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Contents

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	Articles
The Problem Of Urban Squatting In African Countries — With A Special Focus On Nairobi (Kenya) And Harare (Zimbabwe)	Victor Nkiwane 3
An Analysis Of A Grassroots Perspective On Violence Against Women In Zimbabwe In The Context Of The General Discourse On Violence	Amy Shupikai Tsanga 19
A Theory Of Delict	Dennis T Mandudzo 27
Land Expropriation Laws In Zimbabwe And Their Compatibility With International Legal Norms	Ben Hlatshwayo 41
Externally Sourced Finance and its Impact on the Doctrine of the Sovereignty and Equality of State	Arthur Johnson Manase 59
Education for Human Rights: Which Way Forward?	Marina d'Engelbronner-Kolff 64
Demarcation of Centre-Local Fiscal Relations and Financial Viability of Rural Local Authorities (District Councils) in Zimbabwe	Ben Hlatshwayo 79
Labour Laws in Zimbabwe: Legal Targets and Reality	Shephard Nzombe 117
The Press and The Law of Defamation in Zimbabwe: Achieving a Better Balance?	Geoff Feltoe 129
The Ghost of the Ultra Vires Doctrine in Zimbabwean Company Law	Artwell Gumbo 137
On Civil Procedural Law and Liberal Legalism	BDD Radipati 141
<hr/>	
<i>Sprite KM (Pvt) Ltd v Tawurai</i> 1961 R & N 290 — A Critique	Case note
	A Manase 146
<hr/>	
Law and development crisis	Book reviews
The Southern Rhodesian Question From An International Law Perspective	L Tshuma 149
	M d'Engelbronner-Kolff 157
<hr/>	
A Summary of Amendments to Zimbabwe's Constitution	Materials
Accession by Zimbabwe to International Human Rights Instruments 159
Basic Information on the Constitutional and Legal System of Zimbabwe 165
 166

LABOUR LAWS IN ZIMBABWE: LEGAL TARGETS AND REALITY

by

*Shephard Nzombe**

Editorial Note:

Every attempt was made to reproduce the written speech as closely as possible to what it was in the spoken delivery. However, necessary punctuation and additions or word substitutions had to be effected to achieve clarity in a few places. The editor's comments, additions or word substitutions have been kept to the barest minimum and are set off in square brackets [].

I would like to thank the secretaries who laboured with me through the numerous drafts of this presentation: Ms Susan Dhliwayo and Miss Eunice Chidyamatamba both of the Faculty of Law, University of Zimbabwe and Munyaradzi Gwisai, Labour Law Lecturer, University of Zimbabwe, who assisted in the final editing and proof-reading.

Finally I would like to thank Mr Kurt Haesemeyer, Resident Director, Friedrich Ebert Stiftung (FES) Harare, Zimbabwe, who, once the idea of a posthumous publication had been mooted, not only fully supported it but directed attention to this particular presentation.

Ben Hlatshwayo, August 1993.

Introduction and The Constitutional Framework

Mr. Chairman, in this paper I have used the example of Zimbabwe as a case study of the dichotomy between the legal targets and reality. My starting point by way of introduction is to point out that, firstly, the fundamental rule of our constitutional order is based on constitutional supremacy as opposed to an order based on parliamentary supremacy and sovereignty. The difference is that in our context, Parliament can only make those laws which are in compliance with the Constitution and any law which is outside the ambit of the Constitution is void to the extent of its inconsistency with the Constitution.

The second point is that the custodian of the Constitution and therefore of the entire legal order is the Supreme Court. This means that the Supreme Court is empowered by the Constitution to strike as void any law which is inconsistent with the Constitution.

The third point is that in the Constitution of Zimbabwe the basic and fundamental rights of all citizens are enshrined and entrenched in a part entitled "the Declaration of Rights" [Chapter III (ed.)] and it confers the normal traditional civil and political liberties. The details of what this means and the translations of these rights into reality, into concrete meaning for the rest of the population, is then to be found in specific legislation and other legal enactments. The content of this legislation and all these other enactments is strengthened and further developed by international instruments and practices within the arena of labour relations. A case in point is the contribution made by the International Labour Organization standards setting activities.

Now I would like to go into details regarding the provisions in our Constitution which relate to trade union rights. The first of these rights relates to protection and entitlement to the protection of the law which is found in section 18. This is a section which entitles every citizen to seek protection of the law and I must add *at one's expense* — and this is an important qualification.

