that right.

Some of the rights of the worker that need protection are the right to employment, job security, adequate remuneration, sick leave, housing, paid leave, retirement and redundancy benefits, lunch allowance, funeral allowance, compensation, maternity leave for women, industrial safety and the right to belong to or participate in the formation and activities of a trade union of one’s choice. Most of these rights are addressed in the Zambian legislature, although some are inadequately protected. Unfortunately, the Zambian domestic worker is left with no protection, as there are no legislative or institutional provisions that are inclusive of him.

1.7 ISSUES AFFECTING WORKERS’ RIGHTS PROTECTION IN ZAMBIA

Before Zambia embarked on liberalisation and its policies, the formal sector was relatively well paying with decent working conditions and there was a high degree of job protection. But in pursuit of such policies as privatisation, job losses through retrenchments and layoffs, job insecurity and loss of many benefits have resulted, as will be espoused in chapter two of the study. But the State has not left its workers to the complete mercy of the investor

²⁰ Human Rights In Africa: Some selected problems-Lagos (1984), p4

employers although its system lacks, in significant areas, to adequately protect their rights. The shortcomings include the huge gap between relevant law and society and also the mostly unaffordable cost of retaining Counsel, resulting in many cases of workers' rights violation unattended.

The lack of public awareness in terms of workers' rights and duties and Investors' rights and duties pertaining their relation to the workers, makes it hard for the workers, the public and the investors themselves to have their affairs regulated or adjudicated upon by competent bodies provided by law. The legislature fostering liberalisation is only aimed at encouraging investment and does not encompass the duties that investors have to their workers. These pieces of legislature include the Investment Act, Competition Act and the Privatisation Act. Because of this, a lot of workers' rights violations end up becoming acceptable normal practice and the employers get away with it.

Most workers, those who have no unions and those failed by their unions, are not aware of their rights and duties as well as their employers' and so even when their rights are being violated, the workers cannot do anything about it because they do not know their lawful entitlements and what their employers are permitted and not permitted to do to them by law. Most have been exposed to inhuman treatment at their workplaces such as working more than the required number of hours by law without overtime pay, being locked up in environmental conditions not conducive for humans without protective or hygienic consideration and precautions, late payment of wages, unreasonable and erroneous wage cuts and deductions, and also physical torture and unlawful detention when suspected of 'unlawful' activities.²¹ They lose their jobs at the whims of their employers not knowing what grounds at law can or cannot warrant their dismissal, and not understanding the

²¹ An account of some of these happenings can be derived from the Legal Resource Foundation (LRF) publications which reports on some of the cases reported to and taken up by it.

thought, assembly and association. Economic social and cultural rights, to the worker, include the right to adequate means of livelihood, opportunity to obtain employment, right to fair labour practices and safe healthy working conditions. This also entails the right to work, fair remuneration and adequate standard of living, the right to organise or form a trade union and to collective bargaining and the right to equal pay for equal work, social security and education. The excuse used for the non-justiciability of the economic and social rights is that government does not have enough resources.²⁴ There are some developing countries that have made justiciable some of these rights but this will be discussed in detail in chapter four of the study.

The Employment Act, Chapter 268 of the Laws of Zambia

This Act provides the basic employment law and basic employment contractual terms and it was first enacted in 1965 and was amended by the Amendment Act No.25 of 1997 to remove certain provisions restrictive in the current liberalised economic environment. The Amendment Act provides for such rights as the right to repatriation, holiday with pay including maternity leave and the payment of wages and other allowances due on summary dismissal. It provides for a right to housing or housing allowance, or a loan or advance towards the purchase or construction of a house, in accordance with the collective agreement, contract of employment or general conditions of employment. The Act obligates the employer to provide adequate drinking water at the place of work, but provision of medical attention; medicine or transport to a medical institution is subject to agreement between the employer and the employee. It also provides for when, how, where and in what currency the payment of wages should be made. The major weakness with the Amendment Act is that it

²⁴ The International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 2(1) provides that the realisation of these rights must be progressive and to the maximum of a State's available resources.

has made most of the rights a matter of agreement even when it is trite that employees have a very weak bargaining strength.

The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia

This 1993 Act, as amended by the Amendment Act No.30 of 1997, regulates labour relations in the country and provides for the rights and obligations of employers and employees. It contains principles of employee involvement through participation in the formation of and belonging to any trade union of their choice and participation in its activities at proper times and without hindrance. The employers are also given a right to participate in the formation of and joining an employers' association and to participate in its lawful activities without any impediments or discrimination. The employers and employees have a right to collective bargaining, by themselves or through their representatives, and the resultant collective agreement is binding and enforceable in so far as it does not conflict with the established labour laws. The Act sets out industrial action as a right and prescribes the conditions under which it may be called. But the procedure provided for legal industrial action is so unreasonably complex that it renders the right virtually unprotected. It is for the same reason that most industrial actions in Zambia are illegal. Exercising a right should not be so complicated as to make it almost untenable and so this should be a source of concern for the State.

The Industrial and Labour Relations Act is established under the Act for purposes of employee-employer disputes resolution. The Act also establishes the Tripartite Consultative Labour Council for the harmonisation of the labour sector by its major players, which are the employees, employers and government who form its membership. These and other institutions and offices created in the legislature of Zambia for the harmonisation and enforcement of labour relations will be exhaustively dealt with in chapter three of the study.

Factories under the Ministry of Labour pertaining to factory safety and also the Department of Mines in matters concerning industrial safety.

Workers Compensation Act, CAP 271

This Act, No.10 of 1999, provides for the establishment of a Fund for the compensation of workers disabled by accidents occurring during the course of their employment, or diseases similarly contracted by workers. It requires that every employer, except the government, register with the Workers Compensation Fund. A worker (or his dependants if he dies) is, by virtue of this Act, entitled to compensation for disability or death caused by an accident arising out of and in the course of his employment unless it is proved that the cause of the accident was serious and wilful misconduct on his part. This is one of the rights that are well respected by the investors, as opposed to the Zambian employers, although there are some investors who shun from doing what is expected of them by law.

Companies Act, CAP 388

This Act No.26 of 1994 regulates companies in Zambia, from their incorporation to their winding up and all such matters incidental to the foregoing. Payment of a company's unsecured preferential debts, at the company's winding up, is provided for under Section 346 of the Act. Workers dues are amongst preferential debts of the company and these dues include the workers' three-month salary redundancy packages and other dues, as provided for under section 346(b) of the Act. The problem with this provision with regards workers' rights protection is that, payment to them is not really prioritised since secured debts, which include loans to the company, are given preference over unsecured debts under which the workers' dues fall. Even in the ranking of unsecured debts, workers' dues are to be paid only after payments of the costs of winding up and the remuneration of liquidators are made.²⁶

²⁶ Section 346(a)

CHAPTER TWO

LIBERALISATION AND ITS RELATION TO WORKERS' RIGHTS PROTECTION

This chapter aims at discussing the implication of liberalization in the context of workers' rights protection in Zambia. More specifically, a brief background to liberalization in Zambia will be given, and then an analysis of the implication of liberalization on the worker and on the economy will follow before the role of preventive measures to the violation of workers' rights resulting from liberalization is discussed. In short, this chapter discusses the question whether liberalization affects the protection of the rights of the worker and if so, to what extent.

2.1 BRIEF BACKGROUND TO LIBERALIZATION IN ZAMBIA

Zambia attained its independence from the British colonial rule in 1964 with Kenneth David Kaunda as its first president. The Zambian economy was driven by its booming mining sector with a rise in copper prices resulting in high profits and, in effect, high income to the government.²⁷ But then in 1970 things began to change with a fall in copper prices worsening after the 1973 energy crisis. In the words of Anderson,²⁸ Zambia experienced a 'dual shock' namely the quadrupling of the world price of oil in 1973 and the collapse of the price of copper after 1974. There was a vain expectation of the reversal of the oil and copper trends, which never materialized.

Anderson describes the economic crisis that the new government of 1991, led by Fredrick Titus Jacob Chiluba, had to grapple with as:

...a declining GDP, triple- digit inflation rates, budget deficits averaging 14% GDP, declining investments and savings, a flourishing black market for foreign exchange, shortages for basic goods and services, dilapidated state of physical

²⁷ Mwanza et al (1997), Structural Programmes in SADC, p129

²⁸ The Global Economy and Society: A World Survey (2000) p165

infrastructure, low levels of business and consumer confidence, huge external debts, and poverty embracing 70% of the population.

This is the economic scenario that led the new government to decide to put in place a new policy framework that would revive growth in the economy. This and the aggravation of the problem by the ruling party, United National Independence Party (UNIP), which had embarked on development which it could ill afford in the light of subsequent developments, prompted the putting into effect of the realised need to liberalise and reform the national economy and its constitution and structure. In its manifesto, the Movement for Multi Party Democracy (MMD) stated:

MMD believes that the economic prosperity for all can best be created by free enterprise; by economic and social justice involving all the productive resources- human, material and financial, and by liberalizing industry, trade and commerce, with the government only creating an enabling environment whereby economic growth must follow as it has done in all the world's successful countries.

