

**A CRITICAL ASSESSMENT OF THE EXTENT TO WHICH
INTERNATIONAL LABOUR STANDARDS RELATING TO PROTECTION
OF EMPLOYEES FROM DISCRIMINATION ARE INCORPORATED INTO
ZAMBIAN AND MALAWIAN LABOUR LAWS.**

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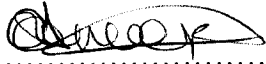
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**A dissertation submitted to the University of Zambia in partial fulfillment of the
requirements of the award of the Bachelor of Laws (LLB) Degree.**

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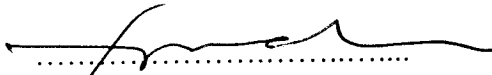
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I recommend that the Obligatory Essay prepared under my supervision by Caroline Zamaere entitled "A Critical Assessment of the Extent to which International Labour Standards Relating to Protection of Employees from Discrimination are Incorporated into Zambian and Malawian Labour Laws," be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements pertaining to the format as laid down in the regulations governing Directed Research Essays.



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ABSTRACT

Discrimination occurs on many different levels and on various grounds, but this essay focuses on discrimination in the workplace and the laws that have been put in place in Zambia and Malawi to address the issue, in light of International Labour Standards.

The study analysed seven Conventions and two Recommendations by highlighting their principle obligations and measures stipulated for giving effect to the obligations. Chapter One introduces the research topic, including the background, rationale, objectives and methodology for the study. Chapter Two looks at the Discrimination (Employment and Occupation) Convention of 1958 (No. 111), the Discrimination (Employment and Occupation) Recommendation of 1958 (No. 111) and the Vocational Rehabilitation and Employment (Disabled Persons) Convention of 1983 (No.159). Chapter Three examines the Equal Remuneration Convention of 1951 (No. 100), the Equal Remuneration Recommendation of 1951 (No. 90) and the Equality of Treatment (Accident Compensation) of 1925 (No. 19). Chapter Four explores three Conventions, namely, the Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87), the Right to Organise and Collective Bargaining Convention of 1949 (No. 98) and the Migration for Employment Convention (Revised) of 1949 (No. 97). In Chapter Five the study compares how successful the two countries have been in applying the Standards and recommends solutions to the problems identified.

The study has found that the prevention of discrimination in the workplace through law is necessary, however, the content and the scope of such laws and their application in both Zambia and Malawi remains a problem. Furthermore, the current laws that are inadequately enforced. Measuring the scope of the problem of discrimination in the workplace is another problem, given the lack of statistical data and the low number of cases on discrimination in the Industrial Relations Courts, which gives a false impression that discrimination does not really exist.

In order to address these problems, a number of solutions have been identified which ought to be taken collectively rather than in isolation. Prime among these is reforming legislation to ensure better conformity with the International Labour Standards. These reforms must be supported by national policies to ensure that the fight against discrimination has a wide sphere of influence. Labour enforcement mechanisms also need to be strengthened to identify violations of the labour laws by employers and protect vulnerable workers.

ACKNOWLEDGMENTS

I wish to express my sincere gratitude to my supervisor, Mr. Fredrick Mudenda, for his assistance, patience and understanding whilst directing this novice researcher. *Zikomo kwambiri.*

Thanks to Mr. Francis Kwenda, Principal Labour Officer of the Ministry of Labour in Malawi and Mr. William Msiska, Assistant Chief Law Reform Officer of the Malawi Law Commission, for taking time out of their busy schedules to answer my questions.

Thanks to Mr. Matthews Shumba, Clerk of the Industrial Relations Court in Zambia for helping me to access court judgments.

Last but certainly not least, I am very grateful to Major Banda and Mr. Mwiza Gondwe of the ILO library in Lusaka, for putting up with my incessant data collection visits. I will not forget their dedication to their work and kind assistance.

DEDICATION

To my uncle Danny Kamwaza and my sister Angela Mugore for the financial support rendered to me during my studies, without which I could not have survived.

To my brother-in-law Caesar Mugore for the beautiful notebook. I do not know how I would have typed this manuscript without it.

Thank-you all for “running with my vision.”

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LIST OF ABBREVIATIONS

ADEPt	Advancing Disability Equality Project
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
DPO	Disabled Person's Organisation
HIV/AIDS	Human Immuno-Deficiency Virus/ Acquired Immuno-Deficiency Syndrome
ILO	International Labour Organisation
IRC	Industrial Relations Court
ITUC	International Trade Union Confederation
MACOHA	Malawi Council for the Handicapped
NELMP	National Employment and Labour Market Policy
NGO	Non-Governmental Organisation
SADC	Southern Africa Development Committee
SCZ	Supreme Court of Zambia
SI	Statutory Instrument
TEVETA	Technical Education, Vocational and Entrepreneurship Training Authority ¹
TEVETA	Technical Entrepreneurial and Vocational Education and Training Authority ²
UN	United Nations
UNI	Union Network International
ZAFOD	Zambian Federation of the Disabled
ZAPD	Zambia Agency for People with Disabilities
ZCTU	Zambia Congress of Trade Unions

¹ Zambia

² Malawi

CHAPTER ONE

GENERAL INTRODUCTION

1.0 BACKGROUND OF THE PROBLEM

The International Labour Organisation (ILO) is a branch of the United Nations that was founded in 1919 with the objectives of achieving social justice and promoting decent work for workers worldwide, regardless of their sex, race or social origin.¹ There are three organs which form the ILO: governments of the 183 member States,² representatives of employers and representatives of workers, making the Organisation tripartite in nature.

In order to achieve its objectives, the International Labour Organisation (ILO) has developed a system of International Labour Standards (hereinafter referred to as 'Standards') to ensure equity and freedom for employees on three levels – obtaining employment, conditions of employment and upon leaving employment. The Standards outline the obligations of member States, determine goals for policy and give guidance on the measures to be taken for implementation of the obligations.³ The Standards strictly speaking take the form of Conventions (binding international treaties that member States may ratify) and Recommendations (non-binding authoritative guidelines for national law and practice) however, resolutions, conclusions and codes of practice also provide significant guidance.

Conventions and Recommendations are valuable because they are models on which countries may base their labour legislation.⁴ Ratification is an important first step because it signifies a country's commitment to make the provisions of the Convention effective both in law and practice.⁵ Nevertheless, the real problem for countries lies in implementation. This not only involves domestication (codifying the Conventions into national laws) but also application of the laws in the courts and their enforcement, for example through labour inspectors. Governments also have an obligation to report to the ILO on the measures they have taken to effectively apply any Conventions which they have ratified.⁶

In view of this challenge, the aim of the study is to assess how labour laws in Zambia and Malawi reflect the adoption of the various ILO Standards which deal with discrimination, in particular to assess the extent to which they do so. It

¹ ILO, *The ILO and International Labour Standards*, 4th ed., ILO, Geneva, 1998. Page 45.

² As at 1st February 2011, http://www.ilo.org/global/what_we_do/International_Labour_Standards/Introduction/lang--en/index.htm.

³ http://www.ilo.org/global/what_we_do/International_Labour_Standards/Introduction/lang--en/index.htm accessed 3rd August 2010.

⁴ ILO, *International Labour Standards: A Worker's Education Manual*, ILO, Geneva, 1998. Page 60.

⁵ Prof C. Anyangwe, *Applications of ILO Standard in Zambia* presentation, Lusaka, 1997. Page 8 quoted in A. Inutu, *An evaluation of the efficacy of Zambian labour laws and policies in relation to foreign investors as employers*. A dissertation submitted in partial fulfillment of the requirements of the LLB degree in Law, 2008. Page 20.

⁶ ILO Constitution, Art. 22

will therefore be necessary to investigate whether in the two countries, the process stops at enacting legislation (if at all) or goes even further. The research is attempting to uncover more versatile ways of giving effect to the Standards.

1.1 SCOPE OF THE STUDY

The study has identified 12 Conventions aimed at protecting employees from discrimination, five of which have not been ratified by either Malawi or Zambia and are thus excluded from the study. The excluded Conventions are: the Workers with Family Responsibilities Convention of 1981,⁷ Equality of Treatment (Social Security) Convention of 1962,⁸ Migrant Workers (Supplementary Provisions) Convention of 1975,⁹ Indigenous and Tribal Peoples Convention of 1989¹⁰ and Maternity Protection Convention of 2000.¹¹

It is the remaining seven Conventions which will be analysed. In chronological order these are:

1. Equality of Treatment (Accident Compensation) Convention of 1925.¹²
2. Freedom of Association and Protection of the Right to Organise Convention of 1948.¹³
3. Migration for Employment Convention (Revised) of 1949.¹⁴
4. Right to Organise and Collective Bargaining Convention of 1949.¹⁵
5. Equal Remuneration Convention of 1951.¹⁶
6. Discrimination (Employment and Occupation) Convention of 1958.¹⁷
7. Vocational Rehabilitation and Employment (Disabled Persons) Convention of 1983.¹⁸

The three sources of labour law which will be assessed are Constitutions, Statutes and Case Law. The study area will consist of Zambia and Malawi because regionally they are grouped together with Mozambique (the ILO Regional

⁷Convention No. 156. This Convention aims at enabling men and women with family responsibilities to exercise their right to work without being victims of discrimination, and as far as possible, to work without clashes between their obligations at work and at home.

⁸Convention No. 118. This Convention obliges States to provide equal treatment for nationals and non-nationals in obtaining social security benefits.

⁹Convention No. 143. This Convention outlines how to deal with illegal immigration and the duty to respect the human rights of migrant workers.

¹⁰Convention No. 169. This Convention covers the rights of indigenous and tribal peoples, based upon the realisation that they have unique cultures, traditions and customary laws which need to be appreciated to avoid social tension and civil strife.

¹¹Convention No.183. Although Zambia ratified the earlier Maternity Protection Convention (Revised), 1952 (No. 103), when the Maternity Protection Convention, 2000 (No. 183) came into force, there was implied closure of ratification of the earlier Convention. The latest Convention provides for maternity leave and cash benefits for women workers as well as protection from discriminatory dismissal based on pregnancy.

¹²Convention No. 19.

¹³Convention No. 87.

¹⁴Convention No. 97.

¹⁵Convention No. 98.

¹⁶Convention No. 100.

¹⁷Convention No. 111.

¹⁸Convention No. 159.

Office for these three countries is located in Lusaka, Zambia). The proximity of the two countries will also facilitate the research. Both countries gained independence in 1964 - Malawi in July and Zambia in October, and their legal systems are based on the Common Law. The research will attempt to determine which country has been more successful in the domestication and implementation of the Standards into national law and shall also highlight the best practices employed which the other may adopt.

It would be naive to imagine that labour laws are an adequate means to eliminate discrimination in and of themselves. Economic, trade and social policies are also needed and the co-ordination of these is key. Some mention has been made of these policies, because some Conventions impose obligations on ratifying States to pursue specific policies.

1.2 STATEMENT OF THE PROBLEM

Workers face discrimination on grounds ranging from old forms of discrimination (based on gender, race, religion, social origin and association) to newly recognised forms of discrimination (based on age, sexual orientation, disability and disease such as HIV/AIDS) and completely novel forms of discrimination (genetic discrimination¹⁹ and discrimination based on lifestyles that are considered unhealthy such as smoking).

Of increasing relevance to the two countries is discrimination based on actual or perceived HIV/AIDS status. There are between 800, 000 and 1 million Malawians living with HIV.²⁰ In Zambia, this figure is 920,000.²¹ Fear of being refused employment is a barrier to being tested. Whilst a number of countries have legislation in place to protect those with HIV from discrimination, the laws are not sufficiently enforced.²²

In June, 2010 the ILO adopted the Recommendation Concerning HIV and AIDS in the World of Work,²³ which addresses the discrimination and stigmatisation of workers and job-seekers, and obliges member States to form national HIV workplace policies and programmes, which can then be applied at individual workplaces through a national workplace plan or strategy. All 183 ILO member States are obliged to submit the Recommendation to competent national authorities, usually their national parliaments, for consideration.²⁴ It remains to be seen what responses will be made to this Recommendation. There are already proposals to add a chapter in the *Zambian Employment Act*²⁵ on prevention and management of HIV/AIDS in the workplace.²⁶ In Malawi, whilst over 70

¹⁹ Here employers may engage in pre-employment genetic screening, the effect being to discriminate against potential employees who have a predilection to develop certain illness.

²⁰ Malawi HIV/AIDS Extended National Framework 2010 – 2012, Office of the President and Cabinet, National AIDS Commission, 2009. Page 8.

²¹ F. Bupe & C. Silwemba, HIV/AIDS stigma hindrance to treatment, *The Post of Zambia*, 1 December 2010. Page 6.

²² F. Bupe & C. Silwemba, HIV/AIDS stigma hindrance to treatment. Page 6.

²³ Recommendation No. 200.

²⁴ http://www.ilo.org/aids/Whatsnew/lang--en/WCMS_141909/index.htm accessed 27th November, 2010.

²⁵ Cap. 268, *Laws of Zambia*.

²⁶ *Zambia Decent Work Country Programme, 2007 – 2011*. Page 2.

organisations have implemented HIV/AIDS workplace policies, the Ministry of Labour receives complaints of discrimination on grounds of perceived HIV/AIDS status in the workplace and there is no provision in the Malawian Employment Act²⁷ to protect workers from this form of discrimination.²⁸

Table 1 below shows the number of cases on discrimination that have come before the Industrial Relations Court (IRC) of Malawi between July 2007 and June 2008 and Table 2 shows the grounds of complaints based on judgments of the Industrial Relations Court in Zambia.

TABLE 1: CASE RETURNS: STATISTICS PERTAINING TO SPECIFIC GROUNDS

Dispute	Ground	Principal Registry	Lilongwe Registry
Unfair Dismissal	Discrimination	1	2
	Retirement	2	11
	Resignation	1	5
	Redundancy	3	19
	Retrenchment	2	-
	Breach of Contract	1	7
	Other Reasons	352	262

Source: Industrial Relations Court of Malawi, Annual Report 2007 – 2008

TABLE 2: ZAMBIA IRC JUDGMENTS: STATISTICS PERTAINING TO SPECIFIC GROUNDS

Dispute	Ground	Lusaka Registry
Unfair Dismissal	Discrimination	7
	Retirement	4
	Redundancy	3
	Breach of Contract	7
	Other Reasons	23
Withheld wages/benefits		12

Source: Author's compilation based on 2008 IRC judgments.

The IRC in Zambia does not compile annual case returns pertaining to specific grounds of discrimination, therefore in compiling Table 2, the data was accessed from the court's Volume of Judgments of the IRC, 2008. There were 52 judgments and some of the cases had more than one ground of complaint. The grounds of discrimination were sex, status, race, tribe and religion and age. Of the seven cases where the ground was discrimination, three complainants

²⁷ No. 6 of 2000.

²⁸ S. Banda Jnr, More firms develop HIV/AIDS policies, The Daily Times of Malawi, 15 December 2010, The Business Pages, page 3, confirmed in interview with Mr. Francis Kwenda, Principal Labour Officer, Ministry of Labour, Lilongwe, Malawi, 23rd December 2010.

managed to succeed in proving discrimination, the other four failed for lack of evidence and failure to prove discrimination to the requisite standard of proof, that is, on a balance of probabilities.

