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**LABOUR LAW IN NAMIBIA:
TOWARDS AN ‘INDIGENOUS
SOLUTION’?**

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INTRODUCTION

This article is about Namibia's new labour law, the Labour Act 2004 (the 2004 Act),¹ which replaces Namibia's first comprehensive post-independence labour law, the Labour Act 1992 (the 1992 Act). Among the more significant changes are new dispute-resolution processes, and the introduction of codes of practice and guidelines as methods for legal regulation of labour relations.² I endeavour to set the new provisions in their longer historical context - comparing the 2004 Act with both the 1992 Act and its predecessors – and to consider their likely impact. As the title of the article suggests, I seek to explore the extent to which the 2004 Act is an 'indigenous solution' to the needs of labour market regulation in Namibia. That inquiry is prompted by the observation of Clive Thompson, writing of the 1992 Act, that it was 'superimposed', and that it later may be necessary for Namibia 'to return to the drawing board for a less ambitious but possibly more indigenous solution.'³ In that light, I venture some views on the processes by which labour law in Namibia has evolved, and the prospects for the 2004 Act in the labour relations and labour market context in which it will operate. To these ends, I draw on some of the literature on labour relations and labour history in Namibia.⁴

Recourse to literature in disciplines other than law is in any event essential: labour law in Namibia has thus far been little examined, at least by (labour) lawyers. The

¹ Act No. 15 of 2004, Government Gazette of the Republic of Namibia, No. 3339, 8 December 2004. The Act was passed on 14 October 2004. The 2004 Act deals principally with the core of labour law as it is traditionally understood: the regulation of the individual working relationship and collective labour relations through the formation of trade unions and regulation of collective bargaining. In other words, it does not purport to include all matters affecting the work relationship and legal regulation of the labour market. In that sense, other relevant laws passed since independence include: the Employees Compensation Amendment Act 1995, the Public Service Act 1995, the National Vocational Training Act 1994, the Social Security Act 1994, the Export Processing Zones Act 1995 and the Affirmative Action (Employment) Act 1998. For a brief summary of all but the last of these, see J van Rooyen, *Portfolio of Partnership – An analysis of labour relations in a transitional society - Namibia*, (Gamsberg Macmillan Publishers, Windhoek, 1996), 233-236 (hereinafter: *Portfolio*). On the paradigmatic content of labour law and the contrast with a 'labour market regulation' approach see generally the contributions in R Mitchell (Ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, (Centre for Employment and Labour Relations Law, University of Melbourne, 1995).

² 2004 Act, s 135.

³ C Thompson, 'Namibia's New Labour Code' (1991) 7 *Employment Law* 98 at 101.

⁴ For overviews of the literature, see van Rooyen, *Portfolio*, above n 1; G Bauer, *Labour and Democracy in Namibia, 1971-1996*, (Ohio University Press, Athens, Ohio, 1998), and J van Rooyen, 'Namibian Labour Relations in Historical Perspective: The Case for Normative Convergence' (1996) 20 *South African Journal of Labour Relations* 36 (hereinafter: *Normative Convergence*).

most extensive treatment is found in van Rooyen's 1996 study of labour relations in Namibia, which surveys the topic from the onset of colonization until the mid-1990s.⁵ Despite its scale and the breadth of its historical scope, that work contains invaluable and succinct analysis of virtually all of the labour law that has ever applied in Namibia. A briefer history may be found in the 1989 report of the Wiehahn Commission into labour matters in Namibia.⁶ Bauer's work on the prospects for labour in a democratic Namibia also contains brief analysis of labour law changes at different times.⁷ More recently, I have elsewhere considered labour law in Namibia from the point of view of comparative (labour) law theory.⁸ What this present article will add, I hope, is an up to date picture of Namibian labour law that will not only be of use to labour lawyers, but of interest to those with broader interests in Namibia, legal development, and cognate fields.

The article is structured as follows. In Part One I give a brief history of Namibia and its labour law, highlighting the entrenchment of racial and labour discrimination that the 1992 Act set out to overcome. Part Two is an overview of the post-independence labour law dispensation in Namibia, emphasising the structure and content of the 1992 Act. In Part Three I examine the 2004 Act, including the lengthy process that led to its adoption, and make some observations about the new provisions that it introduces. In the conclusion I hazard a preliminary assessment of the prospects for labour law in Namibia since the passage of the 2004 Act.

PART ONE - LABOUR LAW AND LABOUR RELATIONS IN COLONIAL NAMIBIA

Racially discriminatory labour laws under South African administration

Labour law in Namibia from the start of colonial rule was a tool of racial discrimination deployed to facilitate the economic exploitation of the territory by a

⁵ Van Rooyen, *Portfolio*, above n 1.

⁶ N Wiehahn, *Report of the Commission of Inquiry into Labour Matters in Namibia*, (Windhoek, 1989).

⁷ Bauer, above n 4, at pp 102-108.