The immediate reason for the liberalization programmes included the need for financial assistance from the international community. It can thus be asserted that Government's policy of liberalization hinged, by and large, on the conditionalities placed by the IMF and World Bank, upon governments intending to use the Bank's resources. These conditionalities included wage restraints, encouragement of foreign investment, trade deregulation, privatization and, removal of administrative controls and, improvement in human rights.

By 1992, the Zambia Privatisation Agency was created to oversee and control the privatization of State owned enterprises, there was a lifting of price controls, removal of subsidies, unification of exchange rates, and introduction of cost- sharing. And so by 1995,

the Zambian economy had, *de facto*, become a market economy par excellence.²⁹ In order to effectively implement the liberalization policies, the Zambian government substantially decentralized and deregulated most spheres of economic activity, passed a number of Acts and created a number of institutions.

The 1995 Customs and Excise Act is the main legislation governing Zambia's foreign trade and together with the Income Tax Act and Value Added Tax Act, corporate income tax stands at 35% with investment in the agricultural sector at only 15%. Under the Mines and Minerals Act of 1995, any investment by a holder of a mining right can be deducted from income tax, and imports of productive mining equipment required for exploration or mining can be exempt from customs, excise and value added tax (VAT).³⁰ The Export Processing Zones Act of 2001 gives additional incentives to the investors such as exemption from corporate tax; withholding tax on dividends and tax on interest or royalties; capital gains tax; duty on imported raw materials, plant and machinery intermediate and capital goods, and services; import value added tax; and excise duty.³¹ The Competition and Fair Trading Act introduced a code of conduct for all business entities and prohibits anti-competitive trade practices. Under the 1993 Investment Act, as amended in 1995, other than the general incentives provided to investors such as protection from nationalization or any other compulsory acquisitions, setting up a business in Zambia has been made very easy with the minimum required capital standing at only five million Zambian kwacha (k5, 000,000), and investors retain 100% foreign exchange earnings and can repatriate profits at will subject only to the dictates of the business requirements of the investor.

²⁹ Mwanza (1997) The World Bank and IMF supported programmes: A Zambian Perspective. p129

³⁰ A-Z of Business in Zambia (2006), Article entitled Opportunities for Foreign Direct Investment in Zambia. p15

³¹ Ibid

There has, however, been a change in the Investment laws with effect 1st January 2007. The Zambia Development Agency Act (hereinafter referred to as ZDA Act)³² has repealed the Investment, Privatisation, Export Processing Zones, Small Enterprise Development, and Export Development Acts.³³ Its objectives, *inter alia*, is to streamline bureaucratic procedures and requirements faced by investors and it provides for investment incentives that apply to both local and foreign investors.³⁴ The ZDA Act creates the Zambia Development Agency whose functions is to further the economic development of Zambia by promoting efficiency, investment and competitiveness in business and promoting exports from Zambia.³⁵ In its functions, the ZDA Act provides, the Agency should give regard to the protection of the interest of employees that are likely to be affected by measures proposed by the Agency and also the increase in employment in Zambia.³⁶ To this extent, it shows that there is regard given to workers' rights as the nation pursues development through investment. The ZDA Act provides that one of the considerations to be made before approving an application for an investment licence, permit or certificate of registration, is the extent to which the proposed investment will lead to the creation of employment opportunities and the development of human resources.³⁷ This also is a good development because it shows that Zambia intends to reaffirm its commitment to the welfare of its workers even as it pursues economic bliss. However, even this Act does not fully support the worker as it does not provide the criteria and model to be used in the determinations mentioned above.

³² Act No. 11 of 2006

³³ Ibid, section 84

³⁴ Ibid, objective (g) and Part VIII respectively

³⁵ Ibid, section 5(1)

³⁶ Ibid, section 5(2) (e) and (f)

³⁷ Ibid, section 69(b)

The institutional support mechanism for liberalization include an independent body, the Zambia Revenue Authority (ZRA), created in 1994 to improve revenue performance and this has led to an improvement in budgetary deficits. The Zambia Development Agency, which performs the consolidated functions of the Investment Centre, the Export Board of Zambia and Zambia Privatisation Agency (ZPA), is created to improve investment, promote and improve export performance and promote sales of state owned companies, among other things. In terms of sectoral aspects of trade, Zambia's resource allocation has shifted significantly from state control toward market orientation where the government plays only the role of creating an 'enabling environment.'

The need for economic growth was, without doubt, the chief aim for embarking on liberalization of the economy in order to create a civilized modern economy that has a place in the globalised world. But after ten years of this pursuit, The Zambia Congress of Trade Unions president, Fackson Shamenda,³⁸ aptly, albeit in a rather melancholy tone, described the social- economic impact of liberalization as thus:

We have had ten years of little economic growth. We have instead lost our manufacturing base, we have had ten years of high unemployment and impoverishment of our communities, we have witnessed an increased number of street kids in our towns and cities and a serious erosion of real incomes among the workers, schools and hospitals have become no-go areas for the poor in society, and tax cuts are ever on the increase. These are crucial issues...

And Elliot Jacques has this to say about the hoped for civilised society in a globalised world:

"To call itself well ordered, a society must of certainty be able to provide work for every citizen who wants to work. But it must do more. It must provide work, which enriches the individual by allowing him to exercise his full wit and capacity

³⁸ Opening speech to the ZCTU Workshop of 21-23 March 2001 in Lusaka on the theme, The Role of Trade Unions In Promoting Good Governance and Democracy

in his work. It must provide an economy so regulated as to ensure a fair and balanced distribution of wealth in connection with his work; fair in the sense that each man is assured of his fair due measure of reward for the level of employment he is employed to carry out, and balanced in the sense of giving each worker that standard of living which he can enjoy without on the one hand experiencing the bitterness of want, or on the other, being prey to idleness or tempted into compulsive and wanton expenditure."³⁹

The Zambian economy sure has not attained this ideal position because workers are one sector of the economy that has been neglected in pursuit of 'economic bliss'. Government has left too much to the market forces thereby downplaying its responsibilities to its citizens, more so to its workers.

2.2 THE IMPLICATION OF LIBERALISATION ON THE PROTECTION OF WORKERS' RIGHTS, VIS-À-VIS THE WORKER AND THE ECONOMY

There are basically three forces operating in a neo-liberalisation economy that have an impact on the protection of workers' rights. These include the corporate strategies adopted, the legislative framework and also the economic influences:⁴⁰

2.2.1 Corporate Strategy

A corporate strategy is a business strategy, and for our interest, it includes employment strategies adopted by employers in the interest of the business. Decisions of business on employment strategies evolve around regarding workers as human resource, which is just one factor of production. Workers are regarded as tools of production whose interests do not matter so long as what is done is good for the organization. This differs from a national

³⁹ E. Jacques (1963), *Equitable Payment: A General Theory of Work Differential Payment and Individual Progress*, p25

⁴⁰ Personal interview with Grayson Koyi, Director Research and Information, Civil Servants and Allied Workers Union of Zambia

economy where workers' interests are accorded as much importance as the parallel organizational interests. In Zambia, this difference is highlighted in a number of changes that have taken place in the industrial relations structure.

Previously, an organization had a Personnel Manager who was in charge of issues pertaining to workers and the emphasis was the welfare of the workers. Presently, the Human Resource or Structural Manager is in charge of recruiting workers and regulating their relationship with the organization. This shows that workers are but an organizational resource or tool to further organizational interests. The right to employment is adversely affected in so many ways. Whereas there was a system of job-on-training dominating employment, whereby workers were taken in raw, such as straight from school, and then developed, they are now expected to be skilled before they can be employed and to ensure this, they are subjected to stringent tests or aptitudes. The reason is to acknowledge the skill and knowledge possessed and to take in only those that can easily be oriented in the organization and also to avoid training expenses. Employers had the responsibility of training the workers generally as they would get anyone for the work, but now, employment is based on skill and this impedes on the right to employment. Skill based occupational concentration also leads to labour market discrimination as ladies and the untrained are put on unskilled or low skilled low wages because skills differentiation determines the wage ladder. There is discrimination at entry point in these organizations as the requirements sometimes go beyond training. Fore instance, people are required to have minimum work experience of many years. This leads to the same people moving from one work place to another since the newly qualified people have no place to get the experience that is required by every organization they apply to. At work places, there is an emphasis on dealing with individuals who sign individual contracts and as such trade unions are undermined and this in turn leads to employment insecurities as

contracts are based on unilateral terms without recourse and representation that trade unions and employment laws would guarantee as the parties are bound by the agreement entered into. In these contracts, in which government will seldom get involved, employers more or less dictate the conditions of service while exhibiting the 'take it or leave it' attitude during the bargaining process. Most workers end up with jobs in which they are unaware of terms under which they are engaged, and are often too afraid to ask the employer lest they lose their jobs by so doing, and what is worse is that they are often too poor to seek services of a lawyer.