* Lecturer in Law, Department of Public Law and Dean of Students, University of Zimbabwe. Shepard Nzombe tragically passed away in a car accident on 7 December 1992. This is a posthumous transcription of a lecture he delivered at a Friedrich Ebert Stiftung (FES)-sponsored conference on "Democracy and Trade Unions In Africa" held at the Cresta Lodge, Harare, Zimbabwe from 9-11 November, 1992. Edited by Ben Hlatshwayo, Lecturer, Department of Public Law, University of Zimbabwe.

The second and major provision relates to the right of assembly and association for the protection and advancement of one's interests and in this provision the Constitution specifically mentions the exercise of that right in associating in trade unions and political parties.

I must also add that the enjoyment of these fundamental rights can be qualified or even suspended in a state of public emergency, which means they will not be enjoyed in the form in which they exist in the Constitution or at all for the duration of the emergency.

Now, in mobilizing and taking and deriving authority from these constitutional provisions, we then have certain specific legislation which puts some flesh into these general rights which are in the Constitution and in the Declaration of Rights. The first of these is the Labour Relations Act, which is the main instrument providing for the relationship between employers and employees at both individual and collective levels.

The second piece of legislation which apparently has implications for the enjoyment of these rights is the Law and Order (Maintenance) Act [Chapter 65] and at some point in the course of our history until a few years ago, the Emergency Powers Act [Chapter 83] also made an input into the definition of trade union rights.

Now what I want to do at this stage is to assess the extent to which the provisions in these Acts of Parliament are in compliance and consistent with the provisions in the Constitution, starting with the Labour Relations Act.

The Labour Relations Act

The Labour Relations Act provides for the right to associate in trade unions and employers' organisations and then goes on to give greater detail than that which is in the Constitution. However, in respect of certain categories of employees, this right is so hedged with so many qualifications that at the end it virtually does not exist as far as those categories of employees are concerned. A category in question is "managerial employees". "Managerial employees" have been defined so widely as to include, for instance, in a hotel, the head waiter to the extent that he supervises and can make recommendations regarding hiring and firing the discipline, and the retrenchment of other employees. To the extent that he has this limited responsibility, he is a managerial employee who can therefore not associate in trade unions!

Registration Requirements

The second issue relating to trade unions, is the requirement that trade unions be registered "in order to enjoy certain privileges". That is the wording of the Act. They register to enjoy privileges [section 29]. What are these privileges? The "privileges" relate to the right to collect union dues, the right to engage in collective bargaining, the right to engage in collective job action, the right to access to employees at their place of work, the right to assistance from the officials of the Ministry of Labour. These are the "privileges" which a registered union enjoys. I am sure you can already see that there are "privileges" in quotes. What about the non-registered union? The non-registered union is not entitled to these "privileges", which in reality means it cannot exist because the so-called privileges are in reality not privileges but are indeed basic [rights necessary for] the discharge and the performance of even traditional trade union functions.

Other Controls

The other provision relates to controls over union finances. The Minister of Labour has general powers to control union finances to the extent that he can prescribe the level of union dues. That is the extent to which his powers go and are cast [section 58]. Regarding union finances again, there is a specific provision which prohibits the use of union dues for political purposes. So, unions cannot use their finances for political

purposes in terms of the Act. And, a proposed amendment to the Labour Relations Act, [Labour Relations Amendment Act 1992] which has now been signed but whose date of [coming into] effect has not been gazetted, also prohibits the federation of trade unions from raising dues from individual members of trade unions, which means it can only raise dues from affiliated unions but cannot go down to the individual members and raise dues.

Another provision in the Labour Relations Act (which is on the verge of amendment) provides for a policy of one union in one industry and registration was conditional on that policy being followed. So, only one union in one industry. [Section 45(I)(d)].

The other element which is very important for the general [observance] of the trade union rights relates to collective bargaining. After the employers and the trade union have agreed regarding the general terms and conditions, that agreement does not assume legal force until it is registered and only upon registration does it assume legal effect and can it be legally enforced. And finally there is the virtual prohibition of collective job action under the Labour Relations Act.

Constitutionality of Controls

Now, regarding the constitutionality of these issues: In the first instance the constitutional provision which guarantees freedom of association makes it very clear that it means individuals must be able to associate in political parties, in trade unions and employers' organisations without previous authorization from the state [section 21(i)]. There are a number of associations which can be registered: companies, partnerships, co-operatives, etc. The state is allowed to make a law for the registration of all those except for the registration of trade unions, employers' organizations and political parties. These three have been specifically excluded from the category of organisations or associations which require registration prior to being able to operate legally. And I think the reasons are obvious, particularly within the context of British jurisprudence from which the Zimbabwean Constitution largely derives. These are organizations which are regarded as fundamental pillars in any democratic society and attempts to reduce their effectiveness and attempts to control their organization are then deemed to be an infringement on democracy and hence their exclusion from the registration requirement. In fact, there was a case which went up to the Privy Council (which was the Appellate Court during the days of British colonial rule) which emanated from the Caribbean where the ruling party had made a law regarding the registration of political parties and said only those parties which comply with the following will be registered:

1. They must not subscribe to communist views.
2. They must disclose the sources of their finance on a regular basis as prescribed by the appropriate Minister.
3. They must open up registers of their members and lodge them with certain offices.

