Internationalisation of Labour Law: The Lesotho Experience

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Abstract

This article considers Lesotho's labour laws in the light of the country's obligations under international labour standards. It assesses the extent to which the international labour standards have had an impact on the development of labour law in Lesotho. It argues that Lesotho's various Acts perpetuate the country's non-compliance with International Labour Organization standards as significant aspects of the Acts still undermine workers' rights. It contends that Lesotho still has a long way to go towards fulfilling the expectations of the International Labour Organization. After noting the various labour-law concepts in the international labour standards which have had an impact on Lesotho law and reviewing the sources of Lesotho's obligations to respect the various workers' rights, the article focuses on the workers' rights to join trade union organisations, the promotion of free and voluntary collective bargaining and the right to strike. The article concludes that reforms are needed to internationalise Lesotho's labour law further, in line with International Labour Organization requirements, so that workers' rights are protected.

Keywords: Constitution; internationalisation; International Labour Standards; conventions; labour code; recommendations; labour law

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Introduction

At independence, Lesotho acceded to the International Labour Organization (ILO) Constitution and the various international instruments on labour to which Britain was party.[1] In this way, internationalisation became an inherent element of Lesotho's labour law from its foundational stages.[2] The ILO is the foundation for the International Labour Standards in the form of its Conventions and Recommendations.[3] The ILO's sources of international labour law can be found in its Constitution and in its numerous Conventions and Recommendations. The purpose of this article[4] is to assess the extent to which the International Labour Standards have an impact on the development of Lesotho's labour law. This will be undertaken in five main ways. First, the main problems that confront Lesotho's internationalisation of its labour law is investigated. Second, international labour law is conceptualised briefly. Third, the extent of the collaboration between the ILO and the Kingdom of Lesotho is considered. Fourth, the article reflects on the judicial application of the principles used in the interpretation and administration of the Labour Code[5] and their effect on the implementation of the International Labour Standards in Lesotho. Finally, the article, by way of conclusion, highlights some of the salient issues resulting from the discussion.

Problematisation

Lesotho has ratified 23 International Labour Conventions, of which 22 are in force in the country, including all eight fundamental core conventions.[6] They include those that cover the four fundamental principles and rights at work.[7] This notwithstanding, no assessment has to date been undertaken of the extent to which the International Labour

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1 The Kingdom of Lesotho obtained independence from Britain on 4 October 1966.

2 See also s 4*(c)* of the Labour Code Order 24 of 1992.

3 Moses Daemane, 'The Critical Exposure of Lesotho's Labour Law Effectiveness: Industrial Relations' Calamity of Textile Industry Workers in Lesotho' (2014) 5(2) Journal of Social and Development Sciences 58–72, 65.

4 This article was adapted from a conference paper presented at the Labour Relations Law in South Africa: Twenty Years of Lawmaking and Adjudication Conference held at the University of South Africa, Pretoria, on 17–18 August 2016.

5 Labour Code Order 24 of 1992. The Labour Code Order is an Act of Parliament made during the military rule in Lesotho. Since the Military Council was not an elected but a legislative body, all the laws made in the exercise of its legislative powers are styled 'Orders'. They are of the same legal force and effect as Acts of Parliament.

6 Ministry of Labour and Employment, Workers' and Employers' Organizations, *Lesotho and the International Labour Organization Lesotho Decent Work Country Programme, Phase II 2012 to 2017* (launched on 29 February 2012) 15 <http://www.ilo.org/public/english/bureau/program/dwcp/download/lesotho.pdf> accessed 25 July 2016.

7 Freedom of association and the right to collective bargaining (C87 and C98); elimination of all forms of forced labour (C29 and C105); abolition of child labour (C138 and C182); elimination of discrimination in respect of employment and occupation (C100 and c111).

Standards have affected the development of labour law in the country. The result is a disturbing dearth of information on this subject. To understand better how these labour standards have affected the development of the country's labour law, research is needed on the factors that mediate the implementation and enforcement of these standards in the country's legal system. This article undertakes such an evaluative study.

Conceptualisation of International Labour Law

The phrase 'internationalisation of labour law' is capable of denoting various concepts. First, it may be applied to the ratification and implementation of the ILO Conventions in line with Southern African Development Community (SADC) resolutions.[8] The ILO's Declaration on Fundamental Principles and Rights of Work and its follow-up Declaration creates obligations on its member states to adhere to the core labour standards by adopting the Declaration.[9]

Membership by any state of the ILO necessarily involves accession to its Constitution; and ratification of that accession must be communicated and registered, in this way rendering the Constitution binding on a member state.[10] This is clear from the Report of the International Labour Organization Committee on Freedom of Association.[11] Therefore, when a state decides to become a member of the ILO, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principle of freedom of association.[12] The ILO Constitution is a treaty. As a treaty, it creates obligations between member states *inter se* and between those members and the ILO as an institution created by the treaty.[13] In this way, the Constitution is in itself to be interpreted in the manner of other multilateral, interstate treaties.[14] The Constitution is therefore the foundation of modern international labour

8 As Paul Benjamin, *Labour Market Regulation: International and South African Perspectives* (Cheadle Thompson & Haysom Inc, 2005) 23, points out, in southern Africa the SADC Charter of Fundamental Rights adopted in August 2003 requires SADC members to ratify and implement the core ILO Conventions contemplated in the 1998 Declaration of Fundamental Principles and Rights at Work.

9 Benjamin (n 8) 23.

10 Neville Rubin, Evance Kalula And Bob Hepple (eds), *Code of International Labour Law; Law Practice and Jurisprudence: Essentials of International Labour Law Vol I* (Cambridge University Press, 2005) para 1.01.3.

