FACULTY OF LAW

A CRITICAL EXAMINATION OF THE NATURE, SCOPE AND EXTENT OF THE RIGHT TO COLLECTIVE BARGAINING IN THE CONSTITUTION OF ZIMBABWE.

This dissertation is submitted by

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(R170463L)

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Supervisor: Mr N. Maringe

Declaration

I declare that this dissertation is my own work and has not been submitted for any degree or examination in any institution or published in any journal, textbook or media. The sources that were used in this dissertation were properly referenced. I have not previously in its entirely or in part submitted it for obtaining a qualification.

Signed: …….....

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Approval Form

The undersigned certify that they have read and recommend to **Zimbabwe Ezekiel Guti University Faculty of Law** for acceptance, a dissertation entitled **a critical examination of the nature, scope and extent of the right to collective bargaining in the Constitution of Zimbabwe** submitted by **Pride Psychology Dzapasi (R170463L)** in partial fulfillment of the requirements for the degree Bachelor of Laws (Honours) Degree.

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Dedication

To my dearest parents Mr and Mrs Dzapasi for giving birth to a visionary, and to my siblings, humble as they are who have dedicated themselves in prayer for the wellbeing of our family, I dedicate this work to them. And to my late brother **Vision Dzapasi** who was brutally electrocuted and died on the 6th day of January 2019 at the age of 8 years. May your dearest soul continue to rest in peace in the House of the Lord.

And

To all those who were harassed, maimed and murdered due to their quest for social justice and beliefs in the democratic cause since the attainment of our national independence. Never again shall we as Zimbabweans allow violence to be used to settle political disputes. Democracy requires politics to lead the gun. Victory against violence and intolerance is irreversible. We must all have a shared common national vision that will set Zimbabwe on a developmental trajectory. Democracy and constitutionalism may be painful and inconvenient sometimes, yet in serious national building this pain and inconvenience is unavoidable. Hate, acrimony and rancor can drive away the people's demand for true democracy at wherever level. A true revolution is built on solid values and principles and not on opportunism, favouritism and self-hate. Zimbabwe belongs to all of us regardless of political colours and persuasions. Toxicity and negativity has destroyed the fiber of our country. We must all believe in the collective which is Zimbabwe. The citizens are the engines that turn the turbines of good governance, a flourishing economy, national prosperity and industrial harmony at workplaces. It's possible for the sun to shine once again in Zimbabwe.

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I want to appreciate my family, and in a very special way I want to make a mention of my mother Zvisinei Makosa and my father Clever Dzapasi, this work is a product of your moral and financial support. Your prayers sustained me this far. Prominent, Proceed, Felia, Felisper, Lesie and Letie, thank you. In sincere gratitude, I would want to thank the Almighty Creator for divine favour and wisdom.

Abstract

Zimbabwe's legal system in all its forms is founded in the value of the supremacy of the Constitution. This means that whenever a legal norm or rule of decision which is established by the Constitution comes into practical conflict with a legal norm or rule of decision stipulated by non-constitutional law, the rule or norm that is contained in the Constitution is to be given precedence by anyone whose duty is to enforce the provisions of the Constitution. For the first time in the history of the existence of independent Zimbabwe, the right to collective bargaining is now enshrined under section 65 (5) (a) of the Constitution which provides that, '*Except for members of the security services, every employee, employer, trade union and employee or employer's organization has the right to collective bargaining*.' This provision is very important in our labour law jurisprudence considering the fact that the Constitution is the supreme law of the land. The concept of constitutional supremacy is enshrined on section 2 (1) of the Constitution of Zimbabwe. This section provides that '*this Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of its inconsistency*.' This is a milestone achievement which deserves commendation especially if one compares the new Constitution and with the old Lancaster House Constitution (LHC) which is a mere dry letter without any explicit labour rights. This current Constitution is a transformative legal document that seeks to transform the lives and create better living conditions for Zimbabweans.

The right to collective bargaining as enshrined in the Constitution forms the heart of Zimbabwe's labour rights. This is so because the right assumes a willingness on each side to abandon fixed positions were possible in order to find common ground. The inclusion of the right to collective bargaining in the Constitution is a direct response to international norms, practices and developments in the area of labour law. A critical and legitimate question then follows; does the Constitution of Zimbabwe impose a judicially enforceable duty to bargain on the other party in an employment relationship? It is a question that has to be answered by the researcher as this research unfolds. However, the nature, scope and meaning of this right as provided in the Constitution directly respond to the unique circumstances underpinning Zimbabwe's labour regime, and that constantly inform debates and discussions on the right to collective bargaining.

The right to collective bargaining is of cardinal importance in any democratic society based on social justice and democracy in the workplace. Further, section 2 of the Labour Act defines a

collective bargaining agreement as '…*an agreement negotiated in accordance with the provisions of this Act which regulates the terms and conditions of employment of employees*.' This definition is very helpful. It unpacks the Labour Act's contemplation of the process of collective bargaining as a negotiation process with a view to agreeing on the terms and conditions of employment. The law of collective bargaining in Zimbabwe is rooted on 2A (1) (c) of the Labour Act clearly provides that the purpose of the Act is to advance social justice and democracy at the workplace by providing a legal framework within which employees and employers can bargain effectively for the improvement of conditions of employment. This patently shows that the right to collective bargaining is clothed with the force of law. The Labour Act promotes the participation of employees in decisions affecting their interests at the workplace. This is in line with section 65 (5) (a) of the Constitution of Zimbabwe.

Acronyms

ACHPR	African Charter on Human and People's Rights
BCEA	Basic Conditions of Employment Act
CALR	Centre of Applied Legal Research
CCMA	Commission for Conciliation, Mediation and Arbitration
CJ	Chief Justice
CPD	Continuous Professional Development
CSO	Civil Society Organizations
GZU	Great Zimbabwe University
IBA	International Bar Association
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Convention
JSC	Judicial Service Commission
LHC	Lancaster House Constitution
LLAA	Labour Law Amendment Act
LRF	Legal Resource Foundation
LSZ	Law Society of Zimbabwe
MSU	Midlands State University
NEC	National Employment Council
NEDLAC	National Economic Development and Labour Council
NMWA	National Minimum Wage Act
NMWC	National Minimum Wage Commission

TLAC	Tripartite Labour Advisory Council
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
USA	United States of America
UZ	University of Zimbabwe
ZCTU	Zimbabwe Congress of Trade Unions
ZEGU	Zimbabwe Ezekiel Guti University
ZHRC	Zimbabwe Human Rights Commission

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CHAPTER 1

UNLOCKING THE LAW OF COLLECTIVE BARGAINING

1.1 Introduction

Zimbabwe's legal system in all its forms is founded in the value of the supremacy of the Constitution.[1] This means that whenever a legal norm or rule of decision which is established by the Constitution comes into practical conflict with a legal norm or rule of decision stipulated by non-constitutional law, the rule or norm that is contained in the Constitution is to be given precedence by anyone whose duty is to enforce the provisions of the Constitution.[2] For the first time in the history of the existence of independent Zimbabwe, the right to collective bargaining is now enshrined in the Constitution of Zimbabwe.[3] This provision is very important in our labour law jurisprudence considering the fact that the Constitution is the supreme law of the land. The concept of constitutional supremacy is enshrined under section 2 (1) of the Constitution of Zimbabwe. This section provides that '*this Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of its inconsistency*.' This is a milestone achievement which deserves commendation especially if one compares the new Constitution and with the old Lancaster House Constitution (LHC) which is a mere dry letter without any explicit labour rights.[4] The current Constitution is a transformative legal document that seeks to transform the lives and create better living conditions for Zimbabweans.

The right to collective bargaining as enshrined in the Constitution forms the heart of Zimbabwe's labour rights. This is so because the right assumes a willingness on each side to abandon fixed positions were possible in order to find common ground. The inclusion of the right to collective bargaining in the Constitution is a direct response to international norms, practices and developments in the area of labour law.[5] A critical and legitimate question then follows; does the

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[1] Section 2 (1), *Constitution of Zimbabwe Amendment* (No. 20), 2013 hereinafter referred to as the Constitution.

[2] Moyo A, *Basic Tenets of Zimbabwe's New Constitutional Order* (2019) at 10. See also the case of *Marbury v Madison*, 5 U.S 137 (1803) wherein the U.S Supreme Court held that 'the Congress does not have the power to pass laws that override the Constitution.'

[3] Section 65 (5) (a), *Constitution of Zimbabwe Amendment* note 1.

[4] Mucheche Caleb H, *A Practical Guide to Labour Law, Conciliation, Mediation & Arbitration in Zimbabwe,* 2nd edition (2014).

[5] International Labour Organization Convention 154.

Constitution of Zimbabwe impose a judicially enforceable duty to bargain on the other party in an employment relationship? It is a question that has to be answered by the researcher as this research unfolds. However, the nature, scope and meaning of this right as provided in the Constitution directly respond to the unique circumstances underpinning Zimbabwe's labour regime, and that constantly inform debates and discussions on the right to collective bargaining.

On the same note, the right to collective bargaining is of cardinal importance in any democratic society based on social justice and democracy in the workplace. Further, section 2 of the Labour Act[6] defines a collective bargaining agreement as '*…an agreement negotiated in accordance with the provisions of this Act which regulates the terms and conditions of employment of employees*.' This definition is very helpful. It unpacks the Labour Act's contemplation of the process of collective bargaining as a negotiation process with a view to agreeing on the terms and conditions of employment.[7] The law of collective bargaining in Zimbabwe is rooted on 2A (1) (c) of the Labour Act clearly provides that the purpose of the Act is to advance social justice and democracy at the workplace by providing a legal framework within which employees and employers can bargain effectively for the improvement of conditions of employment. This patently shows that the right to collective bargaining is clothed with the force of law. The Labour Act promotes the participation of employees in decisions affecting their interests at the workplace. This is in line with section 65 (5) (a) of the Constitution of Zimbabwe.

[6] Chapter 28:01, *hereinafter* referred to as the Labour Act.

[7] Madhuku L, *Labour Law in Zimbabwe* (2015) at 319. See also, Grogan J, *Collective Labour Law* (2010) at 263 where this man of great learning stated that collective bargaining is a process in terms of which employers and employee collectively seek to reconcile their conflicting goals through a process of mutual accommodation. The process extends to all negotiations which take place between an employer and employee for determining working conditions and terms of employment, regulating relations between employer and employee, and regulating relations between employers or their organizations and workers or worker's organizations. Accordingly, Mucheche Caleb, in his book '*A Guide to Collective Bargaining Law & Wage Negotiations in Zimbabwe*' made remarkable contributions wherein he stated that collective bargaining mainly deals with bread and butter issues, for instance the battle of the stomach. However, Madhuku Lovemore, *Op cit note* 7 goes further when he underscored that collective bargaining must be given a liberal and all-encompassing interpretation. This is because, it covers other issues to do with the terms and conditions of employment. This view was endorsed in the case of *Metal and Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 at 493 H-1, wherein the court underscored that there is a distinct and substantial difference between consultations and bargaining. To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take.

Further, the right to collective bargaining in Zimbabwe is also understood in the same way as it is conceived by the International Labour Organization Convention No. 154 and ILO Convention No. 98. ILO Convention No. 154 defines the right to collective bargaining as follows; '*Collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employer's organizations', the other hand, and one or more employee's organization on the other for: determining working conditions and terms of employment and or regulating relations between employers and workers and or regulating relations between employers or their organizations and a worker's organization*.'[8]Accordingly, the fundamental nature of this process was also underscored by the then President of the United States of America Woodrow Wilson in his presidential message of May 1919 in the following words, '*the object of all reform in this essential matter must be the genuine democratization of industry, based upon full recognition of the right of those who work, in whatever rank, to participate in some organic way in every decision that directly affects their welfare and the part they are to play in industry*.'[9] The parties often refer the result of the negotiation as collective bargaining agreement or as collective employment agreement.[10] The main issue in collective bargaining is the motivation to reach an agreement. It fulfills three main roles in labour relations.[11] The first role is that it fulfills economic function. Economic conflict is inherent in any employment relationship. So, collective bargaining seeks to regulate the individual and collective workplace relations. This is followed by a social function role, by establishing an industrial justice system which protects workers from arbitrary action by management and recognizes their right to human dignity.[12] Political function will then

[8] See also, The Right to Organize and Collective Bargaining Convention 98. It provides that member States must promote voluntary collective bargaining, where necessary. Zimbabwe has ratified this Convention. The legal effect of ratification of this Convention is that it has legal force in this jurisdiction.

[9] Milton D, *The American Idea of Industrial Democracy*: 1865-1965 (1970) at 46. See also Copper, Milton J, *Woodrow Wilson: A Biography* (2009) at 34.

[10] Mucheche Caleb. H, *A Practical Guide to Labour Law, Conciliation, Mediation & Arbitration in Zimbabwe* (2014) 2nd edition at 69. During negotiations, the position of the law is that both a single employer and an employers' organization are competent to negotiate with a workers' committee or a trade union. On the other hand, there are two types of representatives for workers in collective bargaining; that is a registered trade union at industry level and a workers' committee at enterprise level. According to Madhuku Lovemore, *Op cit* note 7 at 323, the position in Zimbabwe of granting the right to collective bargaining to a trade union merely upon registration is uncommon. Joubert W. A, *The Law of South Africa* (1995) Vol 13 (1) observed that there are three types of approaches in determining the representatives of trade unions. These three approaches are the majoritarian, pluralist and all-comers approaches.

[11] Rycroft A and Jordan B, *A Guide to South African Labour Law* (1992) 2nd edition at 116-117.

[12] Madhuku Lovemore, supra note 7.

occupy the third role, in that it promotes democracy in industrial life by giving employees a say in matters which affect their working lives.

The law of collective bargaining is not unique to Zimbabwe alone. It is a global issue. As such, there is an important connection between the domestic legal regime and the international legal regime in the context of the right to collective bargaining. In Zimbabwe the law of collective bargaining has been influenced by both regional and international developments.[13] For instance, the concept of collective bargaining was first recognized under the Industrial Conciliation Act, 1934. It was modeled on the South African Industrial Conciliation Act of 1924. However, the most influential developments came from the United States of America through the Wagner Act or the National Labour Relations Act of 1935. The Wagner Act set the foundations for modern collective bargaining law. It provided workers with key rights such as the right to organize, engage in peaceful strikes and to collectively bargain. These rights have now been codified in various International Labour Organizations Conventions. Thus creating a definite right to collective bargaining under international labour law. It is worth mentioning that Zimbabwe has ratified the Right to Organize and Collective Bargaining Convention 1949 (No.98) and the Freedom of Association and Protection of the Right to Organize Convention 87. The International Labour Organizations Convention 154, the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966 and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, 1998 have also influenced collective bargaining law in Zimbabwe. The Industrial Conciliation Act established a solid foundation for collective bargaining in Zimbabwe. However, the Zimbabwe Industrial Conciliation Act was largely facilitative and non-interventionist, precisely if comparing with the South African Industrial Conciliation Act of 1924 and Industrial Relations Act No. 66 0f 1995. It is the Labour Relations Act No. 16 of 1985 which ushered in significant changes to the law of collective bargaining in Zimbabwe. This Act deals with both individual and collective labour law. It became the spine of post-independence labour law. The Act promoted centralized collective bargaining, with every registered trade union having an automatic right to be recognized by the employer for collective bargaining purposes. Generally, the Act reflected a broadly pro-worker

[13] Gwisai M, *Labour and Employment Law in Zimbabwe-Relations under Neo Colonial Capitalism*, (2006) at 89.

orientation that was condemned by the capitalistic sector.[14] However, the Labour Amendment Act No. 17 of 2002 put the final nail on the coin and it remains the chief cornerstone in terms of promoting collective bargaining and the participation of employees in decisions that affect them at the workplace.