Certain parties which felt that this was a threat to the whole multiparty and pluralistic [system] in that country took the matter right up to the highest court of appeal which at the time was the Privy Council in London and it is in that forum that law was [declared] unconstitutional and therefore null and void. So the question of registration in our context is debatable. In fact, as I speak right now, together with certain colleagues, we have sought the opinion of the Supreme Court on this matter because it is only the Supreme Court which has the jurisdiction and authority to [adjudicate] over constitutional matters particularly those relating to fundamental rights. So, we still await an opinion of the Supreme Court because our contention is that the whole section providing for the registration of trade unions and employers' organisations is null and void because it is unconstitutional.

The second issue relates to the controls over union finances. Since these controls arise from the registration requirements, the moment the registration requirement is [declared] unconstitutional, it must also follow that any section, any provision associated with that registration which provides for control over union finances is similarly void and unconstitutional.

Managerial Employees

[As for] the other element which relates to the right to associate which excludes managerial employees, well, those managerial employees affected are entitled to challenge this apparent violation of their constitutional right to associate in trade unions. In fact, we have lined up test cases (and the example I have given you is one of them) one of which involves a head waiter and the other example involves the supervisor of a gang of road labourers because in terms of that definition he is also capable of being a managerial employee and therefore has no right to associate in trade unions. Now, of course, this has a significant impact on trade unions and the trade union strength because if you are to exclude the semi-literate supervisors from unionization, you are virtually condemning the whole concept of unionization to unskilled and even illiterate workers and you say these are the only people qualified to be members of trade unions particularly within our context where we still have a large rate of illiteracy at certain generations, [especially the] colonial generation who did not have the advantage of the opening up of the educational system which took place in 1980. So, this has a significant bearing on the quality of leadership. It has a bearing on the quality of the membership and consequently on the quality of the activities which the unions can perform and to that extent it is the issue which the trade unions have to take up and as I said we are lining up a few test cases to just get that definition of managerial employee set aside as being in violation of certain constitutional rights.

Constitutionality of Ministerial Powers

Now, within the same Act we have general executive and administrative powers which have been conferred upon the Minister of Labour. The Minister of Labour has power to make regulations on anything concerned with the development of labour relations [section 17]. Now, his powers have been exercised by making regulations for termination of employment, making regulations regarding minimum wages. He has powers to make regulations over anything connected with labour relations. The problem here is how to reconcile these wide powers with the Constitution, with democratic consultation and with controls, checks and balances. The constitutional issue which arises from those wide powers can be posed as follows:

Firstly, the relationship between the employer and employees at both individual and collective levels is traditionally a private relationship in that the parties freely and voluntarily decide to enter into it. It is, in a way, like a marriage where the parties decide who to enter into a relationship with and when to get out of it. So, it is traditionally in the domain of what we would refer to as private law, as it were.

Secondly, to what extent should Parliament and Government administrative mechanisms interfere and prescribe rules of that relationship? How far should they go? We pose this question not only in relation to labour but also in relation to other relationships which we conceptualize as falling in the domain of "private".

Now, in attempting to answer this I have sought the guidance of the Constitution. In terms of the Constitution, Parliament is charged with and I quote, "making laws for the peace, order and good government of Zimbabwe" [section 50]. And, in the same Constitution, the executive authority of Zimbabwe is conferred on the President and he exercises this authority through his Ministers. In the same Constitution, particularly that section [Chapter III, sections 11–23] providing for those fundamental rights, the enjoyment of those rights whenever it is interfered with by the state or whenever the state has occasion to interfere with the enjoyment of those rights, it must be able to show that its actions are, and I quote, "reasonably justifiable in a democratic society". So, when the state makes a law even for the registration of companies, for the registration of partnerships; when the state makes a law curbing freedom of expression, curbing freedom of conscience,

curbing various other freedoms; whenever it is empowered to make a law and this excludes the area regarding trade unions because in that area it is not even empowered to make a law, but whenever it is empowered to make a law, it must be able to show that its law is reasonably justifiable in a democratic society. Now, we can therefore use that as a test for judging the appropriateness of the extent the state goes in prescribing the rules governing the relationship between the employer and the employee. To what extent is such intervention reasonably justifiable in a democratic society? And using that test one is able to strike out some of these wide and unqualified powers which have been given to the Minister to make regulations because one can say the conferment of such wide powers without limits is not reasonably justifiable in a democratic society.