11 See the United Kingdom Case No 2437 in the ILO Committee on Freedom of Association Report No 344 (vol XC, 2007, Series B, No 1) para 1311. The committee also recalled the conclusions reached in a similar case concerning the locally recruited staff of the Embassy of South Africa in Ireland (Case No 2197, 334th Report, approved by the Governing Body at its 290th Session (May–June 2004), paras 95–131). cf the discussion in the Industrial Court of Botswana case of *Olga Dube & Another v American Embassy/Botusa* Case No IC 897/2006.

12 See ILO, *Digest of Decisions and Principles of the Freedom of Association Committee* (5 edn, ILO 2006) para 15.

13 Rubin, Kalula and Hepple (n 10) para 1.01.4.

14 Rubin, Kalula and Hepple (n 10) para 1.01.4.

law (also called 'labour standards').[15] The International Labour Standards provide a benchmark of best practice on which member states can rely for guidance in the formulation of their policies and legal frameworks. Trade unions and employers' organisations also rely on these standards when they draft and negotiate collective bargaining agreements.[16]

International Labour Organization and Lesotho

The ILO has had a strong influence on the labour-law systems in southern Africa.[17] When a state decides to become a member of the ILO, which Lesotho is, it accepts the fundamental principles embodied in the ILO's Constitution and the Declaration of Philadelphia. A state has an obligation to give effect to those fundamental principles in its embassies, consulates and other offices.

The Directorate of Dispute Prevention and Resolution, the Labour Court and the Labour Appeal Court of Lesotho are robust in their application of the International Labour Standards. These rules of equity,[18] as they are sometimes called, are also applied by the Lesotho labour tribunals and courts when determining trade disputes. The following consolidated tables reflect the relevant conventions and the dates on which each convention was ratified. They also reflect the status of each convention.

15 Rubin, Kalula and Hepple (n 10) para 1.01.4.

16 Malebona Khabo, *Collective Bargaining and Labour Disputes Resolution – Is SADC Meeting the Challenge?* International Labour Organization (20 March 2008) 6 <http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-harare/documents/publication/wcms_228800.pdf> accessed on 29 July 2016.

17 Colin Fenwick, Evance Kalula and Ingrid Landau, 'Labour Law: A Southern African Perspective' (International Institute for Labour Studies, 2007) 7.

18 Steyn JA (as he then was) held in *Attorney General v Lesotho Teachers Trade Union* 1996 LLR 16 at 24 that the Labour Court was a 'court of equity' (whatever that meant) and not a court of law. This holding was, however, later reversed in *CGM Industrial (Pty) Limited v Lesotho Clothing and Allied Workers Union & Others* C of A CIV/10/99.

Table 1: Fundamental/core conventions

Convention	Date	Status
C029 – Forced Labour Convention, 29 of 1930	31 Oct 1966	In force
C087 – Freedom of Association and Protection of the Right to Organise Convention, 87 of 1948	31 Oct 1966	In force
C098 – Right to Organise and Collective Bargaining Convention, 98 of 1949	31 Oct 1966	In force
C100 – Equal Remuneration Convention, 100 of 1951	27 Jan 1998	In force
C105 – Abolition of Forced Labour Convention, 105 of 1957	14 Jun 2001	In force
C111 – Discrimination (Employment and Occupation) Convention, 111 of 1958	27 Jan 1998	In force
C138 – Minimum Age Convention, 1973 (No 138) *Minimum age specified: 15 years*	Minimum age specified: 15 years – 14 Jun 2001	In force
C182 – Worst Forms of Child Labour Convention, 182 of 1999	14 Jun 2001	In force

Table 2: Governance (priority) conventions

Convention	Date	Status
C081 – Labour Inspection Convention, 81 of 1947	14 Jun 2001	In force
C144 – Tripartite Consultation (International Labour Standards) Convention, 144 of 1976	27 Jan 1998	In force

Table 3: Technical conventions

Convention	Date	Status
C011 – Right of Association (Agriculture) Convention, 11 of 1921 (No 11)	31 Oct 1966	In force
C014 – Weekly Rest (Industry) Convention, 14 of 1921	31 Oct 1966	In force
C019 – Equality of Treatment (Accident Compensation) Convention, 19 of 1925	31 Oct 1966	In force
C026 – Minimum Wage-Fixing Machinery Convention, 26 of 1928	31 Oct 1966	In force
C045 – Underground Work (Women) Convention, 45 of 1935	31 Oct 1966	In force
C064 – Contracts of Employment (Indigenous Workers) Convention, 64 of 1939	31 Oct 1966	In force
C065 – Penal Sanctions (Indigenous Workers) Convention, 65 of 1939	31 Oct 1966	In force
C135 – Workers' Representatives Convention, 135 of 1971	27 Jan 1998	In force
C150 – Labour Administration Convention, 150 of 1978	14 Jun 2001	In force
C155 – Occupational Safety and Health Convention, 155 of 1981	01 Nov 2001	In force
C158 – Termination of Employment Convention, 158 of 1982	14 Jun 2001	In force
C167 – Safety and Health in Construction Convention, 167 of 1988	27 Jan 1998	In force

Notwithstanding that the above conventions have been ratified, their implementation has not always been effective, largely due to capacity challenges in ensuring enforcement, compliance and timely submission of relevant reports in accordance with the ILO's constitutional obligations.[19] In addition, Lesotho has neither ratified nor adopted the Promotional Framework for Occupational Safety and Health Convention No 187. This has resulted in many enterprises failing to integrate workers' wellness programmes as part of business concerns, leading to poor work ability and productivity.[20] Bearing in mind the above record of Lesotho's ratification of ILO conventions, it is apposite to consider the nature of their impact on the labour law of Lesotho.