This speaks volumes on the scope, meaning, content and extent of the right to collective bargaining in Zimbabwe. This dissertation considers in broad overview the effect of constitutionalizing the right to collective bargaining taking into consideration the practice in other jurisdictions such as South Africa who have constitutionalized this right at an early stage of their constitutional jurisprudence. The research will also unpack the legal, institutional and administrative framework available for the protection, enforcement, implementation and promotion of the right to collective bargaining both in Zimbabwe and in other countries.

1.2 Background to the Study

It is an indisputable fact that the right to collective bargaining is a new class of rights in the Constitution of Zimbabwe and it was not given prominence as human rights under the Lancaster House Constitution. The Lancaster House Constitution did not provide for any collective bargaining rights. When Zimbabwe adopted its new Constitution in March 2013, collective bargaining rights were placed in the supreme law of the land. It is that Constitution which provides employees with fundamental right to collective bargaining.[15] Both the Constitution of Zimbabwe and the Labour Act provides for the right to collective bargaining. It is now a fundamental constitutional right which derives its life and existence from the supreme law of Zimbabwe, such as to render any law, custom or practice inconsistent with this right null and void.[16] This makes the right to collective bargaining justiciable. Any aggrieved person may approach a court of law ascertaining his or her constitutional rights. In the past, the right to collective bargaining was very much peripheral.

This dissertation considers in broad the nature, scope and extent of collective bargaining. It shows that collective bargaining seeks to regulate the individual and collective workplace relations, establish an industrial system which protects workers from arbitrary action by the management

[14] Madhuku Lovemore, op cit note 7 at 20.
[15] Section 65 (5) (a) supra note 3.
[16] Section 2 (1) ibid note 1.

and recognizes their right to human dignity and that it promotes democracy in industrial life by giving employees a say in matters which affect their working lives.[17] The inclusion of the right to collective bargaining as human right in the Constitution of Zimbabwe represents a massive step in the protection of labour rights in general. Labour rights are now justiciable and this can be seen as a positive and progressive move in addressing Zimbabwe's myriad labour problems. In spite of the fact that this is an important step in the protection, realization, fulfillment and enforcement of labour rights, there remains a need for a clear understanding of the nature, content and extent of the right to collective bargaining clause. This research contends that this understanding is critical in the implementation, application and enforcement of this right. This argument is based on the understanding that the right to collective bargaining has always been part and parcel of Zimbabwean law but there are various factors such as lack of understanding by the judiciary, lack of awareness by the people of Zimbabwe, among others affected the implementation and realization of such rights. Therefore, another argument pursued in this research is that unless these other issues are confronted, the right to collective bargaining will remain paper tiger.

1.3 Problem Statement

The statement of the problem is the foundation of any innovative research. The overriding problem in this mixed-research is that, Zimbabwe has not comprehensively given the right to collective bargaining the prominence it deserves in the political, economic, social and legal systems as evidenced by serious violations of the right. This is a massive problem. It means that there is no general consensus on the scope, meaning, nature and extent of the right to collective bargaining as enshrined in the Constitution of Zimbabwe and other pieces of legislation such as the Labour Act. Although the Constitution of Zimbabwe includes the right to collective bargaining in the Bill of Rights, and in line with international best practices, the problem remains that there is no solid jurisprudence that can assist in the implementation, enforcement and application of existing right to collective bargaining. Accordingly, the constitutional recognition may not translate into the people of Zimbabwe fully enjoying and realizing their right to collective bargaining as envisaged by the Constitution. There is simply no guidance to our judiciary, the executive and the legislature on how to apply and make use of the right to collective bargaining for purposes of enhancing enjoyment of the employment relationship. This dissertation is based on this problem of a lack of

[17] Mucheche Caleb, supra note 4 at 321.

clear and comprehensive understanding of the content, nature and extent of the right to collective bargaining as enshrined in the Constitution of Zimbabwe and other subsidiary legislation like the Labour Act. A corollary of the lack of a clear knowledge base on the right to collective bargaining is that labour problems remain unaddressed. With a clear understanding of the scope, nature and the meaning of the right to collective bargaining, this problem can be confronted and addressed.

1.4 Hypothesis

The working hypothesis in this study is that a clear understanding of the scope, content and meaning of the right to collective bargaining as enshrined in the Constitution and subsidiary legislation such as the Labour Act is critical in the protection, enforcement, fulfillment and limitation of the right by both private and public persons. The assumption being that, Zimbabwe has not comprehensively given the right to collective bargaining the prominence it deserves in the political, economic, social and legal systems as evidenced by serious violations of the right. There is no general consensus on the scope, meaning, nature and extent of the right to collective bargaining.

1.5 Research Objectives

To deepen the knowledge of the law on the scope, nature and extent of the right to collective bargaining, this dissertation has been motivated by the following specific objectives:

i. To explore the nature, content and extent of the right to collective bargaining in Zimbabwe
ii. The effect of constitutionalizing the right to collective bargaining in Zimbabwe.
iii. To explore the international legal regime on the right to collective bargaining.
iv. Examine the substantive legal, institutional and administrative mechanisms that exist and their implications on the promotion and enforcement of the right to collective bargaining.
v. To provide a framework that would guide the understanding, enforcement and implementation of the right to collective bargaining in Zimbabwe.

1.6 Research Assumptions

i. Zimbabwe has not comprehensively given the right to collective bargaining the prominence it deserves.

ii. There is no general consensus on the scope, meaning, nature and extent of the right to collective bargaining as enshrined in the Constitution of Zimbabwe.

iii. There are no strong institutions and administrative framework that can assist in the implementation, enforcement and application of existing right to collective bargaining.

iv. There is no guidance to our judiciary, the executive and the legislature on how to apply and make use of the right to collective bargaining for purposes of enhancing enjoyment of the right by the people of Zimbabwe.

v. A comparative approach with other countries that constitutionalized the right to collective bargaining at an early stage will assist Zimbabweans in the protection, promotion and enforcement of their constitutional right to collective bargaining.

1.7 Research Questions

The research is based on the following research questions:

i. What is collective bargaining?

ii. What is the effect of constitutionalizing the right to collective bargaining in Zimbabwe?

iii. What is the effect of international legal instruments that exist for the recognition and protection of the right to collective bargaining?

iv. What role does the legal, institutional and administrative framework in Zimbabwe play in the protection, enforcement, implementation and promotion of the right to collective bargaining?

v. What lessons can Zimbabwe get from other countries that have constitutionalized the right to collective bargaining at an early stage?

1.8 Methodology

This research fuses both qualitative[18] and quantitative[19]research methods. This has a substantial influence on the outcome of this research. This strategy of combining the advantages of both the qualitative and the quantitative approach is referred to as triangulation.[20] As a qualitative research method, the dissertation used a longitudinal approach to examine the right to collective bargaining

[18] Olsen, WK, Haralambos H and Holborn M, Triangulation in Social Research: Qualitative and Quantitative Methods Can Really Be Mixed (2004) *Developments in Sociology* at 34.

[19] Ibid at 35.

[20] Yeasmin S and Rahman K.F, *Triangulation Research Method as the Tool of Social Science Research* (2002) at 67.

in greater detail. Various court judgements were evaluated. The study also makes use of various legal sites, for instance MalawiLII, Veritas, SAFLII and ZIMLII. The researcher also uses secondary sources in form of research papers, thesis and conference papers. These sources are not used in as far as they attempt to draw conclusions in law, or give legal opinions on the basis of the information they would have gathered.[21] Participatory observation is also used in the study to get necessary information since the researcher works at various organizations as a legal intern. Further, descriptive and conceptual analysis is also used in this research. The descriptive methodology assists the researcher in the understanding of the state of the right to collective bargaining in Zimbabwe. On the same note, doctrinal analysis of primary literature such as the Constitution of Zimbabwe, legislation, case law, international treaties, conventions, declarations, agreements, United Nations Resolutions and Protocols were used. This enables the researcher to explore in detail doctrines related to the protection and enjoyment of the right to collective bargaining.

The research also uses case study and comparative analysis approach.[22] This involves a qualitative enquiry that investigates a contemporary phenomenon in-depth and in its real-life context.[23] Some of the research questions cannot be answered through descriptive and doctrinal analysis. This necessitated the use of comparative and case study approach. The comparative approach empowers the researcher to critically examine the scope, content and extent of the right to collective bargaining in the Constitution of Zimbabwe and other constitutions from modern jurisdictions, such as the United States of America, Malawi and South Africa at the micro level.[24] Notwithstanding its criticism[25], the method has been used for this study because it gives the reader clear appreciation of the right to collective bargaining. It is hoped that Zimbabwe will learn from these other jurisdictions on their understanding, protection and protection of the right. The method will be very instructive in establishing how the right to collective bargaining can be enjoyed by

[21] See generally Bargar R. R and Duncan J.K, 'Cultivating creative endeavor in doctoral research' (1982) 53 *Journal of Higher Education* 1. See also Dobson I & Jones F 'Qualitative legal research' in McConville M & Hong Chui W (eds) *Research Methods for Law* (2007) at 21.

[22] See generally Yin R. K *Case Study Research: Design and Methods* 4th edition (2009) at 15. See further Campbell C M & Wiles P 'The study of law in Great Britain' (1976) *Law and Society Review* at 578.

[23] Ibid at 579.

[24] Zaidah Zainal 'Case study as a research method' (2007) 9 *Journal Kemanusiaam* 1 at 5.

[25] Gunn Sara E '*Comparative analysis and case studies*' 2010, Olso University, Norway at 45. The main lines of criticism put forward by the author includes: (i) the difficulty facing the comparative method is that it must generalize on the basis of relatively few empirical cases; (ii) the problem of selection bias; common problems arising from the choice of selection is that it may over-represent case at one or the other end of the distribution on a key variable.

Zimbabweans. It generates novel and groundbreaking ideas on the nature, scope, content, meaning and extent of the right to collective bargaining on the countries under study.[26] Comparative research method is therefore used to make a comparison on different legal structures and jurisprudence on the meaning of the right.[27] The method focuses on similarities and differences.[28] As such, comparative research is not only vital for this dissertation but also for Zimbabwe as a country in order to have a full understanding of the scope, nature, content and meaning of the right to collective bargaining.

1.9 Relevance of the research

This study cannot be underestimated taking into consideration the fact that a constitution is a living document. It has been described as '*a legal text that grounds a legal norm, as such, it should be interpreted as any other legal text. However, constitution sits at the top of the legal system in respective state. It is designed to guide human behavior over an extended period of time, establishing the framework for enacting legislation and managing the government*.[29] This means that, it must be given a generous interpretation if its provisions are to be protected. It is trite law that the Constitution of any modern and functional democracy is the soul that brings to life the existence of that nation. A synthetic analysis on the right to collective bargaining in Zimbabwe is made in this study. This makes this research germane as it compares the Zimbabwe's approach to the right to collective bargaining with other modern jurisdictions. The foundation of this dissertation is therefore an analysis of the scope, content and extent of the right to collective bargaining in Zimbabwe.

1.10 Delimitations of the research

This research is carried out both within and outside Zimbabwe. The study spans from October 2021 to February 2022.

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[26] See generally Else Oyen (ed) *Comparative Methodology: Theory and Practice in International Social Research* (1990) at 34.

[27] Wilson G 'Comparative legal scholarship' in McConville M & Hog Chui W (eds) *Research Methods for Law* (2007) 87.

[28] Jaakko H, *Methodology of comparative law today: From paradoxes to flexibility?* (2006) at 57.

[29] Young Hoa J, '*The Comparative Study of Constitutional Interpretation Between U.S Supreme Court and East Asia Constitutional Court'* at 7. See also Hofisi S, '*The doctrine of constitutional avoidance as a nemesis to public interest and strategic impact litigation in Zimbabwe: thesis, antithesis and synthesis*' LLM thesis, University of Zimbabwe (2017) at 22.

1.11 Limitations

Firstly, bureaucracy and withholding of primary data during the course of this research, secondary sources are used as part of research. So, to counter this limitation the researcher used reasonable inferences and secondary data to come to certain conclusions. Secondly, there is limited information on the right to collective bargaining in Zimbabwe. To counter the limitation, the study used comparative analysis from other jurisdictions. Thirdly, researcher bias is another limitation faced by the researcher during the course of his research. The researcher was involved in participatory observation. To deal with this limitation, the researcher got data from practicing lawyers, law lecturers, legal pundits, researchers and other law students. Further, to avoid bias, the researcher also wrote case reviews on the right to collective bargaining and solicits comments from different readers through email and sometimes via whatsapp platforms.

1.12 Chapter Synopsis

The research will consist of five chapters.

Chapter 1: Introduction and background

This Chapter will consist of the introduction and background to the research. It will give an overview of the law of collective bargaining in general. It also covers the problem statement, hypothesis, the objectives of the study, research assumptions, research questions, methodology, relevance of the study, delimitations and the limitations of the study.

Chapter 2: The effect of constitutionalizing the right to collective bargaining in Zimbabwe

This Chapter gives a detailed overview of the effect of constitutionalizing the right to collective bargaining in Zimbabwe. It will also critically examine the progress made and problems being encountered by citizens in the promotion, enforcement and protection of the right as enshrined in the Constitution of Zimbabwe. In other words, the chapter will look into the positives and negatives of constitutionalizing the right to collective bargaining in Zimbabwe.

Chapter 3: International legal framework on the right to collective bargaining

This Chapter critically examines the scope, nature and extent of the right to collective bargaining in other modern jurisdictions and at international law. Countries such as South Africa, Malawi and United States of America will be used as points of reference. Further, the International Labour Organizations Convention 154, the Right to Organize and Collective Bargaining Convention 98, Freedom of Association and Protection of the Right to Organize Convention 87, International

Labour Organization's Declaration on Fundamental Principles and Rights at Work 1998, Universal Declaration of Human Rights 1948, International Covenant on Economic, Social and Cultural Rights 1966 and the African Charter on Human and Peoples Rights 1981 will also be used as comparators. It is these judicial interpretations that will give meaning to the right to collective bargaining in section 65 of the Constitution of Zimbabwe.

Chapter 4: The legal, institutional and administrative framework for the protection, implementation and promotion of the right to collective bargaining in Zimbabwe

This Chapter will examine the current legal framework, institutional and administrative mechanisms for promoting, implementing, and protecting the right to collective bargaining in Zimbabwe. The Labour Act which is the enabling statute will be analyzed as part of the legal framework available to protect, promote and enforce the right to collective bargaining. Further, the right to strike as a collective bargaining tool will be scrutinized as part of the legal framework available to protect, promote and enforce the right to collective bargaining. The role of the Judiciary and the State and/or Government will also be used by the researcher as institutions available to promote, protect and enforce the right to collective bargaining. Conciliation, Mediation and Arbitration as other ideal methods for promotion, protection and enforcement of the right to collective bargaining will be analyzed. The strengths and weaknesses of these available legal, institutional and administrative mechanisms in the promotion, enforcement and implementation of the right to collective bargaining in Zimbabwe will also be analyzed.

