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THE RIGHT TO STRIKE IN ZIMBABWE

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INTRODUCTION

The right of workers to strike is probably the most controversial component of labour law. It raises complex questions. For instance, is the right to strike a human right? Does an individual worker have a right to strike? Should the law create and protect a right to strike? The list of questions could be continued *ad infinitum*. The complexity of the questions are compounded by the fact that the issue of a right to strike attracts very strong, and sometimes, deeply emotive and ideological views. A leading labour lawyer is often quoted in the following words as an example of these strongly expressed views:

There can be no equilibrium in industrial relations without a freedom to strike. In protecting that freedom, the law protects the legitimate expectations of workers that they can make use of their collective power: it corresponds to the protection of the legitimate expectations of management that it can use the right of property for the same purpose on its side . . .¹

Such comments are not restricted to academics. Even judges have had occasions to strongly defend the right of workers to strike. The celebrated dicta is that of the English judge Lord Wright, who noted:

The right of workmen to strike is an essential element in the principle of collective bargaining.²

A Canadian judge was even more forthright:

. . . the freedom to bargain collectively, of which the right to withdraw services is integral, lies at the very centre of the existence of an association of workers. To remove their freedom to withhold their labour is to sterilise their association.³

Yet, notwithstanding these strong sentiments in support of the right to strike, workers the world over seem to share a common feature: The right to strike is not meaningfully available to them whatever the claims to the contrary. With few exceptions, strikes are either completely outlawed or severely restricted. This article seeks to examine strike law in Zimbabwe in the light of international labour standards and principles of labour law. It is sought to be demonstrated that viewed from the angle of the purposes which a modern labour law should serve, the current law of strikes in Zimbabwe is both misconceived and ridiculous. With this objective, the article will first explore the philosophical justifications for a right to strike, to be followed by an examination of international labour law on the subject and thereafter an examination of Zimbabwean law.

1 Per Kahn Freund, quoted in P. Davies and M. Freedland, *Kahn Freund's Labour and The Law*, 3rd edition, 1983 (Stevens & Sons, London) p. 292.

2 *Crofter Harris Tweed v Veitch* [1942] AC 435 at 463.

3 Per Cameron J A, *Re Retail Wholesale Union and Govt of Saskatchewan* (1985) 19 DLR (4th) 609, at 639.

JUSTIFICATIONS FOR A RIGHT TO STRIKE

The debate on the issue of the right to strike seems to be premised on the assumption that it is "obvious" that there must be recognition of this right in any democratic society.⁴ However, a number of specific justifications have been given to support the entrenchment of a right to strike for workers in any industrial relations system. First, the right to strike has been defended as a fundamental human right.⁵ On this basis, no more justification is required than that applicable to the defence of human rights in general, namely self evident rights which accrue by virtue of one being human.⁶ A right to strike, if seen as a fundamental human right, ought to be part of any civilised community in the same way as the right to life, liberty and other common human rights. This justification seems to have been largely resisted. It has been said that "there has been reluctance to describe the freedom to strike as a *right* because of a strike's coercive nature and delictual consequences, no other human right exists for the explicit purpose of forcing others to do what they do not want to do."⁷ Be that as it may, the characterisation of a right to strike as a human right is one of the justifications given for insisting on its universal recognition.

Second, the right to strike has been justified on the grounds of democracy, it being argued that such a right is "intrinsic to the notion of a democracy, a view reinforced by the fact that, conversely, it is often banned in totalitarian societies".⁸

The third justification has been described as the "equilibrium" argument⁹ and is heavily rooted in the concepts that underlie labour law. It is the notion that the withdrawal of labour acts as the only effective countervailing force to the power of capital (management) to hire and fire. The right to strike is thus seen as creating an "equilibrium" in labour relations.¹⁰ This equilibrium is seen as essential for the establishment of a properly functioning industrial relations system. Of particular note is the fact that this justification does not see the "equilibrium" as an end in itself. The equilibrium is seen as a means to facilitating collective bargaining, the latter being taken as the cornerstone of modern labour law. Put differently, according to this justification, the basic principle of modern labour law should be to promote collective bargaining as a means to resolving the inherent conflict between labour and capital while at the same time preserving an efficient capitalist system. However, collective bargaining cannot work without workers having a right to strike. The right to strike is thus supported only in order to promote collective bargaining! The strike is "the sanction that impels the parties to bargain collectively".¹¹ This narrow conception of a right to strike appears to be the most widely accepted and explains the law of strikes in