19 Ministry of Labour and Employment, Workers' and Employers' Organizations (n 6) 15.
20 Ministry of Labour and Employment, Workers' and Employers' Organizations (n 6) 16.

Regulatory Framework of Labour Law in Lesotho

Constitutional Context

The Constitution of Lesotho is the supreme law of the country and if any other law is inconsistent with it, that other law is, to the extent of the inconsistency, void.[21] The word 'law', as used in the Constitution, includes any instrument having the force of law made in the exercise of a power conferred by a law.[22] It has been argued elsewhere that the right to life, the right to a fair trial, freedom from discrimination, freedom of expression, freedom of peaceful assembly, freedom from slavery and forced labour;[23] equality before the law and equal protection of the law[24] as well as freedom of association are areas in the Constitution of Lesotho which mark an existing intersection between labour law and constitutional law.[25] To these areas have been added four principles of state policy, namely*:* equality and justice; opportunity to work; just and favourable conditions of work and the protection of workers' rights and interests.[26]

There is no express provision in the Constitution of Lesotho that the international treaties and conventions to which Lesotho is a member should be borne in mind when interpreting the provisions of the Constitution. The methods by which courts ascertain a constitutional meaning are of the utmost legal and political importance.[27] It is now a settled principle of constitutional interpretation that ratified treaties provide a legitimate guide to interpreting constitutional provisions. This statement is made notwithstanding the traditionalist international-law approach adopted by some High Court of Lesotho judges to the effect that:

> [46] The *dualist* position of Lesotho would … be indicative that notwithstanding the fact that the country has ratified the CEDAW albeit with reservations, it still has to legislatively domesticate its provisions and ideals for their local enforcement. In the

21 Section 2 of the Constitution of Lesotho, 1993.

22 Section 154 of the Constitution of Lesotho, 1993.

23 Universal Declaration of Human Rights (UDHR) 25; International Covenant on Civil and Political Rights (ICCPR) 24; ILO 182.

24 UDHR 7; ICCPR 26; ILO 111.

25 Kananelo Mosito, 'The Constitutionalisation of Labour Law in Lesotho' (2014) 21(1) Lesotho Law Journal 33, 34–51.

26 UDHR 23; International Covenant on Economic, Social and Cultural Rights (ICESCR) 8; ILO 98.

27 Robert Post, 'Theories of Constitutional Interpretation' Yale Law School Legal Scholarship Repository 14 <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1208&context=fss_papers> accessed 28 July 2016.

> meanwhile, its equality oriented provisions would continue to remain purely inspirational.[28]

The above remarks were made in the context in which the High Court of Lesotho had been invited to interpret the equality and discrimination provisions of the Constitution in the light of the provisions of the Convention on the Elimination of Discrimination against Women (CEDAW). At this juncture, a critic would argue *en passant*, first, that the above approach by the High Court ignores the fact that the doctrine of the non-enforceability of international treaties is inherited from Britain, a country which possesses neither a written constitution nor a Bill of Rights, whereas in Lesotho the Constitution is supreme.[29] Second, given the generous and purposive approach required under the Constitution, it is questionable whether this doctrine of non-enforceability applies with respect to the domestic application of treaties which declare basic human-rights standards.[30] Third, it is doubtful whether the doctrine reflects the present-day aspirations of the people and gives to individuals the full measure of their fundamental rights and freedoms.

Fourth, it is arguable that the doctrine is concerned with non-enforceability as opposed to the use of treaties as guides to the interpretation of the Constitution. Finally, even if the doctrine of non-enforceability were to be accepted, the fact that Lesotho has ratified an international human-rights treaty cannot be regarded as wholly irrelevant. It is arguable that, by ratifying the treaty, the state has demonstrated its clear intention to comply with the provisions contained in it and should take cognisance of this action as an expression of the recognition which must be accorded to its provisions when interpreting similar fundamental rights provisions under the Constitution or, indeed, implying rights not specifically mentioned in the Constitution. It manifestly must not be presumed that the government signed these international treaties in bad faith.

Statutory Context

In 1988 the Government of Lesotho sought the assistance of the ILO and an expert in the field of labour law to help it update, revise and codify a number of fragmented pieces of labour legislation. At the time the country's labour legislation was dispersed and rather piecemeal, making it difficult for all concerned to find and apply the law in force.

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28 *Mantsubise Khasake-Mokhethi & Anor v Tsabalira Moloi* CIV/APN/73/2013. See also the remarks by the same judge in *Rex v Malefetsane Mohlomi* Review Case No 06/2013 CR NO10/2013, Review Order No 1/2013.

29 Section 2 of the Constitution of Lesotho, 1993.

30 cf *New Patriotic Party v The Inspector General of Police*, Judgment of the Supreme Court of Ghana, Writ No 4/93, 30 November 1993 (unreported) 3.

This resulted in the enactment of the Labour Code.[31] Consistent with ILO jurisprudence, the principles discussed below are contained in the Labour Code.