Chapter 5: Reinstatements of arguments, conclusion and recommendations

This Chapter summarizes the major arguments made in the above four chapters before making practical recommendations for future research. It captures the summary of the research findings in summary and reinstates the objectives of this study.

1.13 Conclusion

This Chapter dealt with the introduction of the research, the background, research assumptions, research relevance, methodology, delimitations and limitations of the study. The next chapter deals with the effect of constitutionalizing the right to collective bargaining in Zimbabwe.

CHAPTER 2

THE EFFECT OF CONSTITUTIONALISING THE RIGHT TO COLLECTIVE BARGAINING IN ZIMBABWE

2.1 Introduction

The Constitution is a transformative legal document that is both a backward looking and forward looking document.[30] The people of Zimbabwe designed it to address both the injustices of the past and to create a better future for all in the context of the enjoyment of human rights. The Constitution seeks to transform the lives of the general populace and create better working conditions for all. The right to collective bargaining is enshrined under section 65 (5) (a) of the Declaration of Rights. However, it must be mentioned that the Constitution extends the right to collective bargaining to all but security services employees are excluded from the enjoyment of the right. These are members of state security. They are different from private security employees like security guards. This effectively endorses the view that military personnel, members of the prison service, members of the police force and members of the central intelligence do not enjoy the right to collective bargaining. The rationale behind this exclusion is that the state security service is a very sensitive area which should be jealously guarded like gold dust.[31] According to Mucheche, whatever justifications are given for a blanket ban on the right to collective bargaining in the state security sector, the bottom line is that this is a naked form of arbitrary denial of rights to a layer of employees who fall within that bracket.[32] At the end of the day, they are exposed to the dictates of their employer whose conditions of employment are unquestionable. Apart from the members of security service, the rest of public service employees now enjoy the right to collective bargaining under section 65 of the Constitution. The Declaration of Rights is a Chapter in the Constitution of Zimbabwe setting out the rights and freedoms which the people are entitled to. The Declaration of Rights is an epitome of the constitutional revolution that took place during the time of the inclusive government.[33]

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[30] Moyo A, '*Zimbabwe's Constitutional Values, National Objectives and the Declaration of Rights*' (2009) at 32.
[31] Mucheche Caleb H, op cit note 4.
[32] Ibid at 6.
[33] Supra ibid at 7.

It must be emphasized that the constitution is the supreme law of the Zimbabwe as provided under section 2 (1). This is so because it is the voice of people. Constitutional order is derived from the people of Zimbabwe. The concept of supremacy of the constitution is about conferring the highest authority to the Constitution in a legal system of a country.[34] The sovereignty of the people is invoked to confer moral authority on the constitution to explain its binding force as the supreme law of the land. There are basically three traits that primarily characterize the principle of supremacy of the constitution. Firstly, the possibility of distinguishing between constitutional and other laws; secondly, the legislator's being bound by the constitutional law, which presupposes special procedures for amending constitutional law; and lastly, an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts.

Accordingly, section 2 (1) of the Constitution holds that '*This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.*'[35] This law serves to explain that anything done ultra vires the Constitution of Zimbabwe is null and void. Modern constitutions derive their legitimacy from the basic principle that they are a word of the people. Section 3 (1) of the Constitution provides for the supremacy of the supremacy of the Constitution as a key founding value and principle. Without any doubt, this should influence the constitutional interpretation on the right to collective bargaining. Hence a value laden or teleological approach which places the Constitution on its climax position is imperative. A Constitution is law made by the people, for the people, unlike other laws made only by parliament, individual companies or entities. As an embodiment of the collective voice of Zimbabweans 'we the people', as provided for in the preamble of Constitution and it being a

[34] See generally *Marbury v Madison* supra note 2. It must be submitted that Constitution is a higher law, that need not to be made everyday. It's not like any other laws. It is holy and precious. The constitution forms the foundation of any modern and functional democratic society and the principles that are put in that constitution ought to live beyond generations. They out to outlive generations. The constitution is not a simple legal document that can be amended at will. It must be somewhat sacred. It must be a fairly respectable document. Whenever, you want to amend it, you must involve the people.

[35] See generally *Ian Douglas Smith v Didymus Mutasa* 1989 (3) ZLR 183. In this groundbreaking case the Parliament of Zimbabwe had denied Smith of his salary as he had breached a rule of parliament. Smith approached the Supreme Court of Zimbabwe, which held that the Parliament's decision was inconsistent with the provision of section 16 of the Lancaster House Constitution. Mutasa, as the then Speaker of Parliament had vowed not to pay Smith 'even a cent'. The supreme court took occasion to remind him of the supremacy of the Constitution. Mutasa thought that the court should not interfere with the internal affairs of the Parliament forgetting the supremacy of the Constitution of Zimbabwe.

product of public and expert consultations and referendums, it codifies the people's social contract with the state and its agents, defining rights and duties. It derives its superiority from the people, who are its architects and commissioners. The voice of the people prevails over anything and is so loud to silence any other choral discords to the contrary. The Constitution as the supreme law of the land, it can invalidate anything inconsistent with it. For instance, the Labour Act.[36] Where such law is contradicting any provision of the Constitution, it is null and void. The Constitution is the standard litmus to test the constitutionality of the law of collective bargaining.

2.2 Constitutional recognition of the right to collective bargaining

From a historical perspective, the right to collective bargaining has often been rendered impotent by an interplay of factors. Before the major reforms introduced by the Labour Amendment Act,[37]the right to collective bargaining was nominally proclaimed but denied in substance. The Constitution marks a pinnacle of the process that stated with the Labour Relations Amendment Act.[38] The Zimbabwean Constitution now unambiguously provides for the right to collective bargaining. Section 65 (5) (a) reads, '*Except for the members of the security services, every employee, employer, trade union and employer's organization has the right to engage in collective bargaining*.' This constitutional provision is the fulcrum of collective bargaining laws in Zimbabwe. At the top of the hierarchy of legislation in Zimbabwe is the Constitution. Any legislation that is in conflict with it is invalid. The Constitution is not only a superordinate law or statute, but is the supreme authority at the apex of the legal order.

2.2.1 The rules of constitutional interpretation

a) Text approach

According to this approach in its crude, unqualified form the meaning of a statutory provision must can and must be retrieved from the *ipsissima verba* in which it is couched, regardless of manifestly unjust or even absurd consequences.[39] Legislative authority is unquestioningly deferred to and no-one dares tamper with the very words that the legislature used to express its will. [40]A constitution must be interpreted on the basis of the text. It is assumed that statutory language as it stands, on

[36] Labour Act op cit note 5.
[37] No. 17/2002.
[38] Ibid.
[39] Du Plessis Lourens, *Re-Interpretation of Statutes* (2002) at 93.
[40] Ibid at 93.

the condition that it is clear and unambiguous is a reliable expression of legislative intent. The context of the text must be the starting point at all material times. In *State v Zuma and Others*[41], his Lordship Kentridge JA respectfully submitted that '…*We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'value' the result is not interpretation but divination*.' This approach is echoed in the Zimbabwean constitutional jurisprudence. Fieldsend CJ (as he then was) in *Hewlett v Minister of Finance and Another*,[42] correctly held that the starting point in interpreting the Constitution must be found in the words used in the Constitution. Section 65 (5) (a) is very clear, effect must be given to it. Every person has the right to collective bargaining at the workplace.

b) Progressive approach

This approach was captured in the case of *Edwards v Attorney General Canada*[43]. His Lordship Sankey held that '*A Constitution is a living tree capable of growth and expansion with in its natural limits*.' This approach has the effect of endorsing the view that the constitution is at the top of all legal norms in a legal system. It must be interpreted progressively to give effect to the right to collective bargaining.

c) Generous approach

A generous approach to constitutional interpretation advocates for giving full effect to the right to collective bargaining. A generous interpretation avoids what has been called the austerity of tabulated legalism[44], when interpreting the right to collective bargaining. The generous approach to constitutional interpretation requires the widest possible interpretation of the language of a constitution. The generous approach seeks to grant individuals the full measure of their fundamental rights and freedoms as conferred on them in a constitution. This approach clearly favours the protection of fundamental rights. In *Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319, the court in detailing its approach to constitutional interpretation called for a generous interpretation, avoiding what has been called the "austerity of tabulated legalism", suitable to give individuals the full measure of fundamental rights and freedoms which had been conferred on

[41] 1995 (2) SA 642 (C).
[42] 1981 ZLR 571.
[43] 1930 AC 124.
[44] G Que v Blaikie 1979 (2) SCR 1016.

them. Good examples of a generous approach can be found in Indian jurisprudence. This approach to interpretation, developed after 1978 in India, has as its foundation the stated goal of the Indian Constitution of the creation of a democratic welfare state. The core value underpinning the process of constitutional interpretation was identified as that of social justice. Furthermore, the directive principles of the Indian Constitution were seen as complimentary to the fundamental rights, allowing the courts therefore to expand the scope of the fundamental rights through a generous interpretation. An example of this approach can be found in *State of Himachal Pradesh v Sharma* 1986 (2) SCC 68 where the court ordered the state government to construct a road, in a remote mountain area, declaring that the lack of a road in this remote area constituted a violation of the villagers' right to life in terms of Article 21 of the Indian Constitution. Therefore, it is advisable to adopt the same interpretation when one is reading and interpreting section 65 (5) (a) of the Constitution of Zimbabwe.

d) Purposive approach

This approach attributes meaning to a legislative provision in light of the purpose that it seeks to achieve in the context of the instrument of which it forms part. A purposive approach seeks to identify the particular values fundamental to a constitution and views a constitution as an entity seeking thereby to place a particular provision in context. The purposive approach is aimed at teasing out and grilling the core values that underpin the right to collective bargaining. It seeks to identify the purpose of the right in the Bill of Rights. In Zimbabwe, the approach has found home in the case of *State v Twala*[45]. It requires a value judgment to be made on purposes that it seeks to achieve in the context of the statute it forms part. Where 'clear language' and purpose are at odds the latter prevails.[46] Purposivism allows for a deviation from the literal or clear and unambiguous language of a statute creating the view that, historically, it is preceded by literalism. In this context the chief purpose of inserting the right to collective bargaining in the Constitution of Zimbabwe is to promote the full enjoyment of this right at the workplace.

e) The constitution must be interpreted to create a break with the past

When Zimbabwe adopted a new constitution in 2013, it created a new legal order. This must be recognized in the new constitutional dispensation. Before 2013, the right to collective bargaining

[45] 2000 (1) SA 879 (CC).

[46] Du Plessis Lourens op cit note 35.

was peripheral. The importance of adopting an interpretation that creates a gap with the past legal order was emphasized in *Homomisa v Argus Newspapers*.[47] The court held that '*All South African Courts must now as a first duty, take into account the provisions of the Constitution, particularly its fundamental rights provisions. As observed earlier, the Constitution is designed to create a new legal order in South Africa. In fulfilling this aim, the Constitution treads as a prudent path between legal revolution and legal continuity*.' This legal approach to statutory interpretation invites a new imagination in the course of reading and interpretation of the right to collective bargaining. The constitution is a transformative legal document that is both backward looking and forward looking.

2.3 Locus standi, equal access to courts and enjoyment of the right to collective bargaining

Section 24 (1) of the now obsolete Lancaster House Constitution provided that '*if any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him …then without prejudice to any other action with respect to the same matter which is lawfully available, that person may, subject to the provisions of subsection (3), apply to the Supreme Court for redress*.' The lawgiver designed it to promote direct access to (the then highest court of the land) the Supreme Court by any person who purported that their personal rights had been infringed. Only those people directly affected or to be affected were entitled to approach a court of law for relief. A person therefore could not have legal standing unless he or she had demonstrated that a constitutional provision was violated against themselves.[48] However, in *Tsvangirai v Registrar General of Elections*,[49] Sandura JA (as he then was) took a different approach in his dissenting judgement. He clearly put it that he would have given Tsvangirai legal standing in order to promote enjoyment of human rights and equal access to justice. The learned judge made the following contributions, '*Quite clearly, the entitlement of every person to the protection of the law which is proclaimed in section 18 (1) of the Lancaster House Constitution embraces the right to require the legislature…to pass laws, which are consistent with the Constitution. If, therefore, the legislature passes a law which is inconsistent with the Declaration*

[47] 1996 (2) SA 558.

[48] See generally *In Re Wood v Hansard* 1995 (2) SA 191 (ZS) at 195. On the same note, Gubbay CJ (as he then was) in *United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others* 1998 (2) BCLR 224 (ZS) held that 'section 24 (1) of the Lancaster House Constitution affords the applicant locus standi in judicio to seek redress for contravention of the Declaration of Rights only in relation to itself. It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate it.'

[49] 76/02 2002 ZWSC 20.

of Rights, any person who is adversely affected by such law has the locus standi to challenge the constitutionality of that law by bringing an application directly to this court in terms of section 24 (1) of the Constitution. Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by parliament as required by section 28 (4) of the Constitution. In the circumstances, he had the right to approach this court directly in terms of section 24 (1) of the Constitution and had the locus standi to file the application.' These sentiments by Sandura JA (as he then was) is commendable. It laid solid foundation on the law of legal standing and equal access to justice in Zimbabwe.

Accordingly, the current Constitution which was adopted in 2013 broadens the number of persons who can bring cases for determination in a court of law. Section 85 of the Constitution provides that '*Any of the following persons, namely- any person acting in their own interests, any person acting on behalf of another person who cannot act for themselves, any person acting as a member or in the interests of a group or class of persons, any person acting in the public interest and any association acting in the interest of its members, is entitled to approach a court, alleging that a fundamental right of freedom enshrined in this Chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation*.' These aforementioned group of persons may approach a court alleging that a fundamental right or freedom enshrined in the Constitution has been, is being or is likely to be infringed. The principle that a person may approach a court for relief only when they have direct and substantial interest in the case makes it impossible to challenge the infringement of the right to collective bargaining. This view was embraced by Lord Diplock in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd*[50], wherein it was stated that '*It would, in my view be a grave lacuna in our system of public law if a pressure group, like the federation or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped*.' In Zimbabwe, this view found home in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe NO. and Others*[51], wherein the court held that '*Certainly this Court does not expect to appear before it only those who are dripping*

[50] 1992 AC 617.
[51] CCZ 1/2013.

with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.' The court was concerned with the fact that narrow approach to locus standi only served a litigant who had suffered a direct infringement of their rights or who had faced an imminent threat to their rights. It was against this legal position. The approach adopted by the court broadened the concept of legal standing.[52] On a different matter, in *Mudzuru v Minister of Justice, Legal and Parliamentary Affairs*[53], the Constitutional Court of Zimbabwe extended the right to institute and defend proceedings in a court of law even when a litigant has a direct or indirect interest in the outcome of the dispute. The Court further held that while they had failed to fulfill the prescription of the law for standing under section 85 (1) (a) of the Constitution, they could still benefit from section 85 (1) (d) of the same Constitution which allows public interest litigation. The Court clearly put it that '*The Constitution guarantees real and substantial justice to every person, including the poor, marginalized and deprived sections of the society. The fundamental principle behind section 85 (1) of the Constitution is that every fundamental human right enshrined in Chapter 4 is entitled to effective protection under the constitutional obligation imposed on the state. The right of access to justice, which is itself a fundamental right, must be availed to a person who is able, under each of the rules of standing, to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned*.'[54] This represents a clear departure from the traditional approach. The emphasis on the existence of a link between a challenger of a particular law and the law is no longer applicable. Individuals and organizations now have the right to challenge the infringement of the right to collective bargaining in any court of law.

