THE CONSTITUTIONALISATION OF LABOUR LAW

Barely ten years old, the Constitutions of South Africa and Malawi are amongst the newest in the world. Canada’s Charter of Rights and Freedoms (1982) manifestly influenced its drafting of the South African Constitution. To a lesser extent, traces of German Constitution are evident. Unusually, however, the South African and Malawian Constitutions have a fair labour practice clause. No other constitution that predates the interim South African Constitution has such a right. Some jurisdictions entrench the right to strike in their constitutions. Most constitutions protect freedom of association and expression as civil and political rights. Attempts to persuade foreign courts to infer labour rights such as picketing from these protections have been disappointing.

Cheadle explains that the inclusion of the fair labour practice clause in South Africa was a compromise to secure the support of the public service for the new constitution and the transformation of public service to being broadly representative of the South African community. At the time the public service, especially at the management levels, was staffed almost exclusively by whites, who supported the apartheid government. Ironically, the Constitution, a symbol of liberation of the oppressed, also safe-guards the interests of the oppressor in the spirit of national reconciliation.

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1 I use the term “Labour Law” to include employment law.
2 I am indebted to Rachel Zibelu Banda, the Chairperson of the Industrial Relations Court of Malawi for providing me with materials and information which made this comparative study easier. This is especially so as judgments of the Malawi courts are not reported. Her book Unfair labour Practices in Malawi has therefore been especially helpful.
5 Halton Cheadle Fundamental Rights in the Constitution Juta & Co 212.
6 Dennis Davis Fundamental Rights in the Constitution Juta & Co 14.
7 S 23 of the Constitution of the Republic of South Africa.
8 S 31 of the Constitution of the Republic of Malawi.
10 Halton Cheadle Fundamental Rights in the Constitution Juta & Co 212.
11 e.g. Japan, Argentina, Sweden, Italy, Spain, Portugal, Greece and France (Simon Deakin and Gillian S Morris Labour Law second edition Butterworths at 859 and 861.)
12 I use the term “labour rights” or “labour law” to refer generically to labour law.
13 Government of Saskatchewan et al. v. Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 et al
In Truax et al, Copartners, Doing Business Under The Firm Name And Style Of William Truax, V. Corrigan et al 257 U.S. 312, 1921 the US Supreme Court applied the Fourteenth Amendment-equal protection of the law- to set aside Arizona state law which allowed peaceful picketing because the employer was denied the right to enjoin employees' actions, while the injunction was available to other litigants.
14 Professor Cheadle headed the Task Team that drafted the LRA and was Technical Advisor to the Constitutional Assembly on the Bill of Rights.
15 Cheadle Fundamental Rights in the Constitution Juta & Co 212.
Despite its entrance into the SA Constitution being driven by political expediency, the fair labour practice clause is generally celebrated in both countries as a victory for workers and, to a lesser extent for employers.\(^{16}\) Labour rights as human rights are well placed in a modern bill of rights.

Equally unusual is the introduction of a clause guaranteeing just administrative action.\(^{17}\) By definition, a constitution is aimed at regulating the exercise of public power by establishing fundamental principles. An administrative justice clause merely reinforces the obligation to exercise public power justly and spells out that this can be achieved by, amongst other things, action that is lawful, procedurally fair and supported by reasons. Administrative law continues to be invoked in labour law in the public, and surprisingly, also in the private sector.\(^{18}\)

Where then does the common law fit? For that, one turns to the interpretation clauses of the constitutions.\(^{19}\) Both constitutions direct that when interpreting the Bill, the values that underlie an open and democratic society be promoted.\(^{20}\) A South African adjudicator must consider international law;\(^{21}\) and may consider foreign law.\(^{22}\) A Malawian adjudicator shall have regard to current norms of public international law and comparable foreign law.\(^{23}\) When interpreting any legislation, when developing the common law or customary law, South African adjudicators must promote the spirit, purport and objects of the Bill of Rights.\(^{24}\) All other rights that arise from customary law or common law must be consistent with the Bill.\(^{25}\) The Malawian Constitution directs that “appropriate principles of interpretation” be developed to reflect its unique character and supreme status.\(^{26}\) The Malawian Labour Relations Act (MLRA) expressly provides that any contractual term in restraint of any right recognised by the Constitution shall be void.\(^{27}\)

As their interpretation is underpinned by the values of an open and democratic society, they are living Constitutions that develop and are developed by the societies that they serve. The intention of the Constitutional Assemblies that adopted them is not necessarily a basis for interpretation. The transformative agenda of the Constitutions is imperative and undeniable.

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\(^{16}\) In South Africa, like employees rights, employers' rights to freedom of association and the freedom to bargain collectively are entrenched. But, there is not absolute parity between employers' and employees' rights. For instance, whilst workers' right to strike is constitutionally protected, employers merely have a statutory recourse to lockout in South Africa. In Malawi, only the right to form and join trade unions, not employer organizations is guaranteed.

\(^{17}\) S 33 of the SA Constitution; S 43 of the Malawian Constitution.

\(^{18}\) In South Africa, for instance in the referral of public sector employment disputes to the High Court or in applications for legal representation under administrative law.

\(^{19}\) S 39 of the SA Constitution; S11 of the Malawian Constitution.

\(^{20}\) S 39 of the SA Constitution.

\(^{21}\) at 39(1)(b) of the SA Constitution.

\(^{22}\) at 39(1)(c) of the SA Constitution.

\(^{23}\) S 11 (2)(c) of the Malawian Constitution

\(^{24}\) S 39(2) of the SA Constitution.

\(^{25}\) S 39(3) of the SA Constitution.

\(^{26}\) S 11 (1) of the Malawian Constitution

\(^{27}\) S 2(3) of the MLRA.
In so far as the Constitutions or statutes have not supplanted common law values that are inconsistent with those of an open and democratic society, the common law must be developed and interpreted consistently with the Bills. International law should infuse the meaning of “the values of an open and democratic society”.

A trip through the South African case law\textsuperscript{28} will firstly show that the Constitutional Court (CC) has endorsed the International Labour Organisation’s (ILO’s) elevation of labour law as a distinct field. But, it also shores up tensions between constitutional and statutory interpretation. Secondly, the interaction between administrative law and the common law with labour law will be discussed. Finally, suggestions are made about managing the overlaps.

**International Labour Law**

The principal source of international labour law is the International Labour Organisation (ILO).\textsuperscript{29} Following the end of the First World War and the Treaty of Versailles, the ILO was established.\textsuperscript{30} Predictably, it was committed to the quest for peace and social justice. Today it remains dedicated to promoting human rights, which are foundational to labour rights.\textsuperscript{31} Its Constitution and conventions constitute the bedrock of rights and protections that make up international labour law. The ILO adopted the Declaration on Fundamental Principles and Rights at Work in 1998.\textsuperscript{32} Membership and the Constitution of the ILO\textsuperscript{33} bind states to promote the Declaration and reinforce four core Conventions.\textsuperscript{34} In addition, the entire machinery of the ILO – its conferences,

\textsuperscript{28} Malawian case law is still at a formative stage of development. The Chairperson of the Industrial Relations Court, Rachel Banda, reports that to date (16 December 2005) not a single collective bargaining or freedom of association dispute has been referred to it. A few hundred cases are referred annually. Most of them are referred by individual employees. They relate mainly to unfair dismissal.

\textsuperscript{29} Even though there are other sources of international labour law, such as the United Nations and the Council of Europe, the ILO instruments have emerged as the principal source of international labour law. See Valticos and Samson in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* Chapter 5, Kluwer Law International; L. Sweepton (ILO) : *International Labour Law at Chapter 7*, 135-156 in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, edited by Blanpain and Engels:revised edition 2001, Kluwer Law International; Chapter 3 Valticos and Potobsky: *International Labour Law*, second revised edition 1995, Kluwer Law and Taxation Publishers, Deventer Boston; http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/law/lablaw; S 1(b) of the LRA.

\textsuperscript{30} http://www.ilo.org/public/english/about/index.htm

\textsuperscript{31} Ibid.