Collating data of this nature on discrimination is important, however the data does not reflect the situation on the ground. For example the 2005 Labour Force Survey, which is currently the most recent comprehensive survey of the labour force in Zambia, shows that on average, men in Zambia earn twice as much as their female counterparts.²⁹ This issue is considered in Chapter Three of this essay. The data captured in Tables 1 and 2 therefore only covers a tiny percentage of actual incidents of discrimination. It is further submitted that ironically, the greater the number of complaints of discrimination, the greater the sign that progress is being made because it shows there is a better understanding of the concept of discrimination and that complainants have faith in the justice system or other avenues of redress.³⁰ The low number of cases on discrimination in Malawi and Zambia could therefore indicate that a large percentage of the labour force, do not know their rights or that the legal remedies are limited, especially because discrimination is in most cases difficult to prove. It could also mean that the mechanisms for enforcing the law are inadequate or litigation is perceived as expensive and lengthy.³¹

In recognition of these problems, there seems to be an on-going commitment by both Zambia and Malawi to reform labour laws, for example by enacting specific legislation on non-discrimination and equality in the form of specific statutes on different grounds of discrimination rather than amending existing laws. Examples are the People with Disabilities Act³² in Zambia and the Gender Equality Bill in Malawi, which are discussed in Chapter Two.

1.3 RATIONALE AND JUSTIFICATION FOR THE STUDY

According to an article published in the *International Labour Review*³³:

With a few exceptions (Leary, 1982³⁴; Valticos, 1983³⁵; von Potobsky³⁶, 1997) studies on the incorporation of international labour standards into national law systems remained scarce until recently (Beaudonnet, 2005³⁷). International human rights law has been the focus of special attention in studies devoted to the case law of regional courts of human rights (especially that of the European Court of Human Rights). But international legal instruments concerned with labour have elicited much less analysis.

²⁹ Zambia Labour Force Survey, 2005. Page 59.

³⁰ ILO, *Equality at Work, Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights to Work*, International Labour Conference, 2007. Page 11.

³¹ ILO, *Equality at Work*. Page 11.

³² No. 33 of 1996.

³³ E. Gravel and Q. Delpech, *International Labour Standards: Recent developments in complementarity between the international and national supervisory systems*, *International Labour Review* 147, 2008. Page 404.

³⁴ V. Leary, *International Labour Conventions and National Law: The effectiveness of the automatic incorporation of treaties in national legal systems*, La Haye, Martinus Nijhoff, 1983.

³⁵ N. Valticos, *International Labour Law*, Dalloz, Paris, 1983.

³⁶ G. von Potobsky, *Los Convenios de la Organizacion Internacional del Trabajo: una nueva dimension en el orden juridico interno? Derecho del Trabajo*, 1997.

³⁷ X. Beaudonnet, *The use of International Labour Law in Domestic Courts*, ILO, Geneva, 2005.

It is on this premise, that the justification of this study is founded and built upon. One might also add that the majority of the studies mentioned have focused on developed countries and few have tackled the challenges faced in developing countries like Zambia and Malawi. Further, the studies have not focused solely on the issue of discrimination, but the general problem of domestication. This study is therefore unique in its focus.

1.4 OBJECTIVES OF THE RESEARCH

The objective of the study is to assess the state of Zambian and Malawian labour laws on non-discrimination at work and recommend suitable measures which the two countries can take in order to bring themselves in line with International Standards. In order to achieve this objective, the following research questions need to be answered:

1. What is discrimination and what does it consist of?
2. How are International Labour Standards applied at the national level?
3. Which Standards that are aimed at protecting employees from discrimination will be analysed?
4. What are the sources of labour law which will be critically assessed?
5. In Zambia and Malawi, under each of the sources of labour law identified, how are the Standards reflected? OR How successful have the two countries been in domesticating these Standards into national law?
6. What are some of the problems the two countries are facing regarding application of the Standards?
7. What steps can Zambia and Malawi take to reach the standards imposed by international law?

1.5 METHODOLOGY

The study complies with both qualitative and quantitative research methods. The qualitative aspect of the research will involve an investigation of the phenomenon of discrimination in light of ILO Conventions and analysis of both primary and secondary data that have a bearing on the subject matter.

It will first be necessary to go through the ILO Conventions and Recommendations and pick out the ones which deal most comprehensively with discrimination and equality of treatment. It will then be necessary to determine whether or not the Convention has been ratified by either or both countries and then highlight what the obligations of that Convention are and what measures are stipulated for giving effect to the obligations. There is then a need to analyse the various Constitutions, Statutes, Case Law and other provisions in the two countries which portray whether or not the obligations are being adequately fulfilled. In this sense the study is also comparative in nature because it compares similarities and differences in the labour laws of the two countries. Best practices and suggestions for reform can then be put forward.

With regard to the four core or fundamental Conventions³⁸ examined in this essay, - Discrimination (Employment and Occupation) Convention of 1958, Equal Remuneration Convention of 1951, Freedom of Association and Protection of the Right to Organise Convention of 1948 and Right to Organise and Collective Bargaining Convention of 1949 - countries are obliged to submit regular reports on the measures being taken to fulfill their obligations. Reference will be made to the most recent of these reports where available.

1.6 HOW ARE INTERNATIONAL LABOUR STANDARDS APPLIED AT THE NATIONAL LEVEL?

The International Labour Conference which is composed of delegates from the ILO member States and the ILO Governing Body, meets annually to discuss relevant matters and adopt Conventions, Recommendations and other instruments. Once adopted, States are required to submit the instrument to competent authorities – usually Parliaments - for possible ratification, enactment of legislation or other actions.³⁹

If a State decides to ratify a convention it begins to apply one year after the ratification date.⁴⁰ The ratifying State takes measures for the application of the Convention in domestic laws and policies.⁴¹

Both Zambia and Malawi are ‘dualist’ States, therefore an international instrument will only take effect in domestic law when Parliament passes a statute enacting the instrument. This is known as ‘domestication.’⁴² If a State takes no action or chooses not to ratify, the ILO may still request reports on law and practice and impediments to ratification.⁴³

The supervision of a member State’s adoption, ratification and application of Standards is conducted by the Committee of Experts on the Application of Conventions and Recommendations (CEACR).⁴⁴

1.7 CONCLUSION

This preliminary chapter has established the background, purpose and methodology for the study. The first four research questions have also been answered in order to lay the foundation for analysis in the subsequent chapters.

³⁸ A Convention encompassing a core value of the ILO, and one which requires every ratifying State to submit reports to the ILO on a biannual basis, detailing the measures being taken to give effect to the obligations in law and in practice.

³⁹ ILO, International Labour Standards. Page 75 – 77.

⁴⁰ ILO, International Labour Standards. Page 81.

⁴¹ ILO, International Labour Standards. Page 80.

⁴² C. Anyangwe, Introduction to Human Rights and International Humanitarian Law, UNZA Press, Lusaka, 2004. Page 190.

⁴³ ILO, International Labour Standards. Page 87.

⁴⁴ ILO, International Labour Standards. Page 87.

CHAPTER TWO

ASSESSMENT OF THE CONTENT AND LEGISLATIVE PROVISIONS RELATING TO THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION OF 1958 AND THE VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION OF 1983

2.0 INTRODUCTION

This Chapter examines the definition of key terms, obligations and measures for giving effect to the obligations of two ILO Conventions, namely, the Discrimination (Employment and Occupation) Convention of 1958¹ and the Vocational Rehabilitation and Employment (Disabled Persons) Convention of 1983.² Relevant provisions of the Discrimination (Employment and Occupation) Recommendation³ are also mentioned in this Chapter. The Chapter begins by examining the most significant Convention concerning non-discrimination and equality of treatment at work – the Discrimination (Employment and Occupation) Convention and the accompanying Recommendation. Secondly, the Convention on Vocational Rehabilitation and Employment of Disabled Persons is examined. After the examination of each Convention, the legislative and policy provisions that give effect to the obligations of the Conventions in Zambia and Malawi are analysed and compared.

The discrimination of disabled persons in employment has far reaching consequences and should not be under-estimated. An interesting working paper suggests that the price for excluding disabled persons from the labour market is costing the Zambia economy US\$498 million and the Malawian economy US\$ 99 million.⁴

In another survey of disabled persons in Malawi, South Africa and Zambia, 31% of the 279 respondents in Zambia cited discrimination as a major reason for their unemployment. This again shows that the number of complaints in the courts is not an accurate indicator of actual incidences of discrimination. In Malawi, 10% of the 248 respondents cited the employer's lack of awareness of disabled persons' rights as a barrier to obtaining employment and 28% cited lack of skills training as the greatest barrier.⁵

¹ Convention No. 111.

² Convention No. 159.

³ Recommendation No. 111.

⁴ S. Buckup, *The Price of Exclusion: The economic consequences of excluding people with disabilities from the world of work* ILO, Geneva, 2009. Pages 28 and 33.

⁵ ILO Skills and Employability Department, *Strategies for Skills Acquisition and Work for People with Disabilities in Southern Africa*, ILO, Geneva, 2007. Page 26.

2.1 DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION AND RECOMMENDATION OF 1958

The Discrimination (Employment and Occupation) Convention obliges ratifying countries to declare and pursue a national policy designed to promote equality of opportunity and treatment in employment and occupation, so as to eradicate discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin. The Discrimination (Employment and Occupation) Recommendation suggests what measures member States can take to give effect to the obligations under the Convention. The Discrimination (Employment and Occupation) Convention was ratified by Malawi on 22nd March 1965 and by Zambia on 23rd October 1979.

2.1.1 DEFINITIONS OF KEY TERMS IN THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION AND RECOMMENDATION

Both the Convention⁶ and the accompanying Recommendation⁷ define discrimination as:

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

Article 1(3) of the Convention and paragraph 1(3) of the Recommendation state:

The terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Both direct and indirect discrimination are covered and additional grounds of discrimination may be determined by member States.⁸ Differential treatment based on inherent requirements of a job,⁹ measures based on protecting State security¹⁰ and affirmative or positive action measures¹¹ are not deemed to be discriminatory.¹²

2.1.2 OBLIGATIONS UNDER THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION

The key obligation of this Convention is for ratifying countries to declare and pursue a national policy under control of

⁶ Discrimination (Employment and Occupation) Convention, Article 1(1).

⁷ Discrimination (Employment and Occupation) Recommendation, Paragraph 1(1).

⁸ Discrimination (Employment and Occupation) Convention, Art.1(1)(b).

⁹ Discrimination (Employment and Occupation) Convention, Art. 1(2).

¹⁰ Discrimination (Employment and Occupation) Convention, Art. 4.

¹¹ Differential treatment targeted at particular categories of workers such as women or ethnic minorities, in order to correct or reverse the effects of deep-seated discrimination.

¹² Discrimination (Employment and Occupation) Convention, Art. 5.

a national authority, designed to promote equality of opportunity and treatment in employment and occupation, and ultimately stamp out discrimination. This policy must be tailored to suit national conditions and practice.¹³ In order to accomplish this, the countries undertake to:

- 1) co-operate with employers' and workers' organisations and other bodies;¹⁴
- 2) enact legislation and promote educational programmes;¹⁵
- 3) repeal any statutory provisions and modifying any administrative practices which are not in line with the policy;¹⁶
- 4) ensure the policy is observed in vocational guidance and training and placement services¹⁷ and
- 5) report on the steps taken to pursue the policy and the outcomes.¹⁸

2.1.3 MEASURES FOR GIVING EFFECT TO THE OBLIGATIONS UNDER THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION

Paragraph 2 of the Recommendation advocates using legislative measures, collective agreements and any other measures which are suited to national conditions and practice. The establishment of specialised agencies for promoting and enforcing the policy, as well as investigating and settling complaints of non-observance of the policy through conciliation is also supported.¹⁹

2.2 CONSTITUTIONAL PROVISIONS REGARDING DISCRIMINATION IN EMPLOYMENT IN ZAMBIA

Article 23 of the Constitution of Zambia²⁰ concerns discrimination. Clause 1 prohibits the making of laws that are discriminatory in content or effect, but it excludes laws providing for "appropriation of general revenues of the Republic"; laws concerning non-Zambian citizens; matters of personal law (adoption, marriage, divorce, succession) and customary law.²¹ Laws which provide for particular qualifications for service are not deemed contrary to clause 1.²² clause 2 of article 23, protects individuals from being treated in a discriminatory manner unless expressly or impliedly authorised by clauses 4 or 5, or as a result of any discretion exercised in relation to court proceedings.²³

¹³ Discrimination (Employment and Occupation) Convention, Art. 2; 3(d).

¹⁴ Discrimination (Employment and Occupation) Convention, Art. 3(a); Discrimination (Employment and Occupation) Recommendation, Par. 9.

¹⁵ Discrimination (Employment and Occupation) Convention, Art. 3(b).

¹⁶ Discrimination (Employment and Occupation) Convention, Art. 3(c); Discrimination (Employment and Occupation) Recommendation, Par. 5.

¹⁷ Discrimination (Employment and Occupation) Convention, Art. 3(e); Discrimination (Employment and Occupation) Recommendation Par. 3(a)(ii).

¹⁸ Discrimination (Employment and Occupation) Convention, Art. 3(f).

¹⁹ Discrimination (Employment and Occupation) Recommendation, Par. 4.

²⁰ Cap. 1, Laws of Zambia.

²¹ Constitution of Zambia, Art. 23(4).

²² Constitution of Zambia, Art. 23(5).

²³ Constitution of Zambia Art. 23(6); 23(8).

The term 'discriminatory' is defined in article 23(3) as:

affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Save for social origin, the prohibited grounds of discrimination here therefore include all those covered by the Discrimination (Employment and Occupation) Convention although different terminology is used – tribe (instead of national extraction), creed (instead of religion). There is an additional ground of marital status.

It is not deemed inconsistent with article 23, where a law places on any person described in clause 3, certain authorised restrictions on their rights and freedoms as are permitted in the Constitution, on grounds including the interests of defence, public safety, order, morality, health; the protection of the rights and freedoms of others and the enforcement of court orders or judgements. These restrictions are found in articles 17(2), 19(5), 20(2), 21(2) and 22(3) and each article states that they may only be imposed if "reasonably justifiable in a democratic society." Article 25 also permits derogations from the provisions of article 23 where the nation is in a state of war or when a public emergency is declared.

2.3 CONSTITUTIONAL PROVISIONS REGARDING DISCRIMINATION IN EMPLOYMENT IN MALAWI

Under the Malawi Constitution,²⁴ there is express prohibition against any form of discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.²⁵ The prohibited grounds of discrimination are therefore wider than those in the Zambia Constitution. Legislation may be passed to address inequalities and prohibit discriminatory practices - the penalty for such practices being criminal sanctions.²⁶ There are currently no special statutes enacted in this regard. The protection of women against discrimination is especially emphasized in the Malawi Constitution.²⁷ Any law that discriminates against women based on gender or marital status is invalid.²⁸ In contrast with section 20(2) which is discretionary, section 24(2) states in mandatory terms that legislation shall be passed to eliminate harmful customs and practices that discriminate against women. The Gender Equality Bill is one such proposed piece of legislation.²⁹

²⁴ Cap. 1, Laws of Malawi.