Tripartism

In keeping with the tripartist and social dialogue philosophy of the ILO, the Labour Code has established six main bodies through which the social partners are consulted on national labour issues.[32] These bodies are tripartite in nature.[33]

Child Labour

The Labour Code prohibits any person from employing a child or a young person in certain restricted circumstances.[34] It does not make a blanket prohibition of the employment of children and 'young persons'.[35] A 'young person' means a person of or over the age of 15 years but under the age of 18 years.[36] The Labour Code also provides that no person under the age of 18 years may enter into a contract of foreign service.[37] Where any question arises as to the age of any person wishing to enter into such a contract, the provisions of section 236 relating to the determination of age applies.[38]

The Lesotho child labour laws do not cover the informal and agricultural sectors, however. The United Nations Children's Emergency Fund estimates that 23 per cent of children between 5 and 14 work in the informal sector – in small family businesses, domestic households and doing farm work, particularly herding. [39]

Being mostly an agrarian country, in Lesotho boys tend to work predominantly as shepherds in the countryside. Shepherd boys have traditionally lived on the edge of society, living in high-risk circumstances. The herding of animals involves long hours, night work (looking for lost stock, guarding against thieves) and an unhealthy environment with poor accommodation, a lack of clean water and frequent exposure to harsh elements.[40] The conditions of work for shepherd boys are considered to be a

31 Labour Code Order 24 of 1992.

32 These include the Labour Court (LC), the Labour Appeal Court (LAC), the National Advisory Committee on Labour (NACOLA), the Wages Advisory Board (WAB), the National Advisory Committee on Occupational Safety and Health (NACOSH) and the Industrial Relations Council (IRC).

33 They comprise representatives of government, business and labour.

34 Section 125 of the Labour Code Order 24 of 1992.

35 Section 148(1) of the Labour Code Order 24 of 1992.

36 Section 3 of the Labour Code Order 24 of 1992.

37 Section 156 of the Labour Code Order 24 of 1992.

38 The section provides that '[w]henever any question arises as to the age of an employee and no sufficient evidence is available as to his or her age, a medical officer may estimate his or her apparent age by his or her appearance or from any information which is available, and the age so estimated shall, for the purposes of the Code, be deemed to be his or her true age.'

39 World Vision Lesotho and World Vision International 3.

40 World Vision Lesotho and World Vision International (n 39) 3.

feature of local culture and a prerequisite for manhood.[41] Children are also vulnerable to attack by armed stock thieves and fights over the ownership of animals between rival villagers; the girls tend to be engaged predominantly in domestic work.

Freedom of Association

The Labour Code provides that freedom of association must be guaranteed for all workers, employers and their respective organisations in accordance with the provisions of the Code.[42] Freedom of association is a universally recognised civil liberty and one of the most fundamental rights of workers and employers.[43] Even the Constitution of Lesotho provides for freedom of association.[44] It provides that every person is entitled to and (except with their own consent) must not be hindered in their enjoyment of freedom to associate freely with other persons for labour purposes.[45] Despite this clear provision, the government has passed various pieces of legislation which undermine this constitutional freedom.[46] In Lesotho the private and the public sectors are regulated by two separate legal regimes.[47] The Lesotho Public Service Act, 2005 explicitly removes public officers from the ambit of the Labour Code.

The Committee on Freedom of Association, which was set up by the ILO to examine complaints about freedom of association, has decided that states that have ratified Conventions 87 and 98 are not required to grant the guarantees in them to members of the armed forces and the police.[48] Notwithstanding the enactment of the Labour Code, the Lesotho government later enacted the Public Service Act[49] to regulate public officers. Section 35 of the Act expressly excluded public officers from the scope of the Labour Code. Section 31 of the Act provides that:

> (1) Public officers may form and establish a staff association or staff associations under the provisions of the Societies Act 1966.

41 World Vision Lesotho and World Vision International (n 39) 3.

42 Section 6 of the Labour Code Order 24 of 1992.

43 OVC Okene, 'The Internationalisation of Nigerian Labour Law: Recent Developments in Freedom of Association' (2008) 7 University of Botswana Law Journal 93–126 <https://www.researchgate.net/publication/274374303_The_Internationalisation_of_Nigerian_Labour_Law_Recent_Developments_in_Freedon_of_Association> accessed 27 July 2016.

44 See s 16 of the Constitution of Lesotho, 1993.

45 Section 16(1) of the Constitution of Lesotho, 1993.

46 See, generally, Tamara Cohen and Letlhogonolo Matee, 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa – A Comparative Study' 2014 (17)4 Potchefstroom Electronic LJ.

47 These are the Labour Code Order 24 of 1992 and the Public Service Act 1 of 2005.

48 *Lesotho Union of Public Employees v The Speaker of the National Assembly* CIV/APN/341/95.

49 Public Service Act 13 of 1995.

> (2) Notwithstanding any other law, public officers shall not become members of any trade union registered under the Labour Code Order 1992.

Subsequently, a public officers' trade union registered in terms of the Labour Code was to cease to exist. As a result, the Lesotho Union of Public Employees challenged the constitutionality of the Act[50] in the High Court. In essence, its contention was that sections 31(2) and 35 were unconstitutional because they were inconsistent with section 16 of the Constitution, which guarantees freedom of association. The court held that sections 31 and 35 pursued the legitimate aim of the preservation of a sound economy and did not abridge the rights protected by section 16(1) to a greater extent than is necessary in a democratic society.