\textsuperscript{32} http://www.ilo.org/dyn/declaris/declarationweb/aboutdeclarationhome?var_language=EN

\textsuperscript{33} Article 1 of ILO Constitution : http://www.ilo.org/public/english/about/iloconst.htm#a39

\textsuperscript{34} The core conventions relate to (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.
its governing body, the international labour office, its technical committees and meetings – supervise compliance with its instruments.

The European Social Charter has, since its origin in Turin in 1961, detailed labour rights ranging from the right to work, to freedom of association, collective bargaining, the protection of vulnerable persons and the promotion of several social rights. It is the first and only international instrument to promote the right to strike explicitly. Other international instruments include the Universal Declaration of Human Rights, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the African Charter of Human and Peoples' Rights (ACHPR).

After three decades of Apartheid isolation, South Africa rejoined the ILO in 1994. Both countries have ratified all the core conventions. Besides the interpretation clauses in the Constitutions, the LRA requires adjudicators to interpret the law in compliance with the public international law obligations that South Africa has incurred and the Malawian Labour Relations Act (MLRA) must be interpreted to give effect to obligations incurred in any international treaty or convention. South Africa and Malawi are bound to comply with international labour law not only through their membership of the ILO, its Constitution which binds member states to abide by its Declaration of Fundamental Rights, and any the act of ratification but also because of their domestic laws.

The Fair Labour Practice Clause

Unfair labour practice was introduced into South African labour jurisprudence in 1979. Its definition endured several amendments. Usually it amounted to any practice that the industrial court considered unfair. This ranged from unfair dismissal to unfair discrimination, from a refusal to bargain to industrial action. Fairness was determined mainly by importing principles of administrative law: the right to a hearing, to representation, to be given reasons for prejudicial action. Whilst the unfair labour practice jurisdiction of the erstwhile Industrial Court protected most categories of workers in the private sector, administrative law was the source to which public employees turned. The relationship between labour law with administrative law can be described as osmotic: The high concentration of principles of natural law present in administrative law seeped into labour law where such principles had not been recognized previously.

36 See Appendix A and B for the lists of ratifications.
37 S 39 of the SA Constitution; S 11 of the Malawian Constitution discussed above.
38 S 3 of the LRA.
39 S 2(2) of the MLRA.
40 See e.g. Kalinda v Limbe Leaf Tobacco Ltd civil cause no 542 of 95 (unreported) 7 -8. Mwaungulu J also took judicial notice of the Termination of Employment Convention which was binding on Malawi before its 1994 Constitution.
41 Although the Public Service Labour Relations Act and the Education Labour Relations Act were operative for about two years, it is doubtful that it excluded the application of administrative law altogether.
In the absence of any definition of unfair labour practice Malawi is undergoing a similar experience as South Africa did in the formative years of its jurisprudence it spawned.

Unfair labour practice is imported into the both Constitutions\textsuperscript{42} with all the attendant problems of its open textured quality and the casuistry evident in the jurisprudence.

In a sweeping brushstroke the Constitutions give “everyone”\textsuperscript{43} or “every person”\textsuperscript{44} the right to fair labour practices.\textsuperscript{45} Thereafter they lay the foundation for freedom of association. The SA Constitution gives a right to collective bargaining and to strike.\textsuperscript{46} The Malawian Constitution anticipates measures to ensure the right to withdraw labour.\textsuperscript{47}

The scope of labour rights is broadened by the vertical and horizontal application of the SA Constitution.\textsuperscript{48} Not only is the Bill binding as between the State and persons but also, depending on the nature of the right, amongst persons themselves, including juristic persons. The Malawian Constitution is not explicit about its horizontal application. But it is hard to imagine any labour right that is not capable of horizontal and vertical application. Thus far the horizontal application of the right has not been contested in either Malawi or South Africa.

The horizontal application of the Bill has the effect of strengthening the rights of public employees. However, if public employees are allowed to invoke the right to just administrative in employment matters, they will, as discussed below, be advantaged over private employees.

Is every labour dispute a constitutional matter? What is a constitutional matter was discussed in \textit{NEHAWU v University of Cape Town}\textsuperscript{49}. The employer contended that the only constitutional matter that can arise when dealing with the LRA, must relate to the constitutionality of its provisions; otherwise the CC would have jurisdiction in all labour matters.\textsuperscript{50}

In rejecting this submission the CC declared that a constitutional matter may arise either because of the interpretation\textsuperscript{51} or constitutionality of the statute itself. After all, the CC opined, the purpose of the LRA is to give effect to and regulate the fundamental rights in section 23 of the SA Constitution.\textsuperscript{52} But a challenge to the manner in which a statute is interpreted and applied did not

\textsuperscript{42} S 23(1) of the SA Constitution and S 31 (1) of the Malawian Constitution.
\textsuperscript{43} South African Constitution.
\textsuperscript{44} Malawian Constitution.
\textsuperscript{45} S 23 (1) of the SA Constitution.
\textsuperscript{46} 23(2) – (6) of the SA Constitution
\textsuperscript{47} S 31(4) of the Malawian Constitution.
\textsuperscript{48} S 8 of the SA Constitution.
\textsuperscript{49} 2003 (2) BCLR 154
\textsuperscript{50} NEHAWU para 15
\textsuperscript{51} NEHAWU para 13-14
\textsuperscript{52} S 1(a) of the LRA; NEHAWU para 14
have to be a constitutional matter. Furthermore, the CC will be slow to hear appeals from the Labour Appeal Court (LAC) unless they raise important issues of principle.

**National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another**

As background, collective bargaining in South Africa is a mixture of majoritarianism, where a single union is recognized exclusively, and pluralism, where a few representative unions enjoy collective recognition. Organisational rights for qualifying trade unions includes rights of access to the workplace, deduction of subscriptions, representation, time off and information. They are graduated from the basic, such as rights of access and deduction of dues, for which lower thresholds are allowed, to the complex, such as rights to information and shop steward representation, for which majority representation is required. The employer party to bargaining may be a single entity or a collective of several employers. Bargaining may take place at plant level, regionally or nationally, within or outside a council. (The MLRA also grants organisational rights to registered unions, but it prescribes a minimum of 20% representivity for collective bargaining rights.)

NUMSA was only 26% representative of Bader's workforce, but it wanted to strike for organizational rights for which it was not recognised. Bader was willing to afford NUMSA access to its premises and stop-order facilities; but it refused to recognize the union's shop stewards, or to bargain collectively with it for better terms and conditions of employment.

The crux of the appeal in **NUMSA** was whether the LRA precluded unrepresentative unions from obtaining organizational rights, either through agreement with the employer, or through industrial action. Two constitutional rights arise for discussion: the right to strike and the right to bargain collectively.

### The right to strike

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53 *NEHAWU* para 15
54 *NEHAWU* para 31
56 Chapter III Part A of LRA.
57 S 12 of LRA.
58 S 13 of LRA.
59 S 14 of LRA.
60 S 14 (5) and S 15 of LRA.
61 S 16 of LRA.
62 A council is a statutory entity constituted by employers and trade unions to regulate an industry and area.
63 S 35-38 of the MLRA.
64 S 11(1) of the MLRA.
65 S 25 of MLRA.
66 S 12 of LRA.
67 S 13 of LRA.
International law recognizes the right to strike. The European Social Charter (revised) includes the right to strike under its section on the right to bargain collectively.\(^{69}\) The International Covenant on Economic, Social and Cultural Rights (1966) also recognizes the right to strike, provided it is exercised in conformity with the laws of the particular country.\(^{70}\) The ILO Conventions\(^{71}\) do not specifically mention the right to strike. It is considered an activity of workers' organisations within the meaning of Article 3 of Convention 87.\(^{72}\)

The European Court of Human Rights\(^{73}\) declined to hold that the right to strike is implicit in Article 11 of the European Convention of Human Rights, which recognizes the right to freedom of peaceful assembly and of association, including the right to form and to join trade unions for the protection of workers' interests, but which does not expressly mention the right to strike. The Court opined that the right to strike, which was subject to regulation under national law, was but one of several means of protecting workers' interests.\(^{74}\)