²⁵ Constitution of Malawi, s. 20(1).

²⁶ Constitution of Malawi, s. 20(2).

²⁷ Constitution of Malawi, s. 24(1).

²⁸ Constitution of Malawi, s. 24(2).

²⁹ See paragraph 2.4.4 below.

Section 13 provides for the adoption by the State, of policies and legislation including gender equality and education, to promote the welfare and development of all Malawians. The courts may have regard to these policies when interpreting and applying provisions of the Constitution or any law, or in determining the validity of decisions of the executive.³⁰ There is a provision for gender equality for women and men to be achieved by implementing the principles of non-discrimination and other necessary measures.³¹ With regard to education, the goals include removal of political, religious, racial and ethnic intolerance.³² As with the Zambia Constitution, derogation from the rights contained in this Chapter³³ is permitted if a state of emergency is declared.³⁴ The courts can enforce these rights through any appropriate orders.³⁵

2.4 STATUTORY PROVISIONS REGARDING DISCRIMINATION IN EMPLOYMENT

2.4.1 MALAWI – EMPLOYMENT ACT OF 2000

Section 5(1) of the Malawian Employment Act of 2000 contains an express prohibition against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities. In line with paragraph 2(d) of the Discrimination (Employment and Occupation) Recommendation, section 5 applies equally to employees and prospective employees at all stages of the employment process including recruitment, training, promotion, terms and conditions of employment or termination of employment. Affirmative action measures which are designed to improve the conditions of disadvantaged persons are not deemed discriminatory and thus are not applicable to section 5(1).³⁶ This fits in with article 5 of the Discrimination (Employment and Occupation) Recommendation. Section 57(3)(a) renders invalid any dismissal or disciplinary action taken against an employee on the grounds listed in section 5(1).

2.4.2 ZAMBIA – EMPLOYMENT ACT, CHAPTER 268

Unlike under the Malawian Employment Act, the Zambian Employment Act does not contain a specific section on anti-discrimination. There is however a provision preventing the termination of employment based on an employees' pregnancy,³⁷ which is a form of discrimination on the ground of sex. In both countries the provisions of the Employment Act do not apply to employees of the prison service, police and defence force.

³⁰ Constitution of Malawi, s. 14.

³¹ Constitution of Malawi, s. 13(a).

³² Constitution of Malawi, s. 13(f).

³³ Being Chapter IV, containing articles 15 – 46.

³⁴ Constitution of Malawi, s. 45.

³⁵ Constitution of Malawi, s. 46(3).

³⁶ Employment Act, s. 5(2).

³⁷ Employment Act, s. 15B.

2.4.3 ZAMBIA – INDUSTRIAL AND LABOUR RELATIONS ACT OF 1993 (AS AMENDED)

The Zambian Industrial and Labour Relations Act of 1993 (As Amended), also prohibits discrimination against employees exercising their rights to form or join a trade union.³⁸ Section 108(1) of the said Act prohibits an employer from terminating an employees' services or:

imposing any other penalty or disadvantage on an employee on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of an employee.

2.4.4 MALAWI – LABOUR RELATIONS ACT OF 1996

As with Zambia, Malawi's Labour Relations Act of 1996 prohibits anti-union discrimination³⁹ and requires that workers dismissed because of their union activities be reinstated where appropriate.⁴⁰ Section 7(2) of the said Act prevents the trade unions and employer organisations themselves from discriminating in their constitutions, rules or actions against anyone, on the same prohibited grounds as appear in section 5(1) of the Employment Act. The interpretation section of the Labour Relations Act provides that it shall be interpreted in light of the Constitution and Malawi's obligations under international treaties including ILO Conventions.⁴¹ This makes it easier for courts to apply the provisions of ILO Standards regardless of whether or not Parliament has passed an Act regarding the same.

The Malawi Law Commission is finalising its work on a Gender Equality Bill. According to a Government report to the UN, anti-discrimination cuts across all areas of the Bill which includes sections on employment, education and training. The Bill defines discrimination on similar terms as the Discrimination (Employment and Occupation) Convention, that is:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by either men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The Bill also requires public or private workplaces that employ at least 15 people to form and put in place policies for the removal of sexual harassment.⁴² The Bill however has not been Gazetted, therefore it is not available for public consumption and these provisions are subject to change.⁴³

³⁸ Industrial and Labour Relations Act, s. 5.

³⁹ Labour Relations Act, s. 6.

⁴⁰ Labour Relations Act, s. 8(4).

⁴¹ Labour Relations Act, s. 2(2).

⁴² Committee on the Elimination of Discrimination Against Women Pre-session Working Group, Forty-fifth Session, 18 January-5 February 2010: Responses to the list of issues and questions with regard to the consideration of the sixth periodic report – Malawi.

⁴³ Interview with Mr. William Msiska, Assistant Chief Law Reform Officer, Malawi Law Commission, Lilongwe, Malawi, 20th December 2010.

2.4.5 ZAMBIA – TECHNICAL EDUCATION, VOCATIONAL AND ENTREPRENEURSHIP ACT OF 1998

It is recalled that the Discrimination (Employment and Occupation) Convention and Recommendation direct States to ensure the principles of non-discrimination are applied to vocational guidance and training and job placement services under the control of a national authority. The Zambian Technical Education, Vocational and Entrepreneurship Training Act⁴⁴ established the Technical Education, Vocational and Entrepreneurship Training Authority (TEVETA) and also provides for the establishment of government institutions of technical education, vocational and entrepreneurship training. Part VIII of the Zambian Employment Act⁴⁵ concerns the establishment and operation of employment agencies. Neither of these Acts mention the need to apply a policy of equality of treatment and non-discrimination in TEVETA or the operations of employment agencies, however one of the aims of the TEVETA Policy is:

to be an instrument for the minimisation of inequalities among the people of Zambia.⁴⁶

The Malawian Employment Act makes no provision for the establishment of employment agencies under the control of a national authority. The Ministry of Labour is responsible for controlling employment agencies, which are required to register with the Ministry and obtain a certificate to operate. There has however been an eruption of a number of illegal operators which leaves employees vulnerable to discrimination and unlawful termination of employment contracts, due to non-compliance with the statutory notice period and severance allowance as provided for in sections 29 and 35 of the Employment Act. The illegal operators are only discovered when a complaint is made to the Ministry by an employee who has used their services and suffered maltreatment.⁴⁷

2.5 CASE LAW GIVING EFFECT TO OBLIGATIONS OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION IN MALAWI

In Malawi, courts have been willing to apply the obligations of international conventions and treaties that Malawi has ratified in handing down their decisions. In *Banda v. Lekha*,⁴⁸ where the complainant alleged discrimination on grounds of HIV/AIDS status, the IRC held that although section 20 of the Constitution does not mention HIV/AIDS status as a ground for discrimination, it was covered by the general prohibition against discrimination. Whilst there are no laws which deal with HIV/AIDS in the workplace, the Court applied the Discrimination (Employment and Occupation) Convention, which imposed an obligation on Malawi as a ratifying State to enact laws and implement a policy giving effect to the principles entrenched in the Convention.

⁴⁴ No. 13 of 1998.

⁴⁵ Comprising section 56 – 63.

⁴⁶ http://www.teveta.org.zm/index.php?option=com_content&view=article&id=95:tdp&catid=25:teveta accessed 20th December 2010.

⁴⁷ Interview with Mr. Francis Kwenda, Principal Labour Officer, Ministry of Labour, Lilongwe, Malawi, 6th January 2011.

⁴⁸ [2008] MLLR 338.

In the absence of a statutory definition of discrimination in Malawi, the concept has been defined in judicial decisions. The IRC in *Jana v. Attorney-General*,⁴⁹ held that discrimination was not defined either in the Constitution or any other labour legislation, but has been defined elsewhere as the unequal treatment of persons where one person similarly situated to the other, suffers a detriment or is placed at a disadvantage because of an attribute that distinguishes him from that other person.

2.6 CASE LAW GIVING EFFECT TO OBLIGATIONS OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION IN ZAMBIA

By contrast, in Zambia, the Supreme Court has refused to have regard to ratified ILO Conventions that have not been domesticated. A case in point is *Zambia Sugar Plc v. Fellow Nanzaluka*.⁵⁰ At first instance, the IRC held that the respondent's termination of employment was contrary to the ILO Termination of Employment Convention of 1982.⁵¹ An appeal to the Supreme Court was allowed on the basis that even though Zambia had ratified the said Convention, the Courts could not apply it as it had not been domesticated into Zambian national law.

2.7 POLICY PROVISIONS GIVING EFFECT TO THE OBLIGATIONS OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION

An important obligation of the Discrimination (Employment and Occupation) Convention is for States to form and pursue a national policy based on the principle of non-discrimination and equality of opportunity; promote educational programmes and ensure that the policy is applied to those seeking access to training and vocational guidance. This provision is important because access to education and training is necessary for entry into employment. In recognition of the challenges faced by the most vulnerable and disadvantaged groups of people, Zambia's National Employment and Labour Market Policy (NELMP) of 2005, focuses on creating jobs for women, youth and the disabled. Strategies for this include advocating for 'removal of discriminatory laws and policies that constrain the participation of youth, women and people with disabilities in all aspects of employment,' mainstreaming their interests in employment and business related laws, policies and programmes and improving their access to skills training, business support (including micro-finance) and career guidance.⁵²

There is currently no National Employment Policy in Malawi, however the country is in the process of adopting one. The Ministry of Labour has completed consultations with employer organisations, trade unions, civil society and

⁴⁹ [2008] MLLR 391.

⁵⁰ SCZ Judgement No. 5 of 2001 (unreported).

⁵¹ Convention No.158.

⁵² Zambia Decent Work Country Programme 2007 – 2011. Page iv.

NGO's. The Policy is currently being scrutinised by the Ministry of Justice.⁵³

2.8 VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION OF 1983

The Vocational Rehabilitation and Employment (Disabled Persons) Convention obliges ratifying countries to declare and pursue a national policy aimed at ensuring that workers with disabilities and those without, enjoy equal opportunities and treatment. The Convention was ratified by Malawi on 1st October 1986 and by Zambia on 05th January 1989.

2.8.1 DEFINITIONS OF KEY TERMS IN THE VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION

Article 1(1) of the Vocational Rehabilitation and Employment (Disabled Persons) Convention defines a 'disabled person' as:

an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.

The purpose of 'vocational rehabilitation' is stated as:

being to enable a disabled person to secure, retain and advance in suitable employment and thereby to further such person's integration or reintegration into society.⁵⁴

2.8.2 OBLIGATIONS UNDER THE VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION

There are two key obligations:

- 1) Development, application and periodic review of a national policy aimed at making vocational rehabilitation accessible to all classes of disabled persons, thereby promoting their prospects for employment in the open labour market. The policy must strive to ensure that workers with disabilities and those without, enjoy equal opportunities and treatment. Any affirmative action measures taken to this end are not deemed to be discriminatory.⁵⁵
- 2) Article 5 calls on States to consult with employee and employer organisations and disabled person organisations to tackle policy implementation and consider how best the activities of private and public bodies concerned with vocational rehabilitation may be coordinated.

⁵³ Interview with Francis Kwenda, Principal Labour Officer, Ministry of Labour, Lilongwe, Malawi, 23rd December 2010.

⁵⁴ Vocational Rehabilitation and Employment (Disabled Persons) Convention, Art. 1(2).

⁵⁵ Vocational Rehabilitation and Employment (Disabled Persons) Convention, Art. 2, 3 and 4.

2.8.3 MEASURES FOR GIVING EFFECT TO THE OBLIGATIONS UNDER THE VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION

Laws, regulations and any other means suited to national conditions and practice are advocated to develop rehabilitation services.⁵⁶ To facilitate their employment retention and advancement, disabled persons should be provided with vocational guidance, vocational training, placement and similar services run by qualified staff,⁵⁷ alongside services which are present for workers without disabilities, but with modifications to suit their needs.⁵⁸ Services should also be introduced in rural and remote areas.⁵⁹

2.9 CONSTITUTIONAL PROVISIONS REGARDING VOCATIONAL REHABILITATION AND EMPLOYMENT OF DISABLED PERSONS IN MALAWI

Disability is one of the grounds listed in the anti-discrimination clause of the Malawi Constitution.⁶⁰ As noted at paragraph 2.3 above, section 13 of the Malawi Constitution places the State under an obligation to adopt and put in place various national policies and legislation and clause f thereof, extends this obligation to the support of the disabled in three areas: increased access to public places, fair employment opportunities and the fullest possible participation in all areas of Malawian society. Article 31(1) also guarantees the right to fair wages for disabled persons.

2.10 CONSTITUTIONAL PROVISIONS REGARDING VOCATIONAL REHABILITATION AND EMPLOYMENT OF DISABLED PERSONS IN ZAMBIA

The Constitution of Zambia does not include disability as one of the grounds in the anti-discrimination article thereof, however, article 112(f) which falls under the Directive Principles of State Policy, places the State under an obligation to provide the disabled, aged and other disadvantaged persons with suitable social benefits and amenities. Unlike under the Malawi Constitution, the Directive Principles of State Policy in the Zambia Constitution are not justiciable, which in effect means no individual may go to a court, tribunal, administrative institution or entity to enforce their rights thereunder.⁶¹

⁵⁶ Vocational Rehabilitation and Employment (Disabled Persons) Convention, Art. 6.

⁵⁷ Vocational Rehabilitation and Employment (Disabled Persons) Convention, Art. 9.

⁵⁸ Vocational Rehabilitation and Employment (Disabled Persons) Convention, Art. 7.

⁵⁹ Vocational Rehabilitation and Employment (Disabled Persons) Convention, Art. 8.

⁶⁰ Constitution of Malawi, s. 20.

⁶¹ Constitution of Zambia, Art. 111.

2.11 STATUTORY PROVISIONS REGARDING VOCATIONAL REHABILITATION AND EMPLOYMENT OF DISABLED PERSONS IN MALAWI

Section 5(1) of the Malawian Employment Act and section 7(2) of the Labour Relations Act prohibit discrimination on the ground of disability. In the Technical Entrepreneurial and Vocational Education and Training Act⁶², which established the Technical, Entrepreneurial and Vocational Education and Training Authority (TEVETA) there is a requirement that a person with disabilities be represented on the Board of TEVETA. TEVETA is also responsible for promoting vocational training for disadvantaged groups which is interpreted to include the disabled.

Currently, the most comprehensive statute on disabled persons in Malawi, is the Handicapped Persons Act of 1971. In this Act a handicapped person is defined as anyone:

... who, by reason of any defect or impairment of the mind, senses or body, congenital or acquired, (is) unable to take part in normal education, occupation and recreation, or who, by reason of any such defect or impairment, require(s) special assistance or training to enable them to take part in normal education, occupation or recreation.

The Act created the Malawi Council for the Handicapped (MACOHA) whose mission is to advise the Minister on all matters affecting the handicapped including education, training and employment; promote public interest in the welfare of handicapped persons; administer rehabilitation and welfare services for the handicapped and raise funds to apply to the welfare of the handicapped.