But corporate strategies adopted are not always negative. The advantages include the employment of skilled people who sell their skill and get competitive wages for them as their individual bargaining strength is enhanced and not solely based on their being human. Their bargaining strength as individuals can be comparatively higher than those represented by trade unions as the unions represent a lot of people collectively and have to negotiate for what will be relatively uniform. Another advantage is the Gain Sharing Schemes, which enables individual workers to put shares in the organization and get a share of gains or interests since the interest of the organization and the individual workers is taken to be one.⁴¹

2.2.2 Legislative Framework

A move between industrial relations regimes can only effectively be done through Labour law reforms. There has been a revision of existing Labour laws to accommodate and encourage investors by lessening their responsibilities to the workers and so workers lose out because what is mostly revised is legislature guaranteeing them payment of certain benefits or demands. In Zambia, workers used to enjoy the right to shelter as employers were by

⁴¹ Ibid

virtue of the Employment Act⁴² obliged to provide housing or rent allowance in lieu of it, but now the Employment (Amendment) Act number 15 of 1997⁴³ (hereinafter referred to as CAP 268) provides that the employers are not obliged to provide housing, housing allowance, house loan or advance towards the purchase of a house unless it is contractually agreed. Previously in Zambia, and prior to the ILO Convention number 87 of 1998, with a seventy five percent membership a trade union could represent everybody in that category of employees, but now the right to belong to a trade union has been taken to the total discretion of an individual⁴⁴ and as such a potential recipe for fragmentation is created thereby undermining the right of the worker to collective representation. Employers were previously required to provide medical attention and paid sick leave but the amended section 43(1) of CAP 268 provides that this can only be if it is contractually agreed or is a term in the collective agreement.⁴⁵

There is legislative recognition of, and lack of protection of workers against, casualisation of labour and this has become breeding ground for the many instances of exploitation of the workers thereby impeding on their right to decent work and decent wages as they neither have an equal bargaining strength nor does the scarcity of jobs give them much choice but to give in to the mocking offers given by employers. Employers are no longer required to provide child care and other services like the mothers' shelter and so this has led to women leaving their work places in order to look after their children. In view of this, given a choice between a woman and a man, an employer would more easily give a job to a man than a woman because he knows that the man is more likely to stay longer at the job than the

⁴² section 41 and 42 of the Act prior to the Amendment Act No. 15

⁴³ CAP 268 of the Laws of Zambia

⁴⁴ section 5 of The Industrial and Labour Relations Act

⁴⁵ Mwenda, W.S (2004), Employment Law in Zambia: Cases and Materials. UNZA Press: Lusaka

woman. Women are even more disadvantaged because although they are employed on the same skill as men, future projections such as maternity leave, mothers' day and so on lead employers to leave them out or confine them to low skill and low wage jobs thereby undermining the right to equal employment.

The lack of legislation guaranteeing equal right to work is disadvantageous because the markets will not see for themselves unless it is put in law. The revision of pension laws in Zambia has greatly affected the Zambian worker as well. Previously, there was an option to get a two- third (2/3) lump sum and then one- third (1/3) monthly but that right to choose has been taken away as the lump sum no longer exists and the argument is that it is for social protection, that is, the worker should now go and rest as he should have done all he could in the working field by the time he qualifies for the pension.⁴⁶ The right to strike was guaranteed but now the legislature has just fallen short of outlawing legal strikes by the introduction of a cumbersome process to conduct one. These are just some of the rights unprotected, undermined or not accorded sufficient recognition and/or importance in the legislation in the liberalized economy of Zambia.

Zambia's investment environment is enhanced by the passing of such pieces of legislation as the Privatisation Act of 1992, the Investment Act of 1993, the Securities Act of 1993, the Companies Act of 1995 and the Mines and Minerals Act of 1995. But building an investor friendly economic environment can negatively affect the economy if other levels of the economy are neglected. Fore instance, some Acts propose to increasingly regulate foreign shareholding businesses and dramatically increase the rights of contract and casual labourers while 'protecting' existing workers; these legislation most certainly impact negatively on the

⁴⁶ The National Pension Scheme Act No. 40 of 1996, CAP 256 provides in section 19 and 20 for the award of retirement pension monthly but does not provide for the lump sum existing previously.

numbers of people hired and result in smaller company size.⁴⁷ And the World Bank notes, “With fewer job opportunities in the formal sector, the expansion of an unofficial sector becomes inevitable.”⁴⁸ And so whereas the situation is not so conducive for the economy, it does not satisfy the people either, especially that informal employment relations exist beyond the reach of protective laws. The inadequacies of the Legislative framework, in relation to the protection of workers’ rights, is aggravated by the regulatory system not being prompt or transparent due to the relatively inexperienced courts in the area of commercial litigation.

However, the Legislative framework has not only culminated in the reduction of workers’ rights protection but has some positive effects. For instance, trade unions had become too powerful that wage determination became viewed as distortional thereby affecting income distribution and employment negatively, and now income distribution is equal to productivity and skill possessed. This is to say that previously, workers could get jobs and have wage increments through trade unions without any effort on their part because they were comfortable, but now they have to earn their wages by selling the skill possessed as they must do the bargaining themselves and be bound by the contract of employment resulting therefrom.

2.2.3 Economic Influences

Economic influences of liberalization have a great impact on the protection of the rights of the worker. Liberalisation has resulted in job reduction, massive job losses or shedding off. There is massive deprivation of the right to employment as in a nation of an estimated four million labour force, people who are willing and able to work; only about ten percent are appropriating the right to work. Many people skilled in manual jobs can hardly get decent

⁴⁷ A-Z of Business in Zambia (2005) Article entitled Business Environment in Zambia by Sean Willis. P31

⁴⁸ Monitoring, Analysis and Policy Unit, Investment Climate Dept, World Bank Group (2003)

jobs as much of the liberalized economy is computerized leading to a reduction of the work that humans can do with their hands and feet. To complement this unfortunate situation, a job that should be done by five people only requires one person both because the employer wants to reduce the amount it has to spend on wages and because jobs are reduced by technology. Because of the emphasis on profit maximization and cost minimization, sticky wages are the norm, for instance, wages are linked to productivity meaning that in a country with low productivity there is a big problem.

A liberalized economy is capital intensive and so the capital ratio is higher than the labour ratio unless in labour intensive economies where the opposite is true. There is also the polarization of labour within labour, that is, wage gap based on skill. The problem with this is that these wage gaps cannot be justified by any objective criteria and it is disadvantageous on the unskilled workers in terms of the right wage in connection to input. The determining question is how much labour the production got and not how many people were engaged, thereby regarding workers as synonymous with tools of production. Because of their mobility, multinational enterprises, who are the major investors, have enormous power and so they can demand and get huge amounts of government support to attract or secure their presence and in so doing they can bid down employment conditions between locations or simply move to areas with cheaper labour costs.⁴⁹

These trends are bound to continue until the State government and International bodies concerned get more involved in the strict regulation and monitoring of the organizational employers in order to prevent the escalating workers' rights violation.

⁴⁹ Murray, Jill in an Article dated 5th March 1998 and titled 'Corporate Codes of Conduct and Labour Standards'

2.3 THE ROLE OF PREVENTIVE MEASURES TO THE VIOLATION OF WORKERS' RIGHTS

Prevention of the violation of workers' rights emanating from liberalization is a two-fold responsibility; it falls on both the international and domestic authorities. In the words of Jill Murray,⁵⁰ the action which shape labour standards within a firm are influenced, to a greater or lesser extent, by the external environment, which includes the systems of national and international regulation. This means that an entity in question, such as a Multinational Enterprise or a local investment company, will be influenced by what the ILO and OECD stipulates and also what the Labour Laws of the country demand of it and this is in fear of sanctions or other legal consequences.

The protection of workers against excessive exploitation is the very premise upon which the ILO was formed and it has a number of conventions under it that ensure the protection of several core labour standards of universal application. The ILO Declaration on Fundamental Principles and Rights at Work was adopted in 1998 by the 86th International Labour Conference to respond to the challenges of globalization and it commits all ILO member States to respect, to promote and to realize in good faith the principles and rights enshrined in the eight ILO Fundamental Conventions. These are; The Freedom of Association and Protection of the Right to Organise Convention;⁵¹ The Right to Organise and Collective Bargaining Convention;⁵² The Forced Labour Convention,⁵³ The Abolition of Forced Labour Convention,⁵⁴ The Minimum Age Convention⁵⁵ The Elimination of the Worst Forms of

⁵⁰ Ibid

⁵¹ Convention No. 87 of 1948

⁵² Convention No. 98 of 1949

⁵³ No. 29 of 1930

⁵⁴ No. 105 of 1957

⁵⁵ No. 138 of 1973

Child labour Convention;⁵⁶ The Equal Remuneration Convention⁵⁷ and; The Discrimination (Employment and Occupation) Convention.⁵⁸

The above instruments provide for the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination between male and female persons in respect of employment and occupation. This Declaration is important in that it requires all member States of the ILO, such as Zambia,⁵⁹ to respect the fundamental principles involved even when they have not ratified the relevant conventions. But then, some of the provisions of the Declaration are biased and not so favourable to the worker, an example of which is where it states that workers may meet to consult each other 'provided that the functioning of the operations of the enterprise are not prejudiced', thereby giving primacy to the financial interest of the organization.

The role of an international body setting down binding and internationally applicable labour standards is to ensure that in this globalised world, every country and multinational or other investor is aware of, respects and adheres to the necessary labour standards. But as mentioned in the previous chapter, the ILO lacks an effective implementation and monitoring system and relies on the concerned countries to implement these conventions through labour laws and policies, although it has a system whereby States that have ratified the conventions are obliged to report at regular intervals to the ILO regarding measures taken to comply with the standards set therein.

