

THE ROLE OF INTERNATIONAL LABOUR STANDARDS IN DECISION-MAKING ON THE RIGHTS OF VULNERABLE GROUPS IN BOTSWANA¹

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Introduction

World history was permanently re-written in 1919. As a result of the ‘Great War’, the International Labour Organisation (ILO) was born. In the Preamble of its Constitution, the following is stated – setting the tone for what the ILO would seek to do in its attempts to restore normality in the ‘broken’ world of labour. It states:

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including ... *the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, ... recognition of the principle of equal remuneration for work of equal value ...*³

It is evident that the theme is protecting people identified as being in need of protection, while at the same time ensuring equality for all people engaged in work.

The term ‘vulnerable’ groups is regularly used in the instruments of the ILO; however, it has not been defined. To attempt to define the term and reach consensus between the current 185 member states is nigh impossible. Furthermore, and since 1919, what is considered to be a vulnerable group in one country is not necessarily a vulnerable group in the next country. A general (rather than specific) definition of the term seems to have worked for the ILO.

This paper briefly discusses what role the ILO plays in protecting vulnerable groups in the world of labour. The objective of this paper is to establish the role of international labour standards in decision-making on the rights of vulnerable groups – with particular reference to Botswana – to establish whether protection in international law is provided for vulnerable groups, including women, migrant workers, persons with disabilities, and persons living with HIV. With this in mind, this paper discusses the ILO and International Labour Standards (ILS), the application of international labour standards in domestic courts, and judicial decisions where courts have relied on international labour standards.

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- 3 Own emphasis in italics.

What is the International Labour Organisation (ILO)?

The ILO is a specialised agency of the United Nations Organisation that deals with all labour-related issues in the workplace. It currently has 185 Member States.⁴ There are four fundamental documents that shape the work of the ILO, and guide it in achieving its mandate. These are:

- The Constitution, 1919;
- The Declaration of Philadelphia, 1944;
- The Declaration on Fundamental Principles and Rights at Work, 1998; and
- The Declaration on Social Justice for a Fair Globalisation, 2008.

A perusal of the above fundamental documents reveals that the aim of the ILO is to create parameters in which as much fairness as possible is achieved for all human beings. To this end, for instance, the Declaration of Philadelphia, 1944, declares in clear and concise terms that:

All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

One cannot, in my view, have economic opportunity without a guarantee of economic security, because the one cannot exist without the other.

In the Declaration on Social Justice for a Fair Globalisation, 2008, the concept of ‘decent work’ was coined. This concept was institutionalised in this declaration and, by so doing, ‘decent work’ was catapulted to become arguably the core of ILO policies. The ‘decent work’ concept highlights the importance of sustainable enterprises in creating greater employment and income opportunities for all. With the advent of the computer age and electronic advancements, new terms and concepts have, however, emerged. These terms, such as ‘the world is a global village’, are a direct result of electronic and technological advancements seen over the last decade or so. Advancement in technologies necessarily results in more efficient ways of doing things. If left unchecked, the workplace could easily become skewed in favour of the bottom line, without due regard and protection of workers’ rights.

Clearly being conscious of these developments and the perils such advancements would bring if unchecked, world leaders unanimously declared at the 2005 United Nations World Summit that:

We strongly support fair globalisation and resolve to make the goals of full and productive employment and decent work for all, including for women and young people, a central objective of our relevant national and international policies, as well as national development strategies.⁵

It is interesting to note that in mentioning “decent work for all”, the leaders appear to have been concerned (and therefore careful) that special mention be made of women and young people, as these historically disadvantaged group have common cause and bear the brunt of unfairness and inequality.

4 See alphabetical list of ILO Member Countries, available at <http://www.ilo.org/public/english/standards/relm/country.htm>.

5 See Toolkit for Mainstreaming Employment and Decent Work, available at http://www.ilo.org/integration/themes/dw_mainstreaming/WCMS_189352/lang--en/index.htm.