A Bill on Equalisation of Opportunities for Persons with Disabilities was developed in 2004 and has been presented to a cabinet committee for scrutiny.⁶³ Two ILO reports⁶⁴ mention some provisions of the draft Bill. In the Bill MACOHA is renamed MACODA, following the replacement of the word 'handicapped' with 'disabled.' If enacted, this legislation would be more relevant to the modern understanding of the rehabilitation needs of the disabled elucidated in the Vocational Rehabilitation and Employment (Disabled Persons) Convention and the principles of non-discrimination and equality of treatment in employment. According to the reports, the draft Bill defines discrimination as:

limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunity or status of such an applicant or employee.⁶⁵

The scope of discriminatory practices cover recruitment and promotion of people with disabilities or demotion and dismissal of employees who acquire a disability.⁶⁶ Through a quota system, the draft Bill seeks to ensure 5% of all

⁶² No. 6 of 1999.

⁶³ T. Chapulapula, Disability bill at cabinet level – Ministry, The Daily Times of Malawi, 16 December 2010. Page 4.

⁶⁴ People with disabilities: Pathways to decent work: Report of a tripartite workshop, Lilongwe, Malawi, 16-17 May 2006 and ILO Skills and Employability Department, Malawi Country Profile: Promoting the Employability and Employment of People with Disabilities Through Effective Legislation, ILO, Geneva, 2006.

⁶⁵ People with disabilities. Page 10.

positions in public and private establishments are allocated to disabled persons.⁶⁷ There is also a sanction for learning institutions which refuse to admit disabled persons.⁶⁸

2.12 STATUTORY PROVISIONS REGARDING VOCATIONAL REHABILITATION AND EMPLOYMENT OF DISABLED PERSONS IN ZAMBIA

In Zambia, the Persons with Disabilities Act came into force in 1996. The Act defines disability as:

...any restriction resulting from an impairment or inability to perform any activity in the manner or within the range considered normal for a human being, and would or would not entail the use of supportive or therapeutic devices and auxiliary aids, interpreters, white cane, reading assistants, hearing aids, guide dogs or any other trained animals trained for that purpose.⁶⁹

A person with a disability is defined as:

a person with a physical, mental or sensory disability, including a visual, hearing or speech functional abilities.⁷⁰

Section 19(1) of the Persons with Disabilities Act defines discrimination as:

- (a) treating a person with a disability less favourably from a person without disability;
- (b) treating a person with a disability less favourably from another person with a disability;
- (c) requiring a person with a disability to comply with a requirement or condition which persons without a disability may have an advantage over; or
- (d) not providing different services or conditions required for that disability.

Section 19(1)(d) notably complies with the provision of the Vocational Rehabilitation and Employment (Disabled Persons) Convention, by ensuring that services for disabled workers run parallel to those for workers without disability, but with necessary modifications.⁷¹

Discrimination in job advertisement, recruitment, training and promotion of staff, terms and conditions of employment, including the provision of benefits is prohibited by section 20. Discrimination by institutions of learning with regard to student admissions, giving terms and conditions before admitting disabled persons, denying or limiting the disabled access to benefits, expelling students for having a disability and any other grounds of discrimination is prohibited by section 21.

The Persons with Disabilities Act puts in place measures of positive action in line with articles 2 – 5 of the Vocational Rehabilitation and Employment (Disabled Persons) Convention. These measures include public funds for training institutions which admit disabled persons⁷² and tax rebates for employers hiring at least three disabled persons.⁷³

⁶⁶ People with disabilities. Page 10.

⁶⁷ ILO, Malawi Country Profile. Page 6; People with disabilities. Page 10.

⁶⁸ ILO, Malawi Country Profile. Page 6; People with disabilities. Page 11.

⁶⁹ Persons with Disabilities Act, s. 2.

⁷⁰ Persons with Disabilities Act, s. 2.

⁷¹ Vocational Rehabilitation and Employment (Disabled Persons) Convention, Art. 7.

In accordance with the coordination obligations of the Convention, the Persons with Disabilities Act created the Zambia Agency for People with Disabilities (ZAPD).⁷⁴ Among its wide-ranging functions, the ZAPD was created to promote, co-ordinate and provide services for the disabled, including rehabilitation services, training and the promotion of research on rehabilitation programmes. Section 16 provides for the appointment of inspectors to inspect facilities at institutions and ensure compliance with the Act.

The ZAPD may make adjustment orders compelling organisations to make their premises and facilities more accessible and accommodating to disabled persons.⁷⁵ Malawi's draft Equalisation of Opportunities for Persons with Disabilities Bill also reportedly has a similar provision, through a requirement that special education units be established in public schools and at least one, integrated public vocational and technical school, be present in every region of the country.⁷⁶ A practical example of the principle of accommodation is the TEVETA/MACOHANAD⁷⁷ project which is rehabilitating Soche Technical College in Blantyre, Malawi to accommodate disabled students.⁷⁸

2.13 CASE LAW GIVING EFFECT TO THE VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION

According to a report by Elias U. Ngongondo, former Secretary for what used to be called the Ministry of Social Development and Persons with Disabilities,⁷⁹ there has been no case of discrimination lodged with the courts or with the Ombudsman by any person with a disability in Malawi.⁸⁰

In Zambia between the year of ratification of the Vocational Rehabilitation and Employment (Disabled Persons) Convention 1989, until the year 2008,⁸¹ there are no reported cases concerning complaints of discrimination at work by disabled persons in the Zambia Law Reports. In recognition of this lack of case law, the Zambia Federation of the Disabled (ZAFOD) is seeking to build a portfolio of landmark court cases as a means of sensitizing employers, institutions and the public at large about the rights of disabled persons through the Advancing Disability Equality Project (ADEPt).⁸²

⁷² Persons with Disabilities Act, s. 23(2).

⁷³ Persons with Disabilities Act, s. 24.

⁷⁴ Persons with Disabilities Act, s. 3.

⁷⁵ Persons with Disabilities Act, s. 25(2).

⁷⁶ People with disabilities: Pathways to decent work. Page 11.

⁷⁷ Norwegian Association for the Disabled.

⁷⁸ http://www.tevetamw.com/index.php?option=com_content&task=view&id=12&Itemid=26 accessed 20th December 2010.

⁷⁹ Now called the Ministry for Persons with Disabilities and the Elderly.

⁸⁰ People with disabilities: Pathways to decent work. Page 17.

⁸¹ The most recent volume of law reports.

⁸² <http://www.zafod.org/projects>, accessed 25th February 2011.

2.14 POLICY PROVISIONS GIVING EFFECT TO THE OBLIGATIONS OF THE VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION IN ZAMBIA

In addition to those policies highlighted in the application of the Discrimination (Employment and Occupation) Convention that include the disabled,⁸³ Zambia's NELMP also aims to build the capacity of Disabled Persons' Organisations (DPO's).⁸⁴

The National Youth Policy, 2006 aims to include disabled youth in programmes and policies involving non-disabled youth.⁸⁵ A unique feature of the Zambia National Policy on Disability 2002 is that it employs a rights-based approach to integrate the disabled into society, especially through promoting the awareness of disability issues, equal rights and opportunities and the removal of discrimination. Strategies for accomplishing these aims involve among other areas, development of advocacy programmes on human rights and disability issues. There is an undertaking by Government to persist in the evaluation of legislation relating to disabled persons.⁸⁶

2.15 POLICY PROVISIONS GIVING EFFECT TO THE OBLIGATIONS OF THE VOCATIONAL REHABILITATION AND EMPLOYMENT (DISABLED PERSONS) CONVENTION IN MALAWI

In Malawi, the main policy is the National Policy on Equalisation of Opportunities for Persons with Disabilities. In order to equalise the opportunities of the disabled, the policy aims to integrate disabled persons in all aspects of life. In order to allow the disabled to 'compete favourably,' the policy recognises the need for the disabled to enjoy equal access to education, training, employment, health and other aspects of life.⁸⁷

2.16 CONCLUSION

Legislative measures are inadequate when taken in isolation. They must be complemented with strong policies. By incorporating the concept of national policies relevant to the issue of discrimination in the Constitution and permitting the judiciary to have regard to the same in delivering decisions, Malawi has effectively united the two. Another good practice in Malawi is the provision that the Labour Relations Act shall be interpreted in light of Malawi's obligations with international labour conventions.⁸⁸ However there is a need to implement a National Employment Policy to promote equality of opportunity.

⁸³ See paragraph 2.7 above.

⁸⁴ Zambia Decent Work Country Programme, 2007 – 2011. Page 38.

⁸⁵ http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp-skills/documents/publication/wcms_115100.pdf accessed 27th November 2010.

⁸⁶ ILO Skills and Employability Department, Zambia Country Profile: Promoting the Employability and Employment of People with Disabilities Through Effective Legislation, ILO, Geneva, 2007. Page 7.

⁸⁷ People with disabilities: Pathways to decent work. Page 13.

⁸⁸ Labour Relations Act, s. 3(2).

Surprisingly, the Discrimination (Employment and Occupation) Convention and the labour legislation of the two countries, make no reference to age as a ground for discrimination. This would be the most obvious way of mainstreaming youth employment interests into laws and also prevent discriminatory practices against elderly workers.

Zambia is ahead of Malawi in terms of its legislation on disabled persons. The provision for incentives to organisations and institutions which accommodate disabled persons is a good practice. It is however noted that the wording of the Zambia Constitution still refers to disability as a matter for social welfare, that is, the need to provide care for the disabled. This approach has led to marginalisation of the disabled in society⁸⁹ and is inconsistent with the contemporary view that the disabled should be included in all areas of society that non-disabled persons are involved, including employment.

The negative impact of the welfare-orientated approach on the disabled is also the rationale for proposals to repeal the Malawian Handicapped Persons Act of 1971, which is an out-dated piece of legislation. From the outset, the word 'handicapped' is considered offensive and demeaning in contemporary language.⁹⁰ The length of time it is taking to enact the Bill on Equalisation of Opportunities for Persons with Disabilities is detrimental to the interests of disabled persons, especially since lack of awareness of rights is an obstacle to finding work for many disabled persons in Malawi.⁹¹ Two features of the new Bill could go a long way in integrating disabled persons. Firstly the introduction of a quota system providing for a minimum number of disabled persons to occupy positions in public and private establishments, and secondly the handing down of sanctions for institutions which refuse to admit disabled persons.

⁸⁹ ILO, *Achieving Equal Employment Opportunities for People with Disabilities Through Legislation: Guidelines*, ILO, Geneva, 2007. Page 18.

⁹⁰ ILO, *Achieving Equal Employment Opportunities*. Page 18.

⁹¹ ILO, *Strategies For Skills Acquisition*. Page 26.

ASSESSMENT OF THE CONTENT AND LEGISLATIVE PROVISIONS RELATING TO THE EQUAL REMUNERATION CONVENTION OF 1951 AND THE EQUALITY OF TREATMENT (ACCIDENT COMPENSATION) CONVENTION OF 1925

3.0 INTRODUCTION

This Chapter examines the Equal Remuneration Convention¹ and Recommendation² of 1951. The other Convention examined is the Equality of Treatment (Accident Compensation) Convention of 1925.³ As with the previous Chapter an assessment of legislative provisions covering the obligations under each Convention is included.

The ILO's policies in the first decades of its existence were based on different rights for men and women.⁴ This policy is apparent in the fact that the Maternity Protection Convention of 1919⁵ was one of the first labour standards adopted by the ILO. The different rights approach recognises the man as the bread winner and woman as home-maker based on the differences between the genders in physiologies and family responsibilities.⁶ This approach advocates protective legislation to support women who wish to combine work and family life. Protective legislation is thus seen as necessary to put women on par with men.⁷ The different rights approach is criticised because having special provisions for women only is seen as discriminatory and protective measures have potential to deny female employees the same rights and responsibilities as their male colleagues.⁸

Over time, various international women's organisations lobbied for an equal rights approach to be adopted whereby men and women would be treated equally before the law and this would lead to equality in outcomes such as pay.⁹ The main criticism of this approach is that whilst it seems probable in theory, it is not in fact sufficient to lead to equality in the labour market.¹⁰ Despite these criticisms there has been a gradual shift towards an equal rights approach as evident in the Equal Remuneration Convention.¹¹ However, the ILO's policies have still maintained elements of the protective approach whereby concessions are made for female employees, recognising their role as mothers and home-makers.

¹ Convention No. 100.

² Recommendation No. 90.

³ Convention No. 19.

⁴ P. Määttä, *The ILO Principle of Equal Pay and Its Implementation*, An Academic Dissertation, Tampere University Press, Tampere, 2008. Page 67. Accessed from <http://acta.uta.fi/pdf/978-951-44-7240-4.pdf> 11th January 2011.

⁵ Convention No. 3.

⁶ P. Määttä, *The ILO Principle of Equal Pay*. Pages 68 - 69.

⁷ P. Määttä, *The ILO Principle of Equal Pay*. Page 69.

⁸ P. Määttä, *The ILO Principle of Equal Pay*. Page 69.

⁹ P. Määttä, *The ILO Principle of Equal Pay*. Page 96.

¹⁰ P. Määttä, *The ILO Principle of Equal Pay*. Page 96.

¹¹ P. Määttä, *The ILO Principle of Equal Pay*. Page 104.

Table 3 below highlights the key features of a model of gender contracts in relation to the ILO's principle of equal remuneration for work of equal value (or equal pay principle). Gender contracts are a means of assessing how typical attitudes, standards and customs for male and female members of society influence state policies, the labour market and other institutional structures at a given point in time.¹² This model will be used to assess the extent to which the Equal Remuneration Convention is applied in law and practice in both Zambia and Malawi.

TABLE 3: KEY FEATURES OF A MODEL DEPICTING GENDER CONTRACTS IN RELATION TO THE ILO EQUAL PAY PRINCIPLE

GENDER CONTRACT	FEATURES OF THE SYSTEM IN RELATION TO THE EQUAL PAY PRINCIPLE			
	Type	Legislation	Wage disparities	Application of equal pay principle
The male-dominated family economic gender contract	Instead of equal pay general equality between genders is enacted	Wage disparities are evident	Concept and scope is limited and not equivalent to ILO principle	Limited- Usually by existing labour inspection authorities
The male-dominated equal status contract	Equal pay for equal work rather than equal value enacted	Wage disparities still obvious	Partially equivalent to ILO principle	Not yet effective or sufficient
The dual breadwinner and equal value contract	Equal pay for work of equal value is enacted but limited implementation	Disparity due to undervaluing of women's work results in lower pay	Hampered by continued male dominance in the labour market	Specialised bodies in place to enforce principle
The dual breadwinner and pay equity contract	Pay equity laws are enacted and proactively applied	Women's wages are closer to those of men	Principle is applied broadly	Effective system that obliges job evaluations

Source: Author's own compilation based on P. Määttä, The ILO Principle of Equal Pay and Its Implementation. Pages 52 – 61.