And finally, since I am running out of time, associated with those wide powers (because the exercise of those wide powers falls in the realm of administrative law, because he [the Minister] now must make administrative decisions, must make administrative regulations) one must look at it within the context of a political economic system and even a legal system where administrative law and its popular mobilization are not properly developed. This therefore means the extent to which the Minister can be challenged, can have his actions qualified and can follow and observe basic tenets of the rule of law is therefore [not clearly defined], suspect and dubious owing to the context in which these powers are being exercised. Now, one finds within our legal system and our political economic context a large dichotomy between what the law says and what the reality is: what the law, particularly the Constitution, requires, and the laws which have [been made] on the ground. The examples I have just cited are just but a few, and the question which obviously occurs in our minds is why this is so, why we have such a situation and how we should redress that imbalance, that dichotomy? I will leave some of these questions to the discussion but I will also provide some of the observations which I have made myself.

Legal And Political Consciousness

Firstly, such an imbalance and dichotomy exists in the absence of certain levels of legal and political consciousness among the social groups concerned. I know some of the things we are having to put up with here have been challenged long ago within the legal system in South Africa, for instance, where there has been a lot of litigation within the area of labour relations law. A number of these issues have been taken up and challenged and appropriate redress given.

Secondly, in a legal system which affords legal protection and redress at one's expense, you obviously have problems in that the majority of the people are financially unable to mobilize the legal system for the protection of their rights. And we do not have a developed legal aid system which can then fill in that gap. And this applies not only in the area of labour relations law but in all other areas; in the area of consumer rights, for instance, a lot of people get away with murder owing to the inability of people to mobilise the legal system because one can only do so at one's expense.

Thirdly, there is general ignorance on the part of the citizens and this also applies to workers who do not know the extent and the limits of their rights, and the extent and limits of the powers of the state. A case in point, which is very fresh in my memory, is a case which I took on board on Friday, which is still fresh on my table. We have a law which gives employers' and workers' organisations at a plant level the right and responsibility of agreeing on retrenchment and the accompanying package [SI 404 of 1990]. So this does not require state authority anymore. The workers and employers at the plant level would sit in a forum styled the Works Council, agree on retrenchment, agree on the package and inform the Ministry accordingly. Now, what has been happening is that suddenly a group of workers discover they are being retrenched and they are not happy with the package they are getting. They think they have been short-changed and they want to challenge the whole exercise and the package which they have got only to discover that their representatives agreed to it, and therefore it was done in terms of the law and they start saying, "But we did not know, we didn't discuss it, they didn't even come back to tell us what is happening" and, "How can we get the order set aside on that basis?" And then it opens up a whole complex area of the law. But you can see that in this case,

and there are so many of these cases, there is a lot of ignorance on the part of the individual employees about matters that directly affect their future. And this ignorance is symptomatic of the general level of ignorance which in turn does not assist in the mobilization of the legal system for the redress of all these violations of the Constitution.

And finally, in order for this dichotomy between the legal targets and the reality to be [redressed], there must be wide and in-depth activities by trade unions in general trade union areas and functions because it is only when they are so involved and so active that they can then encounter the hindrances which the present law has made which will also open up the consciousness and lead to the possibility of these organisations asking [the necessary questions]. This dichotomy cannot be taken up on an academic basis. It can only be taken up in reality. But to me that is but one explanation for the continued existence of the difference between the legal targets and the reality on the ground. As to what can be done, I think these are the issues, Mr. Chairman, which we can then take up in the course of the discussion since I know we have lots of time to discuss and then I can also make some of the [points] which I couldn't make during the course of the presentation. Thank you.

Response To Questions

Thank you, Mr Chairman. As you can see I have got quite a mouthful to respond to. I don't know whether I will be able to do justice to all of [the questions], even though in my profession I am sworn to do justice.

Employer-Employee Relationship: Private or Public Law?