There is no guarantee therefore that the right to freedom of association and to bargain collectively will automatically imply a right to strike.\(^{75}\) Equally, the extension of the civil right to freedom of association to protect and promote labour rights is also not assured.\(^{76}\)

Under the common law, parity between employers and employees as contracting parties is an illusion. Employees can secure no better deal than what they negotiate. If the demand for labour is greater than the supply, the

\(^{69}\) Article 6(4).
\(^{70}\) Article 8(1)(d).
\(^{71}\) Conventions 87 and 98 of the ILO.
\(^{72}\) Para 149 of Freedom of association and collective bargaining: \textit{ibid.}
\(^{74}\) \textit{Schmidt} para 36.
\(^{75}\) See also \textit{In Re Public Service Employee Relations Act: Alberta Union of Provincial Employees et al v Attorney General, Alberta et al} (1987) 38 DLR (4th) 161, where the Supreme Court of Canada held that legislation which prohibited the right to strike was not inconsistent with the Charter right to freedom of association as freedom of association and collective bargaining were not fundamental rights and the Charter has to apply to a wide range of associations. McIntyre J, writing for himself, opines that by according the right Charter status would impair its future development by the legislature.
\(^{76}\) For instance, in \textit{RWDSU v Dolphin Delivery} 1986 2 S C R, McIntyre J held that the Charter does not apply to private litigation divorced from any connection with government. The case involved picketing by a trade union, which the Court found was an exercise of freedom of expression. Because Court orders do not equate to government action - even though courts are bound by the Charter - an order restraining picketing between private persons was not covered by the Charter. So it was held. See also the analysis of two trilogies of Canadian cases by Professor Harry Arthurs in \textit{Constitutionalism and Labour Law}, his presentation notes for a seminar at the University of Cape Town on 23 February 2004.
negotiating position of workers is strengthened. Otherwise employees have to accept what employers give. If they withhold their labour they breach their contracts of employment. They could be dismissed and held liable for damages. Legislation is necessary to elevate employees from their underdog status.

The constitutionalisation of the right to strike trumps the common law. It does not give rise to a breach of contract or delict. Nor does it terminate employment or allow the employer to do so. The dismissal of an employee for participating in or supporting a protected strike or protest action is automatically unfair. Thus an employer cannot claim for loss of profits and employees cannot claim loss of pay. An employer may not engage any replacement labour unless its lockout is in defence of a strike. No civil proceedings may be instituted for participating in a protected strike or lockout. With these protections, the right to strike can compete with other rights, in particular the right to property, person and reputation.

NUMSA is welcomed for the high value that it attaches to the right to strike. Evidence of a values based interpretation emerges when the CC equated the right to strike to the very dignity of workers. In our constitutional order they may not be treated as coerced employees. The right to strike as a basic right empowers workers to use their labour as a weapon to negotiate a better deal. Despite the high value placed on the right to strike, the CC will not come to the assistance of workers who participate in an illegal strike. Whether the Court should have allowed minority unions to strike for organizational rights, however, sparks the controversy.

Collective bargaining

None of the organisational rights arise from the common law. The common law does not impose any obligation on an employer to allow employees or their trade unions any organizational rights. Without legislation such rights can only be exercised by agreement with the employer. Employees who cannot depend on the law for the exercise of basic trade union rights are at the mercy of the employer. The employer's constitutional right to property, person and reputation trump the right to organize. Employers remain more powerful. There can be no genuine, full and free bargaining in those circumstances.

The CC considered international law and recognised the statutory imperative to comply with South Africa's public international law obligations.

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77 S 67(2) of the LRA; section 49 of the MLRA.
78 S 67(4) of the LRA and S 50 of the MLRA.
79 S 187(1)(a) of the LRA.
80 S 76 of the LRA.
81 S 67(6) of the LRA.
82 S 23(2)(c) of the SA Constitution.
83 NUMSA para 13.
84 NUMSA para 13.
85 Xinwa and Others v Volkswagen of SA (Pty) Ltd (2003) 24 ILJ 1077 (CC)
86 S 39(1)(b) of the SA Constitution.
87 NUMSA para 26; S1 and 3 of the LRA
by applying in NUMSA the Right to Organise Convention No 87 of 1948 and the Right to Organize and Collective Bargaining Convention No 98 of 1949. It culled from the opinion of the Committee of Experts and the Freedom of Association Committee of the ILO the right of workers to join organizations of their own choosing, to strike for organisational rights and to be represented in individual workplace grievances. But, it conferred these rights on a minority union.

The controversy

The majority in the Labour Appeal Court (LAC) had inferred from the reference to “sufficiently representative” unions exercising certain organizational rights that minority unions were excluded from striking for such rights. That interpretation imposed a limitation on the constitutional right to bargain collectively and to strike. The CC acknowledged that the text of the LRA lent itself to such an interpretation. But a constitutional matter was at issue, it said, and a constitutional interpretation was required.

Because the LRA was also capable of a broader interpretation that did not limit fundamental rights, the CC preferred that interpretation. Furthermore, the CC accepted that a strike over the issue of shop steward recognition, particularly for the purposes of the representation of union members in grievance and disciplinary procedures, would be more in accordance with the principles of freedom of association entrenched in the ILO conventions. It inferred, therefore, from the absence of an express exclusion in the LRA of minority unions from collective bargaining and industrial action, that they have these rights. Having adopted an interpretation that avoided a limitation the CC found that there was no need to enquire into either grounds of justification or the constitutionality of the organizational rights provisions of the LRA.

It found corroboration for its interpretation in section 20 of the LRA which provides: “Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights.” Whereas the LAC regarded this provision as “clarification” of the right of representative unions to regulate their affairs by collective agreement, the CC linked it to international law as express confirmation of the rights of minority unions to secure organizational rights through collective bargaining.

The right to engage in collective bargaining is as much a constitutional right as the right to strike. Section 23(5) invites the legislature to regulate

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88 NUMSA para 31
89 NUMSA para 29-36.
90 Access (S 12 of LRA), subscriptions (S 13 of LRA ) and leave for trade union activities (S 15 of the LRA)
91 NUMSA para 39
92 NUMSA para 35, 39.
93 NUMSA para 15.
94 NUMSA para 40
95 NUMSA para 41.
96 NUMSA para 41
97 S 23(5) of the SA Constitution.
collective bargaining. In addition, it anticipates that the legislation may limit fundamental rights. Surprisingly the CC, despite quoting fully the purpose of the LRA, did not investigate fully the content of the right to engage in collective bargaining and balance it with the right to strike.

Constitutional rights and the broad objectives of the LRA are usually mutually reinforcing. But they can compete with each other as has happened in this case. One objective is to give effect to and regulate the fundamental rights in the Constitution. Other objectives are to promote orderly collective bargaining and collective bargaining at sectoral level. To allow small unions to strike may not promote either orderly collective bargaining or bargaining at sectoral level.

The collective bargaining model in the LRA is designed to minimize the number of bargaining partners in a workplace in order to promote orderly collective bargaining. Too many unions representing too few workers in the same bargaining unit or workplace could exacerbate inter-union rivalry and impede joint decision making, perhaps even to the point where no constructive collective bargaining can take place at all. How representative trade unions should be is left to the employer and the majority union in a workplace or a bargaining council to determine. By permitting self regulation in this way the particular circumstances of an industry or enterprise is allowed to refine the model for their own needs.

Effectively the judgment places a higher value on the right to strike than it does on the need to provide orderly collective bargaining, without indicating why this should be so. In this instance the right to orderly collective bargaining should have been allowed to restrain the right to strike. Instead, the right to strike was allowed to annihilate (potentially) the right to orderly collective bargaining.

For its lack of deference for the legislature and specialist court in labour matters the CC consoled that its decision may have only a limited impact in practice, for a minority union is rarely able to launch an effective strike against an employer for organizational rights. If this prognosis proves false the judgment could distort the collective bargaining model designed in the LRA.