TABLE 4: LABOUR FORCE STATISTICS RELEVANT TO THE EQUAL PAY PRINCIPLE

CHARACTERISTICS OF THE LABOUR FORCE	ZAMBIA % Ratio of Men:Women	MALAWI % Ratio of Men:Women
Women's labour force participation	86:74	94:92
Average annual income	ZK354,988: ZK196,453	MK56,000: MK33,790
Informal sector	47:53	29:23

Source: Author's compilation based on Zambia Labour Force Survey, 2005 and Malawi Integrated Household Survey, 2005

¹² P. Määttä, The ILO Principle of Equal Pay. Page 50.

Table 4 above shows the labour market characteristics in Zambia and Malawi based on some key features of the equal pay principle. Whilst women's labour force participation rate is high, women still receive wages far below the average of men. The majority of women work in the informal sector which often results in their exclusion from the legal and social protection and benefits available to workers in the formal sector.¹³ There are also few women represented in decision-making positions despite both countries signing the SADC Protocol on Gender and Development.¹⁴

3.1 EQUAL REMUNERATION CONVENTION OF 1951

The Equal Remuneration Convention was ratified by Malawi on 22nd March 1965 and by Zambia on 20th June 1972. The principle of 'equal remuneration for work of equal value for men and women workers,' is defined as rates of remuneration established without discrimination based on sex.¹⁵ The term 'remuneration' includes:

the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.¹⁶

The Equal Remuneration Convention obliges ratifying countries to apply the principle of equal remuneration for work of equal value for men and women workers. According to article 2 of the Equal Remuneration Convention the measures for giving effect to this obligation may include:

- a) national laws or regulations;
- b) legally established or recognised machinery for wage determination;
- c) collective agreements between employers and workers; or
- d) a combination of these various means.

Objective job appraisals may be promoted where they will support the provisions of the Equal Remuneration Convention. Differential rates of remuneration based on the appraisals are not considered to be discriminatory.¹⁷

The Preamble to the Equal Remuneration Recommendation points out the desirability of member States to take into account successful methods that other countries have adopted. Where it is not feasible for States to apply the equal pay principle immediately, the principle should be applied progressively by reducing differences in the remuneration rates of men and women.¹⁸ To increase the 'productive efficiency' of women workers, both sexes should have equal facilities for vocational guidance or employment counselling, and women should be encouraged to utilise such facilities.¹⁹ It is also suggested that to meet the needs of women, especially those with family responsibilities, welfare

¹³ O. Mudenda, *How Adequate and Effective are the Current Labour Laws Concerning Casual Workers*. A dissertation submitted in partial fulfillment of the requirements of the LLB degree in Law, 2005. Pages 9-10; 14-15.

¹⁴ M. Chizinga, *Zambia Drawing from Strategies used within the SADC Region on the Progressive Realisation Towards Achieving Gender Parity at all Levels of Decision-Making*. A dissertation submitted in partial fulfillment of the requirements of the LLB degree in Law, 2010. Pages 16 and 27.

¹⁵ Equal Remuneration Convention, Art. 1(b).

¹⁶ Equal Remuneration Convention, Art. 1(a).

¹⁷ Equal Remuneration Convention, Art. 3.

¹⁸ Equal Remuneration Recommendation, Par. 5.

¹⁹ Equal Remuneration Recommendation, Par. 6(a) and (b).

and social services should be provided through public funds.²⁰ Finally the Equal Remuneration Recommendation encourages fostering public understanding of the grounds on which the equal pay principle should be implemented and the undertaking of investigations to promote its application.²¹

3.2 CONSTITUTIONAL PROVISIONS REGARDING EQUAL REMUNERATION FOR WORK OF EQUAL VALUE IN ZAMBIA

Apart from a Directive Principle of State Policy to the effect that every person has the general right to fair labour practices and safe and healthy working conditions,²² the Zambian Constitution does not specifically incorporate the principle of equal remuneration for work of equal value. The Directive Principles of State Policy contained in the Zambian Constitution are not justiciable and therefore cannot be enforced in any court, tribunal, administrative institution or entity.

3.3 CONSTITUTIONAL PROVISIONS REGARDING EQUAL REMUNERATION FOR WORK OF EQUAL VALUE IN MALAWI

Article 31(3) specifically provides for the equal pay principle thus:

Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction and discrimination of any kind especially based on gender, disability or race.²³

Article 30(3) of Malawi's Constitution provides that:

The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.

Article 31(1) ensures the right to fair and safe labour practices and fair remuneration by all people.

3.4 STATUTORY PROVISIONS REGARDING EQUAL REMUNERATION FOR WORK OF EQUAL VALUE IN MALAWI

In Malawi the provisions of the Equal Remuneration Convention are applied through the Employment Act of 2000.

The Act defines remuneration in harmony with the Equal Remuneration Convention as:

The wage or salary and any additional benefits, allowances or emoluments whatsoever payable, directly or indirectly, whether in cash or in kind, by the employer to the employee and arising out of the employee's employment,²⁴

The Act further defines wage as:

All earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law, which are payable by virtue of a written or unwritten contract of employment by an employer to an employee for work done or to be done or for service rendered or to be rendered.²⁵

²⁰ Equal Remuneration Recommendation, Par. 6(c).

²¹ Equal Remuneration Recommendation, Par. 7 and 8.

²² Constitution of Zambia, Art. 112(j).

²³ Constitution of Malawi, Art. 30(3).

²⁴ Employment Act, s.3.

²⁵ Employment Act, s.3.

This broad definition ensures that the application of the equal pay principle extends beyond basic wages to cover any employment-related ingredients of pay. The Employment Act also recognises the principle of equal pay in section 6(1):

Every employer shall pay employees equal remuneration for work of equal value without distinction or discrimination of any kind, in particular, on basis of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities.

This differs from the Equal Remuneration Convention which is concerned with equal remuneration without discrimination based on the ground of sex only, whereas the Malawian Employment Act includes other prohibited grounds.

By section 6(2) of the Employment Act, the burden of proving absence of discrimination under section 6(1) rests entirely on the employer. This is a good practice that recognises the difficulty in proving discrimination especially where the complainant does not have access to the evidence necessary to prove unequal treatment.

Whilst the Employment Act has a provision for eight weeks maternity leave every three years on full pay for pregnant workers,²⁶ this pay is provided for by the employer and not the State.²⁷ This is contrary to the Equal Remuneration Recommendation which states that social and welfare services for women with family responsibilities should be provided through public funds, to guard against the tendency of employers dismissing pregnant workers in order to avoid the cost to their companies.²⁸

In Malawi, the Regulation of Minimum Wages and Conditions of Employment Act²⁹ was repealed by section 68(1) of the Employment Act. The provision for determining minimum wages is now contained in Part VII of the Employment Act, comprising sections 50 to 55. In accordance with paragraph 2 of the Equal Remuneration Recommendation, section 54(1) of the Employment Act states that when determining the national minimum wage, the Minister shall consult with relevant employee and employer organisations. Section 54(1) also complies with article 2(c) of the Equal Remuneration Convention by permitting wages to be set through collective agreements, but these must not be lower than the minimum wage. Tough criminal sanctions are imposed on employers who fail to observe the minimum wage.³⁰

There are no statutory provisions for job appraisals to determine work of equal value in Malawi.

²⁶ Employment Act, s.47(1).

²⁷ I. Öun and G Trujillo, *Maternity at Work: A review of national legislation*, ILO, Geneva, 2005. Page 4 of Annex.

²⁸ I. Öun and G Trujillo, *Maternity at Work*. Page 19.

²⁹ Chapter 55:01, *Laws of Malawi*.

³⁰ 10 years imprisonment and a fine of MK50, 000.00 – s.55(2).

3.5 STATUTORY PROVISIONS REGARDING EQUAL REMUNERATION FOR WORK OF EQUAL VALUE IN ZAMBIA

There is currently no provision in any Zambian statute that mentions the principle of equal remuneration for work of equal value. This limits male and female workers to the right to equal remuneration for equal work but not different work of equal value.³¹ There are proposals to include such a section embodying the equal pay principle in subsequent amendments to the Employment Act. In Zambia's draft Employment Act (Amendment Bill), equal pay for work of equal value is defined as:

An expatriate or Zambian professional with matching qualifications holding similar roles be remunerated equitably.³²

The CEACR has noted that the proposed definition is narrower than the definition in article 1(b) of the Equal Remuneration Convention, and does not address equal remuneration between men and women.

In Zambia the provisions of article 2 of the Equal Remuneration Convention are applied through the Minimum Wages and Conditions of Employment Act³³ and Statutory Instrument (SI) numbers 1, 2 and 3 of 2011. The Minister is vested with power to regulate minimum wages or minimum conditions of employment for any group of workers by statutory order, if he is of the opinion that no adequate provision exists.³⁴ If a group of workers is represented by a trade union, no such order shall be made before consulting the trade union.³⁵ The Minimum Wages and Conditions of Employment (General) Order of 2011³⁶ does not apply to employees:

- (a) of the Government of the Republic of Zambia;
- (b) of a local authority;
- (c) in any occupation where wages and conditions of employment are regulated through the process of collective bargaining conducted under the Industrial and Labour Relations Act, or where the employee-employer relationships are governed by specific employment contracts attested by a proper officer, and such conditions shall not be less favourable than the provisions of this Order;
- (d) in management; and
- (e) in a sector for which the Minister, by statutory instrument, has prescribed the minimum wage.³⁷

With regard to sectors for which the Minister has already prescribed the minimum wage,³⁸ the wages of shop workers and domestic workers are governed by Statutory Instrument numbers 1 and 3 of 2011 respectively. There are therefore three ways in which the wages and salaries of workers are determined in Zambia: statutory orders by the Minister, collective agreements and contractual agreements.

³¹ P. Määttä, *The ILO Principle of Equal Pay*. Page 294.

³² Observations of the CEACR 2008/78th Session.

³³ <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN> accessed 25th February 2011.

³⁴ Cap. 274, Laws of Zambia.

³⁵ Minimum Wages and Conditions of Employment Act, s.3(1).

³⁶ Proviso under s.3(1) Minimum Wages and Conditions of Employment Act.

³⁷ Statutory Instrument No. 2 of 2011.

³⁸ Minimum Wages and Conditions of Employment Act (General) Order of 2011, s.2(1).

³⁹ Minimum Wages and Conditions of Employment Act (General) Order of 2011, s.2(1)(e).

As in Malawi, Zambian legislation does not provide for job evaluation methods to determine work of equal value. Pregnant employees are entitled to 12 weeks maternity leave on full pay,³⁹ but as in Malawi, this is wholly paid for by the employer.⁴⁰ In both countries it is an offence to terminate the services of a pregnant employee for reasons related to her pregnancy.⁴¹

3.6 CASE LAW GIVING EFFECT TO THE OBLIGATIONS OF THE EQUAL REMUNERATION CONVENTION IN MALAWI

The principle of equal remuneration for work of equal value was interpreted by the High Court of Malawi in *Davie Thomu Muhondo v. Polyplast Limited*.⁴² The plaintiff who was employed as a Mixer alleged that he was earning less than what his fellow colleagues (also employed as Mixers) were earning. The court referred to section 31(3) of the Malawi Constitution and sections 6(1) and 6(2) of the Employment Act and stated that:

These words should be understood as connoting that equal pay is accorded to work of equal or comparable value evaluated in terms of skill, effort, responsibility and working conditions.

The defendant company discharged its evidential burden by proving that the plaintiff was only trained as an Assistant Mixer but never completed his training and that the colleagues whom the plaintiff was comparing himself with, had more experience and skill than him and had joined the company earlier. These facts were admitted by the plaintiff. The court concluded that there was no discrimination:

...the law does not suggest ... that there should be equal pay just because one is in the same or similar position with or working in the same section with another employee... There is evidence on record to show that the plaintiff did not have the same qualities in terms of skills or experience as those he was comparing himself with. It is so found that there was no violation of the Constitution or the statute providing for equal pay for equal value of work.

This is an insightful judgment by the court because in most cases the principle of equal pay for work of equal value is applied in a limited form, namely to instances where jobs are the same or equal. As Table 3 above shows, this limited form of application of the equal pay principle is a feature of the male-dominated family economic gender contract. It is more in the spirit of the Convention to apply the principle to those performing jobs which are different in nature, but equally demanding and therefore have equal value⁴³ which is what the court did. When the equal pay principle is applied in this way, even part-time female workers can earn as much as full-time male workers if their work is equally demanding.⁴⁴

³⁹ S.15A(1) Employment Act.

⁴⁰ I. Öun and G Trujillo, *Maternity at Work*. Page 4 of Annex.

⁴¹ S.15B Employment Act of Zambia; S.49 Employment Act of Malawi.

⁴² Civil Cause No. 3626 of 2001.

⁴³ P. Määttä, *The ILO Principle of Equal Pay*. Page 63.

⁴⁴ *Jenkins v. Kinsgate (Clothing Productions)* 96/80, 918 ECR 911, 1981.

In evaluating the plaintiff's job for application of the principle of equal pay, the court correctly applied the four factors of skill, effort, responsibility and working conditions. Although these factors do not appear in the Equal Remuneration Convention, the ILO has approved them as a means of job evaluation.⁴⁵

3.7 CASE LAW GIVING EFFECT TO THE OBLIGATIONS OF THE EQUAL REMUNERATION CONVENTION IN ZAMBIA

According to this research, there have not been any cases in Zambia where the court has interpreted and applied the concept of equal remuneration for work of equal value.⁴⁶ This may be largely due to the fact that the concept is not provided for in legislation. There is only a general provision for the right to fair labour practices in the Zambian Constitution, but as already noted, this right is not legally enforceable. Furthermore as noted in Chapter Two of this essay, where reference was made to the Zambia Sugar v. Fellow Nanzaluka case,⁴⁷ the courts in Zambia will not give effect to provisions of a Convention that have not been domesticated.

3.8 EQUALITY OF TREATMENT (ACCIDENT COMPENSATION) CONVENTION OF 1925

The Equality of Treatment (Accident Compensation) Convention was adopted to ensure that foreign and national workers are treated equally in receiving workmen's compensation for industrial accidents.⁴⁸ The Convention also provides that workers of one member State who are involved in industrial accidents whilst temporarily working in another member State, should be entitled to receive compensation under the laws of the latter State.⁴⁹ The Convention was ratified by Zambia on 2nd December 1964 and by Malawi on 22nd March 1965.

3.9 CONSTITUTIONAL PROVISIONS REGARDING EQUALITY OF TREATMENT IN ACCIDENT COMPENSATION

The provisions of the Equality of Treatment (Accident Compensation) Convention have not been applied in the Zambian or Malawian Constitution.

⁴⁵ P. Määttä, The ILO Principle of Equal Pay. Page 63.

⁴⁶ Equal pay policies: international review of selected developing and developed countries
http://www.ilo.org/public/english/dialogue/ifpdial/publ/infocus/equalpay/13_4.htm accessed 25th February 2011.

⁴⁷ SCZ Judgment No. 5 of 2001 (unreported).

⁴⁸ Equality of Treatment (Accident Compensation) Convention, Art.1.

⁴⁹ Equality of Treatment (Accident Compensation) Convention, Art.2.