4 P. Davies and M. Freedland, *op.cit* p. 292 where it is said: "There must be a freedom to strike . . . this is obvious".

5 See, Ruth Ben-Israel, *International Labour standards: The case of freedom to strike*, Klumer (1988), Chapter 1.

6 See for instance, the opening paragraphs of the American Declaration of Independence (1776) ". . . we hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights . . ."

7 Alan Pycroft and Barney Jordaan, *A Guide to South African Labour Law*, 2nd edition (Juta & Co.) p 271-272.

8 Simon Deakin and Gillian S. Morris, *Labour Law 1995*, Butterworths, p. 752.

9 *Ibid*, p. 752.

10 See Kahn Freund's statement, *op. cit*, note 1.

11 MSM Brassey *et al*, *The New Labour Law*, 1987 (Juta & Co.), p. 243.

the United States, United Kingdom and South Africa.¹² It also explains strike law in a number of European countries.¹³

The justification given to support the existence and/or protection of the right to strike largely shapes the nature and extent of protection given by the law. For instance, the "equilibrium" argument as the basis of the law of strikes, makes purely political strikes illegal in the United Kingdom and the United States as these are not functional to collective bargaining.¹⁴ The interim South African constitution does not protect political strikes as it only grants the right to strike "for the purpose of collective bargaining".¹⁵ In Germany, the position has been put more forcefully as follows:

The aim of strikes must be the conclusion of a collective agreement. If they are called to achieve goals that cannot be covered in a collective agreement, they are illegal. This applies particularly to political or demonstration strikes . . .¹⁶

On the other hand, in Italy where the Constitution grants a right to strike on the justification of fundamental human rights, some political strikes are lawful.¹⁷

It should be clear that the justification given in defence of the right to strike helps one to understand the law. It will be shown that the justifications for Zimbabwe's strike law are unclear and hence the ridiculous nature of the current law. To streamline the law of strikes in Zimbabwe, it will be essential to provide a clear justification for the right to strike which can then constitute the basis of the law.

THE RIGHT TO STRIKE IN INTERNATIONAL LABOUR LAW

International labour law refers to the rules of labour law which have been established by international law. Its main sources are the legal instruments of the International Labour Organisation (ILO) and other international and regional human rights instruments. There is no ILO Convention dealing specifically with the right to strike. The more obvious candidate ILO Conventions, No 87 (On Freedom of Association and Protection of the Right to Organise) and 98 (on the Right to Organise and Collective Bargaining) do not make any specific reference to the right to strike. However, the absence of a specific reference to the right to strike in ILO Conventions, does not mean that such a right does not exist in International labour law. ILO case law, developed by the Committee of Experts and the Committee on Freedom of Association, have derived the right to strike from the concept of Freedom of Association as enshrined in Conventions 87 and 98 holding that the right to strike is "an intrinsic corollary to the right to organise protected by Convention No. 87" and the right to strike is "a legitimate means . . . through which workers may promote and defend their economic and social interests".¹⁸

12 See generally *ibid*, pages 241-250.

13 See generally Wedderburn, *Employment Rights in Britain and Europe* (1991), p. 276-353.

14 MSM Brasse, *op.cit*, pages 241-250.

15 Section 27(4) of the interim South African Constitution.

16 See Gunter Halbach *et al*, *Labour Law in Germany: An Overview*, (1992) p. 308, paragraph 125.

17 See R. Birk, "Industrial Conflict: The Law of Strikes and Lock-Outs" in Blanpain R. *Comparative Labour Law and Industrial Relations*, 3rd edition (Kluwer) p. 401 at 415.