**The labour rights of soldiers**

Another case in which the CC applied international law was SANDU (1). The LRA and the MLRA do not apply to the army. The Bills, however,
promise fair labour practices to “everyone” and “every person” respectively. In the context “everyone” cannot include those not in or seeking employment. Furthermore, “(e)very worker”\textsuperscript{106} and “all persons”\textsuperscript{107} have a right to form and join trade unions.

In SANDU (1) the CC declared members of the South African National Defence Force (SANDF) to be workers. It claimed support for this finding from Article 2 of Convention 87 of 1948 which proclaims the right of workers, without distinction whatsoever, to freedom of association. Article 9(1) of the Convention leaves it to member states to determine by national laws and regulations the extent to which the right to form and join trade unions shall apply to the armed forces and the police. By linking Article 2 to Article 9 the CC inferred that soldiers are workers who were entitled to freedom of association rights.\textsuperscript{108}

The judgment must be applauded firstly for its reliance (albeit misconstrued, with respect) on international labour law and reference to foreign case law. It referred to the decision of the Supreme Court of Canada in \textit{R v Genereux},\textsuperscript{109} where Lamer CJ pointed out that:

\begin{quote}
the armed Forces depend upon the strictest discipline in order to function effectively. The reasons for this are obvious …Clearly, without the type of rigorous obedience to a rigid hierarchy which the military demands of its members, our national defence and international peacekeeping objectives would be unattainable.
\end{quote}

Consequently, the CC pitched the engagement between the army and its soldiers to be no higher than “discussion and consultation”. Predictably, the exercise of freedom of association rights by soldiers is likely to be more restrained than for workers covered by the LRA.

Secondly, SANDU(1) confirms that soldiers can claim their basic civil and human right to freedom of expression. Historically, soldiers have not enjoyed any labour rights. Their basic human rights are also severely attenuated by the overriding consideration of state security. The judgment opens the door to challenging the reasonableness of limitations on their fundamental rights.

\textbf{The controversy}

The LRA takes its cue from Article 9(1) and regulates labour relations in the police service, but not the armed forces. The CC did not infer from this exclusion that Parliament had exercised its right not to legislate rights for soldiers in the LRA. If it did, it would have had to confront the constitutionality

\begin{footnotes}
\item[106] S 23(2) of the SA Constitution.
\item[107] S 31(2) of the Malawian Constitution.
\item[108] i.e. the rights under S 23(2)(a) and (b) only of the SA Constitution. The right to strike under subsection (c) was not in issue before the CC.
\item[109] 88 DLR 4\textsuperscript{th} 110 SCC at 163.
\end{footnotes}
of the scope of the LRA head on: Does the exclusion of soldiers\textsuperscript{110} render the LRA unconstitutional? It avoided doing so.

The CC declared the status of soldiers to be "akin to an employment relationship."\textsuperscript{111} That was not necessary as the Convention accepts soldiers to be workers. It simply permits states to exclude them from its application.

A compelling consideration in \textit{SANDU (1)} was the need for effective communication in the armed forces. That concern could have been addressed by reference to other provisions in the Constitution. Just as the CC drew on the right to freedom of expression to find that soldiers have a right to engage in public protest, so too could it have invoked the right to freedom of association.\textsuperscript{112} Or, quite simply, the CC could have reinforced the constitutional imperative that the SANDF must be “managed”.\textsuperscript{113} Management implicitly means, amongst other things, effective communication. In that way the impact of the LRA as the only collective bargaining statute would have remained undiluted.

Predictably, the promise in \textit{SANDU (1)} of freedom of association and the right to participate in public protest has spawned a spate of applications by soldiers for collective bargaining rights.\textsuperscript{114} Sachs J in dissent anticipated this.\textsuperscript{115} In three judgments issued thus far the question whether there exists a constitutional duty to bargain arose. Smit J\textsuperscript{116} and Bertelsmann J\textsuperscript{117} said that there is such a duty. The weight of academic and judicial opinion is that there is no such judicially enforceable duty generally.\textsuperscript{118} Ironically, if the duty is imposed on the army then soldiers, who have had the least protection against unfair labour practices, will be more privileged than all other workers. Another unhappy consequence is that it broadens the scope of fair labour practices to every relationship that is merely akin to employment.

\begin{footnotes}
\item[110] S 2 of the LRA.
\item[111] \textit{SANDU (1)} para 24.
\item[112] S 18 of the SA Constitution; \textit{SANDU (1)} per Sachs J at para 42.
\item[113] S 200(1) of the SA Constitution.
\item[114] \textit{SA National Defence Union \textit{v} Minister of Defence \& Others} (2003) 24 ILJ 1495 (T), per van der Westhuizen J (\textit{SANDU (2)}); \textit{SA National Defence Union \& Another \textit{v} Minister of Defence \& Others}; \textit{SA National Defence Union \textit{v} Minister of Defence \& Others} (2003) 24 ILJ 2101 (T) per Smit J (\textit{SANDU (3)}); \textit{SA National Defence Union \textit{v} Minister of Defence \& Two Others} Case No 15790/2003 (TPD) per Bertelsmann J (\textit{SANDU (4)}).
\item[115] \textit{SANDU (1)} at para 48.
\item[116] \textit{SANDU (3)}
\item[117] \textit{SANDU (4)}
\end{footnotes}
National Education Health & Allied Workers Union v University of Cape Town & Others ("NEHAWU") 119

NEHAWU arises from the decision by the University of Cape Town (UCT) to outsource cleaning, gardening and maintenance services to four contractors, including the second respondent, Supercare Cleaning (Pty) Ltd. UCT consulted with NEHAWU on the reasons for outsourcing and the possible dismissal of workers who were performing the services to be outsourced. NEHAWU resisted UCT’s outsourcing plans. UCT nevertheless implemented the plan. Some 267 workers were notified of the termination of their employment and the payment of retrenchment benefits. They were told to apply for jobs with the contractors who were to consider their applications favourably. After taking up jobs with the contractors many workers stopped working because they found that the contractors paid them far less than UCT had paid them.

The CC had to decide whether the provisions in the LRA relating to the transfer of undertakings were aimed at the protection of workers or the facilitation of the transfer of businesses. 120 It considered comparable foreign instruments namely, the Acquired Rights Directive 77/187 EEC adopted by the European Commission in 1977 and the British Transfer of Undertakings (Protection of Employment) Regulations 1981/1794 (TUPE), and foreign cases and concluded that they are aimed primarily at the protection of workers. Section 197 of the LRA, the Court said, attracted the same interpretation as these foreign instruments because of the similarity of the language and its inclusion in a chapter dealing with unfair dismissal. It acknowledged that security of employment is a core value of the LRA and not to be unfairly dismissed is essential to the constitutional right to fair labour practices. 122

NEHAWU elevates the protection of employment to the promotion of economic development, social justice and labour peace. 124 Commercial considerations lose the priority they enjoy under the common law. Unlike in NUMSA, the CC reflected on the purpose and objects of the legislation. 125 Construed against this background, the CC found that the LRA 126 creates an

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120 S 197 of the LRA. The MLRA does not have a similar provision.
121 The Labour Court and the majority of judges in the Labour Appeal Court in NEHAWU opined that it was to facilitate the transfer of businesses. The minority judgment in the Labour Appeal Court, and the judgments in Schutte & Others v Powerplus Performance (Pty) Ltd & Another (1999) 20 ILJ 655 (LC); [1999] 2 BLLR 169 (LC) and Foodgro, A Division of Leisurenet Ltd v Keil (1999) 20 ILJ 2521 (LAC); [1999] 9 BLLR 875 (LAC) held that the provisions protected workers.
122 NEHAWU para 47-51.
123 S 185 of the LRA; NEHAWU para 42.
124 NEHAWU para 62
125 S 1(a) of the LRA.
126 S 197 of the LRA.
exception to the common law principle that a contract of employment may not be transferred without the consent of the workers. This led to the further finding that upon the transfer of a business as a going concern, workers are automatically transferred to the new owner. It is therefore possible in labour law to transfer workers without their consent on transfer of a business as a going concern. If the LRA was interpreted to create merely a voluntary obligation by giving employers the choice to transfer the employees on transferring a business they could simply refuse to do so. In that case the purpose of the section and the exception to the principle that a contract of employment may not be transferred without the consent of the employee, will be defeated.