⁵⁶ No. 182 of 1999

⁵⁷ No. 100 of 1951

⁵⁸ No. 111 of 1958

⁵⁹ Zambia has been a member of ILO since 1964 and has so far ratified 40 ILO Conventions on the application of international labour standards - Information Document on Ratifications and Standards-Related Activities, International Labour Office. p180

The ILO Director- General, Juan Somavia, reported that up to now better jobs and income for the world's workers has not been a priority in policy making and that the creation of sufficient and sustainable decent work opportunities has not, as such, resulted from liberalisation.⁶⁰ It follows that the protection of workers rights in a given country is determined by the trade and labour policies applicable to that country. Multilateral trade liberalization can be a sound social policy and foster long term economic growth, stimulate trade and investment and assist developing countries' integration into the world trade system and it can do this in a way that will help combat poverty and raise the standards of living and working standards for all members of society.⁶¹ Any country, including Zambia, can therefore remain globally competitive in the long term and at the same time save and improve social and labour standards, but again this can only be done by strengthening the economic, labour and social policies of the given State.

It follows that if a country is to effectively combat or prevent workers' rights violation; it must do so through its legislative and policy making mechanisms with a highly effective monitoring and enforcement mechanism which will not be biased towards protecting the interest of the organization over that of the workers. But existing on the ground is that there is repression of basic labour rights in a bid to be competitive in international markets, following the logic that by not respecting core labour standards, economic costs could be reduced and chances for attracting foreign investment enhanced.

⁶⁰ In the ILO report of December 9th 2005 entitled Globalisation Failing to Create New, Quality Jobs or Reduce Poverty

⁶¹ 'Trade Policy for a Social Europe' speech by Commissioner Peter Mandelson at the ILO/European Commission Forum on the theme 'Social and Employment Dimensions in an Open Trading Regime,' Turin, Italy, 26th May 2005

The watchdog role of human rights organizations and trade unions to remain vigilant and denounce any workers' rights violation is now, more than ever, indispensable if workers' rights are to still be respected and protected and not be trampled on at the will of the employers. This is because of the weaknesses in the ILO and the tendencies of nations like Zambia, which put the interests of the investors and the organization before those of the workers, all in an effort to encourage investment and realize the hoped for economic growth, leading them to offer cheap labour and flexible labour laws much to the detriment of workers and the very economy they are doing it for.

CHAPTER THREE

INSTITUTIONAL PROTECTION OF WORKERS' RIGHTS IN LIBERALISED ZAMBIA

The effectiveness of a law lies in its enforceability and the purpose of this chapter is to examine the institutional enforcement mechanism for workers' rights in Zambia. This will be done by identifying, analysing and evaluating the institutions to which workers can go for redress, with regard to how they assist the workers in the enforcement of their rights.

3.1 THE JUDICIARY

The Zambian judiciary consists of the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts, Local Courts and such lower courts as may be prescribed by an Act of Parliament⁶² and those presiding over the Courts are by legislation impartial, independent and subject only to the Constitution and the law.⁶³ The worker has recourse to the first three courts in the hierarchy, which can hear and determine Labour matters that fall within its scope and with the guide of the Constitution, and any other relevant laws, give efficacy to the rights of the worker which may otherwise be left unenforceable.

3.1.1 The Supreme Court

The Supreme Court is the appellate and final court in Zambia and it has jurisdiction to hear and determine appeals in both civil and criminal matters and it also has original jurisdiction in matters as may be determined by the Constitution or any other law.⁶⁴ Accordingly, the court will hear matters concerning the worker and arising from the decision of the High

⁶² The Constitution of Zambia, Chapter one of the Laws of Zambia, Article 91(2)

⁶³ Ibid, Article 91 (2)

⁶⁴ Ibid, Article 92

Court and the Industrial Relations Court on matters of law or mixed law and fact. The Supreme Court may confirm, vary, amend or set aside the judgment appealed from or give such judgment as the case may require and if the case be on any matter not provided for in the local practice and procedure, the court may have recourse to the application of the law and procedure obtaining for the time being in England.⁶⁵

The worker can move the Supreme Court by a notice of appeal containing grounds of appeal and supported by affidavits where necessary, which should be filed in duplicate and state whether it is the whole or part of the decision being complained of and if it is part then which part.⁶⁶ Appeals from the High Court require that Leave of appeal be obtained from the High Court at judgment, and the judgment will record the grant or denial of the same.⁶⁷ Appeals from the High Court must be made within 30 days after the judgment complained of⁶⁸ but there is not yet a limit for appeals from the judgment of the Industrial Relations Court.

The Supreme Court assists the worker to get a second chance at obtaining justice or sought-for remedy by allowing him to appeal against the judgment of the Industrial Relations Court and High Court where he deems the judgment unfavourable or unjust.

3.1.2 The High Court

The High Court is created by the Constitution of Zambia⁶⁹ and is established under the High Court Act.⁷⁰ The High Court has unlimited jurisdiction which includes the judicial hearing and determination of industrial and labour relations cases even though the law has granted

⁶⁵ Section 8 of the Supreme Court Act, CAP 25 of the Laws of Zambia

⁶⁶ Order 49 of the Supreme Court Rules, CAP 25

⁶⁷ Order 50 of the supreme Court Rules, CAP 25

⁶⁸ Order 47 and 49 of the Supreme Court Rules, CAP 25

⁶⁹ Article 93 of Chapter one of the Laws of Zambia

⁷⁰ Chapter 27 of the laws of Zambia

jurisdiction in these matters to the IRC.⁷¹ The two courts, as per Justice Ernest Sakala,⁷² cannot be equated because though the IRC is a special court; its jurisdiction is limited to industrial and labour matters while the High Court is a Superior Court of Record with unlimited jurisdiction. Although the question of jurisdiction of the High Court in labour matters has been a matter of much legal controversy, the Constitution itself states that the High Court has original and unlimited jurisdiction except as to proceedings in which the IRC has exclusive jurisdiction under the Industrial and Labour Relations Act⁷³ (hereinafter referred to as the ILRA). But the question of what constitutes ‘labour matters’ in this case has also been a controversial question. In the case of **Cheelo and nine others v Zambia Consolidated Copper Mines**,⁷⁴ on appeal against a High Court decision that the High Court had no jurisdiction to try the case of redundancy agreement without payment of redundancy package, it was held that the proper interpretation of section 85(9) of the Industrial and Labour Relations Act is that notwithstanding the removal of the High Court from the Employment Act, the High Court has jurisdiction to try cases arising out of pure master/servant relationships and that the present case was one such case. According to Mudenda,⁷⁵ it is clear that the Supreme Court hinged its decision on the interpretation of the term “Industrial Relations matter” and construed “Jurisdiction term” as exhaustive when in fact the wording and text of section 85(9) shows that the definition was inclusive or illustrative.

In spite of the controversies, what normally happens in practice is that would-be litigants in the industrial and labour relations matters are advised by the Registry Staff at the High Court

⁷¹ Mwenda, W.S (2004) *Employment Law in Zambia: Cases and Materials*, UNZA Press: Lusaka p.116

⁷² in the case of *Zambia National Provident Fund Board v The Attorney General and Others* (1983) ZR 140

⁷³ Article 94 of the Constitution, CAP 1 of the Laws of Zambia

⁷⁴ SCZ Appeal No. 25 of 1999

⁷⁵ Mudenda, F, *The Award of damages in Employment Cases in Zambia: A General Overview*, in LAZ Journal, Vol.2, (1999/2000), p.55

to commence their cases in the Industrial Relations Court.⁷⁶ But this does not mean that workers cannot seek redress from the High Court for matters that are not strictly of industrial relations nature as defined by the ILRA, such as where there is violation under the Bill of Rights or under the Workers Compensation Act. In such cases, the worker can move the court by a general writ of summons in the prescribed form and accompanying or endorsing it with a full statement of claim containing what his claims are against the employer or what relief he is seeking.⁷⁷ The High Court in this way assists the workers by providing them a forum for the hearing and determination of grievances that fall outside the strict industrial relations sphere, such as matters of physical torture from their employers.

3.1.3 The Industrial Relations Court

The Industrial Relations Court, (hereinafter referred to as the IRC), is created under Article 91 of the Constitution and established under the ILRA⁷⁸ which gives it original and exclusive jurisdiction to hear and determine any industrial relations matters and any proceedings under the Act.⁷⁹ Any disputes between employer and employee can be brought to the IRC⁸⁰ and unlike the Supreme Court and High Court; this Court is not bound by strict rules of evidence as its main objective is to do substantial justice between the parties,⁸¹ which would be hindered if there were a lot of legal technicalities to be followed. The IRC therefore assists the workers in that it is a special court for the redress of labour matters and it enables the worker easy access to justice, as even lay complainants can file their complaints and be heard

⁷⁶ Mwenda, W.S. (2004). p116

⁷⁷ Order vi of the High Court Rules, The High Court Act, CAP 27 of the Laws of Zambia

⁷⁸ section 84 of the 1993 ILRA , originally section 64 of the Industrial Relations Act No. 36 of 1990

⁷⁹ Section 85(1) of the ILRA

⁸⁰ prior to section 85 of the 1993 Act which has given the Industrial Relations Court wide discretion to hear and determine any cases falling within the Industrial and Labour Relations Act, wrongful dismissal cases could only be heard in the High Court and an individual employee had *locus standi* only in the High Court and not in the Industrial Relations Court but now by virtue of section 98, he can commence an action without being part of a collection of employees..