18 *Freedom of Association Digest*, paras 362 and 363; ILO General Survey by Committee of Experts, 1983 para 2000; ILO General Survey, 1994, per 148. See also Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike*, (Kluwer), 1988 p. 64-70, and N. Valticos, *International Labour Law* (Kluwer), 1979, p. 85, ILO *Freedom of Association and Collective Bargaining* (1994) p. 136.

The right to strike has therefore become an essential component of International labour law through the interpretation work of the Freedom of Association Committee and Committee of Experts of the ILO. However, this ILO jurisprudence has also made it clear that this right is not absolute and certain restrictions have been admitted. Two restrictions recognised by the ILO to the right to strike are in respect of the public service and in essential services. As regards the public service, the ILO has admitted prohibition of the right to strike only to public servants "acting in their capacity as agents of the public authority"¹⁹ and this should only cover top civil servants. In respect of "essential services",²⁰ the ILO accepts that strikes may be prohibited or restricted in them. It defines "essential services" as those "interruptions of which would endanger the life, personal safety or health of the whole or part of the population."²¹ However, whenever the right to strike is prohibited or restricted in the recognised categories, the ILO insists on the provision of compensatory mechanisms such as reference of disputes to compulsory arbitration.²²

Apart from ILO jurisprudence, the right to strike is recognised in other international instruments. It is guaranteed in the International Covenant on Economic, Social and Cultural Rights (1966) provided it is exercised in conformity with the laws of the particular country.²³ The European Social Charter of 1961, recognises "the right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."²⁴ The European Community Social Charter of 1989 provides that "the right to resort to collective action . . . shall include the right to strike".²⁵ Given ILO jurisprudence which has derived a right to strike from the very essence of freedom of association, it is arguable that many other international instruments' protection of freedom of association impliedly covers a right to strike. Although the effect of this argument is uncertain, it would cover the African Charter on Human and People's Rights,²⁶ the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁷ the International Covenant of Civil and Political Rights²⁸ and the American Convention on Human Rights.²⁹

It must be clear from the foregoing examination of International labour law that the right to strike is overwhelmingly recognised although its exact limits may be uncertain. It now remains to examine strike law in Zimbabwe in the light of this international legal regime.

STRIKE LAW IN ZIMBABWE

Constitutional Protection for the Right to Strike?

The Constitution of Zimbabwe is the supreme law of the country and any law inconsistent with it is void.³⁰ If a right to strike were to be derived from the Constitution, any purported

19 *Freedom of Association Digest*, para 393.

20 *Ibid*, para 394.

21 *Ibid* paras 394 and 400; *General Survey* 1983 para 214.

22 ILO: Official Bulletin Vol LXXVI, 1993, series B, No. 1, Case No 1620 (Colombia).

23 Article 8.

24 Article 6.

25 Article 13.

26 Article 10 (1).

27 Article 11(1) and 11(2).

28 Article 22(1), (2) and (3).

29 Article 16(1), (2) and (3).

30 See Section 3 of the Constitution and the Supreme Court's emphatic embracing of the implications of this provision in *Ian Douglas Smith v Mutasa N.O and Another* 1989 (3) ZLR 183.

prohibition or restriction of it in labour legislation would be void. The problem, however, is that the Constitution of Zimbabwe does not specifically incorporate a right to strike. But this is not the end of the matter. It is arguable that the Constitutional protection of the freedom of association and assembly enshrined in Section 21 could cover a right to strike. Section 21(1) provides:

Except with his own consent or by way of parental discipline, no person shall be hindered in 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 political parties or trade unions or other associations for the protection of his interests.

The issue which arises is: What is the exact content of a freedom to "form and belong to trade unions . . . for the protection of his interests"? Put differently, what right or freedom is there to belong to a trade union if the latter has no right to strike?