The right to fair labour practices is not defined in the Bill. The CC held it to be incapable of precise definition because fairness depends upon the circumstances of each case and involves a value judgment. Specialist labour courts and tribunals, it said, must give content to this concept. They must be guided by the jurisprudence generated by the unfair labour practice provision of the 1956 LRA and international law such as the Conventions and Recommendations of the ILO and the European Social Charter 1961. A flexible approach is good as it allows the concept to be developed in tune with socio-economic needs.

The Controversy

Concerns arise from the generous meaning attributed to the words "everyone" and "unfair labour practice" in section 23(1) of the SA Constitution.

“Everyone”:

“Everyone” was held to include employers. The CC found that there is nothing in the nature of the right to fair labour practices to suggest that employers, including juristic persons, are not entitled to the right. As a general proposition, it is valid. However, the Court aligned itself to the views of Nienaber JA who stated that in the eyes of the LRA of 1956, there are no underdogs. Niebaber JA’s judgment predated the Constitution and the obligation to give effect to its values. Furthermore, the CC opined that s 23(1) must either apply to all employers or none.

If the remarks mean no more than that the LRA represents a balance of employer–employee power, there is no difficulty. In this regard the CC did refer to the transferor employer being relieved of the obligation to pay

127 S 197(1)(a) of the LRA.
128 S 197 of the LRA.
129 NEHAWU para 61-62
130 NEHAWU para 33.
131 NEHAWU para 16.
132 NEHAWU para 34.
133 NEHAWU para 37; First Certification Judgment at para 57; National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others 1996 (4) SA 577 (A); (1996) 17 ILJ 455 (A).
134 National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Others at page 593G-H.
severance pay if the workers are employed by the transferee employer.\textsuperscript{135} Common law lawyers could infer though that employers and employees are on par with each other, and that all employers and trade unions are alike with no regard to their size, capacity or the sector in which they operate.

A generous interpretation of the word “everyone” can lose sight of the very purpose of labour law, namely, to protect the underdog. To achieve the balance between employers and employees, the LRA recognizes that certain rights and freedoms are reserved exclusively for employees. The definition of dismissal is such that only an employee is protected against termination of employment.\textsuperscript{136} An employer has no recourse to the LRA if its employee terminates the contract of employment.\textsuperscript{137} Furthermore, by definition an unfair labour practice can be perpetrated only by an employer against an employee and not vice versa.\textsuperscript{138} Employees have a right to strike but employers have only recourse to lockout. In few instances, such as disputes about the exercise of organizational rights, the employer is allowed to initiate the referral of a dispute for resolution. Usually, that is the prerogative of employees. With the elevation of the weaker position of workers in this way the balance with the superior position of employers as owners of the business is achieved in the LRA.

In order to maintain the balance that the LRA strives to set, everyone cannot enjoy the right to fair labour practice in the same way. Small businesses or unrepresented workers may in certain circumstances deserve greater accommodation than a multinational corporation or a well-organised trade union.

Malawi also gives workers preferential rights over employers, such as the right to form and join trade unions.\textsuperscript{139} But it allows any of the parties to refer disputes for settlement.\textsuperscript{140}

“Unfair labour practice”:

In the LRA “unfair labour practice” is confined to unfairness pertaining to certain limited issues.\textsuperscript{141} Unfair dismissal is not included in the definition of unfair labour practice. It is treated as a substantial subject in a dedicated chapter. Other unfair labour practices may arise from the common law, such as an unlawful breach of contract.\textsuperscript{142}

\textsuperscript{135} NEHAWU para 70
\textsuperscript{136} S 186 (1) of the LRA.
\textsuperscript{137} A claim for breach of contract under the common law or the Basic Conditions of Employment Act No 75 of 1997 is possible.
\textsuperscript{138} S 186(2) of the LRA.
\textsuperscript{139} S 31(2) of the Malawian Constitution.
\textsuperscript{140} S 43 of the MLRA.
\textsuperscript{141} Viz. promotion, demotion, probation, training, provision of benefits, suspension, disciplinary action short of dismissal and refusal to reinstate or re-employ a former employee as agreed, an occupational detriment arising from a protected disclosure (S 186(2) of the LRA)
\textsuperscript{142} Fedlife Assurance Ltd v Wolfaardt (2001) 22 ILJ 2407 (SCA).
Unfair dismissal fits comfortably within the ordinary meaning of unfair labour practice. Difficulties may arise firstly because the CC did not reconcile the ordinary meaning of the term in the Constitution with the technical meaning attributed to it in the LRA, and how the common law should be developed in order to be consistent with these instruments. For instance, is a breach of contract, which is unlawful but fair, constitutionally tenable?\(^{143}\) Again the CC availed labour rights from the Constitution direct, as it did for soldiers.

In *Kalinda*\(^{144}\) however, the High Court of Malawi granted relief from the Constitution direct as the Employment Act\(^{145}\) came into effect after the cause of action arose.

Circumstances may call for protection and a remedy which the LRA does not provide but which the open textured nature of the Constitutions can offer. When should the Constitutions fill the gap?

In *NAPTOSA & Others v Minister of Education, Western Cape & Other* ("*NAPTOSA*")\(^{146}\) the Cape High Court refused to bypass the LRA and grant relief directly under section 23(1) of the SA Constitution because it would encourage parallel streams of labour law to develop.\(^{147}\) It aptly used the metaphor of a marriage to describe the relationship between the LRA and the Constitution. *NAPTOSA* has not been overruled, although the CC distinguished it on the basis that in *NEHAWU* it did not need to go beyond the LRA\(^{148}\) as the issue to the decided was the meaning of section 197 of the LRA.\(^{149}\)

Malawi does not define unfair labour practice in either its Constitution or the MLRA. Indications are that a wholistic approach is being followed in compliance with the interpretation clause.\(^{150}\) In *Banda v Dimon*\(^{151}\) the High Court said that in interpreting the provisions of the Malawian Constitution and of any law, the courts shall promote the values which underlie an open and democratic society and take full account of the fundamental principles and human rights entrenched in the Constitution. Where applicable, the courts are to have regard to current norms of public international law and comparable foreign case law. In *Liquidator, Improt and Export (Mw) Ltd v Kankhanwangwa and Others*\(^{152}\) the High Court looked to courts within the Southern African region and applied *NEHAWU*.

\(^{143}\) See *Highveld District Council v Commission for Conciliation, Mediation & Arbitration & Others*, below where this was held to be so.

\(^{144}\) *Kalinda* 16.

\(^{145}\) No 6 of 2000.

\(^{146}\) 2001 (2) SA 112 (C); (2001) 22 ILJ 889 (C).

\(^{147}\) *NEHAWU* para 17

\(^{148}\) *NEHAWU* para 17

\(^{149}\) *NEHAWU* para 1

\(^{150}\) S 11(2)(c) of the Malawian Constitution. See *Phiri and 14 Others v Minister of State in President’s Office and Attorney-General Civil Cause Number 60 of 1997* (unreported) HC; *Banda v Dimon* (Malawi) Ltd Civil Cause Number 1304 of 1996 (unreported) HC

\(^{151}\) *Banda* 5.

\(^{152}\) Civil Appeal Number 52 of 2003 (unreported) HC, summarized by Banda at 5.
Kalinda described “fair labour practices” as practices that are even-handed, reasonable, acceptable and expected from the standpoint of the employer, employee and all fair-minded persons looking at the unique relationship between the employer and employee and good industrial and labour relations. Laws limiting this right must, according to section 44 of the Malawian Constitution, be reasonable, not offend international human right (sic) standards and must not wholly abrogate the right." On that basis, a dismissal without reasons being given to the employee was held to be an unfair labour practice.