2.4 The duty to collective bargaining and the constitution

In terms of section 65 (5) of the Constitution, 'every employee, employer, trade union and employee or employer's organization has the right to…engage in collective bargaining.' This

[52] See also *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs and Others* 79/14 (2015) ZWCC 12.
[53] Ibid.
[54] Supra ibid.

provision is similarly worded with section 23 (5) of the Constitution of South Africa. The South African Supreme Court of Appeal in *South African Defence Force v Minister of Defence and Others*,[55]succinctly underscored the deep rooted legal position that the South African constitutional provision does not impose a judicially enforceable duty to bargain.[56]It merely creates a freedom that no law of the land may prohibit collective bargaining. The case went on appeal. The South African Constitutional Court left the question open on whether a right to collective bargain entail a duty to bargain on the other party. Interpreting the constitutional provision to mean a legally enforceable duty to bargain could draw the courts into a range of controversial industrial relations issues.[57]Accordingly, Professor Lovemore Madhuku underscored the view that International Labour Organizations jurisprudence inspire confidence in voluntarism during the process of collective bargaining. Section 65 (5) of the Constitution ensure that a party to employment contract may not unreasonably refuse to collectively bargain. The better view of the law favours the view that the Constitution of Zimbabwe does not create a judicially enforceable duty to bargain on the other party of the contract but requires the State to create a framework conducive for collective bargaining.

2.5 Conclusion

This Chapter demonstrated the effect of constitutionalizing the right to collective bargaining in Zimbabwe. The right to collective bargaining is now entrenched in the fundamental bill of rights in terms of the Constitution of Zimbabwe. This effectively means that the right to collective bargaining is now justiciable. However, the only permissible constitutional derogation from the right to collective bargaining is in respect of essential services.[58]The term security service employees should not be misconstrued to refer to private security employees, for example security guards but state security. Private security employees enjoy the right to collective bargaining but state security personnel do not enjoy that right. The cardinal rule is that any meaningful labour law reforms should not erode the right to collective bargaining but ensure that the right is brought to fruition. If any law, practice, custom and conduct seeks to water down the right to collective bargaining, such an approach will be counter-productive. Any labour law reform that seeks to take

[55] (2006) 27 ILJ 2276 (SCA).
[56] Supra note 4.
[57] Ibid. See also South African Supreme Court of Appeal in South African Defence Force v Minister of Defence and Others (2007) 9 BLLR 785 (CC).
[58] Section 65 (5) Constitution of Zimbabwe op cit note 1.

away such right, will be a recipe for labour unrest and industrial disharmony. Except the members of the security service, the rest of public service employees now enjoy the right to collective bargaining under section 65 of the Constitution. The old cloud of oppression that used to float above the public service employees thereby denying the right to collective bargaining was nullified by section 65 of the Constitution.

CHAPTER 3

INTERNATIONAL LEGAL FRAMEWORK ON THE RIGHT TO COLLECTIVE BARGAINING

3.1 Introduction

The international legal framework on the right to collective bargaining is premised on that body of law which is international in nature, content and meaning. The main sources of collective bargaining law at the international level are Conventions and Recommendations adopted by the International Labour Organizations, for instance ILO Convention 154, ILO Convention 98, ILO Convention 87 and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work 1998. Not only that, Professor Lovemore Madhuku correctly noted that the international labour standards may also be found in other international and regional legal instruments, such as the Universal Declarations of Human Rights (1948), International Covenant on Economic, Social and Cultural Rights (1966), and the African Charter on Human and Peoples Rights (1981).[59] The International Labour Organization was established in 1919 by the Versailles Treaty[60] and its headquarters are in Geneva, Switzerland. It is the only surviving international body set up at the time of the League of Nations following the First World War.'[61] Its guiding principle is that 'labour is not merely a commodity' to be traded in the same way as goods, services or capital, and that human dignity demands equality of treatment and fairness in dealing within the workplace.[62] The international body has drawn up several conventions on what ought to be the labour standards and the countries that are party to these conventions are obliged to ratify them in their own jurisdictions. In summary, this body is a specialized agency of the United Nations.

3.2 The creation and importance of international labour standards

The international labour standards are designed to promote fair international competition, achieve social justice, create peace, promote economic development being guided by social considerations

[59] Supra note 7 at 502.

[60] Ibid. It entrusted to the International Labour Organization the duty 'to establish everywhere humane conditions of labour and to institute and apply a system of international labour legislation'.

[61] Mucheche C. H, op cit note 4 at 68.

[62] Ibid. See also Madhuku Lovemore, op cit note 7 at 504 wherein this man of great learning opines that the main duty of International Labour Organization is to formulate and supervise the enforcement of international labour standards.

and to stand as a source of inspiration for national action.[63] These commitments are aptly captured by the preamble to the International Labour Organization Constitution which provides that '*Universal and lasting peace can be established only if it is based on social justice…conditions of labour exist involving such injustice, hardship and privation to large numbers of people producing unrest so great that the peace and harmony of the world are imperiled.*' These international labour standards[64] maybe conventions which are premeditated to create legal binding obligations for countries which ratify them, or they maybe recommendations which are designed to encourage countries to conform to the international standards contemplated therein. Recommendations are not intended to create legally binding obligations at law but just to give direction as to practice, policy and legislation. To buttress this point, there is a third legal instrument called a Protocol which is created to complement or amend a Convention. It is a binding legal instrument. It can only be ratified by a State which is simultaneously ratifying the Convention and the Protocol. Further, a convention must be ratified by all member States. This is after adoption by the Conference.

Each State is obliged by the law to submit an adopted legal instrument to its competent authorities, within twelve months of adoption. However, the law may allow eighteen months after adoption. When a convention is ratified by a member State, it must be then communicated to the Director-General of the International Labour Organization. This obligation of a member State does not imply any obligation of the government to recommend ratification or implementation of the instrument in question.[65]The competent authority of each State is determined by the Constitution and any other laws of that state.[66]The supervision of ILO standards is done by the examination of periodical reports on the measures taken to implement the conventions. Secondly, it is done through the complaints procedure wherein a complaint may be filed by one member State against another over non-compliance with a convention, and thirdly, it may be filed by the Governing

[63] Madhuku L, op cit note 7 at 508.

[64] They are minimum standards as evidenced by Article 19 (8) of the International Labour Organization Constitution which provides that 'In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.'

[65] Madhuku L supra note 7 at 508. Each State follows its laws and practices. There is no specific procedure to ratify the convention.

[66] Ibid.

Body of the ILO *mero motu* or on receipt of a complaint from a delegate to the General Conference.[67]

3.3 Application of International labour law in Zimbabwe

The correct legal position is that the International Labour Organization Convention must first be ratified to become part of Zimbabwe's legal system. Section 327 of the Constitution provides that; *"(1) In this section-*

'international organization' means an organization whose membership consists of two or more independent States or in which two or more independent States are represented;

'international treaty' means a convention, treaty, protocol or agreement between one or more foreign States or governments or international organizations.

(2) An international treaty which has been concluded or executed by the President or under the President's authority, (a) does not bind Zimbabwe until it has been approved by Parliament and (b) does not form part of the law of Zimbabwe unless it has been incorporated into law through an Act of Parliament,

(3) An agreement which is not an international treaty but which (a) has been concluded or executed by the President or under the President's authority with one or more foreign organizations or entities, and (b) impose fiscal obligations on Zimbabwe (c) does not bind Zimbabwe until it has been approved by Parliament

(4) An Act of Parliament may provide that subsections (2) and (3) (a) do not apply to any particular international treaty or agreement or to any class of such treaties or agreement or (b) apply with modifications in relation to any particular international treaty or agreement or to any class of such treaties or agreements

(5) Parliament may by resolution declare that any particular international treaty or class of international treaties does not require approval under subsection (2), but such a resolution does not apply to treaties whose application or operation requires (a) The withdrawal or appropriation of funds from the Consolidated Revenue Fund or (b) any modification of law of Zimbabwe

[67] Ibid.

(6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement."[68]

From the reading and interpretation of these constitutional provisions, it can reasonably be concluded that it is permissible at law for an Act of Parliament to provide that ILO Conventions and any other international treaties shall automatically form part of Zimbabwe law without any prior approval by Parliament of Zimbabwe. Currently, no such law exists. Both approval and incorporation through an Act of Parliament is required for an international treaty to become part of Zimbabwe's law. In instances where a convention is ratified but not incorporated through an Act, it may become part of Zimbabwe's law through the process of interpretation as provided under section 327 (6) of the Constitution. Section 327 (2) of the Constitution makes it clear that Zimbabwe is only bound by a convention or treaty after approval by the Parliament. On the same note, Professor Madhuku is of the view that an ILO Convention or an international treaty which has not been ratified is not irrelevant.[69] It may be referred to by the courts of law under the general principles of statutory interpretation.[70]

In connection with the above, customary international law is also crucial on how the international labour law can become part of Zimbabwe's legal system. Section 326 of the Constitution provides that "*(1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament,*

(2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law."

If one is to adopt a literal approach of statutory interpretation in the context of these constitutional provisions, the better view of the law is that an international treaty or convention, whether ratified or not ratified may form part of Zimbabwe's law if it is viewed as evidence of customary international law. However, this interpretation does not make international law part of Zimbabwe

[68] Section 327 of the Constitution of Zimbabwe op cit note 1.
[69] Madhuku L, op cit note 7 at 515.
[70] Ibid.

law ahead of unambiguous provisions of an Act of Parliament. In *Kundai Magodora & Ors v Care International Zimbabwe*,[71]Patel JA (as he then was) respectfully submitted that '*I do not think that the courts are at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognizable where it is inconsistent with an Act of Parliament*.' Thus, buttressing the view that international legal instruments require domestication by the Parliament of Zimbabwe in order to legal effect in our jurisdiction.

In terms of the Constitution of Zimbabwe, an Act claiming to incorporate a convention or international treaty must say so clearly. In the landmark case of *Communications & Allied Services Workers' Union Zimbabwe v Zimpost & Minister of Public Service*[72], the Labour Court held that '*The legal position is that for International Labour Organization Conventions and other international instruments to be part of our domestic law they need not only to be ratified but be specifically incorporated as part of our domestic law*.' This decision is very clear. It does not require any further interpretation. Further, Zimbabwean courts are legally entitled to refer to interpretations made by foreign courts on similarly worded legislation. Once an interpretation is made by the courts, it becomes law in this country. The authority to this is the case of *S v A juvenile*[73] wherein Dumbutshena CJ (as he then was) held that, '*The courts of this country are free to import…interpretations of similar provisions in international and regional human rights instruments…in the end international human rights norms will become part of our domestic human rights jurisprudence*.' The court will not be incorporating the international legal instrument, but it will be simply interpreting the domestic law.

[71] SC24/2014.
[72] LC/H/180/2004.
[73] 1989 (2) ZLR 61 (S).

3.4 The relationship between ILO Conventions and Zimbabwe labour laws on the right to collective bargaining

a) The International Labour Organization Convention, 1981 (No. 154)

This Convention was adopted by the International Labour Organization in 1981. With its accompanying Recommendation (No.163), they are both crucial in the promotion and implementation of the basic principles of Convention No.98. The convention is promotional in nature; thus it is very flexible. Countries that ratifies this convention must take measures to promote collective bargaining. States should try to facilitate the process and must not unreasonably interfere with how the process operates. Sadly, Zimbabwe has not ratified this convention. However, this convention is not irrelevant. It may be referred to by the courts under the general principles of statutory interpretation as respectfully submitted by Professor Madhuku.[74]Thus, it may not be a travesty of to conclude that ILO Convention No. 154 is not irrelevant in Zimbabwe in the context of collective bargaining.

b) The Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

The Right to Organize and Collective Bargaining Convention is one of the most recognized and ratified convention. Zimbabwe ratified this convention in 2003. This convention provides that member States must promote voluntary collective bargaining, where necessary.[75] Professor Lovemore Madhuku, also noted that this convention provides for protection against anti-union discrimination and for measures to promote collective bargaining.[76] Article 4 of ILO Convention No. 98 states that member States must encourage the system of voluntary negotiations of agreements and autonomy of the bargaining partners. The better view is that the existing machinery and procedures in Zimbabwe in the context of collective bargaining must be designed to facilitate bargaining between the two sides of the industry, leaving them free to reach their own settlement.[77] Collective bargaining has proven to be the only democratic tool at the disposal of workers to negotiate their terms and conditions of employment effectively without imbalance with their employers.[78] With the exception of workers who may be excluded from the scope of Convention

[74] Madhuku L op cit note 7 at 508.
[75] Supra.
[76] Supra ibid.
[77] Mucheche C op cit note 4.
[78] Zvobgo T. J, *Collective bargaining and collective agreements in Africa*, *Comparative reflections on SADC* 2019 at 32.

No. 98, namely the armed forces, police and public servants directly engaged in the administration of the State, the right to collective bargaining covers all other workers in public and private sectors who must benefit from it.[79]

c) Freedom of Association and Protection of the Right to Organize Convention, 1948 (NO. 87)

The convention provides for protection against anti-union discrimination and for protection of workers' and employers' organizations against acts of interference by public authorities.[80] This Convention was ratified by Zimbabwe on 09th of April 2003. One of the objectives of workers in exercising their Convention No.87 rights to organize is to bargain collectively[81], for instance through worker organizations, their terms and conditions of employment,[82]to the extent that these are not fixed by law or improving on legal minimum standards.[83]

d) International Labour Organization's Declaration on Fundamental Principles and Rights at Work 1998

The International Labour Organization Declaration on Fundamental Principles and Rights at Work was adopted in June 1998 in Geneva, Switzerland. It states that all member States have a duty to respect, promote and realize the principles concerning fundamental rights, whether or not they have ratified the relevant Conventions. The right to collective bargaining is included as an example of fundamental rights. Article 2 (a) of the Declaration expresses 'freedom of association and the effective recognition of the right to collective bargaining' as essential rights of workers. In terms of this declaration, the right to collective bargaining is universal and applies to all people, regardless of the level of economic development of their respective countries. In order to monitor compliance with the contents of the declaration, review of annual reports from States that have not yet ratified one or more of the ILO conventions that directly relates to the right to collective bargaining is the first weapon available at international law. Global reports on the right to collective bargaining is also another strategy available to monitor the effectiveness of the

[79] Ibid.

[80] Madhuku L op cit note 7.

[81] In *Re Retail Wholesale Union and Govt. of Saskatchewan* (1985) 19 DLR (4th) 609 (Canada).

[82] International Labour Office, *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association,* Geneva 6th edition para 1234. See also Zvobgo Tavonga Jordan, *Collective bargaining and collective agreements in Africa, Comparative reflections on SADC* 2019 at 6.

[83] Fact sheet No.1, *Collective Bargaining International Labour Office* 2015 at 6.

declaration. They provide dynamic global picture on the current situation of the right to collective bargaining and other fundamental rights and principles. This is followed by technical cooperation projects as a third technique to give effect to the declaration. It is intended to address distinguishable needs in relation to the declaration and hence decoding principles and fundamental rights into practice.