On one view, the freedom to join and participate in trade union activities necessarily includes the right to strike. There are two sources of support for this view. The first is ILO jurisprudence already referred to which has derived a right to strike from Freedom of Association. The second support comes from the Canadian case of *Re Retail Wholesale Union and Govt. of Saskatchewan*³¹ which held that provincial legislation banning collective bargaining and strikes was unconstitutional as it infringed the freedom of association of workers protected by Section 2(d) of the Canadian Charter (Constitution). The essence of this decision is that freedom of association is meaningless if the activities of the association are not thereby protected. To remove the right to strike from an association of workers is to "sterilise their association"³² thereby denying them the freedom of association.

Although this is an attractive approach it has been demolished even in Canada itself. The Canadian Supreme Court has ruled that the right to strike cannot be derived from a mere right to associate as the latter does not only exist for trade unions.³³ This position follows an earlier common law position adopted by the Privy Council in *Collymore v Attorney General*³⁴ which held that the right to strike could not be derived merely from freedom of association since trade unions have other activities apart from strikes and collective bargaining.

The position in Zimbabwe has not been tested in the Supreme Court. While it is clear that the present position of the courts in England and Canada is to flatly refuse to derive a right to strike from mere freedom of association, there is merit in the ILO approach. In principle, the right to strike is the *raison d'être* of trade unionism in so far as it represents the ultimate exercise of collective power. It should therefore be regarded as the essence of freedom of association of workers. It is therefore submitted that a right to strike can competently be derived from the freedom of association provisions of the Constitution of Zimbabwe. At the very least the question whether the Constitution of Zimbabwe protects a right to strike should now be regarded as open in the light of the above discussion.

In South Africa³⁵ and Malawi, the Constitutions specifically enshrine some right to strike. The Malawian Constitution however, vaguely enshrines the right as follows: "The state

31 (1985) 19 DLR (4th) 609.

32 Cameron J A, at p. 639.

33 *Alberta Union of Provincial Employees v Attorney-General of Alberta* (1987) referred to in Wedderburn *op. cit.* p. 147-148.

34 [1970] AC 538 (PC).

35 Section 27(4) of the Interim Constitution.

shall take measures to ensure the right to withdraw".³⁶ The actual effect of these constitutional provisions remains to be seen, but the difficulties experienced in Zimbabwe at the very outset are avoided in these countries. Outside South Africa, constitutional entrenchment of the right to strike is not unknown.³⁷

Whatever the constitutional position of the strike in Zimbabwe, it is now clear that workers on strike or participating in a demonstration have a constitutional right to peaceful assembly and movement without interference from the state.³⁸ In particular, no prior permission from the state is necessary for workers to demonstrate or assemble in public as such a demonstration is a facet of the freedom of expression and assembly enshrined in the Constitution.³⁹

RIGHT TO STRIKE IN THE PUBLIC SERVICE IN ZIMBABWE

Zimbabwe has a two-tiered labour law system which makes a distinction between government workers and other workers. Government workers have their terms and conditions of employment regulated by a mechanism set up directly by the Constitution. The Labour Relations Act⁴⁰ which applies to all other workers, makes it clear that it does not apply to workers "whose conditions of employment are otherwise provided for by or under the Constitution".⁴¹ The Constitution creates two main groups of Government workers. The first group is called the "Public Service" which is administered by a constitutionally entrenched Public Service Commission⁴² operating in terms of the Public Service Act.⁴³ The second group consists of other special groups outside the "Public Service" such as the police, the army, the prison service and the judiciary and these are governed by specific Acts of Parliament enjoined by the Constitution.

Whichever group of government workers one is referring to, there is no provision for the right to strike. In the police force resort to a strike may constitute several offenses such as desertion, insubordination or "being absent without leave".⁴⁴ These offenses may lead to imprisonment of up to five years. More serious offenses are created for the army.⁴⁵ Thus outside the 'public service' group of government workers, the question of a right to strike is a non-issue — the law makes the strike unthinkable. It may be remarked that a blanket prohibition of the right to strike in the police and army is permitted by ILO standards given that Convention 87 upon which the right to strike is founded, does not apply to the police and the army.