The first question relates to whether employer-employee relationships are entirely in the realm of private law given the input of trade unions and employers' associations. As I was discussing the matter with the participant who posed it, I remarked that Labour Law in our University is in the Department of Public Law, which only partly answers the question. I don't think it is entirely in the realm of private law [either], it [just] has private law elements. The reason is that given the historical inequality between an individual employee and his employer, it became necessary at a certain point during the welfare era, when a lot of welfare legislation was being passed, for the state to make an input regarding the minimum terms and conditions upon which employers and employees must relate. So, legislation then became a major source of the content of the relationship between the employer and the employee. And then subsequently, with the unionization among workers and the increased organization among workers and with their legitimation (because there was a point when to organise and to come together and associate in trade unions was a crime of conspiracy, of conspiring to injure another man in his trade). Now, with the passing of that era and with the legitimation of trade unions, they also began to bargain with their employers or employers' organisations and consequently collective bargaining also assumed a major role in contributing towards the contract of employment. So, we now have two major contributors to the contract of employment: *legislation and collective bargaining*, [both] of which involved either the state or a collective of employees with a collective of employers or with one employer because as an individual he still represents a social power. And that kind of input, that contribution, [significantly reduced] the erstwhile private character of the relationship between the employer and the employee. The private element, however, remained in the sense that the employee could still at an individual level negotiate terms and conditions with his employer as an individual but if one looks at the bulk of workers, the industrial workers for instance, the main sources of their terms and conditions of employment have become legislation and/or collective bargaining agreements depending on the system in each country. It varies; one can find that in some countries collective bargaining is not that developed, legislation is more developed; that is a variable, but the main sources ceased to be the individual negotiating with his individual employer, so that the dominant element became legislation and collective bargaining. And it is those dominant elements which give it its character of being a public law area and category. Nonetheless, the private law element is still there.

Registration And Constitutional Rights

I was trying to go through the order [in which the questions were posed] but there are certain questions which immediately come to my mind. For instance, the last one which I want to tackle immediately: Registration. The context in which I discussed that is one where we have a Constitution which says in respect of all other organizations prior to their assuming a legal personality there must be registered. If we form a company now to produce bricks, in order for that company to assume a legal personality, we must register it under the Companies Act. If we do not, then it cannot exist as a company recognised by our legal system. Now, when it comes to the issue of trade unions, the same logic cannot simply be applied in that context because there are fears that if you allow the governments to make similar laws in respect of trade unions, employers' organizations and political parties, they could use that to strangle the opposition and some elements of civil society. I gave you the example in the Caribbean where conditions for registration of political parties were: "no communism, tell us where your money is coming from, register your members, etc". And that was the ruling party [making those conditions] and therefore it would have been able to remain in its dominant position as a result of its control and knowledge about how the opposition and how other elements were operating. So that is the other side which we need to consider. Now, in order to strike a balance between the issue of potential anarchy and chaos arising if you say, "no registration, its free for all" (there could well indeed be potential anarchy) the issue hinges around whether in order for the unions to become operative they need registration first; which means they need prior state authorization for their existence. And that's different from mere registration. When you say you need prior state authorization you are going beyond registration, you are saying the state has the power to determine whether you should be in existence or out of existence. Registration of that nature becomes unconstitutional. This must be distinguished from registration for purely administrative purposes. Now, I gave you the example where the state says these are the "privileges" which a registered organisation gets. And if you look into the content of those privileges, they really amount to the basis upon which those organizations exist. So it means for these organization to come into existence they need prior state authorization, prior state approval. And there are, obviously, dangers in such an approach.

The question about free for all: If we are prepared to accept that situation in the realm of political parties, what is so special about the realm of trade unions? We want anybody who wants to form a political party to immediately come to the platform and announce his party. Surely, we must also demand the same in the area of trade unions if the opposite is previous state authorization. At the end of the day it is really the conduct, the practice, the culture, the performance, the accountability which will ultimately prevent the chaos from taking place. It may be necessary to go through that chaos in order for us to learn. And there is no shortcut to it!

Role Of Academics

Now, the other question, Mr Chairman, of a more general nature relates to the role of academics. That's a tricky one! And I would want to answer it within our own concrete environment, so that I do not give an academic response to it! I will confine my example to the subject matter here, namely, the question of trade unions. In 1980 after the formation of the ZCTU [Zimbabwe Congress of Trade Unions] in this country it [became] necessary to forge a certain relationship with the intellectuals, with those intellectuals and those academics who shared the same ideological commitment, because academics have different ideological commitments which arise out of their conviction or out of their own background. There are those even at an intellectual level who are committed to the pursuit of the intellectual path and career which is closely associated with the employers and there are others who think along the lines of the employees. It was necessary for the trade union to be able to forge a certain relationship with those intellectuals who shared the same goals with them, and who were committed to the development of our society with strong trade unions. In fact, I think there is no other way. If the trade unions say, "we do not even want to link up with those intellectuals", it is wrong. Wrong in the sense that the trade union activities at this moment in time require a combination of