Goals of the ILO

Current ILO goals can be classified into two main areas:

- The promotion of social justice, in terms of the principles of the ILO's constituting document; and
- Driving the decent work agenda, in terms of employment, social protection, and social dialogue.

It is this way of doing things that sets the ILO apart from all other international organisations. The ILO is the only United Nations agency that operates on the principle of tripartism: in constructing its instruments and carrying out its work, the ILO has equal participation in all processes of governments, employers, and employee organisations. In the Decent Work Agenda it is stated, *inter alia*:

Achieving the goal of decent work in the globalised economy requires action at the international level. The world community is responding to this challenge in part by developing international legal instruments on trade, finance, environment, human rights and labour. The ILO contributes to this legal framework by elaborating and promoting international labour standards aimed at making sure that economic growth and development go along with the creation of decent work. The ILO's unique tripartite structure ensures that these standards are backed by governments, employers and workers alike. International labour standards therefore establish the basic minimum social standards agreed upon by all actors in the global economy.⁶

Tripartism is not about competing. It is not about one group winning over the other. Tripartism is about reaching consensus over issues that affect the day-to-day running of workplaces. These are workplaces that put food on people's tables, send children to school, and strengthen social fabrics, by ensuring economic viability. True tripartism, in my considered view, has no place for over-reliance on one agenda at the expense of another. For instance, employers cannot demand that everything be about ensuring the bottom line is maximised, regardless of the fact that they are the owners of industry. At the same time, and from a different perspective, employees cannot demand that their terms of employment (especially issues of pay) be met at all costs, simply because they are the labour behind the generation of profits. Governments must not be seen to favour one side over the other, but should create an enabling environment with adequate protection for both sides, in order for the wheels of industry to turn smoothly, and thereby bringing about prosperity for all.

What are International Labour Standards (ILS)?

ILS comprise conventions, recommendations, and protocols. Conventions are international treaties ratified by member states.

Conventions

Once a member state has ratified a convention, it becomes legally binding on that state. The ILO currently has a total of 189 conventions on its books.⁷ Eight of these 189 conventions are referred

6 See Rights at Work, available at <http://ilo.org/global/about-the-ilo/decent-work-agenda/rights-at-work/lang--en/index.htm>.

7 See ILO NORMLEX – Conventions, available at <http://www.ilo.org/dyn/normlex/>.

to as fundamental conventions.⁸ Not all are up to date. All that this means is that some conventions were adopted in the early years of the creation of the ILO, and have been overtaken by events (in a manner of speaking). Once ratified, a convention cannot be updated, neither can it be cancelled or revoked. However, the ILO can adopt revising conventions in order to replace older ones, or adopt protocols to add new provisions to older conventions.⁹ In the case of Botswana, a total of fifteen conventions have been ratified to date.¹⁰ The fifteen include all eight fundamental conventions.

The Declaration on Fundamental Principles and Rights at Work, 1998, adds a very interesting and important dimension to the approach that member states must take to the eight fundamental conventions. It categorically provides that even if member states have not ratified the eight fundamental conventions, they have an international obligation to respect, promote, and realise fundamental rights and principles at work.

Recommendations

Recommendations are not open to ratification by member states and consequently they are not legally binding. Their sole purpose is to provide general and technical guidelines for national action, in the area spoken about in the body of the particular recommendation. As the term suggests, member states agree not to elevate a subject to the realm of adopting a convention, but resolve, for instance, to recommend ways in which fairness in a particular area could be achieved and what national action could be taken to achieve such fairness. The ILO currently has 203 recommendations on its books.¹¹

Protocols

Protocols partially revise conventions. Nothing more; nothing less. This is so because conventions cannot be amended, either by addition or subtraction. The ILO has only five protocols in place.¹²

International Labour Standards and the protection of the rights of employees

Ratification of a convention raises certain obligations for the member state. Before addressing these, it is important to address the different legal systems in which member states might fall. There are generally two legal systems in which member states are categorised: dualist or monist.¹³

Dualist systems require that, once ratified, a convention can only become part of national law upon adoption via an act of parliament, which either adopts the convention wholesale or adopts certain

8 See ILO NORMLEX – Conventions, available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

9 See How International Labour Standards Are Created, available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm>.

10 See Ratifications for Botswana, available at http://www.ilo.org/dyn/normlex/en/?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103303.