In the "public service" the absence of a provision of a right to strike, means that in the absence of a constitutional protection there is no right to strike at all. The absence of a statutory right to strike effectively means there is a blanket prohibition of strikes in the public service regardless of the nature of the job or its scope in relation to the exercise of

36 Section 31(4).

37 For instance, the Right to Strike is constitutionally entrenched in Italy, France, Spain, Portugal and Greece. see R. Birk, *op. cit.*, page 409.

38 See *In Re Munhumeso* 1995 (2) BCLR 125.

39 *Ibid.*

40 Chapter 28:01.

41 Section 3.

42 Sections 74 and 75.

43 Chapter 16:04.

44 See section 29 (read with the schedule) of the Police Act (Chapter 11:10).

45 See Defence Act (Chapter 11:02), First Schedule.

governmental authority. What matters is whether or not one falls into the "public service" as defined by the Public Service Act.⁴⁶ If one is covered by the definition, *cadit quaestio* — there is no right to strike.

As already indicated such a blanket prohibition of strikes in the entire public service is contrary to international labour law. ILO jurisprudence has only allowed prohibitions in those cases where the public servants either exercise governmental authority or are in an "essential service". Only top civil servants can be said to exercise governmental authority and a substantial number of civil servants are not in "essential services" for purposes of strike law.

It is difficult to understand why the law has taken this draconian approach to strikes in the public service. It is perhaps instructive to note that labour relations in the public service in Zimbabwe is characterised by this heavy handed approach. While public servants may join workers' organisations of their choice, these have no entitlement to be recognised by government as worker representatives. There is no scope for the registration and recognition of trade unions in the public service. The Public Service Act leaves it to the Minister to recognise an organisation of workers at his/her sole discretion.⁴⁷ The only reason for recognition of an organisation of workers is for purposes of "consultations"⁴⁸. There is no collective bargaining in the public service. Terms and conditions of employment are determined by the Public Service Commission in consultation with the Minister of Labour.⁴⁹ Workers have neither the right to strike to influence the content or nature of these terms and conditions of employment nor the entitlement to engage in collective bargaining to improve the conditions.

It must be apparent that this state of affairs is unjust and probably inhuman. In a civilised community, it hardly needs to be emphasized that human beings cannot be treated like machines with no say whatever in regulating their employment conditions. The situation becomes more unfair when it is noted that the same government has granted collective bargaining and strike rights to private sector workers governed by the Labour Relations Act. The position in the public service not only offends international labour standards but also undermines the human rights dimensions of the right to strike.⁵⁰

The law also seems to be based on a misconception. It appears clearly based on the thesis that the state as an employer cannot be subjected to the same pressures as private employers. The executive arm of government, even as an employer, is said to be "answerable only to the legislature and its right to act unilaterally should not be challenged or trammelled by particular interest groups such as trade unions".⁵¹ Further, public servants have been seen as representatives of sovereign power⁵² and cannot therefore, through a strike, be in conflict with themselves. These bases for the denial of a right to strike have largely been demolished. It is being realised that merely describing a strike as illegal does not prevent it from occurring. Zimbabwe has just learnt it the hard way with the civil servants strike in August/September 1996 and government health workers strike in October-December 1996. The

46 See section 14.

47 See section 24.

48 See section 20.

49 See section 19.

50 See above on justifications for the Right to Strike.

51 Morris and Freedman, "Is there a Public/Private Labour Law Divide?" *Comparative Labour Law Journal* 1993, p. 115 at 117.

52 *Ibid* p 117.

better approach is for government to establish for the public service, the same labour relations system as that in the private sector, thus giving government workers such rights as collective bargaining and a right to strike (subject to limitations). Zimbabwe has examples to follow even as near home as Southern Africa, where some countries such as South Africa,⁵³ Malawi,⁵⁴ Zambia⁵⁵ and Namibia⁵⁶ grant these rights to government workers.