3.10 STATUTORY PROVISIONS REGARDING EQUALITY OF TREATMENT IN ACCIDENT COMPENSATION IN ZAMBIA

The provisions of the Equality of Treatment (Accident Compensation) Convention are applied in the Workers' Compensation Act of 1999,⁵⁰ in particular section 9(4) which states that:

Where by the law of the country in which an accident occurs or a disease is contracted, a worker in the circumstances described in section (1)⁵¹ is entitled to compensation in respect of the accident or disease, or where the accident occurs or the disease is contracted in Zambia and the worker would be entitled to compensation under the law of any other country as under this Act, the worker shall, by notice to the Commissioner, elect to claim compensation either under this Act or under the law of the other country.

3.11 STATUTORY PROVISIONS REGARDING EQUALITY OF TREATMENT IN ACCIDENT COMPENSATION IN MALAWI

In Malawi the provisions of the Equality of Treatment (Accident Compensation) Convention are applied under section 6 of the Workers' Compensation Act of 2000.⁵² Subsection 3 thereof states:

Where in the circumstances set out in subsections (1)⁵³ and (2)⁵⁴ the worker is also entitled to compensation under the law of another country and upon the worker electing to claim compensation under this Act, the Commissioner shall-

- (a) before paying any compensation make due inquiries to satisfy himself that the worker has not already claimed under the law of that other country; and
- (b) where compensation is paid to the worker under this Act, notify that fact to the person liable to pay compensation to the worker under the law of that other country.

3.12 CASE LAW GIVING EFFECT TO THE OBLIGATIONS OF THE EQUALITY OF TREATMENT (ACCIDENT COMPENSATION) CONVENTION

This research has not discovered any judicial decisions regarding the application of the foregoing respective sections in Zambia and Malawi that give effect to the obligations of the Equality of Treatment (Accident Compensation) Convention. The CEACR⁵⁵ noted that according to the Malawi Government's report, the transfer abroad of cash benefits in the event of an industrial accident occurred only once during the report period,⁵⁶ where benefits were paid to beneficiaries in Mozambique following the death of an accident victim. The Government did not supply any other statistics.

⁵⁰ No. 10 of 1999.

⁵¹ An employer who mainly carries on business within Zambia and has an accident or contracts a disease whilst temporarily employed outside Zambia.

⁵² No. 7 of 2000.

⁵³ A worker usually employed in Malawi who suffers an injury whilst temporarily employed outside Malawi.

⁵⁴ A worker usually employed outside Malawi who suffers an injury whilst temporarily employed inside Malawi.

⁵⁵ Direct Request of the CEACR 2007/78th Session, <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN> accessed 25th February 2011.

⁵⁶ The report period is not stated, however the first request by the CEACR on this issue was made in 2003 and the Worker's Compensation Act came into force on 1st November, 2000 therefore it is assumed the report period is from the coming into force of the Act to 2008 when Malawi eventually responded.

3.13 CONCLUSION

The above analysis suggests that the Equality of Treatment (Accident Compensation) Convention is adequately incorporated into Malawian and Zambian labour laws.

The provisions of the Equal Remuneration Convention are applied more broadly in Malawian legislation than Zambian legislation, although the inequality in wages of men and women still remains a problem. It is recognised that not all disparities in wages are due to discrimination. The wage gap between men and women is compounded by cultural practices and traditions that place women in domestic roles and not as dual breadwinners. Another reason why the wages of men are much higher than women in both countries, is that women in both countries attain lower levels of education than men. Education is vital to enable workers of both sexes to obtain good jobs that pay well. The employment of women depends largely on their ability to obtain higher education.⁵⁷ Vocational training especially in rural areas and on-the-job training with incentives for organisations who offer the training, could help women attain higher positions and increase their productive efficiency.

The CEACR has highlighted a number of problems in the implementation of this Convention in Zambia and Malawi, in particular the problem of defining the concept of equal remuneration for work of equal value, the absence of statistical information in the labour market disaggregated by sex, inadequacy of labour inspection to enforce legislative provisions and the absence of objective job evaluation methods.⁵⁸

Zambia's Labour Force Survey of 2005 (the first in over 20 years) is a welcome development which should be continued periodically and adopted by Malawi in order to assess the gender wage gap in various industries, sectors and occupations, determine reasons for the trend and take measures to address the causes identified. Any proposals to include a section on equal remuneration for work of equal value into the Zambian Employment Act should consider the comments made by the CEACR.

With regard to the model of gender contracts, Zambia typifies the male-dominated family economic gender contract. For the most part Malawi typifies the male-dominated equal status contract; the anomaly is Malawian legislation which features elements of the dual breadwinner and equal value contract.

⁵⁷ M. Munalula, *Women, Gender Discrimination and the Law: Cases and Materials*, UNZA Press, Lusaka, 2005. Page 159.

⁵⁸ Observations of the CEACR 2008/79th Session and 2010/81st Session.

<http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN> accessed 25th February 2011.

CHAPTER FOUR

ASSESSMENT OF THE CONTENT AND LEGISLATIVE PROVISIONS RELATING TO THE FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION OF 1948, THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION OF 1949 AND THE MIGRATION FOR EMPLOYMENT CONVENTION (REVISED) OF 1949.

4.0 INTRODUCTION

This Chapter focuses on three International Labour Organisation Conventions which seek to guarantee the right of workers to associate freely without discrimination. The Freedom of Association and Protection of the Right to Organise Convention of 1948¹ and the Right to Organise and Collective Bargaining Convention of 1949² are examined first. The labour laws of both Zambia and Malawi that domesticate the provisions of these two Conventions are analysed together. It is also appropriate to include the Migration for Employment Convention (Revised) of 1949³ in this Chapter, because trade unions play a vital role in tackling the problems faced by migrant workers through bilateral and multilateral agreements between unions in origin and destination countries.⁴ An example is the Union Network International (UNI) which allows members of a union in one country to be hosted by a union which is a member of the UNI in the destination country using a UNI Passport.⁵

Out of all the Conventions examined in this study, the Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention were the last to be ratified by Zambia. Both were ratified on 2nd September 1996, four years after multiparty democracy was re-established in the country. The liberalisation in politics in turn ushered in the liberalisation of industrial relations.⁶ Prior to this, there was a trade union monopoly operated by the Zambia Congress of Trade Unions (ZCTU) which had strong links with the country's sole party – the United National Independence Party. This arrangement was a threat to the autonomy of the ZCTU.⁷ Despite the delay in ratification, several provisions of the Conventions were already domesticated even before ratification, including the right to be a member of a trade union and the right to take part in trade union activities⁸ without being discriminated against for exercising these rights.⁹

¹ Convention No. 87.

² Convention No. 98.

³ Convention No. 97.

⁴ ILO, Equality at Work, Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights to Work, International Labour Conference, 2007. Page 33.

⁵ ILO, Equality at Work. Page 33.

⁶ E.J. Nyirenda and A. Shikwe, Trade Union Country Report – Zambia, Freidrich, Ebert, Stiftung, Lusaka, 2003. Page 5.

⁷ E.J. Nyirenda and A. Shikwe, Trade Union Country Report. Page 5.

⁸ Former section 5(1)(a)(i) and (ii).

⁹ Former section 5(2).

In a similar vein to the Zambian situation, Malawi ratified the Right to Organise and Collective Bargaining Convention as far back as 22nd March 1965 but did not ratify the Freedom of Association and Protection of the Right to Organise Convention until 19th November 1999, five years after democratic rule replaced a dictatorship dating back to independence in 1964.¹⁰ With democracy also came a growth in the number of trade unions from five to eleven and reform of labour law with the Labour Relations Act being enacted in 1996.¹¹

The ILO has a specialised committee that handles freedom of association violations in member States. The Committee on Freedom of Association (CFA) was formed in 1951 and receives complaints by workers' or employers' organisations or other governments.¹² Once a case is brought before the CFA, it will verify the facts through communication with the State where the violation is alleged. The CFA will then conclude as to whether or not there has been a freedom of association violation and make recommendations for rectification of the violation.¹³ Any issues regarding legislation may still be referred to the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

In Zambia, a total of six cases have been brought before the CFA including a complaint by the ZCTU on the Zambian Government's lack of consultation with trade unions prior to the wage freeze in the public sector in 1998.¹⁴ In Malawi, two cases have been brought before the CFA. Both took place prior to the ratification of the Freedom of Association and Protection of the Right to Organise Convention and both related to the discriminatory dismissal of trade union members.¹⁵ The CFA is not precluded from investigating complaints where a member State has not ratified the Freedom of Association and Protection of the Right to Organise Convention or the Right to Organise and Collective Bargaining Convention, because the obligation to secure freedom of association also stems from the ILO Constitution.¹⁶

¹⁰ E. Kalula, A. Ordor and C. Fenwick, *Labour Law Reforms that Support Decent Work: The Case of Southern Africa*, Issue paper No. 28, ILO, Harare, 2008. Page 19.

¹¹ *Trade Unions and the Struggle for Quality Public Services in Malawi*, a research paper written by Khanya College, South Africa, Public Services International, South Africa, 2004. Page 20.

¹² ILO, *The ILO and International Labour Standards*, 4th ed. ILO, Geneva, 1998. Page 52.

¹³ ILO, *The ILO and International Labour Standards*. Page 53.

¹⁴ Complaint against the Government of Zambia presented by the Zambia Congress of Trade Unions (ZCTU) Report No. 320, Case No. 1976.

¹⁵ Complaint against the Government of Malawi presented by the International Confederation of Free Trade Unions (ICFTU) and the Organization of African Trade Union Unity (OATUU) Report No:292 Case No. 1638.

¹⁶ Preamble to the ILO Constitution, which affirms that freedom of expression and association are 'fundamental principles on which the Organisation is based.'

4.1 FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION OF 1948

The emphasis of the Freedom of Association and Protection of the Right to Organise Convention is the worker's right to form and join any organisation of their choice without prior approval. An 'organisation' is defined as:

Any organisation of workers or of employers for furthering and defending the interests of workers or of employers.¹⁷

The relevant provision with regard to prevention of discrimination, is the key obligation of ratifying States to ensure the right of workers and employers 'without distinction whatsoever,' to establish and join any organisation of their choice without prior approval.¹⁸ The only discretion permitted is that ratifying States may determine the extent to which the provisions of the Convention apply to the armed forces and the police.¹⁹

Part II of the Convention concerns the right to organise. Ratifying States have an obligation:

to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.²⁰

4.2 RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION OF 1949

The Right to Organise and Collective Bargaining Convention is aimed at guaranteeing the protection of workers from anti-union discrimination. Particular measures which workers are protected from are measures which make the employment of a worker subject to a condition that he shall not join a union or shall give up trade union membership,²¹ and those measures which cause a worker to be dismissed or treated prejudicially due to trade union membership or participation in trade union activities.²²

There is a requirement for ratifying States to ensure workers' organisations are protected against acts of interference, in particular, acts which cause the organisations to be dominated or financed by employers.²³ This Convention also preserves the right to collective bargaining which is not defined in the Convention, but has been defined in the Collective Bargaining Convention of 1981,²⁴ as including all negotiations which take place between employers and workers for the purposes of regulating their relationships or their respective organisations, or determining working

¹⁷ The Freedom of Association and Protection of the Right to Organise Convention, Art. 10.

¹⁸ The Freedom of Association and Protection of the Right to Organise Convention, Art. 2.

¹⁹ The Freedom of Association and Protection of the Right to Organise Convention, Art. 9.

²⁰ The Freedom of Association and Protection of the Right to Organise Convention, Art. 11.

²¹ The Right to Organise and Collective Bargaining Convention, Art. 1(2)(a).

²² The Right to Organise and Collective Bargaining Convention, Art. 1(2)(b).

²³ The Right to Organise and Collective Bargaining Convention, Art. 2.

²⁴ Convention No. 154.

conditions and terms of employment.²⁵ The principal aim of collective bargaining is to regulate terms and conditions of employment.²⁶

There are two categories of workers to which the application of the Right to Organise and Collective Bargaining Convention is subject to national laws, namely armed forces and police.²⁷ Public servants engaged in the administration of justice are not dealt with under the Right to Organise and Collective Bargaining Convention, but this should not be taken as prejudicing their rights in any way.²⁸

4.3 CONSTITUTIONAL PROVISIONS REGARDING FREEDOM OF ASSOCIATION, PROTECTION OF THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING IN ZAMBIA

Article 21 of the Zambian Constitution states:

(1) Except with his own consent a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests.

4.4 CONSTITUTIONAL PROVISIONS REGARDING FREEDOM OF ASSOCIATION, PROTECTION OF THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING IN MALAWI

Article 31(2) of the Malawian Constitution states:

All persons shall have the right to form and join trade unions or not to form or join trade unions.

Article 32 states:

- (1) Every person shall have the right to freedom of association, which shall include the freedom to form associations.
- (2) No person may be compelled to belong to an association.

As with the Zambian Constitution, this provision is in line with article 2 of the Freedom of Association and Protection of the Right to Organise Convention. The Malawian Constitution further guarantees the right to strike in article 31(4):

The State shall take measures to ensure the right to withdraw labour.

4.5 STATUTORY PROVISIONS REGARDING FREEDOM OF ASSOCIATION, PROTECTION OF THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING IN ZAMBIA

The provisions of the Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention are applied in Zambia through the Industrial and Labour Relations

²⁵ The Collective Bargaining Convention, Art. 2.

²⁶ The Right to Organise and Collective Bargaining Convention, Art. 4.

²⁷ The Right to Organise and Collective Bargaining Convention, Art. 5.

²⁸ The Right to Organise and Collective Bargaining Convention, Art. 6.

Act of 1993 which confers upon every employee the right to form²⁹ and join³⁰ a trade union; to take part in trade union activities³¹ and not to be prevented, dismissed, penalised, discriminated against or deterred from participating in trade union activities. Every employee has the right not to be a member of a trade union or be required to relinquish membership.³² Employers are prevented from refusing to engage or dismissing, penalising or discriminating against any employee for being or not being a member of a particular trade union or employee organisation.³³ Employers are also prohibited from dismissing, penalizing or discriminating against an employee for being a complainant, witness or giving evidence against the employer or for being entitled to a reward, benefit or compensation from the employer.³⁴

In order to ensure the autonomy of trade unions, it is an offence for any employer, employer's organisation or anyone acting on their behalf, to render financial or other assistance to a trade union or officer or member thereof, with the aim of influencing or exercising control over the trade union.³⁵

The Industrial and Labour Relations Act also guarantees the right to collective bargaining³⁶ and there is a requirement that copies of all collective agreements be lodged with the Labour Commissioner within 14 days of signing.³⁷ This ensures that the agreements comply with the law.

The foregoing provisions of the Industrial and Labour Relations Act are in harmony with the Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention. However, the following provisions in the Industrial and Labour Relations Act have been criticised by the CEACR as not conforming with the Freedom of Association and Protection of the Right to Organise Convention.³⁸

The CEACR is concerned with the way in which the Industrial and Labour Relations Act does not apply to workers in the prison service, judges, court registrars, magistrates and local court justices by virtue of sections 2(1)(c) and (e) thereof.³⁹ There are further calls for the amendment of the discretionary power of the Minister to exclude other

²⁹ Industrial and Labour Relations Act, s.5(1)(a).

³⁰ Industrial and Labour Relations Act, s.5(1)(b).