strategies some of which are best performed with an alliance with the intellectuals. One of the issues our South African comrades raised are the dangers or the concerns about possibly legalising the struggle and therefore taking it from the shop-floor into the courts. I think there is that danger indeed. But what one is looking at is the combination of methods of realising the same goal. There are shop-floor strategies and there can also be legal strategies. When you have a crisis, when you have got a strike and, in the South African context, there have been numerous instances where the legality of strike action had to be determined for purposes of dealing with the consequences arising out of it, for purposes of dealing with possible dismissals, for purposes of dealing with loss of pay while on strike. There are circumstances when you must determine whether an activist at a shop-floor level must be dismissed as a result of activities emanating from his membership of a trade union. The defence of those employees and the [determination] of those issues require an intellectual input. And therefore it becomes necessary to have a certain alliance with the intellectuals. You can develop your own intellectuals among the ranks of workers but then they become intellectuals and, therefore, cease to be in the traditional category of employees. But there are intellectuals who are closely identifying with the struggle. In the South African case the general secretary of the National Union of Mineworkers, Cyril Ramaposa, at one point was an intellectual! Now, of course, he is performing other responsibilities, but he was leading strike actions then. Nobody [ever said] because of his influence and role in the NUM it become less militant, more moderate and increasingly academic and intellectual. It was still a militant union pursuing the normal traditional trade union goals but with a sharper cutting edge because of a combination of this intellectual commitment and the industrial activism at the shop floor level. So, I think it is a question of the extent to which these two can relate and how they can then harness their collective inputs because the workers must be able to generate sufficient activity for the intellectuals to be able to mobilize in the general direction of the realization of the common cause.

A concrete example of what has happened in Zimbabwe is when workers [engaged in] collective bargaining [for the first time]. While they were still on their own, as it were, during the early period, when the opening up was taking place and when the realignment of forces had not yet been settled, workers were talking about the cost of living having gone up, their having extended family responsibilities, transport being more expensive, the rate of inflation going up, etc. On the basis of that they would then say, "we are therefore asking for a hundred percent increase in wages". That was the negotiating position. And obviously it's an unsustainable negotiating position. You needed to do a bit more research, to be able to go into the performance of the company, to be able to go into the profit, to be able to take into account a whole host of other economic factors as the basis of formulating a negotiating position which position can then be backed by militant trade union action at the shop-floor level. You can see in that scenario the need for some kind of combination, some kind of alliance between the two and we are beginning to see it now where workers are able to produce a position paper with the assistance of intellectuals which shows a general survey of the economic performance of that industry which then becomes the basis of their negotiating position so that they are able to counter some of the positions which employers make, which are economically sound on the basis of their own economic research and economic position. Whereas if one is saying, "the company has no money" and the other is saying, "I have a big family to support", how can the two possibly negotiate? So [a different] approach became necessary of making the services of professionals, be they lawyers or economists, at the disposal of unions.

And that is the alliance which we have built now, so that there is that working relationship which previously did not exist and I think it's a very positive thing. And another point on a lighter note to make: because of the economic structural adjustment programme taking place in Africa, intellectuals are no longer able to financially sustain themselves on the basis of what they earn at universities. So they have two options, either to engage in so much moonlighting, you know, do all kinds of things outside, or to begin to fight for better terms and conditions, which then brings them into the realm of the working class, where they must then adopt some of the strategies and tactics which the industrial workers have been using for ages. And I remember recently at a meeting of academics at the University, we were talking of strike action. We said, "we must flex our muscles". Then somebody said, "yes, we must do it, but we must not do it alone. Let us link up with the

workers; and with the students". So you can begin to see that during the comfort of the fifties, the sixties and the seventies the issue of the strike was never an issue and the question of alliances and linking up was never contemplated at all. Now the reality of the economic situation is forcing and imposing an alliance of the two. I think [intellectuals] are now coming down to reality, thanks to structural adjustment programmes!

Internal Democracy Within Trade Unions

[As for] internal democracy [within] unions as the basis for the comment which I made about workers being retrenched and not knowing how it came about etc, I need to make a qualification here. In Zimbabwe unions exist at an industrial national level. So they are industrial unions. At shopfloor level, we do not have, enshrined in our legislation, union shopfloor organs which can negotiate with management in terms of the law. What we have at shopfloor level are what are called workers' committees which are legally independent of trade unions, and management and workers' committees constitute the works councils which make these important decisions. So, if, and this is the case in a number of unions, only about at most thirty percent of the workers are unionised and yet there are workers' committees at every shopfloor, it means in a substantial number of enterprises the workers' committees are completely independent of the union and in some cases they actually fight with the union. These workers' committees are elected by the workers of the enterprises, but the workers are not confined to electing just union members. They select whoever they wish. Now, it is these workers' committees when they are sitting in a Works Council who make decisions regarding retrenchment and negotiate over what we call labour Disciplinary Codes which have legal force. So, the situation you have is that in some industries the unions have worked flat out to unionise everybody, and when you have such a case it means they are able to have control of these workers' committee at shop floor level because everybody is a member of the union and, therefore, the workers' committees at the shopfloor level becomes the lowest organ of union organization. In others they have failed to establish that legitimacy and they have failed to unionise and therefore create such a structure. When we carried out some research two years ago, we found that there was a lot of hostility between the workers' committee and the trade union, even among those workers' committees that had been freely elected. I had a concrete experience in a case where I was asked to be an arbitrator.