3.5 Other fundamental international and regional legal instruments on the right to collective bargaining

a) Universal Declaration of Human Rights (1948)

This declaration is the cornerstone for modern human rights such as the right to collective bargaining. Article 23 of the Declaration provides that "*1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment, 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and join trade unions for the protection of his interests*." The legal implication of this provision is that both the State and employers must not obstruct the right of employees or workers to collectively bargain. This in line with section 65 (5) of the Constitution which explicitly provides for the right to collective bargaining at workplaces.

b) International Covenant on Economic, Social and Cultural Rights (1966)

The right to collective bargaining is not clearly mentioned in the International Covenant on Economic, Social and Cultural Rights. However, it is considered to be an integral element of the right to freedom of association as enshrined under Article 22 of the Covenant.[84] Therefore, the better view is that the right to collective bargaining is recognized as a fundamental human right by the International Covenant on Economic, Social and Cultural Rights.

c) African Charter on Human and Peoples Rights (1981)

Article 15 of the Charter provides that every individual as the right to 'work under equitable and satisfactory conditions'. According to Zvobgo, the idea of working under equitable and

[84] See generally International Covenant on Economic, Social and Cultural Rights, *Concluding Comment on Korea*, E/C 12/KOR/CO/3 (17 January 2009).

satisfactory conditions can be achieved through collective bargaining.[85] The right to collective bargaining is therefore one of the most important weapons at the disposal of employers and employees in the entire African continent. The cardinal importance of this right has earned veiled acclaim at both continental and universal recognition by international law under the auspices of the African Charter on Human and Peoples Rights and the ILO conventions. The right to collective bargaining in the African context is a crucial means through which employees and employers may promote and defend their interests.

3.6 A comparative analysis of Zimbabwe labour laws with other modern jurisdictions on the right to collective bargaining.

a) United States of America

Collective bargaining has a long history in the United States, although it was not enabled and protected by legislation until the 20th century.[86] The case of *Common-Wealth v Pullis*[87], is the famous one studied by all labour law students in America.[88] In this case, skilled shoemakers in Philadelphia combined to set a price for their labour. They refused to work for any employer who did not pay their desired wage. The court ruled that their combination to raise wage was a criminal conspiracy to inflict harm on the public.[89] The court said that collective action was an "unnatural" means of fixing their salary, compared with the "natural" means of supply and demand.[90] So this idea of characterizing collective bargaining as a criminal conspiracy persisted for much of the 19th century.[91] However, in the early 20th century America began to address continuing labour conflicts and to develop a unified labour laws in the context of collective bargaining. Today, the United States of America has three distinct regimes of collective bargaining; one for the railroad and airline industries, one for the rest of the private sector and one for the public sector.[92] The Railway Labour Act of 1926 became the first major labour legislation on collective bargaining in America in the context of railroad industry. It created a decorative system of collective bargaining,

[85] Zvobgo T. J, supra note 78 at 3.
[86] Lance C, *An overview of Collective bargaining in the United States*, Cornell University at 1.
[87] Philadelphia Mayor's Court (1806).
[88] Ibid.
[89] Lance C, op cit note 82.
[90] Ibid.
[91] Supra ibid.
[92] Supra note 82.

mediation, conciliation, fact-finding, arbitration and other measures designed to prevent strikes.[93] In the early 1930s massive workers struggles in the United States of America resulted in the promulgation of radical New Deal Legislation such as the National Labour Relations Act of 1935, which in fact set the foundations of modern bourgeois collective bargaining law.[94] It is also referred to as the Wagner Act. The Wagner Act provided key rights like the right to strike, the right to collective bargaining, the right to organize and the principle of unfair labour practice. These rights have now been codified in several International Labour Organization Conventions which have established a definite right to collective bargaining under international law.[95] However, the high point of collective bargaining in America came in the 1950s, when one third of the labour force was covered by collective agreements.[96]

Today, the United States of America is one of 185 member States of the International Labour Organization,[97]and it has a permanent seat on the International Labour Organization Governing Body. Despite having this permanent seat, it is party to only 14 of the 189 ILO labour conventions.[98] The United States, however, has only ratified two of the core ILO conventions, which are the abolition of forced labour (ILO Convention No. 105) and on the worst forms of child labour (ILO Convention No.182).[99] However, the International Labour Organization Declaration on Fundamental Principles and Rights at Work is applicable in the United States of America since it provides that all member States have a duty to respect, promote and realize the principles concerning fundamental rights, whether or not they have ratified the relevant conventions. ILO standards tend to provide greater protection of the right to collective bargaining than the United States Labour Law.[100] Conclusively, the United States of America and the International Labour Organization Conventions take different approaches to the right to collective bargaining. The

[93] Zvobgo T. J supra note 85.

[94] Gwisai M, *Labour and Employment law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* 2006 at 224.

[95] Articles 5,7 & 8, *Collective Bargaining Convention* 154, Articles 1,2 and 4, Right to Organize and Collective Bargaining Convention 98. See also Gwisai Munyaradzi, op cit note 82 at 224.

[96] Supra note 83.

[97] Weissbrodt D and Mason M, *Compliance of the United States with International Labor Law*, University of Minnesota Law School, 2014 at 1.

[98] Ibid.

[99] Supra ibid at 7.

[100] Jacobs A, *The Right to Bargain Collectively in the European Convention on Human Rights and the Employment Relation* (2013) at 309.

United States of America is bound to respect ILO standards. However, it tends to provide lower levels of coverage and protection for employees than required by ILO standards.[101]

b) Malawi

Malawi uses a dualist approach for international agreements and a monist-like approach is used for customary international law. The Constitution[102]of the Republic of Malawi on section 211 provides that '*any international law agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement*.' This endorses the view that Malawi also uses dualist approach for international agreements. The same constitutional provision provides that customary international law shall form part of the law of the republic unless it is not in line with the Constitution. This endorses a monist-like approach in relation to international law. In Malawi, ILO Conventions are binding international legal agreements and they form part of the law of the country unless its Parliament provides otherwise.[103] It is worth mentioning that the Labour Relations Act[104]gives effect to the Malawian Constitution and various ILO Conventions which the country ratified. This means that ILO Conventions such as the Right to Organize and Collective Bargaining Convention, 1949 (No. 98) form part of the domestic laws of Malawi. One legal mind[105] has described the Malawian Constitution as an '*international law friendly'* legal document. The Constitution calls for international law consideration and foreign comparative law in the interpretation and application of human rights such as the right to collective bargaining and other constitutional provisions.[106] The Industrial Relations Court of Malawi is established through section 110 (2) of the Constitution with original jurisdiction over labour and employment disputes. It is a subordinate court to the High Court and cannot work in a manner that interferes with the operations of the High Court. All unresolved disposed concerning an essential service or the interpretation of a statutory provision, a collective agreement or a contract of employment are referred to this Court for determination.

In the 1990s much like in the past few years, it is worth noting that collective bargaining in Malawi has been in the majority of cases occurred only after workers have gone on strike. Thus taking

[101] Weissbrodt D and Mason M, op cit note 92.
[102] Act, 11 of 2010.
[103] See Section 211 (1).
[104] Section 2(2).
[105] Ng'ong'ola C, Recent Labour Law in Malawi: A Review, *Journal of African Law*, 46 (2) (2002) at 167.
[106] Ibid at 193.

industrial action or striking has been found to be the precursor of collective bargaining by some scholars. The reason for this method has been argued to be on the basis that employers use delaying tactics in handling workers' grievances and taking action often demonstrates the gravity of the worker's grievance. This has affected the quality and effectiveness of the collective bargaining agreements. Furthermore, it appears that Trade Unions in Malawi focus so much on wage negotiation at the expense of other employment conditions hence working hours, skills development, job security and other conditions are jeopardized. Despite this, there has been a rise of collective bargaining leading to gains in terms of wages and better conditions of employment. In order to keep these gains and also further advance decent work and social justice in Malawi, it is essential for Trade Unions to get training on Collective bargaining agreements and to challenge erosion by government officials seeking support from business.

In 1995, the government of Malawi embraced the Employment Act and Labour Relations Act which are related to labour relations. These included the Employment Act and the Labour Relations Act mentioned above. This may have been because the government was eager to impress its supporters as well as a skeptical international community of its good governance credentials. This meant that the law of collective bargaining was too complex for application in an environment in which none of the actors had previous useful experience. It would take some time before these advances became part of the accepted legal culture in Malawi. Further, during the period 2011-2016 the government of Malawi embraced the ILO Decent Work Country Programme.[107]Also, Malawi has a Tripartite Labour Advisory Council which was created in 1996. Its purpose is to advise the Minister of Labour and Manpower Development on all issues relating to collecting bargaining and enforcement of the Labour Relations Act and any other legal framework relating to employment.[108] It also serves to advise the Minister with respect to issues concerning the activities of the ILO. According to the Decent Work Country Program report, the TLAC has faced challenges particularly with regard to collective bargaining at enterprise level whilst its National Social Dialogue Forum has sustainability problems. There is therefore a need to strengthen collective bargaining structures in Malawi with the intent of promoting employment for vulnerable groups, improving the capacity of these platforms and most crucially, sustainable development.

[107] ILO, *Malawi Decent Work Country Programme* 2011-2016.
[108] Supra note 78.

Conclusively, to a greater extent, Malawi and ILO Conventions take similar approaches to the right to collective bargaining as evidenced by authorities cited above.

c) South Africa

In South Africa, a dualist approach is used in dealing with treaties and a monist-like approach is used for international customary law. It therefore has a dualist system with monist elements. Section 223 of the Constitution of South Africa provides that every court must prefer any reasonable interpretation of the legislation that is consistent with international law, when interpreting any legislation but must consider international law when interpreting the Constitution's Bill of Rights. It would therefore be grounds for review and appeal if any court within South Africa failed to apply this constitutional prerogative.

The Constitution of South Africa and its various labour laws are amongst the most progressive legal instruments in the world.[109] The South African Constitution expressly entrenched the right of workers and employers to engage in collective bargaining.[110] The South Africa's labour law seeks to fulfil the country's obligations as a member State of the International Labour Organization.[111] True to this mandate, the judges in this jurisdiction have also established jurisprudential principles based on both ratified and non-ratified international labour standards.[112] The Labour Relations Act No. 66 of 1995 was designed to create conditions for workers to collectively bargain with their employers. Further, its Constitution provides that employees and employers are free and not duty bound to engage in collective bargaining. The Labour Relations Act and the Constitution, does not provide for the duty to bargain but merely facilitates collective bargaining, leaving the rest to the parties involved.[113] The Act however imposes a duty on the employer to disclose to a representative trade union all relevant information that will enable effective collective bargaining, thus indirectly adopting the duty to bargain into its legal

[109] See Zvobgo T. J, *supra* note 78 at 21.
[110] Section 23 (5).
[111] See *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT 14/02) (2002) ZACC 30.
[112] See *Modise and Others v Steve's Spar Blackheath* (JA 29/99) (2000) ZALAC 1. See also Zvobgo Tavonga Jordan, *supra* note 78 at 22.
[113] See generally Zvobgo T. J, *supra* note 77 at 23.

framework.[114] This can be better described as 'corporatist'[115] in the government's use of national institutional processes to integrate employers' and workers' collective interests into policy making.[116] This is in line with international labour standards, particularly the ILO jurisprudence which favours voluntary collective bargaining.

Furthermore, collective bargaining in South African much like in its sister jurisdiction Zimbabwe takes place at several levels.[117] However, a distinction can be seen between single-employer bargaining and multi-employer bargaining arrangements.[118]One key feature of 'multi-employer bargaining arrangement is that the arrangements reached will be extended to non-parties, that is, to employers and employees who are not members of the organizations that negotiated the agreement.'[119]Multi-employer bargaining takes place in the form of bargaining councils.[120]Similarly in Zimbabwe there National Employment Councils (NECS) which perform the same functions as bargaining councils in South Africa at sectoral level. Also, the labour legislation in South Africa provides that the terms and conditions of collective bargaining will take precedence over statutory provisions when the agreement offers the employee better conditions of employment.[121] In most instances, bargaining councils can apply for accreditation to the Commission for Conciliation, Mediation, and Arbitration (CCMA) and by this action will essentially get authorization to resolve disputes affecting parties falling within their council.[122] It is important to note that the CCMA is an independent body thus its services are not run as part of the Department of Employment and Labour. It also does not belong to and is not controlled by any political party, trade union or business.

In addition, South Africa stands as an ideal model for the region regarding strategies to address decent work deficits and strengthening social dialogue institutions, employment generation and

[114] Ibid.
[115] Hayter S and Lee C.H, *Industrial Relations in Emerging Economies: The Quest for Inclusive Development*, (2018) Edward Elgar Publishing, Cheltenham, UK, ILO: Geneva at 12.
[116] Hayter et al op cit note 114 at 12.
[117] Supra note 78.
[118] Ibid.
[119] Godfrey S, *Multi-employer Collective Bargaining in South Africa*. *Conditions of Work and Employment Series* No. 97 ILO, Geneva.
[120] Supra note 117.
[121] Section 49, *Basic Conditions of Employment Act*, 75 of 1997.
[122] Khabo M. F, *Collective Bargaining and Labour Dispute Resolution*; *is SADC Meeting the Challenge*? ILO Sub-Regional Office for Southern Africa, Harare: ILO, 2008 (Issue Paper No. 30).

enhanced social protection. In South Africa, 'social dialogue regarding labour market policy, and social and economic policy in general, takes place at the National Economic Development and Labour Council (NEDLAC)[123], which comprises the tripartite partners as well as a community constituency representing civil society.[124] Organized workers (through unions such as Congress of South African Trade Unions) managed to influence the direction of change prior to independence in 1994. As a result, one of the post–apartheid visions of the country labour market policy targeted balancing economic and social policies through policy concertation in NEDLAC.[125] The Labour Relations Act, South Africa, does not provide for the duty to bargain but merely facilitates collective bargaining, leaving the rest to the parties involved.[126] It however imposes a duty on the employer to disclose to a representative trade union all relevant information that will enable effective collective bargaining thus indirectly adopting the duty to bargain into its framework. It can therefore be described as a corporatist[127] in the government's use of national institutional processes to integrate employers' and workers' collective interests into policy making.

From at least 2005, employment in informal firms has been growing steadily in South Africa. This has been made possible by an increase in sub–contracting, use of temporary employment services, outsourcing and work from home arrangements.[128] Arguably, it has indirectly led to a rising number of vulnerable workers who are not protected by bargaining councils since some work arrangements or firms are not registering with the councils.[129] This seems to have been addressed by the Labour Relations Amendment Act, 8 of 2018 which came into effect on the 1st January 2019. A recent development in South Africa has been the coming into effect of the unified National Minimum Wage Act, 9 of 2018 (NMWA) on the 1st January, 2019. This Act applies to all employers and workers[130] and regulates leave, working hours, employment contract, deductions,

[123] NEDLAC was established in law through the National Economic Development and Labour Council Act, No. 35 of 1994.

[124] Godfrey S, *Multi-employer Collective Bargaining in South Africa. Conditions of Work and Employment Series No. 97* (2018) International Labour Organization: Geneva.

[125] Hayter, S. and Visser, J. *Collective Agreements: Extending Labour Protection*, Document and Publications Production, Printing and Distribution Branch (PRODOC) (2018) International Labour Office, Geneva.