³¹ Industrial and Labour Relations Act, s.5(1)(c).

³² Industrial and Labour Relations Act, s.5(1)(f).

³³ Industrial and Labour Relations Act, s.5(1)(e).

³⁴ Industrial and Labour Relations Act, s.5(1)(i) and (ii).

³⁵ Industrial and Labour Relations Act, s. 5(4) and (5).

³⁶ Industrial and Labour Relations Act, s.66(2).

³⁷ Industrial and Labour Relations Act, s. 70(1).

³⁸ CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2009) and CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2006), <http://www.ilo.org/ilolex/english/newcountryframeE.htm> accessed 1st March 2011.

³⁹ CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2009).

workers from the scope of the Industrial and Labour Relations Act under section 2(2), considering that the only discretion given by article 9 of the Freedom of Association and Protection of the Right to Organise Convention is with regard to the police and armed forces.⁴⁰

Whilst recognising that the right to strike may be limited in services which are essential, the CEACR has noted that the definition of essential services which are excluded from the right to strike is unduly wide.⁴¹ Under section 107(10)(a) to (f) the Industrial and Labour Relations Act, essential services cover services relating to generation, supply and distribution of electricity; supply and distribution of water; hospital or medical services; sewerage service; fire brigade and any service for the safe and sound conditions in a mine. In addition, section 107(6) and (7) allows a police officer to arrest without warrant anyone believed to be striking in an essential service and any one found guilty shall be liable upon conviction to a fine or six months imprisonment. This has been criticised as being too disproportionate a sanction and the Zambian Government has been called upon to guarantee that those conducting peaceful strikes are not imprisoned.⁴²

The Minister may also add to the list of essential services after consultations with the Tripartite Consultative Labour Council.⁴³ The CEACR highlighted that the term essential service should be limited to those services, interruption of which would endanger the life, personal health or safety of part or whole of the population.⁴⁴

The CEACR urged the Zambian Government to amend section 76(1) of the Industrial and Labour Relations Act, which provides that a collective dispute be referred to a conciliator, but gives no time frame within which conciliation should end, and does not provide for a solution in the event of a deadlock.⁴⁵

The CEACR urged the Zambian Government to amend sections 78(6) to (8) of the Industrial and Labour Relations Act, which allow the Minister to apply to the Industrial Relations Court to have a strike or lock-out declared to be against public interest.⁴⁶

⁴⁰CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2009).

⁴¹CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2006).

⁴²CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2006).

⁴³Industrial and Labour Relations Act, s.107(10)(g).

⁴⁴CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2006).

⁴⁵CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2006).

⁴⁶CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2009).

The Zambian Government's response to these calls for reform has invariably been as follows:

...the Technical Tripartite Committee has amended the laws, which await adoption by the Tripartite Consultative Labour Council and ratification by Parliament.⁴⁷

The CEACR has also condemned acts of violence against trade unionists⁴⁸

4.6 STATUTORY PROVISIONS REGARDING FREEDOM OF ASSOCIATION, PROTECTION OF THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING IN MALAWI

The provisions of the Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention are applied in Malawi through the Labour Relations Act of 1996.

The relevant provisions are found in sections 4 and 6 as follows:

4. Every person shall have the right to freedom of association, which shall include the freedom to establish and join organisations of his or her choosing.

6(1) No person shall, in respect of an employee or any person seeking employment –

(a) require that he or she not be or not become a member of a trade union or require him or her to relinquish such membership;

(b) dismiss or prejudice such person because of trade union membership or participation in the formation or the lawful activities of a trade union ...

(2) Where it is shown that an employee was dismissed or otherwise prejudiced and it is alleged that such dismissal or prejudice is contrary to subsection (1), the burden is on the employer to prove that the act was not committed in breach of the subsection.

To preserve the independence of trade unions, any organisation or association that is dominated by an employer or employer's organisation is excluded from the definition of a trade union.⁴⁹ As is the situation in Zambia, collective agreements must be lodged. In Malawi, the collective agreements are deposited with the Registrar of Trade Unions and Employers' Organisations.⁵⁰

Paradoxically, the issues highlighted to the Zambian Government by the CEACR with regard to provisions of the Zambian Industrial and Labour Relations Act which contravene the Freedom of Association and Protection of the Right to Organise Convention, are addressed in the Malawian Labour Relations Act and could be considered good practices which Zambia could adopt.

With regard to the exclusion of workers from the application of the Zambian Industrial and Labour Relations Act, the

⁴⁷ CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2007).

⁴⁸ CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2007).

⁴⁹ Labour Relations Act, s.2(1).

⁵⁰ Labour Relations Act, s.34.

Malawian Labour Relations Act applies to the private sector and the Government, including any public authority or enterprise, but members of the armed forces, the prison service or the police (except those employed in a civilian capacity) are excluded from the application of the Act.⁵¹

With regard to the wide scope of essential services whose right to strike is excluded under the Zambian Industrial and Labour Relations Act, the Malawian Labour Relations Act limits essential services to those services interruption of which would endanger the life, health or personal safety of the whole or part of the population,⁵² in line with the recommendation of the CEACR. In Malawi, the Industrial Relations Court may determine whether or not a service falls under the definition of an essential service.⁵³

In contrast with the lack of time frame for conciliation and absence of a solution in the event of deadlock under section 76(1) of the Zambian Industrial and Labour Relations Act, section 44(4) of the Malawian Labour Relations Act gives the parties 21 days to resolve the dispute unless they agree to extend the period. Further, under section 45(1) of the Labour Relations Act, if an unresolved dispute concerns the interpretation or application of the provisions of a statute, collective agreement or employment contract, an application may be made to the Industrial Relations Court by either party for determination of the dispute. If the unresolved dispute concerns an essential service, the Principal Secretary responsible for labour may apply to the Industrial Relations Court for determination.⁵⁴

If the unresolved dispute concerns any other matter, the dispute shall be referred to the Industrial Relations Court if the parties agree, or either or both parties may give notice in accordance with section 46(3) that they intend to strike or lockout.⁵⁵

Malawi is however not without fault. The following Malawian provisions have been criticised by the CEACR.⁵⁶ Under sections 45(3) and 47(2) of the Labour Relations Act, the Industrial Relations Court may determine whether or not a strike involves an essential service. There has not been any application by Industrial Relations Court for such a determination. The absence of clarity could hamper an employees' right to strike. It would be ideal for the Act to list the class of workers which fall under the definition of essential services using the Convention for guidance.⁵⁷

⁵¹ Labour Relations Act, s.3.

⁵² Labour Relations Act, s.2(1).

⁵³ Labour Relations Act, s.47(2).

⁵⁴ Labour Relations Act, s.45(1)(b).

⁵⁵ Labour Relations Act, s.45(2).

⁵⁶ CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Malawi (2009), <http://www.ilo.org/ilolex/english/newcountryframeE.htm> accessed 1st March 2011.

⁵⁷ E. Kalula, A. Ordor and C. Fenwick, Labour Law Reforms that Support Decent Work: The Case of Southern Africa, Issue paper No. 28, ILO, Harare, 2008. Page 19.

Following comments by the International Trade Union Confederation (ITUC),⁵⁸ the CEACR condemned acts of police brutality against a march by workers in the tea sector and acts of violence against a trade union organiser.⁵⁹ The CEACR further condemned alleged anti-union discrimination that resulted in the dismissal of trade union leaders.⁶⁰

4.7 CASE LAW GIVING EFFECT TO THE OBLIGATIONS OF THE FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION AND THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION IN ZAMBIA

In *ANZ Grindlays Bank (Zambia) Limited v. Chrispin Kaona*,⁶¹ the respondent obtained permission from the appellant (his employer), to take time off in order to attend a trade union meeting. He went to the meeting with other colleagues but they discovered that the meeting was cancelled and so returned for work, only to find they were locked out for purportedly being on strike. The following working day the respondent and his colleagues applied to be reinstated. Some of the same colleagues were reinstated, however others including the respondent were told they could not be re-employed because they had withdrawn their labour. The Supreme Court agreed with the finding of the Industrial Relations Court that the dismissal of the respondent was unfair and referred to the then section 5(2)(a) of the Industrial and Labour Relations Act⁶² which confers upon a worker the right to obtain leave of absence to take part in union activities and prevents the employer from unreasonably refusing that right. However, the Supreme Court allowed the appeal to set aside reinstatement which at the time of judgment was not provided for under section 5, and instead ordered the respondent to pay damages for unfair dismissal. Following amendment in 1997, reinstatement is now provided for under section 5(3)(a) of the Industrial and Labour Relations Act.

4.8 CASE LAW GIVING EFFECT TO THE OBLIGATIONS OF THE FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION AND THE RIGHT TO ORGANISE AND COLLECTIVE BARGAINING CONVENTION IN MALAWI

In *Mkwezalamba v. Malawi Posts Corporation*⁶³ the applicant applied to the Industrial Relations Court claiming compensation for unfair retrenchment and victimisation on account of his participation in trade union activities. The applicant later amended the relief to reinstatement. The respondent strongly objected to the amendment, urging the Honourable Chairman not to turn the Court into a 'club.' On this point the Court referred to section 71 of the Labour Relations Act, the effect of which makes the rules of the Court less rigid than the rules of the High Court. The Court

⁵⁸ Formerly known as the International Confederation on Free Trade Unions (ICFTU).

⁵⁹ CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Malawi (2008).

⁶⁰ CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Malawi (2008).

⁶¹ SCZ Judgment No. 12 of 1995.

⁶² Now section 5(1)(d).

⁶³ Matter No. 154 of 2001.

also referred to rule 25(1)(f) of the Industrial Relations Court (Procedure Rules) 1999 which allows a party to amend his application at any time.

On the law, the Court referred to sections 6(1)(b)⁶⁴ and 2(2)⁶⁵ of the Labour Relations Act, as well as the Freedom of Association and Protection of the Right to Organise Convention, the Right to Organise and Collective Bargaining Convention and the Termination of Employment Convention.⁶⁶ With regard to the Conventions the Court had this to say:

This Court also places a lot of emphasis on the use of international labour standards of the ILO which add international flavour to its decisions where domestic law has already adopted the principles of such convention.

On the evidence, the Court found that the applicant's retrenchment was 'accelerated' due to his active role in trade union activities, which contravened article 1(1)(2) of the Right to Organise and Collective Bargaining Convention. On the facts, the Court found that this was a proper case for the applicant to be granted the relief of reinstatement as claimed.

4.9 MIGRATION FOR EMPLOYMENT CONVENTION (REVISED) OF 1949

The Migration for Employment Convention (Revised) of 1949⁶⁷ was ratified by Zambia on 2nd December 1964 and by Malawi on 22nd March 1965. The Convention defines a migrant for employment (hereafter "migrant worker") as a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.⁶⁸ This means the Convention is only concerned with foreign or international migrant workers and not domestic or internal migrant workers.

The key obligation with regard to equality of treatment and non-discrimination is found in article 6 which requires ratifying States to ensure that legal migrant workers are not treated less favourably than nationals.

4.10 CONSTITUTIONAL PROVISIONS REGARDING EQUAL TREATMENT OF MIGRANT WORKERS IN ZAMBIA

Under article 23(3) of the Zambian Constitution discrimination on the ground of place of origin is prohibited. This provision could be applied to a migrant worker who is discriminated against on account of their country of origin. In addition migrant workers often face discrimination on grounds of race, colour, religion or their migrant status.⁶⁹ The

⁶⁴ See paragraph 4.6 above.

⁶⁵ It is recalled from Chapter 2 that this section allows the Act to be interpreted in light of Malawi's obligations under any international treaty including international labour conventions that Malawi has ratified.

⁶⁶ Convention No. 158.

⁶⁷ Convention No. 97.

⁶⁸ The Migration for Employment Convention (Revised), Art. 11.

⁶⁹ ILO, Equality at Work. Pages 30 - 31.

inclusion of race, tribe, colour or creed in the prohibited grounds of discrimination under article 23(3) of the Zambian Constitution is therefore important. However, article 23(4) states that clause 23(1) (which prohibits any provision of law that is discriminatory), shall not apply to a law with respect to non-citizens of Zambia. The provisions of article 23(4) could therefore be interpreted to be affording unequal treatment to migrant workers.

4.11 CONSTITUTIONAL PROVISIONS REGARDING EQUAL TREATMENT OF MIGRANT WORKERS IN MALAWI

Section 20(1) of the Malawian Constitution prohibits discrimination on the grounds of nationality, race, colour, language and religion. These are all forms of discrimination that may be faced by migrants.

4.12 STATUTORY PROVISIONS REGARDING EQUAL TREATMENT OF MIGRANT WORKERS IN ZAMBIA

Section 108(1) of the Industrial and Labour Relations Act prohibits discrimination on the grounds of race, religion or status of an employee. It is submitted that status may be interpreted to include an employee's migrant status. Section 2(1) of the Industrial and Labour Relations Act and section 2(1) of the Employment Act⁷⁰ specify the categories of workers that are excluded from their application and this does not include migrant workers. It follows then that all provisions that apply to nationals in the Act, do apply equally to migrants.

4.13 STATUTORY PROVISIONS REGARDING EQUAL TREATMENT OF MIGRANT WORKERS IN MALAWI

The anti-discrimination section of the Malawian Employment Act of 2000 includes the following grounds which are relevant to the equal treatment of migrant workers: nationality, race, colour, language and religion. As in Zambia, migrant workers are not excluded from any provisions of the Employment Act or the Labour Relations Act.

4.14 CASE LAW GIVING EFFECT TO THE OBLIGATIONS OF THE MIGRATION FOR EMPLOYMENT CONVENTION (REVISED) IN MALAWI

The following is an extract from a report of the CEACR to the Malawian Government in 2009:⁷¹

The Committee notes from the Government's report that no judicial or administrative decisions concerning the application of the Convention have been handed down. Nor have any violations been detected by the labour inspection services. The Committee recalls the importance of establishing effective mechanisms to ensure the application of the Convention, especially the principle of equality of treatment, given that migrant workers may not be in a position to take the initiative to secure respect for the relevant legislation due to lack of awareness or fear of reprisals. The Committee requests the Government to provide information on any practical measures taken to ensure the effective application of the Convention,

⁷⁰ Cap. 268.

⁷¹ CEACR: Individual Direct Request concerning Migration for Employment Convention (Revised), 1949 (No. 97) Malawi (2009) <http://www.ilo.org/ilolex/english/newcountryframeE.htm> accessed 1st March 2011.

including measures designed to provide judges and labour inspectors with specific training on the issues covered by the Convention.

It is clear from the extract that whilst there has been no case law, in order to effectively implement the provisions of the Migration for Employment Convention (Revised), the onus must be on the Government to ensure that effective labour inspection systems are in place to handle any potential violations of the labour laws. This is because not all cases of violations will appear in Court due to lack of awareness of rights or fear of reprisals.