The absence of a right to strike clearly means that failure to report for work in pursuance of a strike objective amounts to a breach of contract under the common law.⁵⁷ This would entitle the employer under the common law to summary dismissal. However, government, being a public authority cannot just exercise this common law power to dismiss strikes without following the principles of natural justice. Thus in *Zimbabwe Teacher's Association and Others v Minister of Education and Culture*,⁵⁸ government's purported mass dismissal of striking teachers who had defied its orders to return to work was held by the High Court to be unlawful. The basis of the decision was that government had breached the *audi alteram partem* rule in not giving each teacher an opportunity to be heard before being fired. It was held further that talking to the worker organisations was not the same as talking to each teacher.

The Public Service Commission has promulgated regulations governing its exercise of the power to dismiss striking workers but these do not oust the *audi alteram partem* rule.⁵⁹ However, apart from this rule, there is no other protection of strikers in the public service.

RIGHT TO STRIKE OUTSIDE THE PUBLIC SERVICE

The legislation governing labour law outside government employment is the Labour Relations Act (Chapter 28:01). This Act applies even where, as in the case of public authorities, there is legislation regulating that public authority unless there is clear provision to the contrary.⁶⁰

The Act provides for a right to resort to industrial action in a manner wider than merely providing for a right to strike. The relevant provision is section 104(1) which reads:

subject to this Act, all employees, workers committees and trade unions shall have the right to resort to collective job action for the redress of lawful grievances.

"Collective job action" is defined in section 2 as:

an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment, and includes a *strike*, boycott, lock-out, sit-in or sit-out, or other such concerted action.

A strike is thus merely one of many forms of industrial action purportedly protected. This makes any attempt at defining what exactly constitutes a strike largely academic as almost every form of industrial action is covered by the definition of "collective job action". In

53 South Africa's Labour Relations Act, No 66 of 1995.

54 Malawi Labour Relations Act, 1996.

55 Zambia's Industrial and Labour Relations Act, 1993.

56 Namibia's Labour Act, 1992.

57 *R v Smit* 1955 (1) SA 239 (c); *NTE Ltd v SACWU* 1990 (2) SA 499(N); *NUMSA v Vetsak Co-operative Ltd* 1991 1LJ 564.

58 1990 (2) ZLR 48(H).

59 See Public Service (Maintenance of Service) Regulations, 1990.

60 See *Gumbo v Norton-Selous Rural Council* 1992 (2) ZLR 403(S).

other countries, the definition of a "strike" is significant because it is only the strike which is protected and not other forms of industrial action.⁶¹ In Zimbabwe, the definition of a strike itself should be regarded as legally immaterial. However, out of abundance of caution, it is suggested that the Act only contemplates a strike as a complete cessation of work to distinguish it from the other forms of industrial action.

There are a number of aspects to note about the right to strike as enshrined in section 104(1). *First*, it is a collective right and not an individual right. The right is granted to "employees . . ." and not an "employee". As such, an individual worker cannot exercise the right to strike enshrined in the Act. *Second*, unlike in other countries, such as Germany and Sweden where a lawful strike can only be organised by a trade union,⁶² the Zimbabwean Act recognises the right to strike even by unorganised workers, as long as they are "employees".

Third, a political strike, in the sense of a strike not directed at the employer but at government or other public authority for changes to policies or law, is not covered by the Act. This is so because the definition of "collective job action" requires industrial action to be directed to a party to an employment relationship and that the demand be "related" to employment. The conservative courts in Zimbabwe are not likely to interpret "related" in such a way as to cover a political strike directed at labour policies.

Fourth, it would appear that picketing is covered. Picketing "refers to the attempts by workers engaged in an industrial dispute:

- (i) to persuade others in that workplace to take their side in the dispute;
- (ii) to deter others (known as scab labour) from taking the jobs vacated by the striking workers;
- iii) to communicate the grievance to the public;
- (iv) to persuade or pressurise customers not to enter the workplace;
- (v) to disrupt deliveries and pick-ups to and from the workplace".⁶³

The definition of "collective job action" incorporates "other such concerted action" and it is submitted that picketing is clearly such concerted action.