In dismissing the application, the court concluded that:

> the impugned legislation pursues the legitimate aim listed in section 1(2)*(c)* of the Constitution. It seems to me that there is a proper balance between the applicant's interests of establishing staff association or staff associations in order to enjoy the fundamental human right of freedom of association and the general public interest of preserving a sound economy of the country.[51]

In terms of the Labour Code, all employees and employers equally have a guaranteed freedom of association.[52] All employers and employees equally have a right to join and/or establish organisations of their own choice without the prior authorisation of the government.[53] In 1995[54] and 2005[55] the government introduced Public Service Acts. [56]

Under section 21 of the subsequent Public Service Act[57] it is provided that, 'public officers shall be entitled to freedom of association in accordance with section 16(1) of the Constitution'. However, section 22(1) of the Act provides that, pursuant to section 21, public officers may form and/or join public officers' associations[58] for the purposes of collective bargaining. Intrinsically, therefore, public officers are not allowed to form and/or join trade unions.

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50 *LUPE v The Speaker of the National Assembly* 1997 11 BLLR 1485 (Les).
51 *LUPE v The Speaker of the National Assembly* (n 50) 1495.
52 Section 6 of the Labour Code Order 24 of 1992.
53 Section 168 of the Labour Code Order 24 of 1992.
54 Public Service Act 12 of 1995.
55 Public Service Act 1 of 2005.
56 UDHR 20; ICCPR 22; ILO 87.
57 Public Service Act 1 of 2005.
58 In terms of the Societies Act 20 of 1966.

Majoritarianism

Freedom of association and majoritarianism belong to two different sides of the same coin. It is therefore fitting to consider the one after the other. Majoritarianism is recognised in international law and, in particular, in the applicable conventions and recommendations of the ILO.[59] The weight of academic authority has endorsed the legislature's choice of majoritarianism as essential to collective bargaining.[60] Specifically with regard to the principle of majoritarianism, both the Committee of Experts and the Freedom of Association Committee of the governing body of the ILO have held that:

> the majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.[61]

In Lesotho, there appears to be some confusion about whether to uphold freedom of association as opposed to majoritarianism. In *Makoa*'s[62] case, the applicant submitted that his purported retrenchment was carried out in accordance with the agreement between the respondents and the Construction and Allied Workers Union of Lesotho (a majority union) which was not binding on him because he was not a member of the union. He contended that he was bound only by the provisions of the Labour Code with regard to the termination of contract or those of his contract of employment with the respondents. The respondents admitted that in terms of the recognition agreement with the union, where retrenchment became necessary, the respondents had to consult with the union, which was a recognised majority union.

The court held that, having formed a union of their choice, employees were entitled to bargain, through their union with their employer. Lesotho being a signatory to ILO Convention 98 on Collective Bargaining and Right to Organize, to uphold the applicant's contention that he was not to be bound by provisions of a product of collective bargaining which Lesotho has undertaken to take measures to promote 'would amount to stabbing ourselves in the back'. In terms of the provisions of that Convention, countries that ratify the Convention undertake to implement measures to promote collective bargaining. The court held that, having struck a deal with the recognised

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59 See Convention 87, namely, the Freedom of Association and Protection of Right to Organise Convention of 1948 and Convention 98, namely, the Right to Organise and Collective Bargaining Convention of 1949.

60 See *Association of Mineworkers and Construction Union & Others v Chamber of Mines of South Africa* (2016) 37 *ILJ* 1333 (LAC) para 109.

61 *Per* O'Regan J in *NUMSA & Others v Bader Bop (Pty) Ltd* [2003] 2 BLLR 103 (CC) para 31.

62 *Makoa v Lesotho Highlands Project Contractors* LC/15/94 at 2. The discussions on the conflict between freedom of association and majoritarianism appear on pages 5 and 6 of the judgment.

union, the employer is entitled to regard the agreement as applying generally to his employees, including those who may not be members of the union.

However, in a different case,[63] the High Court chose to follow the decision of the Industrial Court of South Africa, where it held that:

> Where a system of plural representation is in existence as in this case, it necessarily holds within it the possibility that the principle of equality will be sacrificed where the members of a labour unit of equals elect to belong to different groupings they, in fact, elect to go their separate ways and this at the expense of former equality. The result is that it becomes legitimate for the employer to bargain or deal separately with these two or more groups. It follows that equals performing the same work may be subject to different terms and conditions of employment.
>
> In these circumstances one group cannot be heard to complain about the absence of equality between their terms and conditions of employment and that prevailing as regards the other group. The potential for inequality and unfairness is inherent in their arrangement.[64]

It is not yet settled whether the country should pursue the freedom of association concept or that of majoritarianism. It is submitted that despite this apparent conflict between the proponents of majoritarianism and those of freedom of association, a correct and more tenable legal position is that the proponents of freedom of association should prevail. The reason is that freedom of association is provided for by the Constitution, which is the supreme law in Lesotho.[65]

Promotion of Free and Voluntary Collective Bargaining

Collective bargaining is a means of regulating relations between management and employees and of settling disputes between them.[66] The ILO has long taken cognisance of the critical role that collective bargaining can play in bringing about harmonious relations between employers and workers. In its convention on collective bargaining the ILO provided that:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of the machinery for voluntary negotiation between employers or employers' organizations and workers'

63 See *Senior University Staff Union v National University of Lesotho* CIV/APN/422/96.

64 *National Union of Mine Workers v Henry Gould (Pty) Ltd* (1988) *ILJ* 1149 at 1583.

65 The reason for this argument is that s 2 of the Constitution of Lesotho provides that '[t]his Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.'

66 Khabo (n 16).

> organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.[67]

Freedom of association and collective bargaining are Siamese twins. In Lesotho, trade unions are so very weak and fragmented that the country has had to legislate for the concept of the *duty to bargain in good faith.*[68] Employers are not only compelled by law to bargain with recognised trade unions, but they also have a *duty to bargain in good faith*. As pointed out earlier, in Lesotho, public officers may join only staff associations and not trade unions. The government's genuineness in promoting the settlement of disputes in the public sector, through collective bargaining and in the genuine settlement of disputes in the public sector, is accordingly suspect.