[126] Khabo M. F, ibid note 122.

[127] Hayter S. and Visser, J op cit note 125.

[128] Godfrey S, ibid note 124.

[129] Supra ibid.

[130] With exception to members of the South African National Defence Force, The National Intelligence Agency, the South African Secret Service s3 (1) and volunteers s3 (2).

pay slips and termination of agreements.[131] The Act provides for a national minimum wage; the establishment of a National Minimum Wage Commission; the provision of an exemption from paying the national minimum wage and a review and annual adjustment of the national minimum wage among others. There still remains little or no empirical data regarding its effects on the bargaining council systems and collective bargaining to date. What is certain is that sectoral agreements, collective agreements, bargaining council agreements and employment contracts now need to comply and align with the NMWA. Furthermore, its application brings minimum wages to the forefront and also provides a floor for conditions of employment which will apply to all competitors within any industry and the country at large.

Another recent development is the Labour Law Amendment Act 10 of 2018 (LLAA) whose commencement date is 1st March 2019. This Act amends the Basic Conditions of Employment Act 75 of 1997 (BCEA) by introducing parental leave, adoption leave and commissioning parental leave to employees. Essentially, fathers are now entitled to at least 10 days of parental leave.[132] In the same breadth, one adoptive parent of a child less than two years of age will be entitled to adoption leave (at least 10 days) whilst the other adoptive parent is entitled to 10 consecutive weeks of adoption leave. As the Act[133] is gender neutral, the same will apply to Gay, Bisexual, Transgender, Queer and Intersex (LGBTQI) couples, one partner being entitled to at least 10 days of parental leave and the other to 10 consecutive weeks of parental leave. This again is important as sectoral agreements, collective agreements, bargaining council agreements and employment contracts now need to comply and align with the LLAA.

Labour legislation in South Africa states that collective agreements alter the terms of any contract or employment relationship between an employee and employer who are both bound by the collective agreement. Additionally, the terms and conditions of a collective agreement will take precedence over statutory provisions when the agreement offers the worker (employee) better conditions of employment (for instance, favourability principle).[134] The amendments to the Basic Conditions of Employment Act and the introduction of the National Minimum Wage Act affect the employment relationship between employer and employee which essentially ties to the

[131] Section 3, National Minimum Wage Act.
[132] Article 3, amending section 25 of the BCEA, 1997.
[133] Labour Law Amendment Act, 10 of 2018.
[134] Section, 49 Basic Conditions of Employment Act, 75 of 1997.

collective agreements which will be reached providing a floor for the terms of the contract and leverage for employees during collective bargaining. Conclusively, the Republic of South Africa and the International Labour Organization Conventions take same approaches to the right to collective bargaining. South Africa provides higher levels of coverage and protection for of the right to collective bargaining as required by ILO standards.

3.7 Conclusion

This Chapter has demonstrated the content, nature and extent of the right to collective bargaining in other modern jurisdictions such as South Africa, Malawi and United States of America. Further, the international labour standards such as the International Labour Organizations Convention 154, the Right to Organize and Collective Bargaining Convention 98, Freedom of Association and Protection of the Right to Organize Convention 87, International Labour Organization's Declaration on Fundamental Principles and Rights at Work 1988, Universal Declaration of Human Rights 1948, International Covenant on Economic, Social and Cultural Rights 1966 and the African Charter on Human and Peoples Rights 1981 were also used as comparators to give life to the right to collective bargaining as enshrined under section 65 of the Constitution of Zimbabwe. It is worth mentioning that Zimbabwe has ratified the Right to Organize and Collective Bargaining Convention 98 and the Freedom of Association and Protection of the Right to Organize Convention 87. Sadly, it has not ratified other conventions such as the International Labour Organizations Convention 154. It is these judicial interpretations from other modern jurisdictions such as United States of America, Malawi and South Africa that give meaning to the right to collective bargaining in section 65 of the Constitution of Zimbabwe.

CHAPTER 4

THE LEGAL, INSTITUTIONAL AND ADMINSTRATIVE FRAMEWORK FOR THE PROMOTION, PROTECTION AND IMPLEMENTATION OF THE RIGHT TO COLLECTIVE BARGAINING IN ZIMBABWE

4.1 Introduction

This Chapter will evaluate the Labour Act as part of the legal framework to protect, promote and enforce the right to collective bargaining in Zimbabwe. The Chapter will also focus on the right to strike as a collective bargaining tool. The right to strike is part of the legal framework to protect, promote and enforce the right to collective bargaining. This is simply because without the right to strike, the right to collective bargaining is hallow and useless.[135] Further, the role of the Judiciary and State and/or Government will be analyzed in greater detail. Conciliation, Mediation and Arbitration as other ideal methods for resolving collective bargaining disputes will also be analyzed by the researcher in greater detail. The strengths and weaknesses of these legal, institutional and administrative mechanisms in the promotion, enforcement and implementation of the right to collective bargaining in Zimbabwe will give meaning to the right to collective bargaining.

4.2 The legal framework for the promotion, protection and implementation of the right to collective in Zimbabwe.

a) The Labour Act Chapter 28:01

The right to collective bargaining is enshrined under section 74 (2) of the Labour Act. It provides that, "*Subject to this Act and the competence and authority of the parties, trade unions and employers or employers' organizations may negotiate collective bargaining agreements as to any conditions of employment which are of mutual interest to the parties thereto*." This section must be read in line with section 74 (3) of the Labour Act which provides areas for collective bargaining, whether at enterprise level or at industry level. The employer and employee can discuss and agree on almost everything as long as it relates to the conditions of employment. The areas listed under section 74 (3) are only for guidance, but parties must not derogate from the generality of section

[135] Mucheche Caleb H, op cit note 4 at 57.

74 (2) of the Act. However, there are limitations to this statutory provision. The employer and the employee cannot agree on terms lower than those provided for in the Act[136], secondly, the Minister of Labour may direct the Registrar to refuse to register a collective bargaining agreement if, in his or her opinion, it is unreasonable or unfair,[137] and that, the parties cannot agree to avoid renewed negotiation for a period in excess of 12 months[138] and lastly, collective bargaining on any issues does not necessarily entail a particular result, such as an increase in wages. It may end with an agreement to maintain the *status qou*.[139]The above provisions provide the legal drive for collective bargaining in Zimbabwe. This is in line with Article 5 of the ILO Convention 98 which provides that "*should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules…bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining*."[140]This patently shows that the right to collective bargaining is clothed with the force of law. The Labour Act promotes the participation of employees in decisions affecting their interests at the workplace as shown in the aforementioned sections. This is in tandem with the spirit of section 65 (5) (a) of the Constitution of Zimbabwe.

i) The difference between statutory and non-statutory collective bargaining agreements.

Basically, there are two forms of collective bargaining, that is, statutory and non-statutory collective bargaining.[141]A statutory collective bargaining agreement is one that is conceived in terms of the formalities prescribed in the Labour and in terms of section 79 and 80 of the same Act. It must be registered with the Minister and be gazetted. In order to be legally binding, a collective bargaining agreement requires ratification by fifty per centum or more of the employees at the enterprise and that of the registered union for that industry.[142]Also, in terms of section 82 of the Labour Act, the statutory collective bargaining agreement enjoys the status of subsidiary legislation with binding effect across the entire industry, including to employers, employees, trade unions who were not party to it.

[136] Madhuku L, supra ibid note 7 at 335.
[137] Ibid.
[138] Section 74 (4), ibid.
[139] *Chiremba & Ors v Reserve Bank of Zimbabwe* 2000 (2) ZLR 370 (S).
[140] Right to Organize and Collective Bargaining Convention 98.
[141] Madhuku L, supra note 122.
[142] Section 25 (11), Labour Act op cit note 5.

On the contrary, non-statutory collective bargaining agreements refer to those agreements between the employers and trade unions, and are made outside the purview of Part X of the Labour Act or those made by unregistered trade unions and employers' organizations. In terms of section 30 (2) of the Labour Act an unregistered trade union is prohibited from representation in employment councils or recommending collective job action. This is further buttressed by section 8 (f) of the Labour Act which makes it unfair labour practice for the employer to bargain collectively with another trade union, where a registered trade union representing its employees already exists. However, the recognition of non-statutory collective bargaining agreements by the Labour Act is reflected by the existence of what is termed union agreement.[143] Section 2 of the Labour Act defines it as collective bargaining agreement that has been negotiated by an appropriate trade union and an employer or employers' organization. Gwisai further noted that non-statutory collective bargaining agreements can only be binding under common law, provided they meet the various modes of incorporation under the common law.[144] Thus, where the employer and the employee have through their conduct, whether express or by conduct, given mandate for negotiations to collective bargaining agreement, any agreement reached is valid and parties would be estopped from reneging from the agreement.[145]

There is a gap in the Zimbabwean labour law in the sense that there are no provisions in the Labour Act that compels good faith negotiations and prevent unfair labour practices in non-statutory collective bargaining agreements. This runs contrary to the Article 5 of the Convention 98 which provides that collective bargaining "*should not be hampered by the absence of the rules governing the procedure to be used or by the inadequacy or inappropriateness of such rule, and that, bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining*." In Zimbabwe, the concept of non-statutory collective bargaining is saddled with pitfalls which render its promotion, protection and enforcement fraught with challenges. This obviously undermines the right to collective bargaining as enshrined in the Constitution of Zimbabwe.

[143] Mucheche Caleb, op cit note 4 at 40.
[144] Gwisai Munyaradzi, *Labour and Employment Law in Zimbabwe, Relations under Neo Colonial Capitalism*, Zimbabwe Labour Centre and University of Zimbabwe Publications, 2006 at 316.
[145] Supra note 129.

ii) Levels of collective bargaining in Zimbabwe

The distinction between statutory collective bargaining agreements and non-statutory collective bargaining agreements manifests at enterprise level and industry level. This distinction cascades into Works Council collective bargaining and National Employment Council collective bargaining. Collective bargaining may take place between an individual employer and the workers' committee. This type of collective bargaining is carried out under the auspices of a Works Council where both the employer and the employee have equal representation. This is referred to as the Works Council collective bargaining. Section 24 (1) (a) of the Labour Act states that the workers' committee has the right to engage the employer in collective bargaining at the shop floor level. Zimbabwe has two distinct shop floor institutions, the workers' committee and the workers' council. The main functions of the workers' committee are to represent the workers concerned in any matter affecting them and to engage in collective bargaining over terms and conditions affecting the workers concerned. It is also different from a trade union in that it should represent the interests of all workers regardless of whether or not they are members of the trade union. On the other hand, collective bargaining can take place at industry level and this is better known as National Employment Council collective bargaining. It involves bargaining by a trade union and an employer or employer's organization and it is usually under the parameters of an employment council.[146]Section 62 of the Labour Act empowers the employment council with a duty of assisting its members in the conclusion of collective bargaining agreements and to take steps to ensure that any collective bargaining agreement pertaining to an undertaking is observed.

iii) The duty to collective bargaining and the Labour Act

The Labour Act through the concept of an 'unfair labour practice' creates a duty to bargaining on part of the employer in certain circumstances. However, it does not provide a positive duty to bargain on either side. Section 8 (c) of the Labour Act makes it an unfair labour practices for an employer to refuse to bargain in good faith with workers' committee or trade union.[147]This is in line section 8 (f) which makes it an unfair labour practice for an employer to bargain collectively with an uncertified trade union where a certified trade union exists.[148]The worker is entitled to get an order from the court rectifying the unfair labour practice and the court may order the employer

[146] Supra note 122.
[147] Madhuku L, op cit note 7.
[148] Ibid.

to negotiate. However, it is not 'unfair labour practice' for a trade union to refuse to negotiate.[149] Because it is an 'unfair labour practice' to refuse to bargain, in all the circumstances in which workers' committee or a trade union has a right to engage in collective bargaining, the employer is legally obliged to enter into negotiations with it unless the request by the workers' committee or trade union is grossly unreasonable.[150] Section 74 (6) of the Labour Act is worth mentioning. It entitles workers to negotiate for more favourable conditions, but does not create a legal obligation on either party to collectively bargain. The essence of the provision is that it makes it clear that the existence of collective bargaining agreement does not prevent negotiations seeking to create more favourable conditions than those provided for in the collective agreement. Professor Madhuku was right when he mentioned that 'it is a provision inserted by the Legislature *ex abundanti cautela* (out of abundance of caution) and it creates the legal basis for either party to the employment contract to seek negotiation.'[151] Therefore, one may safely conclude that the Labour Act's contemplation of the right to collective bargaining may be in line with the Constitution of Zimbabwe since these laws favours voluntarism in the process of collective bargaining.

b) The right to strike as a collective bargaining tool

The right to strike is part of the legal framework that may be used by the employee to promote, protect and enforce the right to collective bargaining. Without this right, the right to collective bargaining is useless. Khan Freund opined that without the right to strike, collective bargaining is more than collective begging.[152]A worker's ability to withdraw his or her labour and corresponding employer's power to lock out employees breathes life into the right to collective bargaining.[153] Disputes of interest are best resolved through power games like collective job action if negotiations fail to bear tangible fruit. A lawful strike is one which is not prohibited in terms of section 104 (3) of the Labour Act. The right to strike is of cardinal importance in any labour law regime based on social justice and democracy in the workplace. It lies at the heart of the freedom of association, the right to organize and collective bargaining. The right has received acclaim under international law.

[149] Supra ibid.
[150] See generally *Olivine Industries (Pvt) Ltd v Olivine Workers' Committee* 2000 (2) ZLR 200 (S).
[151] Madhuku L, supra note 7 at 332.
[152] Khan-Freund O, *Labour and the Law*, Stevens & Sons Ltds, 11 New Fetter Lane, London 3rd edition (1983) at 76.
[153] Mucheche C. H, supra ibid note 4.

Under Zimbabwean law, the legal basis for the right to strike is provided for under statutes and the Constitution. Prior to the 2013 Constitution, the sole basis of the right was in terms of the Labour Act. The courts had adopted the unitarist approach and rejected the functional approach position that the freedom of association encompassed the right to strike.91 Under the Labour Act, a considerably restricted right to strike exists, compared to the new Constitution and international law. Section 104 (1) of the Labour Act provides for a right to collective job action, in the following terms, '*Subject to this Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest.*' However, section 65 (3) of the Constitution has elevated the right to strike to a constitutional right. The only permissible constitutional derogation on the right to strike is in respect of essential services as provided for in terms of section 65 (3) of the Constitution. The right is specified as for "employees, worker's committee and trade unions." It does not mention employers and employer's organizations. This is consistent with the international paradigm. It is also consistent with s 65 (3) of the Constitution which extends the right to "every employee."