11 See ILO NORMLEX – Recommendations, available at <http://www.ilo.org/dyn/normlex/en/>.

12 See ILO NORMLEX – Protocols, available at <http://www.ilo.org/dyn/normlex/en/>.

13 For a more detailed discussion on dualism and monism, see RE Kapindu “The Relevance of International Law in Judicial Decision-Making in Malawi” in this publication.

portions thereof.¹⁴ For example, in Botswana, the Diplomatic Immunities & Privileges Act¹⁵ domesticated the Vienna Convention on Diplomatic Relations wholesale. Without such adoption, the ratified convention is not law. Where a member state ratifies a convention but does not make its terms (either in whole or in part) part of its national or domestic law, its international obligations arising from the ratified convention are not necessarily domestically enforceable.¹⁶

In those states where the legal system is monist (an example is France) the act of ratification of any convention makes the terms of the convention part of their national law.¹⁷ It is automatic. In other words, ratification of conventions makes them law.

Ratification

When stated in unambiguous terms, ratification simply means that a member state formally commits to giving effect – both in law and practice – to the provisions of the convention. Member states are not permitted to ratify any convention with reservation.¹⁸ This means that they are bound, under international law, by the entire text of the ratified convention. The process of ratification then gives rise to protection of the rights of employees. At the end of the day, this is the most important reason the convention was drafted and adopted by member states, i.e. to protect workers.

The protection of employees' rights starts with a system of supervision of member states, in terms of the ILO's supervisory systems and mechanisms. Once a convention has been ratified, there is an obligation created against that member state to submit an annual report to the ILO on what it has done in order to domesticate the ratified convention. At article 22 of the ILO Constitution, the obligation is stated thus:

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

These reports are placed before the Committee of Experts – a body comprising high-level judges and lawyers from all over the world – for their consideration.¹⁹ The Committee of Experts is an independent and impartial body. Its decisions and pronouncements are made on the basis of consensus having been reached between the members on the documentary information presented in the annual reports of the member states.

14 See E Benvenisti "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) 102 *Am J Int'l L* 241, 241.

15 Cap 39:01 of the Laws of Botswana.

16 For a contrary view, see RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

17 See G Slyz "International Law in National Courts" (1995-1996) 28 *NYU J Int'l L & Pol* 65, 67; JG Starke "Monism and Dualism in the Theory of International Law" (1936) 17 *Brit YB Int'l L* 66, 74-75.

18 See How International Labour Standards are Created, available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm>.

19 See Committee of Experts on the Application of Conventions and Recommendations, available at <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>.

Where member states are found to be in violation of the obligations or terms of the ratified convention, the ILO Constitution sets out a mechanism on how the violating state is to be approached. Article 24 allows either the organisation of either the employers or employees to make representations to the ILO of any violation they perceive a member state to have committed. When the ILO receives such a representation, it may then communicate the representation to the government of the state in question, together with an invitation to the government to respond as it thinks fit. The said article is couched as follows:

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Member states are also allowed to issue complaints against each other if one perceives that its fellow state is not in observance of the obligation arising under a ratified convention. These complaints are provided for under article 26, in the following words:

1. Any of the Members shall have the right to file a complaint with the International Labour Office, if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.
2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.

Where a member state has received such communication and does not respond to the request for comment, the governing body of the ILO may consider the appointment of a commission of inquiry to look into the matter. During the proceedings of the said inquiry, the member state in question is entitled to send a representative to participate therein.

Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts)

When the Committee of Experts has considered reports that have been laid before them, their findings are published for international consumption in what are called general surveys. The content of the general surveys, like conventions and recommendations, are considered to be persuasive because they are conclusions that have been arrived at by jurists of international repute. Because of that, and further because they bring to the table vast experience from different parts of the world, their findings (or perhaps their conclusions) are regarded to be universal in nature and can be employed, *inter alia*, as a guide in policy formulation or judicial decision-making.

The Conference Committee on the Application of Standards (that is, ILS) is a permanent committee of the International Labour Conference (ILC).²⁰ Member states meet once a year in Geneva for an annual conference, where they discuss various matters, as agreed on a pre-arranged

20 See Conference Committee on the Application of Standards, available at <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm>.

and determined agenda. The annual meeting is referred to as the ILC. The ILC receives, as part of its annual work, reports from the Committee of Experts. From those reports the ILC will select individual countries and ask them to respond to various contraventions of conventions they would have ratified, or alternatively contraventions of one or more of the eight fundamental conventions of the ILO. The proceedings of the Committee of Experts and its comments are again published for international consumption.

The importance of these publications is obvious: the ILO cannot force a member state to do anything, as to attempt to do so would raise questions about violation of a state's sovereignty.²¹ That being the case, publishing contraventions and violations by member states acts like a check on a member state's moral standing amongst its fellow member states. No one wants anything bad said about themselves. The hope is, therefore, in my view, that when such adverse reports are published, a member state would be quick to 'pull its socks up' in order to keep its moral standing amongst its peers.

Application of International Labour Standards in domestic courts

The Industrial Court of Botswana (the Court) was established by the Trade Disputes Act²² (the Act). Section 15(1) of the Act establishes the Court as one of law and equity. The section defines the mandate of the Court as:

- Settle trade disputes; and
- Further, secure and maintain good industrial relations in Botswana.

Under its equitable jurisdiction, the Court can rely on ILS in its bid to determine disputes brought before it. This unique ability provides confidence that the Court will be able to determine disputes properly, by allowing it to look outside domestic law in reaching its decisions. One must not forget that the Court is first a court of law. If domestic law exists and has been developed sufficiently well to enable the Court to determine the dispute, then there will be no need to look elsewhere or at ILS for that matter. However, where a lacuna exists in the domestic law, as endorsed by the highest court in the land, the Court of Appeal, the Court may refer to ILS to resolve the lacuna and determine the matter. That is what the equitable jurisdiction of the Court seeks to achieve, regardless of whether or not Botswana has ratified a particular convention. Thus, the Court is not bound by the ordinary rules of evidence and can even take into account unratified conventions if this would be useful to assist it to settle the dispute.²³ It is therefore important that judicial officers serving in the Court keep themselves abreast of the development of ILS and what other jurisdictions are doing to solve their problems.

21 For a discussion on the relationship between state sovereignty and the application of international law, see RE Kapindu "The Relevance of International Law in Judicial Decision-Making in Malawi" in this publication.

22 Cap 48:02 of the Laws of Botswana.

23 See *Moeti and Others v Botswana Meat Commission* 2000 (1) BLR 153 (CA) 162 A-C.

Judicial decisions where courts have relied on International Labour Standards

The ILS have been used by domestic courts to protect the rights of vulnerable groups in a number of cases, some of which are described below.

*Kioka v Catholic University*²⁴

The case concerned a young female employee, who was discriminated against at work in terms of not being paid similar benefits to her male counterparts, a lack of maternity protection, and loss of employment due to her HIV status. Finding in her favour, the Industrial Court of Kenya relied on the Constitution of Kenya, the Employment Act,²⁵ ILO Conventions 100²⁶ and 111,²⁷ ILO publications, the ILO Recommendation concerning HIV and AIDS and the World of Work (No. 200), and comparative jurisprudence. The Court ordered exemplary damages for the discrimination against the applicant based on her HIV status, and for the gross violation of her human dignity.