⁸¹ Section 85 (4) and (5)

without being bogged down by legal technicalities.⁸² But to move the court, the worker must present his complaint or application within thirty days from the occurrence of the event giving rise to it.⁸³

The Court is empowered to grant any such remedy as it considers just and equitable including award of damages or compensation; order for re-instatement, re-employment or re-engagement; confirmation of the retirement, retrenchment or redundancy; or it may make any other order or award as it considers fit in the circumstances.⁸⁴ And the decision, declaration or judgment of the Court is binding on the parties, subject only to the right to appeal to the Supreme Court on the point of law or of mixed law and fact⁸⁵ but not on the point of fact only.⁸⁶ The Tripartite Consultative Labour Council has proposed that the appeals or counter appeals to the Supreme Court be made within thirty days from the date of judgment of the IRC⁸⁷ as there is currently no period set, leading to delayed justice and inefficient disposal of cases.

3.2 THE PERMANENT HUMAN RIGHTS COMMISSION

Article 125 of the Constitution provides for an autonomous human rights commission although its personnel are appointed by the president and ratified by Parliament. Its functions, powers, composition, funding and administrative procedures, including the employment of staff, are prescribed by an Act of Parliament,⁸⁸ which does not require Commissioners to be qualified in human rights or to be persons known for their integrity, and does not provide for a laid down procedure for their removal resulting in lack of security of

⁸² Mwenda, W.S. (2004) p. 116

⁸³ Section 85(3) of the ILRA

⁸⁴ Section 85A

⁸⁵ Section 85(6)

⁸⁶ Section 97 of the ILRA

⁸⁷ Annotated Agenda on the Amendments to the ILRA, March 2006, p.29

⁸⁸ The Human Rights Commission Act No. 39 of 1996

tenure thereby undermining the independence of the Commission.⁸⁹ These are the weaknesses of the Commission, which make it ill-fitted for the protection of workers' rights.

The Permanent Human Rights Commission, however, is important to the worker in that its functions include investigating any human rights violation on its own initiative or on receipt of a complaint under the above mentioned Act and to propose effective measures to prevent any human rights abuse. It means to the worker that, since workers' rights are human rights that a worker possesses by virtue of being a worker, the Commission will intervene where it sees the abuse of these rights or see to their prevention and the worker can take his complaints to the Commission, particularly on matters arising from the abuse of Constitutional rights as contained in the Bill of rights, such as the infringement of Civil and Political rights which include freedom of association and assembly. The remedies available for recommendation from the Commission, in matters not pending before a court, include the release of a person if detained, payment of compensation to the victim or his family for the human rights abused, that an aggrieved person seek redress in a court of law, and any such action as it may consider necessary to remedy the infringement of a right.⁹⁰ And the problem here is that it makes recommendations and not binding decisions.

3.3 THE LABOUR COMMISSIONER

The Labour Commissioner is an office created under the Employment Act⁹¹ and is responsible to the Minister for the administration of the Act, and he can delegate his powers

⁸⁹ Derived from the Constitutional law notes on the Permanent Human Rights Commission, by Professor Alfred W. Chanda, Dean- Law School, UNZA

⁹⁰ Ibid

⁹¹ CAP 268, section 4

to any person (that is, labour officers) in writing, and with the consent of the Minister.⁹² The Commissioner has power to interpret what the ILRA says about trade unions, plays a participatory role in dispute resolution, and also ensures compliance of the law by employees and employers. These powers possessed include him entering upon work premises, inspecting any documents necessary and interrogating persons involved in so far as it is required to satisfy himself that the provisions of the Act are being complied with.⁹³ The Commissioner registers trade unions when satisfied that the application has complied with all registration requirements and he is mandated to communicate refusal if he so refuses to register the trade union⁹⁴ and he can cancel the certificate of registration of a trade union on instances contained in the ILRA with the approval of the Minister and notify the trade union accordingly.⁹⁵ His actions can, however, be appealed against in the IRC and he has a right to be heard therein.⁹⁶

The Labour Commissioner may sometimes hinder the rights of workers instead of ensuring their protection as per legislative provisions. For instance, he is mandated to supervise and conduct the ballots of a trade union voting on whether to settle a collective dispute for which conciliation has failed, by strike or lockout as per section 78 of the ILRA, and he can so easily frustrate the efforts of the trade union. For instance, the Civil Servants and Allied Workers' Union of Zambia (hereinafter referred to as CSAWUZ) was made to wait indefinitely by the Commissioner when it had a dispute with government over failure by government to pay housing allowance in 2004 which had been negotiated for in 2003. He claimed that he was organizing manpower to conduct the ballot thereby giving government

⁹² Ibid, section 5

⁹³ Ibid, section 6(2)

⁹⁴ ILRA section 7

⁹⁵ Ibid, section 12

⁹⁶ Ibid section 13

leeway to procrastinate the issue until they were ready to re negotiate⁹⁷ and because strikes reflect badly on him as not providing guidance on legal provisions or that he is unable to mediate.⁹⁸ The office of the Commissioner is that of an impartial officer but being a government officer, the Labour Commissioner is susceptible to political manipulation and has hardly operated objectively as exemplified above, where he could have testified or instituted legal action against the employer. Further, confidence in this office is undermined by the perception of it as a mouthpiece of government.

The Commissioner's lack of resources is detrimental to the execution of his duties, for instance, lack of adequate vehicles make implementation and monitoring of agreements between employers and employees quite hard to execute. The Commissioner is not a well paying office and this makes him susceptible to bribes and other malpractices, for instance, there was an incidence where the Commissioner resigned to become the Labour Consultant advising employers in how to exploit workers by pointing to weaknesses in the laws that they can exploit. The lack of adequate enforcement mechanism to ensure the Labour Commissioner's compliance undermines his capacity to enforce the law in cases where he has pecuniary advantage such as the refusal to register trade unions. This and other weaknesses in the regulatory framework make unscrupulous workers and employers take advantage of the Labour Commissioner's office bringing it in disrepute of capacity to objectively carry out its functions.⁹⁹ In certain settings, the Labour Commissioner is a semi autonomous office like the Anti Corruption Commission (ACC) in Zambia and this status would greatly improve and install confidence in the operations of the Labour Commissioner in Zambia.

⁹⁷ Personal interview by Ivor Mukwanka with Darrison Chaala, General Secretary CSAWUZ

⁹⁸ Personal interview with Grayson Koyi, Director- Research and Information, CSAWUZ

⁹⁹ Ibid

3.4 THE ZAMBIA CONGRESS OF TRADE UNIONS

A trade union is an organization of employees, whether permanent or temporal, whose principal objects are the regulations of the collective relations between employees and employers, or between employees and organizations of employers, or between employees and employees... and this gives legal status to a trade union whereby it can sue and be sued in the name independent of its members.¹⁰⁰ The historic mission of trade unions is equity and social justice in the distribution of resources in society and as such modern democracy gets its take from the trade union movement, for instance, Britain's social and economic transformation thrives on the embodiment of industrial democracy perpetuated by the trade union movement, as it emphasizes equity and social justice.¹⁰¹ Workers join trade unions in the hope to have their conditions of work improved through the instrument of collective bargaining resulting from negotiations with the employers and thus the promotion of human dignity and the dignity of work through the uplifting of standards of the worker to a decent living.

The Zambia Congress of Trade Unions (hereinafter referred to as ZCTU) is the 'umbrella' organization of trade unions in Zambia created under the ILRA and is a party to the Tripartite Consultative Labour Council as a third party in this social dialogue for industrial harmony by the advancement of labour rights advocacy. There is an organizational structure through which affiliates or workers let their concerns taken to be represented by ZCTU to this forum. ZCTU oversees and provides leadership and oversight to trade unions on how to conduct themselves with their employers. It plays a conciliatory role especially in dispute between trade unions and also between trade unions and other employers, for instance, a dispute

¹⁰⁰ A.M Mtopa (1989) Labour Law in Zambia, Kenneth Kaunda Foundation: Lusaka, p.206

¹⁰¹ Personal interview with Grayson Koyi, Director-CSAWUZ

between the Civil Servants Union and the National Health Workers Union because both unions would subscribe to ZCTU. The weakness in this is that the ZCTU cannot intervene before the dispute is declared whereas the Labour Minister has superseding mandate as he can intervene before, during and after the negotiations.