Fifth, *sympathy* strikes do not appear covered. "A sympathy strike is a strike in a workplace other than the one where the dispute exists in an attempt to force an employer to settle the dispute."⁶⁴ The definition of "collective job action" seems to suggest that the strike should be directed to "a party to an employment relationship" and it may be regarded absurd by a conservative judiciary to suggest that this covers anybody in an employment relationship.

Sixth, the right to strike is made subject to the restrictions (and they are many) in the Act. It is these restrictions which have made the law on strikes ridiculous.

RESTRICTIONS ON THE RIGHT TO STRIKE

There are two circumstances where the Act places no restrictions whatsoever on the right to strike and these are where workers wish to avoid an occupational hazard⁶⁵ and in "defence

61 See generally, R. Birk, *op cit* note 17 p. 405.

62 *Ibid*, p. 404.

63 A. Pycroft and B. Jordaan, *op.cit.*, note 7 p. 289.

64 *Ibid*, page 289.

65 Section 104(4)(a).

of an immediate threat to the existence of a workers committee or a registered or certified trade union".⁶⁶ It is not clear what this latter phrase exactly entails, and it is suggested that imaginative trade unions can use it to call for a strike. For instance, is an employer refusing to engage in collective bargaining not constituting a threat to the existence of a trade union? What of the employer who fires (lawfully or unlawfully) both the chairman and secretary of a worker's committee? It is submitted that there is merit in arguing that each of these circumstances may constitute an "immediate threat" as contemplated by the Act. If this be so, that could open a way in which some strikes may finally be legal in Zimbabwe.

Apart from the above two circumstances, the Act places heavy restrictions on the right to strike.

The first restriction relates to "essential services". Employers engaged in an essential service have no right to strike at all. "Essential service" is defined so widely as to cover virtually every industrial activity in Zimbabwe. This is in section 102 where it is said to cover services relating to generation, supply or distribution of electricity, fire brigade or fire service, any health services, any communications service and so on.⁶⁷ In addition to the listed service, the Minister of Labour is given power to declare further essential services.⁶⁸

This definition of essential services is unreasonably wide and makes one wonder why it was ever necessary to proclaim the right to strike in the first place. The additional powers given to the Minister can be exercised even where a strike has already broken out, thus making even these strikes that may escape the net to be subsequently made illegal.

It is suggested that the determination of what constitutes an "essential service" be democratised and the tripartite social partners be involved in delineating those services. In South Africa, for instance, the new Labour Relations Act creates a tripartite committee for the determination of essential services. Such an approach will cut down the very wide and ridiculous ambit of the definition of "essential service".⁶⁹

The second restriction is that workers may not resort to a strike before referring the dispute to a labour relations officer.⁷⁰ This restriction should be discussed together with the third restriction, which says that there is no right to strike if the dispute has been dealt with by a labour relations officer or other institution in terms of Part XII of the Act.⁷¹ Now, it is inconceivable that a dispute compulsorily referred to the dispute settlement machinery of the Act will end without being determined in order to open a way for resort to strike action. Invariably, any dispute referred to the machinery in Part XII of the Act will be "determined or disposed of" thereby leaving no room for a strike at all. These two restrictions clearly make the right to strike in the Act meaningless.

The fourth restriction is that there can be no strike where a matter is governed by an unexpired collective bargaining agreement.

The cumulative effect of the provisions on "essential services" and the second and third restrictions above, is to virtually create no room for a legal strike. Either one is an essential service and that is the end of the matter or the dispute has to be referred to the machinery in Part XII and thus closing the route to a lawful strike.

66 Section 104 (4)(b).

67 See the list in section 102 (a)-(g).

68 Section 102 (h).

69 Section 70 of SA Labour Relations Act, No. 66 of 1995.

70 Section 104 (3) (a)(ii).

71 Section 104 (3) (a)(iii).

Even where, in the unlikely event that a strike has broken out, the Act gives the Minister the power to order a stop to the strike by issuing what is called a *show cause order*⁷² asking the workers involved to defend the continuity of the strike. Pending that defence, the strike is illegal. At the hearing of the show cause order a *disposal order* ending the strike may be issued.⁷³ The Supreme Court, has recently held that only the Minister can issue a show cause order.⁷⁴ The Act requires the giving of notice for a strike of 14 days and this facilitates a show cause order.