Whilst South Africa also adopts a wholistic approach, the difference in the meaning of fair labour practices in the SA Constitution and the definition in the LRA gives rise to nuances that are peculiar to South Africa.

**Labour Law vs Administrative Law**

Historically, the marriage between labour law and administrative law was one of convenience. Where labour law was lacking, administrative law filled the void. Now the right to fair labour practices has been constitutionally entrenched and underpinned by legislation. So too is the right to just administrative action. The purpose of labour legislation must be examined to determine what its relationship is with administrative law in a constitutional democracy.

The purpose of the LRA and the Basic Conditions of Employment Act (BCEA) is to give effect to and regulate the fundamental rights to fair labour practices conferred by section 27 of the interim Constitution and section 23 of the final Constitution. Other objectives of the LRA include giving effect to the obligations incurred by South Africa as a member state of the ILO, to provide a framework for collective bargaining and formulating industrial policy and to promote collective bargaining and effective dispute resolution. The purpose of the Employment Equity Act (EEA), which has its genesis in the equality clause of the SA Constitution, is to promote equal opportunity, eliminate discrimination and implement affirmative action.

To achieve these objectives the right to due process, to substantively fair reasons for decisions by an employer or persons exercising public power, such as commissioners, the Minister of Labour or any of his functionaries are codified comprehensively and precisely to minimise uncertainty of the law and casuistry by the courts. So too are the procedures for enforcing rights and the remedies for non-compliance. The EEA is also a codification of the right to equality in the context of employment.

To insulate the delicate balance accomplished through negotiation and codification against distortion by other legislation, sections 210 and 63 of the LRA and BCEA respectively were enacted. These sections, which are

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153 Banda, above at 5.
155 S 1(a) of the LRA; S 2 (a) of the BCEA No 75 of 1997.
156 S 2 of the EEA
similarly worded, state that if any conflict arises between these Acts and the provisions of any other law, save the Constitution or any Act expressly amending these Acts, the provisions of these Acts will prevail.

The interaction between labour law and administrative law has arisen in three broad contexts:

**Arbitration**

Early decisions of the LAC described arbitration awards as administrative acts. As such they had to be rational and justifiable in order to give effect to the right to just administrative action. However, certain Labour Court judges disagreed.

On any interpretation, decisions by the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Industrial Relations Court (IRC) bargaining councils and their commissioners are made in the exercise of public power and in the performance of a public function. Not every exercise of public power or the performance of a public function is administrative action. The exercise of certain executive powers and legislative and judicial functions are not administrative acts.

Conceptually, arbitration and other decisions of commissioners are adjudication that is alternative to litigation. (Shoprite (LC) para 89). By definition adjudication is reasoned decision-making. If the decision is not rational it is not an award or ruling. Awards and rulings do not derive their validity from administrative law. Furthermore, commissioners exercise a discretion that is more akin to performing a judicial than an administrative function. Arbitration and rulings are the means by which the LRA and MLRA strive to give effect to the constitutional right of access to courts. Merely because an official is conducting arbitration under the auspices of a public entity does not alter the essential character of the process.

Delving into the merits is inevitable whenever a rationality or ‘lawful and reasonable’ test applies. The difference is that the rationality test under labour law must meet labour law objectives. Rationality under administrative law must meet administrative law objectives. The goal of administrative law is to control and facilitate the exercise of public power. Administrative law is the regulation of regulation. Labour law is the regulation of the relationship between employers, employees and their respective organisations, in the

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157 The review and appeal of arbitration awards is provided for in sections 145 of the LRA and 65 of the MLRA respectively.
158 Carephone (Pty) Ltd v Marcus NO; Shoprite Checkers (Pty) Ltd v Ramdaw NO (2001) 9 BLLR 1011 LAC
160 Farina Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power (2004) 19 SAPR/PL 502
161 Farina Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power Part I
private and the public service. It also defines the role of the state in facilitating employer-employee relations. Administrative law seeks to resolve disputes between the persons or organs of state exercising public power or performing public functions and others. Labour law resolves disputes involving employers, employees and their respective organisations.

**Ministerial acts:**
A typical example of a purely administrative or ministerial act is the deregistration of trade unions.\(^{162}\) In *National Employers Forum v Minister of Labour\(^{163}\) the registrar of trade unions acted in terms of section 106 of the LRA to deregister a phoney employers’ organisation. The Court upheld the decision. But, the learned Judge also referred in passing to the administrative justice statute. Which statute(s) applies?

Again, regard must be had to the purpose of the LRA. The registration of organisations has its genesis in the fundamental right to freedom of association which is entrenched in sections 23(2) to (4) of the SA Constitution and in international law.\(^{164}\) South Africa incurred international law obligations when it ratified Convention No 98 Right to Organise and Collective Bargaining Convention, 1949 on 19 February 1996 and Convention No.C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 on 19 June 1996. Labour administration is carefully regulated to ensure that South Africa meets its international law obligations. The registration and deregistration of organisations is therefore not a purely mechanical exercise. Functionaries in the Department of Labour and the Labour Court, which hears appeals from their decisions, must be alert to the impact of their decisions on these fundamental rights and international obligations.

The rationale for a right of appeal to the Labour Court\(^{165}\) and the IRC\(^{166}\) respectively against a decision of the registrar, which is more generous than review, can also be traced to international law. Article 4 of Convention No 87 states that workers’ and employers’ organizations shall not be liable to be dissolved or suspended by administrative authority. The suspension or dissolution by administrative authorities, in this case by the registrar of trade unions, is a violation of article 4 of Convention No 87\(^{167}\).

The registrar’s decision would be saved from non-compliance with international and constitutional law firstly, if the requirements for registration of organizations are not tantamount to previous authorization.\(^{168}\) If they are mere formalities, they would not impair the guarantees in the convention\(^{169}\). However, if the registrar is given discretionary powers to decide whether the

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\(^{162}\) S106 of the LRA and S 24 of the MLRA.

\(^{163}\) (2003) 24 ILJ 954 (LC)

\(^{164}\) The Malawian equivalents are sections 11(2) and 31(2) of the Constitution.

\(^{165}\) S111 of the LRA.

\(^{166}\) S 24 of the MLRA.


\(^{168}\) Para 259 of the Digest.

\(^{169}\) Para 259 of the Digest.
requirements for registration are met, or if he has great latitude to exercise his powers, it could amount to previous authorization.\textsuperscript{170} Secondly, it would be saved by the right of appeal to a court. In that way the ILO requirement that cancellation of registration should only be possible through judicial channels is met.\textsuperscript{171} That is not all.

The Committee on Freedom of Association calls upon Judges to "deal with the substance of a case concerning a refusal to register so that they can determine whether the provisions on which the administrative measures in question are based constitute a violation of the rights accorded to occupational organizations by Convention No 87."\textsuperscript{172} Judicial supervision of administrative decisions in the form of an appeal on the substantive merits of the decision therefore, is South Africa's and Malawi's passport to meeting their international obligations.\textsuperscript{173} In \textit{Workers' Union of South Africa v Crouse NO and Others}\textsuperscript{174} the Labour Court found that the registrar of trade unions had misconstrued his authority and the criteria and requirements when he declared a union seeking registration not to be a genuine organisation. The requirement that trade unions and employer organisations should be genuine\textsuperscript{175} was introduced in amendments to the LRA in 2002\textsuperscript{176} to curb the proliferation of organisations into an industry. It gives the registrar discretion. Appeals against his decision are entrusted to the Labour Court because of its specialisation and sensitivity to the objectives of the LRA.

Promoting freedom of association and collective bargaining are not set as objectives of administrative law. They could be easily missed if the administrative law grounds of review were to apply to the registration of organisations. In this instance too the Promotion of Administrative Justice Act (PAJA)\textsuperscript{177} conflicts with the LRA and is, in my opinion, ousted by section 210 of the LRA.