The problem of informal employment has led to a decline in trade union membership. The regulatory framework provides for the multiplicity of trade unions and makes affiliation to ZCTU non mandatory and this undermines workers' rights protection because the strength of trade unions lies in numbers and the ability to speak in one voice, but the proliferation of trade unions results in trade unions working against each other thereby raising the question of the relevance of trade unions. Therefore, the removal of the 'one industry one union' policy has resulted in divisions among workers.¹⁰²

3.5 THE TRIPARTITE CONSULTATIVE LABOUR COUNCIL

Tripartism entails that the employees, management and government should play a role in harmonising industrial relations by addressing the interests of the various interest groups, and it is in line with this that the Tripartite Consultative Labour Council (hereinafter referred to as the TCLC) has been established and its functions include advising the government on all issues relating to labour matters, manpower development and utilization and any other matter referred to the Council by the Government.¹⁰³ These parties to the labour relations on majority vote make decisions on issues with the intent not to oppress any one party thereto. The importance of the TCLC lies in the availability to Government of balanced views on

¹⁰² Section 17 of the ILRA gives one the right to belong to a trade union of his own choosing amidst some employers' craftiness in making the would be employee sign that he will not join any trade union for as long as he remains in their employ and so not all workers favour or join trade unions, which is illegal.

¹⁰³ Section 83 of the ILRA

labour matters from all stakeholders, which opportunity Government can take in improving its labour policies. And to the workers, they can make their wishes known and express their industrial views on matters affecting them, through their representatives, the trade unions organisations which include the ZCTU and the Federation of Free Trade Unions in Zambia. The effectiveness of the TCLC in Zambia is however highly questionable and it seems to exist only in statutory books as most of its works is not seen and its advice is hardly put into effect. Also, there are divergent views proposed and it is difficult to arrive at one that is satisfactory on all the parties to the Council and those they represent.

The Zambia Privatisation Agency's proposals to the TCLC meeting of 4th February 1994, to the effect that in view of the need to maintain social, political and economic stability, and to ensure that national interests were upheld in the Privatisation process, and for the purpose of ensuring smooth transition from the public to the private sector, employees of the privatized companies should be exempt from the law as it relates to transfers, was rejected.¹⁰⁴ The Council's Tripartite Committee on the Review of Labour Laws¹⁰⁵ has proposed that the time frame within which a complaint may be lodged with the IRC should be extended from thirty to ninety days to allow for people in far flung areas an opportunity to reach the Courts in good time and file their cases, as most have sadly fallen prey to lodging their cases out of time because the two Industrial Relations Courts in Ndola and Lusaka are very far. And it remains to be seen whether this and other proposals made will be put to effect.

¹⁰⁴ Section 35(1) of the Employment Act, CAP 268, provides that the existing rights under the contract of service shall not continue on transfer to another employer and this is where renegotiations and change of terms occurs leading to loss of certain rights enjoyed by the employee.

¹⁰⁵ Annotated Agenda on The Amendments to the ILRA, March 2006, p27

CHAPTER FOUR

COMPARATIVE STUDY

The purpose of this chapter is to analyse other countries' responses regarding liberalisation and the protection of workers' rights with a view to identifying opportunities that would inform possible reform in Zambia. It attempts to answer the question whether government has a role to play in the effects of a liberal economy on the protection of the rights of the worker and whether there are opportunities for Zambia's jurisprudence in the area of the protection of the rights of the worker in its liberalisation of the economy. In summary, this chapter will illustrate that some countries have engaged law, policy and activism to address the problem of workers' rights abuses. The interventions adopted have included legislative and policy pronouncements, judicial activism manifest in Court decisions and also institutional engagement as illustrated by the intervention of the trade union movement and human rights commission.

4.1 AN INTERNATIONAL PROBLEM

The problems pertaining to workers rights protection in a liberalized economy is not peculiar to Zambia but is rather a global problem affecting mostly third world countries moving towards a fully liberalized economy. As earlier mentioned, the ILO has set international standards for the protection of workers but has called on the individual countries to enact laws that will give enforcement to them as it lacks the required enforcement mechanism. The OECD has also called on countries to enact enforceable laws that will define the foreign investors' perimeters in relation to industrial relations among other things. Also, the WTO has maintained that opening up the market is good for the economy but protection of workers rights cannot be left to market forces entirely and that national law is the best avenue to use

in the protection of workers rights. The onus is therefore on the individual countries through legislative and institutional frameworks to ensure the protection of these rights. Some countries have done more than Zambia has in this endeavour and Zambia can learn from them and do so much more.

4.1.1 KENYA

Kenya has five export processing zones (hereinafter referred to as EPZs), containing about forty firms, and these EPZs are intended to increase foreign currency earnings and they offer various incentives to attract investors. The EPZs have employed almost forty thousand Kenyans but this success has been undermined by persistent allegations of poor working conditions and human rights abuses in the zones. Workers are forced to work long hours without rest and female workers also face dismissal threats if they fall pregnant. Until now when the workers are getting an average salary of three dollars a day plus 15 percent housing allowance and other performance benefits, workers earned an average of two dollars a day. The EPZ Company owners resisted trade unions but have now allowed them although there are claims that only two zones have allowed this. There are also claims that increased unionism in the EPZs has resulted in ‘cosmetic improvement’ in working conditions especially that union leaders are ‘pocketed’ by employers and are reluctant to take cases to the industrial court despite reports of abuse made to them by workers.¹⁰⁶

The Kenya Human Rights Commission (KHRC) was established in 1992 in response to serious human rights abuses by the government against its people with a focus on

¹⁰⁶ This account on Kenya is from an article entitled “In a situation like this, who cares about human rights?” reported by Darren Taylor of the Inter Press Service on October 5, 2005 from interviews and research conducted

monitoring, documenting and publicising violations of civil and political rights.¹⁰⁷ It also focused on challenging a largely unaccountable executive by attempting to strengthen parliament, the judiciary and other institutions of government. It played an important role in strengthening the role of civil society in advocating for democratic reforms by leading the way in initiating and carrying forward the constitution-making process. It gained a high public profile through its resilience in organizing public direct actions that resulted in several of its leading members being arrested and detained. Its focus has broadened to incorporate a wide range of economic, social and cultural rights although it is still seeking registration under the NGO Registration Act.¹⁰⁸ And the Commission has not just stood by and let the lack of action from the government and the trade unions discourage them from the role that they play in the protection of the rights of human beings, of which workers are a part. And so it has engaged activism and dialogue with government and other stakeholders in its endeavour to serve the best interest of the workers and other people prone to human rights abuses.

The Commissioners do not just occupy operational offices while they let human and workers rights abuses take their toll and so when they saw that workers' wages could not sustain an average family, they attempted to address the injustices caused to workers by speaking for them and the result was the increment of wages in the EPZs, the allowing of trade unions in the EPZs and the improvement in the EPZ workers' working conditions. The Human Rights Commission intervened in spite of the reluctance of the Kenyan government in the protection of workers' rights for fear of loss of investments and the trade unions' inaction and ignorance to workers' rights abuses.

¹⁰⁷ www.umn.edu/humanrts/africa/kenya.htm 02/01/2007

¹⁰⁸ www.ned.org/grants/05programs/grants_multi05_html 02/01/2007

Zambia can get a leaf from the Kenyan experience. There are a lot of institutions and non governmental organisations (NGOs) in Zambia, in addition to the Permanent Human Rights Commission, and government can empower them so that they can more effectively intervene in such cases as calls for their particular attention.

4.1.2 INDIA

The trade unions in India declared a war against liberalisation and scheduled its execution, through an All India Strike, for 29th September 2006, which strike only took off on Thursday December 14th 2006. The strike attests to the widespread and mounting opposition of India's workers and toilers to the slashing of social-welfare and agricultural-price support programs, privatization and the downsizing of the public sector, and other policies aimed at making India a magnet for investment and cheap-labor production for the world market.¹⁰⁹ The contention was mainly that there is very little or no governmental supervision to ensure the operation of labour laws and the payment of minimum wages; that making the labour market "flexible" is a euphemism for a 'hire-and-fire' principle which is undesirable and that this calls for a revision of labour laws; that although the registration of trade unions is guaranteed by a central legislation, unions and the State governments shift the onus on each other and delay matters indefinitely; that the right to trade unions is not recognized in some places; that the eight- hour workday has been turned into an ideal of the past with the excuse being that present technology demands a twelve hour day of work to enhance production, and that without an overtime being in place; and that workers face a threat of retrenchment everyday,

¹⁰⁹ www.cpiml.org/liberalisation/year_2005/html 01/01/2007

which is a threat to their right to employment as factories continue to close down and government continues to embark on privatization and divestments.¹¹⁰

The trade unions responded to the plight of workers by demanding, in their activism, *inter alia*, legislation to restore the right to strike (in 2003 the Supreme Court ruled public sector workers have no constitutional right to strike); scrapping of VRS (Voluntary Retirement Schemes) that have been used to eliminate public sector jobs; and a halt to the government's policies of contracting-out work and leaving jobs in the public sector, including the railways, vacant. (There are said to be some two million vacancies).¹¹¹

The problems being faced by the Indian labour force are not remote to the ones Zambia is facing but the difference is that the Trade unions in India have not just accepted the situation but have decided to state and fight for their position in labour matters. Their place is in fighting for the rights of the worker and not looking at personal interests or internal power fights. There is unity in the unions of India, which lacks in the Zambian movement, and without unity, the unions are ineffective and irrelevant because the strength of trade unionism entails collective responsibility. But the fight should not be against liberalisation *per se* but those policies of liberalisation that affect and undermine the rights of the worker. An all Zambia strike may not be necessary but there is great need for the trade union movement to act to the best of their ability and speak out in the loudest and united voice until they are heard, because until they do that, they will be downtrodden and their position in labour matters will become obsolete rendering them irrelevant, and the same will eventually become of workers' rights.