Right to Strike

The right to strike as a form of dispute-settlement mechanism is a necessary corollary to collective bargaining and is resorted to when parties have reached a deadlock in their negotiations.[69] Unlike in South Africa, Namibia and Malawi, there is no constitutional right to strike in Lesotho.[70] The Public Service Act provides in so many words that 'public officers shall not engage in a strike'.[71] In *Lesotho College of Education Staff Union & Others v Lesotho College of Education*,[72] the Labour Court held that the right of workers to strike for the purposes of collective bargaining is a fundamental right and is protected by the law. It is one of the essential and legitimate means by which workers and their organisations may promote and defend their economic and social interests.[73] In the legal context of Lesotho, the correctness of this pronouncement is questionable because it is too generally stated. The reason is that there is no provision in any of the pieces of legislation that says so. Furthermore, under the common law, a strike, whether it be 'legal' or 'illegal' is a breach of the contract of employment of so fundamental a character that the employer is entitled to accept the strike as a repudiation of the contract

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67 Article 4 of the Right to Organize and Collective Bargaining Convention, 98 of 1949.

68 Section 23 of the Labour Code (Amendment) 3 of 2000 amends the Labour Code Order 24 of 1992 by inserting, after s 198, the 'Duty to bargain in good faith'.

69 Khabo (n 16) 17.

70 South Africa is one of the three southern African countries where the right to strike enjoys constitutional protection. The other two are Malawi and Namibia (see ss 31(4) and 21(1) of their respective Constitutions).

71 Section 19(1) of the Public Service Act 1 of 2005.

72 *Lesotho College of Education Staff Union & Others v Lesotho College of Education* LC 35/14.

73 The court held that the right of workers to strike forms an integral part of the free exercise of the rights guaranteed by the ILO's Conventions on Freedom of Association, which are the Right to Organise Convention of 1948 (87) and the Right to Organise and Collective Bargaining Convention of 1949 (98), although they do not expressly provide for the right to strike. It appears to be implied. The United Nation International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly guarantees the right to strike. These international instruments have influenced the guarantee of the right to strike in the Labour Code Order, 1992, as amended by the Labour Code (Amendment) Act, 2000. Employees may therefore lawfully strike in support of collective demands.

and to dismiss the strikers.[74] There is no provision in the Labour Code which 'legalises' a strike in the sense that it authorises an employee to break his contract of employment by participating in a strike. All that the Act has done is to declare that striking in certain circumstances constitutes a criminal offence. If those circumstances are not present, then no criminal offence is committed, and in that limited sense the strike is 'legal'.[75]

Principles used in the Interpretation and Administration of the Labour Code

The Labour Code Order[76] provides for the following principles to be used in the interpretation and administration of the Code:

> *(a)* the standards laid down in the Code are the minimum legally obligatory standards and are without prejudice to the right of workers individually and collectively through their trade unions to request, to bargain for and to contract for higher standards, which in turn then become the minimum standards legally applicable to those workers for the duration of the agreement;
>
> *(b)* no provision of the Code or of rules and regulations made thereunder shall be interpreted or applied in such a way as to derogate from the provisions of any international labour Convention which has entered into force for the Kingdom of Lesotho;
>
> *(c)* in case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation.
>
> *(d)* where, under the provisions of any other legislation, a person may have a remedy as provided for in that legislation, that remedy shall be in addition to and not in place of any remedy provided for by the Code.

The purpose of the foregoing section is to give effect to the International Labour Standards. Thus labour common law of Lesotho *inter alia* comprises International Labour Standards.[77] The Labour Code serves as a model for a law that introduces International Labour Standards into our labour jurisprudence.[78] Section 4*(b)* and *(c)* of the Code provides that, unless otherwise specified, the Code does not apply to:

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74 *CAWULE v Batignolles & Others* LAC (1990–1994) 194, 200.
75 *R v Smit* 1955 (1) SA 239 (C) *per* Watermeyer AJ paras 241H–242A.
76 Section 4 of the Labour Code Order 24 of 1992.
77 *Lesotho Highlands Development Authority (LHDA) v Maile* LAC/CIV/R/1/2005 para 15.
78 *Remaketse Molaoli & 9 Others v Lesotho Highland Development Authority* LAC/A/06/05 para 18.

> *(a)* any person (other than a person employed in a civil capacity) who is a member of (i), the Royal Lesotho Defence Force; (ii) the Royal Lesotho Mounted Police; or (iii) any other disciplined force within the meaning of Chapter II of the Lesotho Independence Order of 1966;[79] and
>
> *(b)* such category or class of public officer, such public authority or employee thereof as the Minister may by order specify and to the extent therein specified.[80]

The Minister is not allowed to make an exemption which is incompatible with any international labour convention which has entered into force in the Kingdom of Lesotho.[81]

Judicial Application of the Principles used in the Interpretation and Administration of the Labour Code

Retrenchment

In *Khampepe v Muela Hydropower Project Contractor*[82] the applicant was an employee of the first respondent. He was retrenched. The applicant contended that his retrenchment was unfair because he was not given a hearing and further that he was a carpenter, but after his retrenchment the respondent continued to absorb carpenters. The Labour Court remarked that

> [t]his Court has … evolved a precedent in terms of which an employee earmarked for retrenchment must be notified in good time of the intended action and consulted on alternatives. (See Article 13(1)*(a)* of International Labour Organization Convention No 158 of 1982 concerning Termination of Employment.) The established principle, however, is that where employees are members of a trade union or some other collective body through which they communicate with the employer on matters of common interest, it is sufficient for the employer to consult with such a union and/or collective body.