\textbf{Public employment :}

It remains an area where labour law and administrative law continue to overlap. Proceedings to challenge action by a public employer against its employee can be instituted either in terms of the LRA or PAJA. The first example of potential conflict arises from the LRA itself. Section 158(1)(h) of the LRA empowers the Labour Court to review any decision taken or any act performed by “the State in its capacity as employer, on such grounds as are permissible in law”. The grounds of review are not identified but they are qualified by the requirement that the acts and omissions must be those of the employer. It is arguable that labour law and not administrative law applies. That interpretation would result in only those acts and omissions that are not

\textsuperscript{170} See Chapter VI of the LRA and Part III of the MLRA for the procedure for the registration of organisations.
\textsuperscript{171} Para 670 of the Digest
\textsuperscript{172} Para 267 of the Digest
\textsuperscript{173} Northern Natal Employers' Organisation v Registrar of Labour Relations (Case No: D352/05 dated 1 August 2005 unreported)
\textsuperscript{174} Case No C491/04 dated 29 July 2005 unreported
\textsuperscript{175} S 95(7) and (8) of the LRA.
\textsuperscript{176} S 18 of Act 12 of 2002.
\textsuperscript{177} No 3 of 2000.
already codified, such as the transfer of an employee, being reviewed under section 158(1)(h), otherwise there would be duplication.

On the other hand, if a generous interpretation is applied to section 158(1)(h), administrative law can seep into labour law. The employee as *dominus litus* can choose to base her claim for, say, an automatically unfair dismissal, in terms of either section 158(1)(b) of the LRA and proceed by way of action in the Labour Court. Or, she may institute review proceedings by way of motion in either the Labour Court (assuming that its rules allow it) in terms of section 158(1)(h) or the High Court under administrative law. It may be possible to institute both the action and motion proceedings simultaneously by framing them in a way that they are not hit by a plea of *lis pendens*. Which process is followed depends in part on the remedy sought.

A reviewable decision could, if set aside, result in reinstatement inasmuch as a finding that a dismissal is unfair can. In the latter instance the Labour Court has to enquire into the relationship to determine whether reinstatement is appropriate. Under administrative law, no such enquiry need be held. There are distinct disadvantages therefore for the development of a coherent jurisprudence and effective dispute resolution if a generous interpretation were to prevail.

The second consequence could be a conflict with other statutory systems. For example a public employer may decide not to appoint an employee in deference to a collectively endorsed affirmative action plan. If the decision is treated as an administrative act and not an employment decision, it could result in collectively bargained action being trumped by an individual’s action. That can have a disrupting effect on departments if officials are distracted and delayed in executing collectively agreed plans for the greater good of all.

As explained above, labour rights were constitutionalised in order to assuage the insecurities of apartheid era public servants. Under the current dispensation public employees are more privileged than private employees. They have a bigger menu of rights, processes and remedies. The objective of equality between public and private employees is thwarted.

As indicated at the outset, Malawi also has a constitutionalised right to administrative justice.178 No national legislation has been promulgated to give effect to it. There are no cases concerning ministerial acts. Factors militating against the decisions of the IRC being considered administrative acts include its establishment as a court179 as distinct from a tribunal, and the right of appeal, not review, from its decisions. But Malawi is also struggling with the tension between labour law and administrative law. A welcome decision of the Malawi High Court is that of *State and Malawi Development Corporation : Ex parte Nathan Mpinganjira*180 where it was held that the decision to suspend an

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178 S 43 of Constitution of Malawi.
179 S110(2) of Constitution of Malawi.
employee pending an enquiry into alleged misconduct is not administrative action but a private law matter. However, the Supreme Court of Malawi in *Chawani v Attorney-General*\(^{181}\) conflated issues by inferring from the constitutional right to administrative justice to hold that reasons must be given to enable persons to defend themselves adequately. While the CC of Malawi agreed in *Mkandawire v Council of the University of Malawi* that the administrative justice clause\(^{182}\) incorporated the right to be heard before a decision is made,\(^{183}\) it declined jurisdiction on the grounds that it was not a constitutional matter. As it was a matter under the Employment Act\(^{184}\) and the MLRA it referred it to the IRC, preferring instead to preserve itself as a court of appeal from the IRC’s decision.

The meaning of fair labour practice should be developed in Malawi especially as it is not defined. Furthermore, the Employment Act\(^{185}\) prohibits dismissal by an employer unless there is a valid reason and after the employee is given an opportunity to defend himself.\(^{186}\) The statute gives effect to the ILO’s Convention concerning Termination of Employment at the Initiative of the Employer Convention No 158. As Malawi ratified the Convention in 1986, it is the third source of the law determining fair labour practices. Finally, the Constitution directs courts to have regard to comparable foreign case law.\(^{187}\) Foreign law is replete with cases which say that dismissal without a valid reason and an opportunity to defend oneself is an unfair labour practice. As indicated in the discussion on unfair labour practices above, the High Court of Malawi has applied this approach to interpretation in other cases. This evidences another concern – that of consistency of approach amongst the judges. A significant contributor to this problem is that judgments are not reported because of Malawi’s scarce resources.\(^{188}\)

**Labour Law vs Common Law**

The foundation of the employment relationship is the contract of employment. Its terms are implied or express from the constitution, statutes, collective agreements and the common law. Reflecting again on its purpose, labour law aims to elevate the inherent vulnerability of employees as the other party to the contract of employment. The tension between a labour law approach and a common law approach to the contract of employment is evident in the cases.

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\(^{181}\) MSCA Civil Appeal Number 18 of 2000 (unreported) HC summarized by Banda, above at 9.

\(^{182}\) S 43 of the Malawian Constitution.

\(^{183}\) *Mkandawire v Council of the University of Malawi* Constitutional Civil Cause no 19 of 2004 at 3 and 5; also summarised by Banda at 9.

\(^{184}\) No 6 of 2000.

\(^{185}\) No 6 of 2000.

\(^{186}\) S 57(1) and (2).

\(^{187}\) S 11(2)(c) of Constitution of Malawi.

\(^{188}\) See footnote 9 to Preface to Banda, above. She confirmed this in discussions with me at the Judges Conference in Malawi on 16 December 2005.
In *Fedlife Assurance Ltd v Wolfaardt* the Supreme Court of Appeal (SCA) rejected submissions that firstly, chapter VIII of the LRA codifies the rights and remedies of all employees arising from the termination of their employment, thereby depriving them of their common law remedies; and secondly, that the common-law right to enforce a fixed-term contract of employment has been abolished by the LRA. The majority held that the introduction of the unfair labour practice jurisdiction was to supplement the common-law rights of employees whose employment might be lawfully terminated at the will of the employer, but in circumstances that were nevertheless unfair. Furthermore, neither the Constitution nor the LRA deprives employees of the common-law right to enforce the terms of a fixed-term contract of employment. The Court found the clearest indication that the legislature had no intention of doing so in the definition of dismissal. As the definition included an employer’s refusal to renew a fixed term contract, it recognized the enforceability of such contracts. Furthermore, it would be irrational, it said, if an employee is deprived of the remedies of specific performance and compensation arising from an unlawful breach of contract and is confined to what could be absurdly low and arbitrary compensation under the LRA. Even though the LRA does not include in the definition of “dismissal” the premature termination of a fixed term contract, the Court inferred that such a termination would nevertheless be manifestly unfair as the common law right to enforce such a term remained intact; it was thus not necessary to declare a premature termination to be an unfair dismissal.

The majority Court opined that the presumption against non-interference with the existing law meant that the common law would have had to be excluded expressly or by necessary implication, which had not happened. The common law in this case was found to be consistent with the spirit, purport and objects of the Bill. Furthermore, if the Bill creates a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. By bringing the matter within the scope of the Constitution, the Court reinforced the principle that there is only one system of law under the Constitution.

The reasoning cannot be faulted, with respect. The employee’s claim was based on an unlawful, not an unfair breach of the contract of employment. In his minority judgment, Froneman AJA construed the termination as unfair and held that it fell to be determined under the LRA. Such a construction was not justified either on the facts pleaded or the law.