It is precisely for this fact of giving a right to strike by one hand, and almost completely taking it away by the other, which makes the law of strikes in Zimbabwe ridiculous and misconceived. It reveals a lack of a well founded justification for the right to strike. If the right to strike had been granted on some belief or justification, the law would have made every effort to make it realistic. For instance, the very wide definition of "collective job action" which protects some forms of industrial action not protected in other industrial relations systems is rendered a laughing stock when it is realised that none of that industrial action can ever be legal in Zimbabwe.

There is another feature worth exploring. An illegal strike would certainly lead to a breach of contract under the common law entitling the employer to summarily dismiss. But the power of summary dismissal has now been curtailed by SI 371/85. Thus, even where workers have resorted to an illegal strike, the employer still has to apply for permission to dismiss them. The High Court has held that an illegal strike is conduct inconsistent with the fulfilment of the terms of a contract contrary to Section 3 (1)(a) of SI 371/85 (See *Wholesale Centre v Mehlo & Ors* 1992 (1) ZLR 376 and *Kadoma Magnesite v RHO* 1991 (1) ZLR 283. Given the principle in *Masiyiwa v T M Supermarkets* 1990 (1) ZLR 166, the Labour Relations Officer has to dismiss. What is not clear is the effect of a legal strike on the employment contract. The Act does not specifically address this issue. It is submitted that a legal strike merely suspends the employment contract and does not terminate it otherwise there will be no point in providing for a right to strike.⁷⁵ Suspension of the employment contract means the employer is not liable to the payment of wages for the period of the strike.

One strange feature of the right to strike in the Act, which also explains why it is ridiculous, is that there is no apparent link between the strike weapon and collective bargaining. Workers in essential services can not go on strike and that is the end of the matter for them. Workers in non-essential services will have to refer the deadlock to a labour relations officer and as already indicated, this closes any route to a strike. Effectively, the right to strike has not been conceived as a weapon to facilitate collective bargaining and this is difficult to understand. As shown in the opening pages of this article, one of the main justifications for a right to strike is to create an "equilibrium" which will facilitate effective collective bargaining. The result of the lack of a deliberate link between the right to strike and collective bargaining is a legally meaningless right to strike, hence the resort to illegal strikes.

Another disturbing feature of the Act is that although it grants trade unions and workers committees immunity from civil liability, it creates criminal sanctions for any breach of the provisions of the law. Thus, an illegal strike constitutes a criminal offence.⁷⁶ To this, one may only need to refer to the following learned observation:

72 Section 106.

73 Section 107.

74 *Cargo Carriers (Private) Limited v Robert Zambezi and others* SC 82/96.

75 See generally R. Birk, *op.cit.*, p. 401 FF.

76 Section 112.

The time has come to dispense with criminal regulation of industrial relations. The criminal law is a crude instrument of social control. Often it is more a matter of social retribution than an effective deterrent. However effective it might be in deterring other types of social behaviour, it has failed to inhibit strikes.⁷⁷

CONCLUSION

The right to strike is a critical feature of labour law. Zimbabwe's strike law breaches international labour standards both as regards government and non-government employees. The purported right to strike granted by the Labour Relations Act is largely meaningless and ridiculous. One most probable reason for this is that the strike provisions of the Act are not premised on some deliberately conceived purpose of strike law in industrial relations. For instance, a deliberate policy to promote collective bargaining would see more meaningful and realistic provisions of the law. It is therefore suggested that a clear justification for the right to strike be mapped out for a meaningful strike law regime to be established. Whatever the framework to be established in Zimbabwe, it should be clear that a right to strike is an indispensable component of any democratic and civilised society.

⁷⁷ Brassey *et al*, *op.cit*, p. 252.



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