In *Macholo v Lesotho Bakery (Blue Ribbon) PTY Ltd*,[83] the Labour Appeal Court applied the International Labour Standards principles on operational requirements to the labour law of Lesotho. These principles or guidelines[84] are derived from a number of International Labour Organization Recommendations and Conventions.[85] Therefore, the

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79 This section has now been replaced by Chapter II of the present Constitution.

80 See s 4(2) of the Labour Code Order 24 of 1992.

81 See s 4(3) of the Labour Code Order 24 of 1992.

82 *Khampepe v Muela Hydropower Project Contractors* LC 29/97.

83 *Maphoto Elias Macholo v Lesotho Bakery (Blue Ribbon) Pty Ltd* LAC/A/4/04.

84 Note carefully that a reference to ILO guidelines is a reference to the guidelines contained in the ILO Recommendations.

85 Thus, as to retrenchments, the ILO Recommendations 119 and 166 and Convention 158 are of note. It is worth mentioning from the outset that the ILO Recommendation 119 has since been superseded by

content of the concept of operational requirements has been usefully informed through this decision.

Recruitment and Selection

In *Pheko Mafantiri v Lesotho Revenue Authority & Others*,[86] the applicant, along with three of his co-employees at the Lesotho Revenue Authority, applied for several positions which had been advertised by the Authority. Following an expression of interest, the four employees were shortlisted and interviewed. The second to the fourth respondents were successfully appointed to the respective positions whereas the applicant was turned down. Dissatisfied, the applicant challenged his non-selection. The court approved and applied the Discrimination (Employment and Occupation) Convention, holding that its definition of discrimination is broader in that it makes provision for more grounds of discrimination.[87] It went on to highlight the extent of its breadth.[88] It is submitted that this is a correct approach to further internationalising the labour law of Lesotho.

Workers with Family Responsibilities Convention (C156)

Broadly speaking, C156 aims to improve equality of opportunity for male and female workers with family responsibilities to participate in work activities. The Labour Court has held that it is empowered to give effect to the provisions of the Convention and the Recommendation and that the applicant was entitled to be at the side of her dependent child when the child was ill, as is envisaged in the provisions of Recommendation 165. It held that:

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the ILO Recommendation 166 and its Convention. The two Recommendations are not inconsistent with each other and to the extent that Recommendation 119 has been used as one of the guiding the International Labour Standards in retrenchment matters, it remains an important instrument.

86 *Pheko Mafantiri v Lesotho Revenue Authority & Others* LC 13/08.

87 The Discrimination (Employment and Occupation) Convention, 111 of 1958. The Convention describes discrimination in Article 1(1)*(a)* and *(b)* as 'any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, national extraction and social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation' and it goes further to include 'such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation *as may be determined by the Member* concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies' [author's emphasis].

88 In para 12 of the judgment, it held that '12. The *factual element*: which is the existence of a distinction, exclusion or preference originating in an act or omission which constitutes a difference in treatment; secondly, *prohibited grounds* on which the difference in treatment is based and thirdly, *negative effect* one quality of opportunity and treatment (whether or not intended) whose objective result is the nullification or impairment of equality of opportunity or treatment – See the Special Survey on Equality in Employment and Occupation, 1996 by the Committee of Experts on the Application of Conventions and Recommendations. Lesotho has ratified this Convention' [author's emphasis].

> In terms of Article 9 of the convention the provisions of the convention may be applied by laws or regulations, collective agreements, work rules, arbitration awards, court decisions or a combination of these methods. This court is therefore empowered to give effect to the provisions of the convention and the recommendation.[89]

On these grounds the Labour Court applied the provisions of ILO Convention 156 directly, ruling that the suspension of the complainant was void and ordering her employer to pay her the wage due for the period corresponding to the time she had spent with her son.

Equal Remuneration for Men and Women and Discrimination of Workers for Work of Equal Value (C100 of 1951) and Convention 111 of 1958

In *Letsika v National University of Lesotho*[90] the Labour Court applied two ILO conventions. These were the convention concerning equal remuneration and that concerning discrimination.[91] They also referred to section 5 of the Labour Code Order 1992, which outlaws discrimination. Quite clearly, Convention 100 of 1951 has no relevance to this matter as it clearly deals with gender-based discrimination at work. Similarly, Convention 111 of 1958 would appear not to have a holistic or general relevance inasmuch as it deals with equality of opportunity in employment, which is not the issue in the applicants' case. However, it is relevant in so far as it deals with equality of treatment in employment and occupation. Section 5(1) of the Code, too, outlaws any application of any distinction, exclusion or preference which 'has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation'.

International Labour Organization Termination of Employment Recommendation, 166 of 1982

The Labour Court referred[92] to ILO Recommendation 166 as a guide to interpreting national law in order to determine the type of representation to which the employee was entitled pursuant to Article 4*(c)* of the Labour Code.[93] This it did in order to interpret the provisions of the Code pertaining to the pre-dismissal interview. It first stated that 'it is significant that International Labour Organization Recommendation 166 of 1982

89 *Palesa Peko v The National University of Lesotho* LC 33/95.

90 *Letsika & Others v National University of Lesotho* LC/73/05.

91 The Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (C100 of 1951) and the Convention concerning Discrimination in respect of Employment and Occupation (C111 of 1958). Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (C100 of 1951).