4.15 CASE LAW GIVING EFFECT TO THE OBLIGATIONS OF THE MIGRATION FOR EMPLOYMENT CONVENTION (REVISED) IN ZAMBIA

Ironically and sadly, whilst the Migration for Employment Convention (Revised) seeks to try and protect migrant workers from discrimination and unequal treatment, it is often the case that migrant employers are guilty of discrimination and unequal treatment of nationals, particularly where they come into the country as foreign investors. This is not only the case in Zambia but other developing countries like Malawi which rely heavily on foreign investment. As such, in both Zambia and Malawi there are cases of discriminatory treatment by migrant employers rather than those of discriminatory treatment of migrant workers. In the 2005 Annual Report of the Zambia Human Rights Commission⁷² the following statement was made:

The Commission expressed concern over alleged racist practices by some employers, especially those who had come into the country as investors. The Commission reacted to allegations of racist practices at Dunavant Limited. The Commission stated that while Zambia as a country valued the contributions by foreign investors to the economy, this should not be at the expense of the integrity and dignity of the employees who worked for them. Abuse or ill-treatment on the basis of race was abhorrent and went to injure the very core of the respect and dignity every human being deserved. . . The Zambian people should not be taken for granted only because they had become vulnerable due to the economic difficulties the country was experiencing, which had made it extremely difficult for people to find employment. Hence, regardless of colour or social status, every person's dignity needed to be upheld and respected.

4.16 CONCLUSION

In assessing the extent of application of the Freedom of Association and Protection of the Right to Organise Convention, the Right to Organise and Collective Bargaining Convention and the Migration for Employment Convention (Revised), this Chapter has made much use of the reports of the CEACR which have dealt extensively with the problems of domestication and implementation of these Conventions in both Zambian and Malawian labour laws. It is hoped that future reforms to the labour laws of both countries will take on board the various comments and observations made by the CEACR in order to bring the said laws into greater compliance with the obligations of the two countries under the Conventions.

⁷² Page 30 of the report.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

In line with the objectives of this essay, this Chapter looks at how successful Zambia and Malawi have been in incorporating¹ the seven International Labour Organisation (ILO) Standards analysed in the three preceding chapters, into labour laws. The Chapter also recommends possible solutions to the problems that have been highlighted in the two countries regarding application of the said Standards.

The table below shows the presence (1) or absence (0) of legislative and other provisions present in Zambia and Malawi based on the principal obligations of the seven Conventions² and two Recommendations, in the order in which they are assessed in the preceding chapters. The scores have been tallied to give a total figure representing the level of success that each country has obtained.

TABLE 5: ASSESSMENT OF THE SUCCESS OF INCORPORATION OF THE ILO STANDARDS IN ZAMBIA AND MALAWI

Convention and Recommendation No. 111	Zambia	Malawi
Discrimination is defined in legislation in line with the Convention	1	0
Prohibited grounds of discrimination in legislation include:		
Sex	1	1
race/colour	1	1
religion/creed	1	1
political opinion	1	1
national extraction/ tribe	1	1
social origin	0	1
other grounds	1	1
Discrimination is defined in judicial decisions in line with the Convention	1	1
Courts apply the principle of elimination of discrimination in respect of employment and occupation in their decisions	1	1
Discrimination is prohibited in legislation at all stages of the hiring and employment process	1	1
Positive/ affirmative action measures to assist vulnerable groups of workers are permitted in legislation	1	1
National Policy is in place concerning elimination of discrimination in employment and occupation	1	0
National Policy is observed in activities of vocational guidance, training and placement services	1	0

¹This essay has not only assessed domestication of the Standards, but also the implementation, application and enforcement of legislative provisions that give effect to the obligations under the Standards.

²Convention No. 111 - Discrimination (Employment and Occupation) Convention and Recommendation of 1958.

Convention No. 159 - Vocational Rehabilitation and Employment (Disabled Persons) Convention of 1983.

Convention No. 100 - Equal Remuneration Convention and Recommendation of 1951.

Convention No. 19 - Equality of Treatment (Accident Compensation) Convention of 1925.

Convention No. 87 - Freedom of Association and Protection of the Right to Organise Convention of 1948.

Convention No. 98 - Right to Organise and Collective Bargaining Convention of 1949.

Convention No. 97 - Migration for Employment Convention (Revised) of 1949.

Convention No. 159	Zambia	Malawi
Legislation is in place to promote the principles of vocational rehabilitation and employment of disabled persons	1	1
Legislation is in line with contemporary understanding of rehabilitation needs of disabled persons	1	0
National Policy is in place concerning vocational rehabilitation of disabled persons	1	1
Activities of private and public bodies concerned with vocational rehabilitation of disabled persons are coordinated under a national authority	1	1
Convention No. 100 and Recommendation No. 90		
The principle of equal pay for work of equal value ("the principle") is provided for in legislation in line with Convention 100	0	1
The principle is applied in legally established machinery for wage determination	1	1
Courts apply the principle in their decisions	0	1
Government consults with employee and employer organisations when setting minimum wage	1	1
Convention No. 19		
Legislation provides that foreign and national workers be treated equally in receiving workmen's compensation for industrial accidents	1	1
Convention No. 87		
Legislation guarantees the freedom of association and the right to organise	1	1
The right to organise extends to all categories of workers except those where discretion is permitted by the Convention	0	1
Legislation protects workers' organisations from acts of dominance or interference by employers.	1	1
Convention No. 98		
Legislation guarantees the right to collective bargaining	1	1
Legislation protects workers from anti-union discrimination	1	1
Convention 97		
Legislation prohibits discrimination on the ground of nationality	0	1
Legislation prohibits discrimination on other grounds applicable to migrant workers	1	1
TOTAL	25	26

The above Table shows that Malawi has been marginally more successful than Zambia in the incorporation of ILO standards that deal with discrimination in employment into labour laws. In this author's final analysis, Malawi has been more successful than Zambia in domesticating the provisions of Convention No. 100, 87 and 98, whilst Zambia has been more successful with regard to Convention No. 111 and 159. There is no clear winner with regard to Convention No. 19 and 97.

5.1 RECOMMENDATIONS

5.2 CONVENTION NO. 111

Malawi is in need of a National Employment Policy that tackles the issue of discrimination in the workplace. This is a key obligation of Convention No. 111 that has been neglected.

There is no mandate within which courts in Zambia may give effect to ILO Standards that are not domesticated in judicial decisions and thus the role that the Standards play is comparatively weak. One solution to this would be for the *Zambian Employment Act*³ to have an interpretation section like the one in Malawi⁴, which allows the courts to interpret decisions in line with ILO Standards and other international Conventions that Zambia has ratified.

³ Cap. 268, Laws of Zambia.

⁴ Section 2(2) Labour Relations Act, No. 16 of 2006.

Both countries need to consider adding other prohibited grounds of discrimination into legislation, in particular, age, HIV/AIDS status or health, in order to keep up with newly recognised forms of discrimination. The legislation should make clear in which cases differential treatment would be justifiable. For example the age of a prospective employee might be a valid factor to consider in jobs that are classed as dangerous.

5.3 CONVENTION NO. 159

Malawi's legislation on disabled persons⁵ is out-dated and incompatible with ILO Convention No. 159. There should be increased lobbying for the enactment of the Equalisation of Opportunities for Persons with Disabilities Bill. The content of the new Act should include the replacement of the word 'handicapped' (which is considered offensive) with 'disabled persons' or 'persons with disabilities.'

As with sections 19 – 21 of the Zambian Persons with Disability Act,⁶ the new Act should contain a wide anti-discrimination clause that includes failure to accommodate persons with disabilities, with the power of a national authority to make adjustment orders. Discrimination should be prohibited at all levels of the employment process and in institutions of learning. Any proposed quota system should facilitate the entry of a specific group of disabled persons into the workforce and should be backed by enforceable sanctions such as fines or levies on organisations that do not comply with the quota.⁷ The funds levied could then be used to assist disabled persons gain employment.⁸ To overcome the evidential problem of proving discrimination, it should be for the employer to prove the absence of discrimination once a complainant has established a *prima facie* case of discrimination.⁹

Another good practice that Malawi should adopt is rights awareness campaigns through such projects as the ADEPt project in Zambia. The ADEPt project identifies cases of discrimination against disabled persons and attempts to sensitise those engaged in discriminatory practices as to the rights of the disabled. The project also aims to establish a portfolio of landmark court cases in recognition of the strength that judicial precedents can have in raising awareness of the rights of disabled persons.¹⁰

Zambia should include disability as a prohibited ground of discrimination in the anti-discrimination article¹¹ of the Zambia Constitution, as the current provision¹² does not provide disabled persons with a justiciable right.

⁵ Handicapped Persons Act of 1971.

⁶ No. 33 of 1996.

⁷ ILO, Achieving Equal Employment Opportunities for People with Disabilities Through Legislation: Guidelines, ILO, Geneva, 2007. Page 84.

⁸ ILO, Achieving Equal Employment Opportunities. Page 38.

⁹ ILO, Achieving Equal Employment Opportunities. Page 34.

¹⁰ <http://www.zafod.org/projects>, accessed 25th February 2011.

¹¹ Constitution of Zambia, Art. 23.

¹² Constitution of Zambia, Art. 112(f).

5.4 CONVENTION NO. 100

There are two good practices in the Malawian Employment Act¹³ which Zambia could adopt with regard to Convention No. 100. Firstly, Zambia could incorporate the principle of equal remuneration for work of equal value into the Zambian Employment Act and ensure the principle is broadly defined to include jobs of a different nature which nevertheless are of equal value. Secondly, there could also be a section specifying that the burden of proof rests on the employer to prove that any differences in wages are not based on discriminatory practices.

In Zambia the good practice of the Labour Force Survey should be periodically repeated. The Labour Force Survey compiles statistics on the employed and unemployed population in Zambia. The Survey includes information on the age, sex, sector, income and education levels of the 'labour force,' which is defined as those who are over the age of 14 and employed or unemployed but available for work.¹⁴ In Malawi there should be sufficient data collection on the labour market disaggregated by sex in order to help find solutions to the gender wage gap.

In both countries, special consideration should be given to the way in which provisions of labour legislation affect the categories of workers dominated by women, such as domestic workers, part-time and temporary workers. Maternity leave and other social and welfare services that assist women returning to work should as far as possible be provided for through public funds, or a combination of employer and public funds in order to reduce the burden on employers. Both countries should consider provisions that oblige companies employing a particular number of employees to provide child-care facilities.¹⁵

It should be considered whether the legislation in both countries should oblige job evaluations to justify the wage rates of different categories of workers. Permitted grounds of wage differentials should be limited to factors such as individual performance, position of employee, length of period of service, regionality, nature of work and working conditions. These factors should not include the sex of the worker being evaluated. The desired effect of these job evaluations would be to gradually raise the wage levels of women and narrow wage differences because the value of work is being assessed.

Women's entry into the labour market should be facilitated through policies of affirmative action in education and increased vocational training opportunities. Women's access to higher paying jobs may be assisted through on-the-job training.

¹³ No. 6 of 2000.

¹⁴ Zambia Labour Force Survey, 2005. Page 7.

¹⁵ I. Öun and G Trujillo, *Maternity at Work: A review of national legislation*, ILO, Geneva, 2005. Page 67.

The Governments of both countries should not just pay lip-service to the notion of increased participation of women in decision-making positions but actively seek after appropriately qualified women to take up such positions.

5.5 CONVENTION NO. 87

Consideration should be given to the inclusion of the judiciary in the scope of application of the *Zambian Industrial and Labour Relations Act*, so that they may exercise their right to establish and join organisations of their choosing in line with article 2 of Convention No. 98.¹⁶ The term ‘essential service’ should be narrowly defined as in section 2(1) of the *Malawian Labour Relations Act*. Conversely, Malawi would do well to include a list of essential services as in section 107(10) of the *Zambian Industrial and Labour Relations Act* for better clarification.

A time frame for conciliation and solution in the event of deadlock should be provided in section 76 of the *Zambian Industrial and Labour Relations Act*.

5.6 CONVENTION NO. 98

Both countries need to give serious attention to the allegations of violence against trade unionists as this is not only a labour rights but a human rights issue.

5.7 CONVENTION NO. 97

Zambia should consider including nationality in the anti-discrimination section¹⁷ of the *Industrial and Labour Relations Act*.

5.8 OTHER RECOMMENDATIONS

Chapter One of this essay highlighted the negligible number of cases on discrimination in both *Zambian* and *Malawian* courts. One solution to this issue is the awareness-raising of current anti-discrimination legislation through media, company employment policies/ manuals and workshops for employers. The capacity of responsible authorities including judges, labour inspectors and other public officials should be enhanced to assist in the recognition and handling of discrimination cases. Information on the character and outcome of cases on discrimination in the courts, human rights institutions, Ombudsman and the labour inspectorate should be collated and published as a way of raising awareness of current laws and assessing their efficacy.

¹⁶ CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Zambia (2005), <http://www.ilo.org/ilolex/english/newcountryframeE.htm> accessed 1st March, 2011.

¹⁷ *Industrial and Labour Relations Act*, s. 108(1).

The insufficiency and ineffectiveness of labour inspection authorities has also been highlighted in this essay. This is exacerbated by lack of human and material resources such as lack of transport and funds for inspectors.¹⁸ Labour inspection has also traditionally focused more on occupational health and safety rather than combating discrimination at work. It is suggested that labour inspectors could be given a special mandate to firstly ensure that all labour legislation on discrimination is implemented and secondly to enforce the same where non-compliance is found. There should also be increased training and capacity building for labour inspectors.¹⁹ Another proposal is for special provisions to be made for labour inspection in the national budget to overcome the problem of insufficient funding.

5.9 CONCLUSION

In order to combat discrimination in employment a concerted effort at law reform is needed. Law reform should be backed by strong anti-discrimination and equality policies and strategies. The ILO Standards that deal with discrimination in employment are of great use to countries that wish to undertake law reform. Malawi's labour legislation was 'specifically designed to put into effect Malawi's ILO obligations, with particular regard to core labour rights.'²⁰ This explains the incorporation of much of the language used in various Conventions into the Malawian Employment Act and Labour Relations Act. Furthermore, the courts in many cases have been able to enforce provisions of ratified ILO Conventions directly, through the much-mentioned section 2(2) of the Malawian Labour Relations Act.

In Zambia the important role of the ILO Standards needs to be recognised when the courts are handing down their decisions. This is because, as mentioned in Chapters One and Two of this essay, legislation on its own has not proved effective in combating discrimination, due to the limited scope of legislation and weak enforcement mechanisms. The courts therefore should be able to interpret the law in a way that gives effect to the obligations under the Standards.

The supervisory work of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) as well as the Committee on Freedom of Association is very important in ensuring the two countries are towing the line with respect to their legislative provisions. Continued use needs to be made of the reports issued by the CEACR for future labour law reforms. In addition to this, best practices on labour law reforms that support equality and non-discrimination at work need to be shared between countries of similar backgrounds and legal systems such as Malawi and Zambia.

¹⁸ http://www.ilo.org/labadmin/info/lang--en/WCMS_112605/index.htm accessed 26th November, 2010.

¹⁹ http://www.ilo.org/labadmin/info/lang--en/WCMS_112605/index.htm accessed 26th November, 2010.

²⁰ E. Kalula, A. Ordor and C. Fenwick, Labour Law Reforms that Support Decent Work: The Case of Southern Africa, Issue paper No. 28, ILO, Harare, 2008. Page 19.

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