*Fedlife* illustrates that the common law contract of employment will survive constitutional scrutiny if it is also equitable. The inherent balance struck in a fixed term contract of employment is the mutual acceptance that termination will occur by operation of the common law on the expiry of the contract. Both

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189 (2001) 22 ILJ 2407 (SCA)
190 *Fedlife* para 11 and 12.
191 *Fedlife* para 13 to 15 and 17 to 20.
192 *Fedlife* para 17 to 20.
193 S 186(b) of the LRA.
194 S 194 of the LRA; *Fedlife* at para 18.
parties are on risk to ensure that the contract endures for its full term. The employee abandons the right to an unfair labour claim on the expiry of the contract. The employer abandons the right to terminate the contract prematurely.

Another important lesson from *Fedlife* is that the way claims are pleaded can materially affect the outcome. If Wolfaardt pleaded an unfair labour practice claim arising from a breach of contract the Court might well have reasoned as Froneman AJA did. This point was reiterated in *Fredericks & Others v Mec For Education & Training, Eastern Cape & Others*196 where the CC declared that if a dispute is pleaded as a constitutional matter the High Court would have jurisdiction. The LAC has recently endorsed *Fedlife*.197

In *Highveld District Council v Commission for Conciliation, Mediation & Arbitration & Others*198 (“*Highveld*”) non-compliance with a collective agreement was presented as a procedurally unfair dismissal. The LAC distinguished that it was not adjudicating a contractual right but a statutory right to a dismissal that is procedurally fair.199 Furthermore, an agreement will ordinarily go a long way towards proving that the procedure is fair. But because a procedure is agreed does not make it fair.200 The Court looked at what was actually done to determine fairness.201 On the other hand in *Denel Denel (Pty) Ltd v Vorster,* (“*Denel*”)202 the SCA rejected the submission that it should consider what procedure was actually followed as that procedure affected the employees constitutional right to fair labour practices, and consequently it would be an infringement of the employer's right to fair labour practices if the dismissal were to be regarded as unlawful. Even if the Bill implied a reciprocal duty to act fairly, that would ameliorate or, if necessary, supplement the effect of unfair terms in the contract, but not deprive a fair contract of its legal effect.203 So the Court reasoned without, surprisingly, having considered *Highveld* which had already been published.

### Conclusion

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others*204 per O'Regan J said:

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196 (2002) 23 ILJ 81 (CC)
197 Publication of the judgment in the law reports is awaited.
199 *Highveld* Para 16.
200 *Highveld* Para 15.
201 *Highveld* Para 17.
202 *Denel* para 16.
203 *Denel* para 16.
204 2004 (4) SA 490 (CC) para 22.
Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of administrative law is now to be found, in the first place, not in the doctrine of *ultra vires* nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives it force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case by case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.

That is the approach that should also apply to labour law. Instead, the CC in South Africa has granted direct access to the Bill without deference to the Legislature. To summarise, it interpreted the right to strike generously with the result that minority unions have the right to strike, possibly at the risk of distorting orderly collective bargaining. It conferred the labour right of freedom of association from the Constitution direct on soldiers when the LRA expressly excludes them from its scope. Its interpretation of unfair labour practice protected employees against job losses when an enterprise is transferred as a going concern, but it opened the door to any labour practice being a matter for constitutional adjudication. It also gave “everyone” – employers and employees alike – the right to fair labour practices.

The elevation of labour law as a field in its own right, should not spur the CC into over-reaching the legislation. The case studies show that the CC prefers a generous or wide interpretation. A broad interpretation does not always achieve the purpose of either the statute or the Constitution itself. But a purposive interpretation can be both generous and capable of achieving the most coherent results. A purely generous interpretation without adequate attention to countervailing rights and limitations could result in the Constitution meaning whatever a court wants it to mean.

If a statute is capable of two interpretations – one with and the other without a limitation of a right, it should not automatically follow that the interpretation without a limitation should apply. The purpose of the limitation should be investigated. This is what the CC should have done in *NUMSA*.

In *SANDU (1)*, the constitutionality of provisions of the LRA itself was at issue. The focus of the CC should have been the purpose of the exclusion of the SANDF from the scope of application of the LRA and whether that purpose is consistent with the values of a democratic society.

Having opened the door to direct access to labour rights in the Constitution in *SANDU (1)*, the CC kept it ajar in *NEHAWU*. It made no attempt to reconcile the tension between the ordinary meaning of unfair labour practice in the Constitution and the technical meaning of that term in the LRA. The approach to defining unfair labour practice should have been to determine whether the practice was covered in the LRA. Every unfair act or omission prohibited in

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205 For instance, a generous interpretation of the equality clause in a constitution could annihilate the altruistic objectives of legislation that discriminates in favour of the poor and landless. See *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1; Cheadle *Fundamental Rights in the Constitution* 13-14.
the LRA should qualify as an unfair labour practice for purposes of constitutional interpretation; constitutionally speaking, the term the not be limited to only the unfair labour practices covered by the narrow definition.

Before filling any gap in the legislation by direct access to the Constitution the CC should examine the reason for the gap and indicate whether the legislation complies with the Constitution. If it elects to fill a gap, it should do so only in the clearest of cases so as not to disturb the delicate balance that the legislation represents of the interests of the state, employees and employers.

The risk in a generous approach is that greater dependence will be placed on the limitations clause in the constitution to prune back the effect of a broad interpretation. Thus if it transpires that NUMSA results in the proliferation of small unions at the cost of orderly collective bargaining or if soldiers persist in exercising all labour rights, the CC will have to trim the high expectations generated by its generous rulings.

The trend being set by the CC is as surprising as it is disturbing. On the one hand the Constitution anticipates the LRA and that it might limit the rights in the Bill of Rights if it complies with the limitation clause. On the other hand the CC has disregarded the purpose and limitations of the statute. Yet a different stance was adopted as regards the right to just administrative action.

An overbroad interpretation of labour rights raises the spectre of parallel jurisprudence - one under the Constitution and the other under the legislation, and forum shopping. Litigants can choose to be in a High Court if they frame the dispute as a constitutional matter or opt for the specialist labour courts which has jurisdiction in labour matters and labour related constitutional matters. The duplication of legislation encourages forum shopping and parallel streams of jurisprudence: one for High Court decisions, another for Labour Court decisions; one for administrative law decisions, another for labour law decisions; one for private employees and another for public employees.

The duplication of jurisdiction is probably the most perplexing conundrum confronting the Malawian Courts. Unlike the LRA, which confers exclusive jurisdiction in certain labour disputes on the CCMA and the Labour Court, the Malawian Constitution confers “unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.” Simultaneously, it confers “original jurisdiction over labour disputes” on the IRC. Helpfully, the CC of Malawi held in the case of Mkandawire that

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206 S 23(6)
207 S 36(1).
208 S 115 of the LRA.
209 S 157(1) of the LRA.
210 S 108(1) of the Malawian Constitution.
211 S 110(2) of the Malawian Constitution.
although it has unlimited original jurisdiction to determine labour disputes, such jurisdiction is not limitless when the Constitution has deliberately put in place an institution such as the IRC. As indicated above, it referred the matter back to the IRC. In *Chilemba v Malawi Housing Corporation*\(^{213}\) “a practical approach” was suggested in that the IRC should be the court of first instance. Similarly, *Stancom Aviation Services Limited and Stancom Tobacco Company (Mw) Limited v Pieterse*\(^{214}\) steers litigants towards the IRC as the port of first call.

Indiscriminate application of administrative law and common law principles could result in labour law principles being diluted. Osmosis has resulted in equilibrium. Care should be taken that stature that labour law has acquired through the ILO is not lost.

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\(^{212}\) Constitutional Civil Cause no 19 of 2004; also summarised by Banda at 1.

\(^{213}\) Civil Cause Number 3237 of 2000 (unreported) HC summarised by Banda at 1.

\(^{214}\) Civil Appeal No 28 of 2002 (unreported) HC summarised by Banda above at 19.