92 *Maisaaka'Mote v Lesotho Flour Mills* LC 59/95 at 3, 4.

93 ILO Termination of Employment Recommendation 166 of 1982 (ILO Termination of Employment Convention 158 of 1982 had not been ratified at the time).

does not specify the type of representation that an employee appearing before a disciplinary enquiry should have'. The Court held that:

> It was decided in *Dlali and Others v Railit (Pty) Ltd* (1989) 10 *ILJ* 353 that the type of representation permitted the employee at the disciplinary hearing is at the discretion of the employer. The employee's right to some representation is, however, in terms of the guidelines provided in International Labour Organization Recommendation 166 of 1982 incontestable.[94]

Relying on Recommendation 166, the court found that the right to be assisted during a pre-dismissal interview was unchallengeable. Although it was for the employer to choose the type of representation the employee could enjoy, it was up to the latter to choose the person who was to assist them. In the result, the Labour Court ruled that the fact that the employee had not been assisted by his lawyer did not affect the validity of the interview in which he had taken part. The employee's appeal was dismissed.

Termination of Employment Convention (C158)

It may surprise some readers that C158 is used in Lesotho to underpin Lesotho's unfair dismissal laws. This convention was designed to protect job security. The convention came into force against the background of the recession of the early 1980s. It plays a significant role as a guide to interpreting domestic law in Lesotho. Consistent with section 4 of the Labour Code, the Court referred to Articles 12(1.a) and 2(4) of ILO Convention 158 to interpret the provisions of the Labour Code pertaining to severance allowances and therefore settle the dispute. It held that:

> In our view the words 'severance allowance or other separation benefits' in Article 12(1) are instructive. It is clear from these words that severance pay as it provided for under Section 79 of the Code is not the only separation benefit that is legally binding to the employer. There is room for payment of other separation benefits in place of severance pay. Article 2(4) allows exemption of an employer from obligation to pay severance pay where such an employer has arrangements which provide for better separation benefits which are at least equivalent to those provided by the Code.[95]

It then concluded that the different types of allowance could not be drawn concurrently and that the two employees should receive the most advantageous allowance only

> in line with Article 2(4) of Convention No 158 exempted by Section 4*(a)* of the Code from obligation to pay severance pay because the 25% gratuity to which applicants are

94 *Maisaaka'Mote v Lesotho Flour Mills* (n 92).

95 *Matete and Bosiu v Lesotho Highlands Development Authority and the Chief Executive* LC 131/95.

> entitled by virtue of their contracts constitutes an alternative separation benefit which is more beneficial to applicants than severance pay payable under Section 79 of the Code.[96]

In *Khampepe*'s case, an undertaking had carried out a collective dismissal procedure. One of the employees challenged his dismissal, arguing that the employer should have consulted him prior to termination. The Labour Court had to determine whether the employer was subject to an obligation of that nature. In resolving the dispute, the court remarked that:

> What is clear is that the hearing as it is envisaged in Section 66(4) of the Code is not a pre-dismissal requirement where the dismissal is a result of operational requirements. This Court has, however, basing itself on the International Labour Organization Instruments and decisions of neighbouring countries especially South Africa, evolved a precedent in terms of which an employee earmarked for retrenchment must be notified in good time of the intended action and consulted on alternatives. (See Article 13(1)*(a)* of International Labour Organization Convention No 158 of 1982 concerning Termination of Employment.) The established principle, however, is that where employees are members of a trade union or some other collective body through which they communicate with the employer or matters of common interest, it is sufficient for the employer to consult with such a union and/or collective body.[97]

In *Maphoto Elias Macholo v Lesotho Bakery (Blue Ribbon) Pty Ltd*,[98] the Labour Appeal Court applied and introduced various ILO instruments to the labour law of the country and those instruments have now become part of the labour law of Lesotho.[99] The court pointed out that Article 13 of the ILO Convention 158 provides that, when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer must: *(a)* provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; *(b)* give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.[100] Thus, paragraphs 2 and 3 of the ILO Recommendation 119 have application here. The

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96 *Matete and Bosiu* (n 95) 5.

97 *Khampepe v Muela Hydropower Project Contractors* (n 82) 29/97.

98 See (n 83).

99 The ILO Recommendation 119, Recommendation 166, Termination of Employment Convention (ILO Convention 158) 1982, Termination of Employment Recommendation [166] of 1982; the Workers' Representatives Convention [135] of 1971, Termination of Employment Recommendation [119] of 1963; Human Resources Development Convention and Recommendation, 1975. See also *Highlands Security (Pty) Ltd v President of Labour Court* LAC/REV/59/06.

100 Article 13 of the Termination of Employment Convention (ILO Convention 158).

Recommendation provides guidelines regarding the steps that should be followed when a reduction of the workforce is contemplated.

Conclusion

In conclusion, it is submitted that fresh reform is needed to further internationalise Lesotho's labour law in line with ILO requirements in order to protect workers' rights. First, the law relating to the prohibition of child labour still has to be tightened. Second, the area on freedom of association of public officers is in need of urgent attention to improve on collective bargaining. Third, the judiciary needs to be a little more proactive in protecting human rights. Fourth, the courts have tended to apply ILO Conventions and Recommendations directly, purely on the basis that they have been adopted by the Conference of the ILO, and of Recommendations adopted by the Conference. This should be discouraged. Fifth, there is a need to use the principles of state policy and International Labour Standards in interpreting the Constitution, in this way adding some flesh to the bones of the Labour Code. Finally, there is no doubt that the ILO is doing commendable work in Lesotho.

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