¹¹⁰ This account of India was taken from an article prepared by Chittabrata Majumdar entitled 'September 29 All India General Strike; Strike Hard Against Liberalisation'

¹¹¹ Op.cit

4.1.3 NICARAGUA

Nicaragua has fought its own battle against some injustices of liberalisation. Dibromochloropropane (hereinafter referred to as DBCP) is a key chemical in the pesticides Nemagon and Fumazone sprayed in plantations such as the banana plantations and this chemical was banned in the United States in 1979 but the U.S chemical companies continued to export it to countries with less stringent labour and environmental regulations until the mid-1980s. Workers, especially in third world countries to which the chemical is exported through transnational companies still using the chemical, have been suing the U.S corporations for the last two decades over the exposure to this chemical which causes sterility as well as liver, kidney and lung damage, as per studies conducted by Shell and Dow, and their claim is that the companies do not take adequate measures to protect them from exposure to the fumigant, but the result of their lawsuits have mostly been disappointing. Some cases were settled out of court with the awards being relatively small while others have been stymied by legal and political barriers and may be impeded in the future by free trade agreements. Workers, in their home countries face prohibitive costs and legal systems that are unable to handle complex tort cases and that are often corrupt. One of the most considerable impediments to legal action in the U.S is the legal doctrine of *forum non conveniens* or inconvenient forum under which a court can reject a case on the grounds that it would be more appropriate to hear it in another locale such as the Plaintiff's home country and it has been used as a shield or a way for U.S corporations to evade liability. The workers therefore, pressured the Nicaraguan government to find a different route to justice and in January 2001, the Nicaraguan National Assembly passed local Law 364, which was specifically designed to

assist banana workers in gaining compensation from companies that produced or used DBCP, by laying the legal groundwork upon which farm workers can sue corporations.¹¹²

Nicaragua has, therefore, addressed the problem by way of legislation by passing Law 364, which provides a forum to process, adjudicate and compensate for toxic tort injuries and damages caused by the foreign multinational corporations against Nicaraguan citizens.¹¹³

This law has established a rapid procedure for handling judgments that workers bring before the courts and it established that the responsible parties include the chemical manufacturers, its distributors, and the landowners who use the pesticide. This has led to rulings against the companies such as the one dated December 11, 2002 ordering Dell, Shell and Dole to pay \$489.4 million to banana workers and the March 15, 2004 case requiring the same companies to pay another group of workers \$82 million. The enforcement of these rulings is however an uphill battle as the companies are prepared to fight the judgments, they have threatened to reduce or remove investment in the country and in 2002 September dispatched a petition calling Law 364 unconstitutional and suggesting that it be nullified. The month following the petition, the Attorney General's office judged the law unconstitutional after receiving a letter from Caldera conveying Garza's petition, but the revelation of the letter prompted a massive protest of banana workers over U.S meddling in Nicaragua and the Nicaraguan government withdrew the statement and the Supreme Court affirmed the constitutionality of the law.¹¹⁴

Nicaragua's experience is a typical example of what third world countries, including Zambia, are facing in their pursuit of liberalisation. These namely: disregard of national labour laws

¹¹² www.opticalrealities.org/Nicaragua/nemagonAction.html 02/01/2007

¹¹³ www.juanjdominguez.com/justice.html 02/01/2007

¹¹⁴ The account on Nicaragua is extracted from Sasha Lilley's article, in CorpWatch, entitled 'Barren Justice' and dated May 13, 2004.

and the safety and health of workers by investors, unaffordable legal fees and incompetent legal systems, the constant meddling of powerful investors in the affairs of the country, and also a government that will do anything to keep the investors, even sacrifice the dignity of work and that of the workers who constantly depend on the intervention of the State for the protection of their rights.

The Nicaraguan government has, however, shown that the government has a big role to play in the protection of workers' rights and that this role can either be negative or positive and that it can be done through deliberate legislative and policy pronouncements. It has shown that sometimes the recognition and protection of the welfare of the workers will keep genuine investment and get rid of flawed investors. The Nicaraguan government has shown that government can strengthen the legal system and enforcement mechanism and equip them with the necessary competence to handle cases arising out of the worker- employer relations in a liberalized economy. The case of Nicaragua can also be seen as setting a precedent and an example for all nations, including Zambia, that multinational corporations may be held accountable for misdeeds and wrongdoings to injured, damaged and defrauded national and that the passing of law is the best avenue through which workers' rights may be protected.¹¹⁵ Zambia would do well to learn from it.

4.1.4 SOUTH AFRICA

South Africa was faced with a lot of racial and social discrimination at places of work, among other places, and one Reverend Leon H. Sullivan, Director of General Motors, a United States Multinational Enterprise, came up with a statement of principles for United States Corporations operating in South Africa, hereinafter referred to as the Sullivan

¹¹⁵ Ibid

Principles. The fundamental principles of the Sullivan Principles included: non-segregation of the races in all eating, comfort and work facilities; equal and fair employment practices for all employees; equal pay for all employees doing equal work for the same period of time; initiation and development of training programmes for employees with promise; and improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities.¹¹⁶ Although this corporate code of conduct did not have enforcement or monitoring mechanisms, it addressed the problems of discrimination at work places and opened many doors to the protection of workers' rights in investor corporations, which corporations added to these principles at individual work places thereby creating equality in employment practices and improving the living conditions and quality of life for workers- black or white.

In another development, South Africa debated at length and made some of the rights contained in the International Covenant on Social, Economic and Cultural Rights (hereinafter referred to as the ICSECR), the Universal Declaration of Human Rights and the African Charter of Human and Peoples rights, justiciable in the drawing up of the Constitution.¹¹⁷ This is in spite of the provisions of the ICSECR that economic, social and cultural rights should be achieved progressively and in accordance with a country's available resources, the excuse used by many countries like Zambia, in the non justiciability of social, economic and cultural rights citing lack of available resources. South Africa has taken some of these rights, mostly those that do not require resources, and made them justiciable; such rights include the right to fair labour practices, safe healthy working conditions, housing, and also access to

¹¹⁶ Murray, Jill (1998), *Corporate Codes of Conduct and Labour Standards*

¹¹⁷ R. Simbulo, "ECOSOC in Zambia: The Quest for Justiciability" in the *Human Rights Observer*, volume 23 (Lusaka: The Inter-Africa Network for Human Rights and Development, 2000) p.7

health care, food, water and social security.¹¹⁸ South Africa has made the social, economic and cultural rights justiciable by having them entrenched in the Bill of Rights and as such enforceable. It is provided:

*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or a class of persons; anyone acting in the public interest; and an association acting in the interest of its members.*¹¹⁹

This South African example has shown that even corporations or individuals can take an initiative that will lead to equal and enhanced protection of workers' rights and Zambia cannot fail to introduce or even effect corporate codes of conduct which will govern the relationship of workers and their employers at particular work places or in particular industries, although this is an expensive endeavour which requires joint effort from the government and corporations. South Africa has also shown that Parliament can debate on some of the critical labour issues and come up with laws that will affect its people positively. Zambia, just like South Africa, can make justiciable some economic, social and cultural rights, which are close to the heart of a worker and which may not necessarily require resources from government.

¹¹⁸ Chapter 2 of the South African Constitution of 1996, Sections 23, 24, 26 and 27 respectively

¹¹⁹ Ibid, section 38

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

The purpose of this last chapter is to give a summary of the preceding four chapters and also make recommendations basing on the findings of the foregoing chapters regarding possible reform of law, policy and practice with regards protection of workers' rights in Zambia as a liberalized economy.

5.1 CONCLUSION

The following are the findings of this study:

Liberalisation is essential to economic development and Zambia, like any third world, has embarked on the liberalisation of its economy and in so doing is susceptible to and has tended to concentrate so much on this that it has failed to adequately protect the rights of its own workers as per ILO standards and WTO and OECD's call that it does so through its domestic laws and policy. The rights of workers needing protection include, *inter alia*, the right to remuneration which should tarry with the food basket, paid sick leave with medical attention, housing, paid leave which includes maternity leave, retirement and redundancy benefits, lunch allowance, funeral allowance, trade union rights and right to compensatory and industrial safety. With government as the major employer, the socialist Zambian formal sector was relatively well paying with decent working conditions and there was a high degree of workers' rights and job protection in the legislation as compared to the now liberalised economy, which has removed some of these rights or subjected them to individual bargaining strength. In addition to this, investment and competition laws have been enacted to encourage investment by offering incentives to the investor without requiring much from the investor, with regard the rights of the worker.

Although the rights of workers still have legislative protection, there is a gap between relevant law and society as there is a general lack of public awareness when it comes to rights, duties and extent of liability in the employer-employee relationship. Workers' rights protection has further been influenced by the corporate strategies that regard workers as a tool of production thereby making feeding them the only reason of a wage thereby undermining the dignity of work and of workers; the legislative framework that has been adjusted to the point that protection of certain rights seem to be illusory and also it reflects a bias towards the protection of employees and the business and not the workers; and the economic influences of liberalisation that emphasise maximization of profit and minimization of expenses resulting in job reduction and job losses or at least slave wages that are not enough for a decent living.