In our first meeting, the workers' committee came and I invited the union representatives [as well]. They were not in the workers' committee. And then the workers' committee said, "Mr Chairman, we don't want these two gentlemen, these trade union people. We do not want them". I said, "but they represent workers and there is a union in your industry". They said, "they are unreliable, they just take our subscriptions without accountability, we don't want them at all". So, it was a difficult situation to deal with but there is such open hostility, and some of them did not even know the name of the union in that industry, let alone the issues of trade union democracy, issues of accountability, transparency and all the issues we talk about within the political system. These issues must also be extended to the internal organisation of unions because that has a bearing on their strength and it also gives them the qualification and authority to demand accountability and transparency from the political leadership. They [the trade unionists] cannot run with the hares and hunt with the hounds!

Popularizing Constitutional Issues

Are the workers aware of the constitutional limitations which I have dealt with? The question of popularizing these issues is a function of civil society, either through trade unions, through women's organizations, youth organizations, the whole lot. Of course, trade unions have the responsibility of popularizing certain issues among their members for purposes of getting their support when they negotiate with government and employers in respect of those issues. Because without popular awareness and popular support over those issues, the leadership is on its own. It is at a different wavelength from the membership and therefore it cannot rely on the support of the membership when it is negotiating and whomsoever is negotiating with it can take advantage of that alienation between the leadership and the rank and file. If we build a strong

relationship between the workers and the intellectuals, then the popularization of these issues is easily facilitated because part of the popularization involves certain pedagogical tactics and aspects where intellectuals can make a significant input. So, there is need for that relationship and without that relationship in any significant measure then of course the whole issue of popularizing them may not yield the desired results. In our context some of these issues have not been sufficiently popularized to generate discussion and debate among workers. Also, the workers we are talking about are a political constituency. So, once they take a position the politicians must also reckon with that position at a political level. Thus, some of the issues which are purely industrial issues can then assume a political character.

Ministerial Powers And Control

There was a question about the Constitution, the Labour Relations Act and the Minister of Labour's regulatory powers. Where do these [powers] come from? The Minister of Labour's regulatory powers come from the Labour Relations Act. The Act delegates certain functions to the Minister. In my view sometimes the functions which have been delegated are so broad, so general and so all-encompassing that it really amounts to over-centralising these powers in the hands of the Minister and there are obvious dangers associated with such a set-up, with such a system. These dangers are already becoming apparent in our case where you must register your collective bargaining agreement with the Minister before it assumes legal force. For example, the unions and the employers agreed on certain bargaining agreements. The Minister refused to register these agreements because government wanted the wage increments in those agreements staggered because it was not in keeping with the general economic policy of the government at the time, not in line with the structural adjustment programme [to award high wage increases]. It caused quite an uproar between the workers and the employers on one hand and the government on the other. So, there was a lot of tension associated with that. And there has been tension associated with the exercise of these powers in a number of other instances. It defeats the whole process of tripartism which one of the Labour Minister's officials mentioned here that they ratified the Convention on Tripartism this morning. That is all defeated by an approach which confers power in of the Minister, especially power of such a wide nature.

What is the democratic basis of this power and this control? The argument goes that as the Minister and as government they are the custodians of the general public's interest and as custodians of that interest they exercise it in a non-partisan fashion and for that reasons they need the reserve powers to be able to say, "you should go ahead with this or you shouldn't." That argument can no longer be sustained now in the plural society which now generally accepts the notion of civil society and its contribution, which recognises democratic and popular participation in decision making. It means the patronising role of the state, at least in conceptual terms, is no longer as readily accepted as it was before. Because there was a time when we looked towards government for every thing, we looked towards government for redistributing the country's economic wealth, we looked towards the government to deliver, we looked towards the government for every thing. Up to now you still see remnants of that ideology. When workers have a problem they want to run to government and appeal to government. Government is then seen as a big "Father Christmas" who is able to give out gifts as and when he wishes. I think that whole ideology is fast receding because of our experiences with the same governments. It is they who have led us to revise that approach and that concept [because] we have seen various subjective tendencies, of corruption, favouritism, etc and where the central authority which the population had in good faith bestowed upon government has been abused leading to a lack of confidence in government's impartiality and neutrality and government's fatherly role. I think that whole concept is gone. It's like some of our old nationalists. You know, we used to have so much confidence in them that we were prepared to make them presidents for life. We thought they could never go wrong or we thought they should never be questioned or criticized. I think you all agree with me that all that is now a thing of the past. Similarly in this area all this should also be a thing of the past. If you believe in tripartisms, let it be tripartism.