However, section 104 (1) of the Labour Act is restrictive compared to section 65 (3) of the Constitution and international labour standards. This is at several levels. Firstly, the Act specifically conditions the right as being exercisable only in relation "to resolve disputes of interest." The constitutional provision is broader. It establishes a right to participate in collective job action without restricting the purpose for which the collective job action may be exercised for. The Constitution therefore potentially allows for a very broad range of lawful and legitimate purposes for which strikes and collective job action may be done for, including work, economic, social or even political objectives. This is consistent with ILO jurisprudence on the permissible objectives of the right to strike. To the above extent it can be strongly argued that section 101 (1) of the Labour Act is unduly restrictive and ultra vires section 65 (3) of the Constitution. The restriction of collective action to disputes of interest only is excessive and unlikely to be saved under section 86 of the Constitution. A comparable position is under section 64 (1) of the South African Labour Relations Act, where the wording of the right is broader and there is also inclusion of the right to protest action to protect socio-economic interests per section 77 Labour Relations, 1995. The second level of difference is in relation to the definition of "collective job action." Under section 2 of the Labour Act, collective job action is defined 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, lockout, sit-in or sit-out, or other such concerted action.' The above definition restricts the right to strike only to demands "related to employment" and in relation to "a party to an employment relationship." This means socio-economic or political demands which are not directly related to the employer are excluded, whereas the same are permissible under the ILO framework. Secondary strikes would also be excluded. In South Africa such secondary strikes are permissible in terms of section 66 (1) Labour Relations Act, 1995. The definition also excludes general protest action to promote or defend socio-economic interests of workers, such as the stayaways of the late 1990s or what is termed the right to protest action under South African labour legislation as provided under section 77 (1) Labour Relations Act, 1995.

The current provisions of the Labour Act can be viewed as unconstitutional since they require a notice and a certificate of no settlement among others to precede a lawful strike. In terms of the Constitution, the right to strike can even be exercised by one employee unlike under the old law where the strike required more than one employee. With the new constitutional dispensation, Zimbabwean law is poised to give life and meaning to the right to strike as the impetus and the tone has already been set. There is need for a paradigm shift to ensure that action speak louder than words expressed in legislation so that the right to strike ceases to be a pipeline dream but a reality. Undoubtedly full compliance with ILO requirements on the right to strike requires more proactive action by the courts and the State and other social partners but there is beaming light at the end of the tunnel. Thus, one can safely conclude that to a greater extent the Labour Act undermines the right to collective bargaining. For an employee to enjoy his or her right to collective bargaining, the law must also promote and protect the right to strike as well.

4.3 Institutions to promote, protect and implement the right to collective bargaining in Zimbabwe.

a) The Judiciary

Judicial pronouncements have both direct and indirect effects on the enjoyment of the right to collective bargaining. The court's decision in the case of *PTC v Posts and Telecommunications Workers' Union and Others*[154] is legally plausible. This decision has both direct and positive effect on the enjoyment of the right to collective bargaining law in Zimbabwe. The facts of this case are that the employer tried not to comply with a gazetted collective bargaining agreement on the basis

[154] 2000 (2) ZLR 722 (S).

that it could not afford the wage increments and that increases were as a result of an error ostensibly on the basis that the employer representatives lacked the requisite mandate. The then Minister of Labour entertained the illegality and ordered the employer to pay lower wages and referred the matter to a mediator. The Supreme Court correctly ruled that it was unlawful for the Minister of Labour to order an employer to ignore a gazetted collective bargaining agreement and refer the matter to a mediator. This decision is legally sound because once gazetted, a collective bargaining agreement becomes legally binding and holy. The Minister who is not privy to that agreement cannot purport to overturn it. Thus, the court's decision has the effect of promoting and protecting the enjoyment of the right to collective bargaining in Zimbabwe.

In another monumental and celebrated case of *Art Corporation Ltd v Moyana*[155], the Supreme Court of Zimbabwe held that labour laws should protect employees who are vulnerable and weaker parties to the employment relationship. This landmark case has positive effect on the law of collective bargaining in Zimbabwe. The court explained that the purpose of the Labour Act was to protect employees and thus it provides for fundamental rights of employees and not employers. The Act was enacted and tailor made to protect employees. This legal position is now codified in terms of section 2A of the Labour Act. This section provides that the chief purpose of the Labour Act is to advance social justice and democracy at the workplace. Thus any process of collective bargaining must be progressive to preserve the legacy of section 2A of the Labour Act. The court's decision in the above aforementioned case has the effect of promoting section 65 (5) (a) of the Constitution.

On the contrary, there are some instances where the judiciary indirectly undermined the right to collective bargaining. In the case of *Don Nyamande & Anor v Zuva Petroleum (Pvt) Ltd*[156], the Supreme Court of Zimbabwe delivered a shock labour ruling which asserted that the employer and the employee are equal in an employment relationship and that the employer has common law right to unilaterally terminate a contract of employment on notice. With greatest the Supreme Court's decision may be flawed at law. Labour law was created to aid the employee in his relationship with the employer and its trust is to curtail excesses by the employer which flow from

[155] 1989 (1) ZLR 304 (S).
[156] SC 43/15.

the unequal bargaining power between the two parties.[157] However, in the case of Don Nyamande, the Supreme Court opposed this view. The legal import of the Supreme Court decision is that bargaining powers of the two parties (employer and employee) are equal although nothing could be further from the truth. Labour can never be equal to capital in the sphere of bargaining power. The case indirectly reversed the gains of the new constitutional dispensation in the context of the right to collective bargaining. The employer and the employee can never be equal in the process of the collective bargaining or during the process of termination of employment contract. The process of collective bargaining must appreciate this uneven relationship. In making section 12 of Labour Amendment Act No. 5 of 2015 retrospective, the legislature acknowledged that the employer was wielding too much power in the employment relationship which allowed employers to terminate the contract of employment on notice. Thus, bargaining powers of the employer and the employee cannot equal, be it on termination of contract of employment as was in the case of Don Nyamande or during the process of collective bargaining. Therefore, one may argue that there is simply no guidance to our judiciary on how to apply and make use of the right to collective bargaining for purposes of enhancing enjoyment of the employment relationship.

b) The State and/or Government

The State is a key player in the process of collective bargaining. It can either promote, protect and enforce the right or it can undermine the enjoyment of the right to collective bargaining. The government has been promoting collective bargaining since 1990.The Government of Zimbabwe has first laid the legal framework for collective bargaining through the enactment of the Labour Act. In some instances, the government Minister has power to interfere with the freedom of the parties in collective bargaining. The freedom of parties maybe affected by the fact that a collective agreement must be registered before it is effective and the Minister of is given power to interfere with the freedom of parties.[158]Once the Minister directs the refusal of registration of a collective bargaining agreement, the parties are now forced to continue bargaining until they come up with a perfect agreement. The Minister can also direct the employer and the employee to renegotiate to amend the objectionable parts of a collective bargaining agreement. The Minister's involvement

[157] Mucheche C, *Constitutionalism and Contemporary Labour Law Developments in Zimbabwe, South Africa and Namibia: Labour Broking, Termination on Notice & Sexual Harassment*, (2017) 2nd edition Zimlaw Trust, African Legal Resources Dominion, Harare.

[158] Section 79 (2), Labour Act.

in the context of refusal to register agreements for reasons solely determined by himself is an unreasonable interference with the freedom of the parties.[159]The whole philosophy of collective bargaining is that the parties are the best judges of what is right for them subject, of course, to the public interest.[160]But this public interest should not be judged by the Minister of alone.[161] Thus, the State and or the Government has the duty to promote the right to collective bargaining.

4.4 Conciliation, Mediation and Arbitration as ideal methods for resolving collective bargaining disputes.

a) Arbitration

Arbitration is a procedure by which a dispute may be determined without recourse to the courts. In some cases, arbitration is compulsory, but it is mainly used as a result of a provision in the contract between the parties to the dispute. If a party who has previously agreed to arbitration, institute an action nevertheless, the other party may apply to the court for a stay of the action until the arbitration has been completed. Mucheche noted that, compulsory arbitration is not ideal for collective bargaining because the arbitrator is imposed onto the parties by the State.[162]However, voluntary arbitration is ideal for collective bargaining because it allows the parties to freely choose their arbitrator and ensures finality because an award emanating from voluntary arbitration cannot be appealed against.[163]That does not exclude a review based on irregularity, but is usually not easy to upset an arbitrator's award as the grounds of review are limited. The employer or worker are free to choose their own arbitrators with the requisite expertise to deal with the dispute at stake whereas in compulsory arbitration an amateur arbitrator can be appointed to deal with a complex dispute beyond his scope.[164]

Also with compulsory arbitration, the dispute can cascade into the formal courts and take long to resolve. The longer it takes for the matter to be resolved by an arbitrator appointed by the State or Labour Court the more tension.[165]This is counter-productive because workers will not work

[159] Madhuku L, op cit note 7 at 345.
[160] Ibid.
[161] Supra ibid.
[162] Mucheche C. H, supra note 4 at 61.
[163] Ibid.
[164] Supra ibid.
[165] Resorting to formal courts of law does not provide a win-win solution to collective bargaining disputes. In the case of *Chamber of Mines v Associated Mine Workers Union of Zimbabwe* LC/H/250/12 the Labour Court set aside an arbitral award which had awarded employees twenty per centum increase as irrational and arbitrary and substituted it

wholeheartedly given the unfished collective bargaining dispute. Compulsory arbitration takes place where there is no dispute resolution mechanism enshrined in the collective bargaining agreement. It is worst and primitive form of resolving collective bargaining disputes because it unduly protracts the collective bargaining process. A party who is aggrieved by the arbitral award can either appeal or seek review from the Labour Court and it may take long to be resolved because of the technicalities involved in litigation. Compulsory arbitration creates a vicious cycle and a marry go around scenario.[166]Importantly, an arbitral award has the effect of a judgement of the High Court and can be enforced as such. In line with this, it is patently clear that both voluntary and compulsory arbitration are desirable mechanism for resolving collective bargaining disputes.

b) Conciliation

More so, the parties may also make use of conciliation for resolving collective bargaining disputes. It allows parties to come up with their own solution as opposed to have a third party impose his views as happens in compulsory arbitration. This method is akin to mediation in that it results in the parties reaching an agreement themselves. It is also similar in that this solution is reached with the assistance of a trusted third party. Parties are encouraged to try to find solution themselves with the conciliator going no further than to say for example 'have you given thought to such-and-such a solution?'[167] He leaves the parties to come to their own solution rather than to try to persuade them to any particular choice. On this note, conciliation is an important tool for resolving collective bargaining disputes.

c) Mediation

Mediation is no longer than assisted negotiation and it takes place under the supervision of the mediator. The word mediation is derived from the Latin word '*mediare*', which means to be in the middle. That describes the position of the mediator quite accurately. The mediator does not make decisions or give rulings. This method also assists the employer and the employee to reach an agreement between themselves. The answer is not given to the parties; they are just assisted to reach the answer themselves. They need to solve their problems themselves instead of having had

with five per centum increase based on inflation. This judgment created a win-lose situation and this is not ideal for healthy collective bargaining. See also, *City of Harare v Harare Municipal Workers Union* 2006 (1) ZLR 491 (H) at 494D-F.

[166] Mucheche C. H, op cit note 6 at 62.

[167] Mucheche C. H, supra note 7 at 145.

a solution imposed on them. they will have heard and considered each other's complaints and would have had to concede or persuade until eventually they have reached an agreement. However, a mediated settlement is not itself enforceable at law unless it is reduced to writing. The parties will appear before a mediator and each side will state its case. He or she tries to find common ground and gets the parties to agree on that and then agree on actual areas of dispute. The mediator will then meet independently with each of the parties to try to identify points on which they may be willing to yield trade off concession or otherwise compromise.[168] The mediator must not disclose anything without either party's consent, but in his discussions with parties, he will inevitably identify possible areas of compromise and will then go to one of the parties and put to it a suggested solution. If that party agrees then he goes to the other and puts the same solution. If both parties agree, he then calls them together and tells them that they have both accepted the solution. Therefore, one can safely conclude that mediation maybe used by the employer and employee to resolve collective bargaining disputes.

4.5 Conclusion

In summary, this chapter has clearly demonstrated the place and status of the right to collective bargaining in the Labour Act. The Labour Act as the enabling legislation gives life to the right to collective bargaining. The Act creates a duty to bargaining on part of the employer in certain circumstances. However, it does not provide a positive duty to bargain on either side. Further, the Act also entitles workers to negotiate for more favourable conditions, but does not create a legal obligation on either party to collectively bargain. The enjoyment of this right as provided for in the Labour Act must be in line with the Constitution of Zimbabwe. The legal basis of this argument is that the Constitution of Zimbabwe is the supreme law of the land. It is the mother law. This is a grand norm and no derogation is allowed from the requirements of section 65(5) of the Constitution. The research also focused on the right to strike as a collective bargaining tool. The right to strike is a legal weapon available to the employee to enforce the right to collective bargaining. The better view is that without the right to strike, the right to collective bargaining is a *brutum fulmen* (harmless thunderbolt). The role of the Judiciary and the Government was clearly appreciated in this chapter. These institutions are crucial in the context of promoting, protecting and enforcing the right to collective bargaining. The last part of this chapter focused on

[168] Ibid at 144.

conciliation, mediation and arbitration as alternative dispute resolution mechanisms available to the employer and employee in collective bargaining disputes. The strengths and weaknesses of these available legal, institutional and administrative mechanisms were clearly articulated.

CHAPTER 5

REINSTATEMENT OF ARGUMENTS, CONCLUSION AND RECOMMENDATIONS FOR FUTURE RESEARCH

5.1 Introduction

This Chapter will summarize the major arguments made in the above four chapters before making practical recommendations for future research. It captures the central argument of this research in summary and reinstates the objectives of this study.

5.2 The research in summary

This dissertation has examined the effects of constitutionalizing the right to collective bargaining in Zimbabwe. For the first time in the history of the existence of independent Zimbabwe, the right to collective bargaining is now enshrined under section 65 (5) of the Constitution of Zimbabwe. This is a milestone achievement which deserves commendation especially if one compares the new Constitution and with the old Lancaster House Constitution (LHC) which is a mere dry letter without any explicit labour rights. The right to collective bargaining as enshrined in the Constitution forms the heart of Zimbabwe's labour rights. This is so because the right assumes a willingness on each side to abandon fixed positions were possible in order to find common ground. The Constitution seeks to transform the lives of the general populace and create better working conditions for all. The right to collective bargaining is now entrenched in the fundamental bill of rights in terms of the Constitution of Zimbabwe. This effectively means that the right to collective bargaining is now justiciable. However, the only permissible constitutional derogation from the right to collective bargaining is in respect of essential services.

The research also made respectful submissions that section 2 of the Labour Act has characterized a collective bargaining agreement as '*…an agreement negotiated in accordance with the provisions of this Act which regulates the terms and conditions of employment of employees*.' This definition unpacks the Labour Act's contemplation of the process of collective bargaining as a negotiation process with a view to agree on the terms and conditions of employment. The law of collective bargaining in Zimbabwe is rooted on 2A (1) (c) of the Labour Act clearly provides that the purpose of the Act is to advance social justice and democracy at the workplace by providing a legal framework within which employees and employers can bargain effectively for the

improvement of conditions of employment. This patently shows that the right to collective bargaining is clothed with the force of law in Zimbabwe.

More so, the research also focused on the right to strike as a collective bargaining tool. The right to strike is a weapon available to the employee to enforce the right to collective bargaining. The better view is that without the right to strike, the right to collective bargaining is a *brutum fulmen* (harmless thunderbolt). The role of the institutions such the Judiciary and the Government was clearly also appreciated in this dissertation. These institutions are crucial in the promotion, protection and enforcement of the right to collective bargaining. The last part of this research focused on conciliation, mediation and arbitration as alternative dispute resolution mechanisms available to the employer and employee in collective bargaining disputes. The strengths and weaknesses of these available legal, institutional and administrative mechanisms were clearly appreciated.