*Diau v Botswana Building Society*²⁸

The case dealt with an employee who was denied permanent employment after she refused to submit to an HIV test. Finding in her favour, the Industrial Court of Botswana, per Dingake J, relied on comparative jurisprudence as well as the ILO Declaration on Fundamental Principles and Rights at Work in finding that HIV status falls within the list of grounds on which discrimination is prohibited in the Constitution:

The ILO Declaration on Fundamental Principles and Rights at Work, adopted in June 1998, reaffirmed the constitutional principles of the elimination of discrimination at the workplace.

I subscribe fully to the values of the above declaration and believe firmly that elimination of discrimination at work is essential if the values of human dignity and individual freedoms are to go beyond mere formal pronouncements. I also believe that the above position is in line with the Convention No. 111 (Discrimination Employment and Occupation Convention, 1959) that Botswana has ratified. I believe that the fact that Botswana has ratified the Convention cannot be regarded as irrelevant. By doing so, Botswana has demonstrated its clear intention to comply with the provisions contained therein and the Court should take cognizance of this action as an expression of the recognition which must be accorded to its provisions when interpreting similar fundamental provisions under the Constitution.²⁹

24 IC Case No. 1161 of 2010.

25 Cap 47:01 of the Laws of Botswana.

26 ILO Equal Remuneration Convention No. 100.

27 ILO Discrimination (Employment and Occupation) Convention No. 111.

28 IC Case No. 50 of 2003. Subsequent to this case, the list of grounds upon which an employer may not terminate employment has been extended to *inter alia*, race, tribe, status, gender, sexual orientation, health status, or disability - see section 23 of the Employment Act of Botswana. The *Diau* case is also discussed in MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" in this publication.

29 *Id* 61-62.

*First National Bank of Botswana Ltd v Botswana Bank Employees' Union*³⁰

This case concerned issues of collective bargaining and whether or not the employer had a right to object to the composition of the union's negotiating team. The Industrial Court of Botswana, per De Villiers J, held that the ILO Right to Organise and Collective Bargaining Convention (No. 98) was applicable, even though not ratified by Botswana:

The fact that this Convention has not yet been ratified nor included in Botswana legislation, does not mean that this court should just ignore it. Because this court is also a court of equity it does make use of principles set out in unratified conventions, together with other principles when it has to decide whether a certain aspect is fair and reasonable.³¹

*Ganelang v Tyre World*³²

This case dealt with the constructive dismissal of a woman. The employer suddenly said it did not want to see her face at the premises any longer. The applicant was re-designated from being a manager to a toilet cleaner on the same salary. She resigned and sued her employer for constructive dismissal. In reaching its decision, the Industrial Court of Botswana noted that the Employment Act³³ did not define constructive dismissal. Finding in the applicant's favour, the court applied definitions from legal dictionaries, authors, various local authorities, the ILO Termination of Employment Convention (No. 158) (even though this convention does not use the term), and the General Survey of the Committee of Experts.

Conclusion

It is the writer's opinion that judicial officers have a significant role to play in protecting the rights of vulnerable groups. They have both a legal and moral duty to translate domestic laws from appearing good on paper, to making them practical and meaningful in everyday life. An appreciation of ILS is helpful and of great assistance, as it is abundantly clear that in this day and age that it is no longer enough to occupy high judicial office with only a law degree. As per the words of the Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level, "[w]henver appropriate, judicial officers should make recommendations in one's judgment on how domestic law and/or policy might be reformed to bring it in conformity with the state's obligations under the Convention"³⁴

30 1997 BLR 1177 (IC).

31 *Id* 1188.

32 IC Case No. 169 of 2013.

33 Cap 47:01 of the Laws of Botswana.

34 Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level, 11 September 2003, available at <http://www.un.org/womenwatch/daw/cedaw/arusha-declaration2003.pdf>. The Declaration came out of a judicial colloquium on the application of international human rights law, including the Convention on the Elimination of Unfair Discrimination against Women (CEDAW). The judicial colloquium was attended by judges from Botswana, Gambia, Ghana, Malawi, Mauritius, Namibia, Swaziland, South Africa, Tanzania, Uganda, and Zambia.