There is an international framework in place for the protection of workers rights in a liberalized or globalised economy provided by such institutions as the ILO and OECD but there are inadequacies in this essentially voluntary structure or international framework which in essence throws the responsibility of workers' rights protection back on to domestic laws and policies. The national legislative, institutive and enforcement mechanism as regards protection of workers' rights is also weak and does not accord the worker with adequate protection as observed from trade union laws and inner divisions. The role of international and national authorities in workers' rights protection does not begin at the point where violation has occurred but before, and so both the universal precautions and national legislation have a role to play in the taking of preventive measures to this violation, which role they have not performed to satisfactory levels.

5.2 RECOMMENDATIONS

In view of the above, the following have been recommended, bearing in mind that Zambia is a third world country that is still not fully liberalised:

5.2.1 LEGISLATIVE INTERVENTION

a) Labour Commission

The ILRA could be amended to change the structure of the Labour Commission, making it autonomous so that it functions independent of political and governmental intervention thereby restoring workers' confidence in it knowing that they will get unbiased and professional assistance and advice from them.

b) Updating of Labour Legislation

Periodic updates to the legislation regulating labour relations must be made to respond to the changing needs of the workers so that responsive and not outdated laws govern labour relations. Such legislation includes the Minimum Wages Act, which constantly needs review so that it responds to the food basket and minimum requirement for a decent living of workers. Updated laws are also required for furtherance of development which Zambia seeks to achieve through its embarkment onto neo-liberalisation policies.

c) Zambia Development Agency Act

It is here recommended that the ZDA Act gives specific provisions defining the investors' parameters in relation to industrial relations, that is to say, provisions relating to investor responsibilities towards workers. It is also recommended that the instances upon which an investment licence, permit or certificate of registration may be suspended or revoked¹²⁰ must

¹²⁰ As provided for under section 77(1) of the ZDA Act

include the disregard of employment laws and gross abuse of workers' rights. This is to ensure strict adherence to employment sector requirements and the enforceability of employer responsibilities towards workers.

d) Specific legislation for peculiar problems

Specific laws must be passed to respond to specific problems such as those related to industrial and environmental safety as regards miners and bakers who are reportedly being locked up in their places of work for long hours without due regard to their safety in relation to protective clothing and hours of confinement. This will ensure prompt address of problems as and when they arise.

e) Justiciability of economic, social and cultural rights

The Justiciability of some economic, social and cultural rights can be brought before parliament for consideration so that those which are not beyond the affordability of government can be made justiciable. This can be done through the inclusion of the economic, social and cultural rights, such as the right to fair labour practices, safe healthy working conditions and access to social security, in the Bill of Rights as currently these rights are not justiciable as they are provided for in the Directive Principles of State Policy (Part IX of the Constitution), which are not justiciable, that is to say, they cannot be claimed as a matter of right or be sued upon in any courts of law.¹²¹ This inclusion, however, can only be done through a referendum as the Bill of Rights is provided for in Part III of the Constitution, which cannot easily be amended except through a referendum since the Bill of Rights is entrenched. It is recommended therefore, that parliament considers and debates the

¹²¹ Article 111 of the Constitution

justiciability of some of the economic, social and cultural rights, pertinent to the worker, and subject the Bill of Rights to a referendum for their inclusion.

f) Restoration of the ‘one union one industry’ policy

The restoration in labour laws, of the ‘one union one industry’ principle as envisaged by the ILO, can be done by review of the necessary laws so as to return to the unions the unity that was once possessed and as such make the unions strong again. The principle was adopted at the ratification of ILO’s Right to Organise and Collective Bargaining Convention¹²² and the result was the representation of workers by trade unions formed to represent an industry so long as it had seventy five percent of the members of the industry forming its membership. This was however abolished when the Movement for Multi-party Democracy (MMD) took over government in 1991 and decided to liberalise the economy including the labour market, which resulted in allowing workers to form and belong to any trade union of their choice and which also led to the creation of more than one union for a given industry. For instance, the Zambia National Union of Teachers (ZNUT) was the only union in the teaching industry, but with liberalisation came the Secondary School Teachers Union of Zambia (SESTUZ) and Primary Education Teachers Union of Zambia (PETUZ). This trend has led to divisions among trade unions thereby weakening their effectiveness as they are more concerned about inner fights instead of fighting for the workers’ rights. And it is because trade unions are only as strong as they are united that it is recommended that the ‘one union one industry be returned’ to the Zambia labour movement.

¹²² Convention No. 98 of 1949 and this principle was embedded in the pre- 1971 Labour Relations Act of Zambia

5.2.2 POLICY INTERVENTION

The Minister of Labour could pass, *inter alia*, statutory instruments requiring that:

a) Each company adheres to a general corporate code of conduct for the particular industry within which it falls and formulate its own code in compliance to it, which code shall, *inter alia*, include the guarantee of workers' organizational rights and freedoms; that the code forms a precise and binding part of the individual contract of employment of employees; that each worker be provided with a copy of the code in the language he best understands; that each worksite have copies of the code displayed and; that some copies be given to trade union peak bodies, like the ZCTU and the Federation for Free Trade Unions in Zambia (FFTUZ).

The code is important to ensure commitment of employers to the protection of workers' rights and widespread knowledge of the code is essential to internal monitoring of compliance.

b) Each company keeps and makes available to its workers copies of each legislative instrument regulating labour relations. This will ensure knowledge of workers' and employers' rights and responsibilities, as well as any other matters incidental to their labour relations thereby bridging the gap between relevant law and society.

5.2.3 CASE MANAGEMENT

a) Courts must adopt a speedy procedure for the hearing and determination of labour matters and streamline their processes so as to promote mediation and court referred alternative dispute resolution where appropriate, because alternative dispute resolution generally offer comparatively low costs, privacy, confidentiality, speedy resolution of disputes and the fact

that party autonomy is guaranteed.¹²³ Alternative dispute resolution processes also encourage amicable resolutions so that on going or prior relationships (between worker and employee) are preserved.¹²⁴ This recommendation, if put in effect, will improve efficiency in the disposal of cases and as such reduce on delay of justice.

b) Legal aid clinics should be encouraged more, with some clinics specifically dealing with employment disputes. This will assist even those who cannot afford to pay for legal counsel and representation obtain justice and the specific clinics will ensure efficiency.

c) Revitalisation and putting into effect of the Small Claims Court¹²⁵ so that any grievances arising from violation of domestic workers' rights may be settled by bringing small claims actions. This is because there is need for a minimum requirement for the hiring, firing and general welfare of a domestic worker in the spirit of democracy because, like any other worker, he has a commodity- labour. There is a need for a complaints commission or labour standards enforcement division to vigorously enforce minimum labour standards in order to ensure that domestic workers are not made to work under substandard unlawful conditions.

5.2.4 PUBLIC AWARENESS CAMPAIGNS

Increased production of information, including simplified and translated text on the general law of employment. This is for increase of knowledge among workers.

¹²³ Muzumara, N. J. Tom (2004) Medical Negligence in Zambia: Issues and Opportunities for Reform. LL.B Obligatory Essay. UNZA: Lusaka

¹²⁴ Young, A.P. (2000) ADR and its place in the Zambian Judicial System, Vol.32, Zambia Law Journal 79-84

¹²⁵ provided for under CAP 47 of the Laws of Zambia and intended for simple and informal proceedings; substantive justice; less lengthy process without lawyers and not bound by rules of evidence.

Periodical awareness conferences and workshops aimed at spreading and sharing of information between employers and employees as well as employment law experts. This is for harmonious labour relations and sharing of knowledge.

These recommendations are directed at the Tripartite Consultative Labour Council which could facilitate the process in collaboration with relevant government departments and strategic partners like Non Governmental Organisations (NGOs) to simplify, translate to local languages and distribute to the various employees.

5.2.5 TRAINING STRATEGIES

Special training should be provided for judges hearing employment law cases not only at the IRC but at the Supreme Court as well so that they are made aware of all current happenings in labour matters both locally and internationally as our courts are relatively inexperienced in the area of Commercial litigation. This is directed at the Judiciary to improve commercial and labour litigation competence.

Special training should be provided for labour officers and leaders of the trade unions, especially those at the apex of the trade union movement, like the ZCTU. This is so that they will show professionalism and operate with full knowledge and competence thereby avoiding mistakes that may be detrimental to workers.

5.2.6 HUMAN RIGHTS ADVOCACY

Human Rights organisations, especially the Human Rights Commission, should enhance their task to defend and promote the universal recognition of labour rights and to assure that workers' rights and aspirations are put at the centre of economic and social development at both the global and national levels. This they can do through dialog with government and

other international bodies to which they are accorded a forum because their voice in the protection of and over abuses of workers' rights is very important.

5.2.7 INTERNATIONAL ENFORCEMENT MECHANISM

The ILO and the OECD should make their standards of international application enforceable as it is not beyond their ability, instead of deferring every effort on to the nations themselves, which nations are more likely to be concerned with the liberalization of their economies than the protection of their workers. International enforcement mechanisms will ensure universal enforcement of universal workers' rights leaving the nations no room to defer from them as they will.

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