Largely significant in this research was that the right to collective bargaining as enshrined in the Constitution of Zimbabwe and subsidiary legislation such as the Labour Act is also understood in the same way as it is conceived by the ILO Convention No. 154 and ILO Convention No. 98. These conventions promote voluntarism during the process of collective bargaining. The principle found home in Zimbabwe in the case of *Chivinge v Mushayakarara and Another*.[169]The inclusion of the right to collective bargaining in the Constitution is a direct response to these international norms, best practices and developments in the area of labour law. This research also focused on other modern jurisdictions such as United States of America, Malawi and South Africa as comparators. It is these judicial interpretations that gives meaning to the right to collective bargaining in section 65 of the Constitution of Zimbabwe.

5.3 Major highlights

The major highlights are that Zimbabwe has constitutionalized the right to collective bargaining. However, it has not comprehensively given the right to collective bargaining the prominence it deserves as evidenced by serious violations of this right. This is a massive problem. It means that there is no general consensus among Zimbabweans on the scope, meaning, nature and extent of the right to collective bargaining as enshrined in the Constitution of Zimbabwe and other pieces

[169] 1998 (2) ZLR 500 (S) at 505.

of legislation such as the Labour Act. Although the Constitution of Zimbabwe includes the right to collective bargaining in the Bill of Rights, and in line with international best practices, the problem remains that there is no solid jurisprudence that can assist in the implementation, enforcement and application of this right to collective bargaining. Accordingly, the constitutional recognition may not translate into the people of Zimbabwe fully enjoying and realizing their right to collective bargaining as envisaged by the Constitution. There is simply no guidance to our judiciary, the executive, members of the academia, legal pundits, lawyers and the legislature on how to apply and make use of the right to collective bargaining for purposes of enhancing enjoyment of this fundamental right.

5.4 Reassertion of the Objectives

This research sought to:

a) examine the nature, content and extent of the right to collective bargaining in Zimbabwe
b) explore the effect of constitutionalizing the right to collective bargaining in Zimbabwe.
c) scrutinize the international legal framework on the right to collective bargaining.
d) examine the substantive legal, institutional and administrative mechanisms that exist and their implications on the promotion and enforcement of the right to collective bargaining Zimbabwe.
e) provide a framework that would guide the understanding, enforcement and implementation of the right to collective bargaining in Zimbabwe.

5.5 Reassertion of methodology and framework analysis

This research has used both qualitative and quantitative research methods. This has substantially influenced the outcome of this dissertation. Various court judgements were evaluated. The study also made use of various legal sites, for instance MalawiLII, Veritas, SAFLII and ZIMLII. The dissertation also used secondary sources in form of research papers, thesis and conference papers. These sources were not used in as far as they attempt to draw conclusions in law, or give legal opinions on the basis of the information they would have gathered. But only to provide legal guidance on this subject matter. Participatory observation was also used in this dissertation to get necessary information since the researcher works at various organizations as a legal intern. Further, descriptive and conceptual analysis was also used in this research. On the same note, doctrinal

analysis of primary literature such as the Constitution of Zimbabwe, legislation, case law, international treaties, conventions, declarations, agreements, United Nations Resolutions and Protocols were used. This helped the researcher to explore in detail doctrines relating to the protection and enjoyment of the right to collective bargaining.

The researcher also used case study and comparative analysis approach. However, some of the research questions cannot be answered through descriptive and doctrinal analysis. This necessitated the use of comparative and case study approach. The comparative approach has empowered the researcher to critically examine the scope, content and extent of the right to collective bargaining in the Constitution of Zimbabwe and other constitutions from modern jurisdictions, such as the United States of America, Malawi and South Africa. It is hoped that Zimbabwe will learn from these other jurisdictions on their understanding, protection and protection of the right. The method will be very instructive in establishing how the right to collective bargaining can be enjoyed by Zimbabweans.

5.6 Conclusion

This dissertation provides a conceptual framework to provide the effect of constitutionalizing the right to collective bargaining. Both the Constitution of Zimbabwe and the Labour Act provides a definite right to collective bargaining. The right to collective bargaining is now a fundamental constitutional right which derives its life and existence from the supreme law of Zimbabwe such as to render any law, custom or practice that is inconsistent with that right to be null and void to the extent of inconsistency. The right to collective bargaining is enshrined under section 65 of the Constitution of Zimbabwe. However, the Constitution extends the right to collective bargaining to all but not to security service employees. The term security service employees must not be interpreted to mean private security employees, for instance security guards but to members of state security. Security guards enjoy the right to collective bargaining but members of the state security do not enjoy this right. This exclusion of members of the security services from enjoying the right to collective bargaining can be criticized as manifestation of state corporatism. However, those who justify this exclusion may raise the argument that state security service is a very sensitive area which should be jealously guarded. If members of the state security were to be allowed to go on strike as a tool to force collective bargaining, the nation's security can be under serious threat. Whatever justifications given for a blanket ban on the right to collective bargaining in the state

security sector, the bottom line is that this is a plain form of arbitrary denial of rights to a layer of employees who fall within that blanket. They are also exposed to the dictates of their employer whose conditions of employment are unquestionable. However, the rest of public service employees now enjoy the right to collective bargaining and its logical corollaries like the right to organize and the right to strike under section 65 of the Constitution. Under the old constitutional dispensation, the public service employees were not enjoying the right to collective bargaining. By and large, this old way of doing things was assigned to the scrap heap by the promulgation of section 65 of the current Constitution of Zimbabwe.

Secondly, this research found out that both the Labour Act and the Constitution of Zimbabwe does not create a judicially enforceable duty to bargain on the other party of the employment contract but requires the State to create a framework conducive for collective bargaining. These laws favour voluntarism during the process of collective bargaining. This is in line with ILO jurisprudence on the law of collective bargaining collective bargaining. Interpreting these laws to mean a legally enforceable duty to bargain could draw the courts, members of the academia, legal pundits and lawyers into a range of controversial industrial relations issues. The cardinal rule is that any meaningful labour law interpretation and reforms should not erode the right to collective bargaining but ensure that the right is brought to fruition.

Thirdly, this research drew conclusion that Zimbabwe must learn from other modern jurisdictions such as South Africa, Malawi and United States of America. The Republic of South Africa and the Republic of Malawi take same approaches to ILO Conventions on the right to collective bargaining. These two sister jurisdictions provide higher levels of coverage and protection for of the right to collective bargaining as required by ILO standards. However, the United States of America and the International Labour Organization Conventions take different approaches to the right to collective bargaining. Despite having a permanent seat on the International Labour Organization Governing Body, the United States of America tends to provide lower levels of coverage and protection for employees than required by ILO standards. Further, Zimbabwe must not also ignore the precepts and dictates of International Labour Organizations Conventions such as ILO Convention 98. This argument is buttressed by inclusion of other international and regional treaties such as the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People's Rights. These judicial

interpretations and comparisons from other modern jurisdictions and international conventions that give meaning to the right to collective bargaining in section 65 of the Constitution of Zimbabwe.

Fourthly, this research also accepts that the right to strike is a collective bargaining tool available to the employee to enforce his or her constitutional right to collective bargaining. The better view is that without the right to strike, the right to collective bargaining is a *brutum fulmen* (toothless bulldog) on the employee's side. Without it, collective bargaining is no more than collective begging. An employee's ability to withdraw his or her labour and the corresponding employer's power to lock out employees breathes life into the right to collective bargaining. The most lethal and potent weapon at the disposal of the employees is to withhold their labour and embark on strike. In order for the collective bargaining to be effective, there is need for relative equilibrium of power between the parties and use of legitimate economic weapons such as strike by workers accompanied by the employer's right to withdraw wages and lockout.

Further, the role of the Judiciary and the State and/or Government was clearly appreciated in this dissertation. These institutions are crucial in promoting, protecting and enforcing the right to collective bargaining. The judiciary interprets the law and the government helps in the execution of the law. The last part of this dissertation focused on conciliation, mediation and arbitration as alternative dispute resolution mechanisms available to the employer and employee to solve disputes during the process of collective bargaining.

5.7 Recommendations

a) The need to capacitate the Judiciary

There is need to introduce workshops which target the judiciary. Civil Society Organizations (CSOs) and organizations such as the Legal Resources Foundation (Legal Resource Foundation), Centre for Applied Legal Research (CALR)and Zimbabwe Lawyers for Human Rights (ZLHR) must produce manuals which outline the scope, content and extent of the right to collective bargaining. They must also produce a tools for tracking the development of the right to collective bargaining and these must be used in these workshops to specifically equip the judiciary with practical benefits of understanding the nature, scope, content, meaning and extent of the right. The Law Society of Zimbabwe can also partner academic researchers, the Ministry of Labour, the Ministry of Justice, Legal and Parliamentary Affairs, Judicial Service Commission, labour law-based law firms and all four law schools in Zimbabwe; that is Zimbabwe Ezekiel Guti University

Faculty of Law, University of Zimbabwe Faculty of Law, Midlands State University Faculty of Law and Herbert Chitepo Law School of Great Zimbabwe University to organize judicial colloquiums or retreats which are aimed at capacitating judges in constitutional interpretation and human rights. Further, section 7 of the Constitution of Zimbabwe should be used as a way of increasing the constitutional literacy of the general populace. The section allows citizens and various organizations to work together with the Government in making the general populace aware of the provisions of the Constitution. Test cases can be conducted during workshops and can be organized under section 85, as the legal standing provision.

b) The need for strategic research partnerships

Labour law-based law firms, trade unions such as Zimbabwe Congress of Trade Unions and impact litigation lawyers must partner academic and legal researchers in showing the benefits of understanding the right of collective bargaining. These researchers would review the literature on the importance of the right of collective bargaining and the methods of constitutional interpretation that would have been developed by the judiciary to promote, protect and enforce the right. The researchers will also carry out specific research on the status of compliance by the judiciary with the interpretation guidelines that are enshrined in the Constitution. There is need to develop mechanisms for effective monitoring and to assess the development of the law on the right to collective bargaining. It should be mentioned that there is comfort in numbers and a lot more effort is needed to be done within the various stakeholders alluded above. It would be therefore difficult to blame the judiciary when they do not have the necessary information to guide them.

Further, lack of education on the nature, scope, content and meaning of the right to collective bargaining is another possible explanation for the increase of violation of the right to collective bargaining. This is despite the fact that Zimbabwe boasts some of the highest literacy levels in Africa and the world. However, these high levels, of literacy among Zimbabweans have not yet translated to the understanding of the right to collective bargaining. Education on labour issues is therefore critical to alter behavioural change in the way labour rights are viewed and treated by Zimbabweans. The people of Zimbabwe must take the centre stage on the development of the right to collective bargaining. Citizens must be at the centre of any meaning advocacy on the importance of the right to collective bargaining.

c) The need to follow best practices from the legal profession

Practicing lawyers, especially those who specialized in labour law must take their Continuous Professional Development on labour programs seriously. They can also carry out on the job training initiatives such as enrolling for postgraduate degree programmes such as Masters Degrees or Doctoral Studies in Labour law. Further, the Law Society of Zimbabwe conducts various trainings which members of the legal profession must attend so that they earn the required CPD points. It also works in collaboration with International Bar Association (IBA) and organizations such as ZLHR. Members can attend trainings under the auspices of these organizations and still earn CPD points. Judges must be constitutionally obliged to further their academic qualifications on labour matters. This is because the Constitution of Zimbabwe is very transformative and obliges the judges to develop common law.[170]They must be continuously trained on the importance of labour law in any functional democracy. Inasmuch as judges have their own colloquial, which is done together with the Law Society, such an arrangement must be framed in a manner that considers them first as lawyers. Judges must be continuously trained on the nuances of legal research and comparative constitutional arguments especially on the right to collective bargaining. This recommendation makes sense considering the fact that lawyers in private practice are obliged to undertake CPD programmes if they are to practice the noble profession of law in a particular legal year. The same must equally apply to judges who have a constitutional duty to develop common law and in this context to develop common law principles on the right to collective bargaining.[171]

d) The State and/ or Government must support full enjoyment of the right to collective bargaining.

The government and political actors must strengthen and spearhead sound policies and laws surrounding the promotion, protection and enforcement of the right to collective bargaining. Against this background of lack of understanding of the importance of the right to collective bargaining by Zimbabweans in general, the Government should put in place appropriate mechanisms to deal with these shortfalls and embrace imparting knowledge in the minds of the

[170] Section 176, Constitution of Zimbabwe supra note 2.

[171] Section 176, supra ibid note 1 provides that Constitutional Court, Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.

general populace. There is need for political will from the government of the day to capacitate citizens on understanding the importance of the right to collective bargaining. The government must reason together with its citizens. The State must engage both the employer and the employee to try and understand the importance of the right to collective bargaining at workplaces. The development of labour law especially the right to collective bargaining must be citizen based. Citizens are the engine that turn turbines of any nation. When you get citizens in the right mode, reconstruction of the right to collective bargaining becomes easy.

Importantly, there is a lacuna in the Zimbabwe's labour laws in that there are no provisions in the Labour Act that compels good faith negotiations and seek to prevent unfair labour practices in non-statutory collective bargaining agreements. This runs contrary to Article 5 of the Convention 98 of 1949 which stipulates that collective bargaining '*should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules (and that) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining*.' The legal import of this legal provision is that the State has the duty to amend the law so as to promote good faith negotiations in non-statutory collective bargaining agreements.

More so, the restrictions placed on unregistered trade unions by the Labour Act runs counter to Article 4 of ILO Convention No. 98 which seeks to encourage and promote collective bargaining by all parties involved in the process without discrimination. It is therefore patently clear that Zimbabwe labour law is lagging behind Article 4 and Article 5 of ILO Convention No. 98 when it comes to machinery and procedures to facilitate collective bargaining. It is recommended that in order to encourage the harmonious development of collective bargaining and avoid disputes, it would be desirable for the State to draw up an applicable objective procedure which make it possible to determine the most representative trade unions for the purpose of collective bargaining when it is not clear which trade unions the works would like to represent them.

As if this is not enough, there is no clear cut machinery and procedures to facilitate collective bargaining in public sector. The Labour Act itself does not apply to public service employees. This is in terms of section 3 of the Labour Act. They are governed by the Public Service Act[172] and its

[172] Chapter 16:04 (hereinafter referred to as the Public Service Act).

regulations. The Public Service Act and the regulations made under it do not provide for machinery and procedures to facilitate collective bargaining. I recommend the Government of Zimbabwe to align the Labour Act to the Constitution so as to make it apply to public service employees. It is the enabling Act in the context of labour law in Zimbabwe.

In furtherance of the above, there are no specialized bodies in Zimbabwe which closely monitor the duty to negotiate in good faith. This makes the provisions of section 75 of the Labour Act an empty noise. Accordingly, ILO report on Committee of Experts (1994:110), attaches importance to the principle that employers and trade unions should negotiate in good faith and endeavor to reach an agreement, even in the public sector or essential services where trade unions are not allowed strike action. This point buttresses the view that compliance with the duty to negotiate in good faith is one of the major shortcoming of collective bargaining law in Zimbabwe. I recommend the government of Zimbabwe to facilitate the enactment of relevant laws to establish specialized bodies which monitors the duty to negotiate in good faith.

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