Registration Of The Federation And Industrial Unions

From Mozambique, there was the question about which must be registered first, the federation or the industrial union. The federation is a product of the industrial union. So, without the industrial unions you can only have a federation in a very abstract form because it is these unions which then form the federation. So it must therefore follow that you must have these individual industrial unions, associated unions, however you decide to call them, as a basis for the formation of the federation. Therefore, in terms of the sequence, the normal sequence is when you have the industrial unions first.

Now, I think the other main problem relates to [prescribing time limits for registration of trade unions]. It depends on what you want to achieve by the process of registration. If registration is simply for the purposes of knowing who exists and who does not exist, there is some logic in it. But if, on the other hand, registration is for purposes of conferring a legal status, then it's a different kettle of fish altogether. Now, if you put a time period and say, "you must register by this date", I think there is a problem there. It's like saying "If you want to form a political party, you must do so this year; if you miss it, you will never get the chance again". I think there are obviously a lot of problems associated with putting time limits towards the formation of associations in general. I don't think one can say time is of the essence, that they must register now because if you say so it amounts to the state almost organising and forming these associations and it is not coming from the workers themselves. Because if it comes from the workers themselves, there is no need for a time limit to be imposed regarding when they must register. So, I have a feeling that there is a conceptual problem in prescribing a time within which associations of any nature must register, unless you are saying if you want to perform or take part in activity "A", you must register now. That's one thing. That's separate from saying, "if you want to be allowed to exist at all, you must register now", which appears to be what I got from you as happening in the Mozambican context.

There was a question posed regarding whether there are opportunities within our legal frame-work for trade unions to operate effectively. I would say there would always be these opportunities if you take advantage of them. If for instance right now the unions stop being active, they will never come into collision or face the reality of the limitations of the current laws. It is only when they are active as I said before, it is only when they begin to organise, begin to engage in bargaining, begin to engage in negotiations, want to call a strike, and they realise they cannot do it because of the law that they begin to question the legitimacy of such a law. It is only when they want to engage in certain activities and they are threatened with deregistration that they will say, "But, why should we register in the first place? Let us examine this whole concept of registration". Because there is indeed, theoretically, a potential of the state to deregister certain unions if they do not comply with certain provisions. And when you are deregistered you are legally incapacitated. But if you do not have such a situation, then of course nobody is likely to look into it in any greater detail because it is not hampering any trade union activities and you have not yet entered into a certain collision course with the state to justify the state using those reserve powers which will then lead you to question the use of those powers. But we have had instances in this country where the state has said the Zimbabwe Congress of Trade Unions as a federation is not registered and therefore whatever it is doing is illegal. It is then that the issue of the constitutionality of registration became an issue, and this is why we were then seeking an opinion from the Supreme Court. Of course, if the Supreme Court rules otherwise there may then be no option but to fall back on the shop floor level to try and seek some assistance towards the amendment to correct the mischief which may be perceived to be hampering the free development of the trade unions.

Use Of Trade Union Finances For Political Party Activities

There was a question about the political conscientization of the workers as a basis for empowering them. I think it was raised in the context of what I said about trade unions not being allowed to use their finances for political purposes. The prohibition here is against linking the trade unions with a particular political party. I

am not so sure whether the state is better qualified [than the unions] to impose that standard. In normal circumstances it's a choice which is freely made by the unions: to affiliate or not to affiliate. Theoretically, in our context, the unions cannot, using their own initiative, form a political party. They cannot form and support an MMD [Zambian trade union-supported Movement for multi-party Democracy] or a labour party through union finances. Now, this is something which I will leave to you to discuss as to whether it is proper for there to be such legislation because it raises a lot of important issues particularly from the background we are coming from, the background of democratic centralism, the background of the vanguard party providing political leadership to trade unions, workers, students, etc., as was the concept during the period of the Soviet Union under the Communist Party of the Soviet Union. Now, obviously in our context, one can see the politicians being worried about the unions being able to use their numbers, their influence and their constituencies to try and topple existing political structures, to try and remove the government from power. So in an effort to try and stop that you then have these provisions which stop the unions from forming any political alliance, which is financially backed, with any particular political party. I would be more comfortable if these issues are resolved in trade union congresses than in Parliament because I think trade union congresses are the better forum to resolve these issues than Parliament.

Mr. Chairman, I think I can take it easy now and pass it on. If there are any other questions which I may not have answered I will take them up later ...



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