⁸ C Fenwick, 'Labour Law Reform in Namibia: An Overview' in T Lindsey (Ed), *Law Reform in Developing and Transitional Economies*, (Routledge, London, 2005).

minority white settler population.⁹ As Namibia was under South African administration from 1915 to 1990, it is not surprising that the country's pre-independence labour laws closely resembled those of South Africa. African workers were mostly engaged on contracts for fixed periods of time, and subject to criminal penalties by way of discipline. They were also restricted in their movement and residence, and frequently prevented – whether by law or by practice – from participating in certain forms of work. While similar to those of South Africa, Namibia's labour laws had much in common with those of other settler colonies in southern Africa. In this regard, van Rooyen's observation of Namibia is also true of much of the rest of the region: '[t]he recruitment, surveillance and repatriation of workers constituted the main labour-related administrative activities for much of the colonial period.'¹⁰

Namibia's colonial-era labour laws sustained a system of contract work that compelled black Namibians to work within strictly confined parameters. Contract labour was integral to the regime of 'apartheid capitalism':¹¹ it helped to create a ready supply of cheap indigenous labour, to safeguard the economic viability of the settlers and to segregate the races. The key legal instrument was the Masters and Servants Proclamation. The version issued in 1920 (which consolidated earlier laws of 1916 and 1918, and the German law of 1907) was the 'centre-piece of industrial legislation regulating the conditions of employment of the majority of workers in Namibia',¹² remaining so for 55 years.¹³

⁹ I do not here attempt to identify any concept of pre-colonial labour law in Namibia, nor do I deal with labour law under German Administration between 1884 and 1915. Both are addressed (the latter at some length) in van Rooyen, *Portfolio*, above n 1, 104-130. I exclude these periods both for reasons of space and because current Namibian labour law is most usefully analysed by comparison to labour law as it was under South African administration. (Although it is true that the more elaborate system introduced by South Africa continued to have significant similarities with the German laws that it replaced: van Rooyen, *Portfolio*, above n 1, 135).

¹⁰ Van Rooyen, *Portfolio*, above n 1, 166. On colonial era labour policies in Africa, see, eg, B Freund, *The African Worker*, (Cambridge University Press, Cambridge, 1988), 30-34, and F Cooper, *Decolonization and African Society – The Labour Question in French and British Africa*, (Cambridge University Press, Cambridge, 1996), 25 – 50. There is also a useful summary of labour legislation in colonial Africa in G Browne, *The African Labourer*, (Oxford University Press, London, 1933), 133-200.

¹¹ G Klerck, A Murray and M Sycholt, 'The Environment of Labour Relations' in G Klerck, A Murray and M Sycholt (Eds), *Continuity and Change – Labour Relations in Independent Namibia*, (Gamsberg Macmillan, Windhoek, 1997), 8.

¹² Wiehahn, above n 6, 29.

¹³ Van Rooyen, *Portfolio*, above n 1, 135.

The 1920 proclamation offered ‘rather suspect and limited’ protection to Namibian workers. While slightly better conditions were prescribed in other labour legislation - the Shop Hours and Shop Assistants Ordinance of 1939, the Factories, Machinery and Building Works Ordinance of 1952, the Wages and Industrial Conciliation Ordinance of 1952, and the Mines, Works and Minerals Ordinance of 1968 – those Ordinances only regulated the conditions of a small number of employees. Workers in hotels, offices and transport, for example, were covered only by the 1920 proclamation. So too were workers engaged in agriculture and domestic service – the two fields in which the vast majority of black Namibians worked.¹⁴ Thus, the vast majority of Namibia’s workers, and in particular its black workers, were covered only by the 1920 proclamation. Consistently with masters and servants laws throughout the British common law world, the 1920 proclamation made it a criminal offence, punishable by fines and imprisonment, for workers not to comply with their conditions of employment.¹⁵

The Masters and Servants Proclamation was accompanied by a Vagrancy Proclamation that limited Africans to native reserves, and excluded them from a Police Zone unless they could establish that they had employment or other support. It was soon supplemented by the Native Administration Proclamation of 1922, which provided the administration with power to declare native reserves and tightly restricted the recruitment of workers from them.¹⁶ It was later augmented by the Natives (Urban Areas) Proclamation of 1951. It empowered the Native Commissioner to remove an African – and their family - from an urban area for a wide variety of reasons, many of which related to work and its availability: they included lack of suitable employment, refusal to accept employment and unlawful breach of an employment agreement.¹⁷ The proclamation of 1951 worked together with a number of earlier laws that remained in place to control African workers’ lives:

¹⁴ Wiehahn, above n 6, 29.

¹⁵ On Masters and Servants laws see D Hay and P Craven (Eds), *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955*, (University of North Carolina Press, Chapel Hill and London, 2004). For their relevance in South Africa see M Chanock, *The Making of South African Legal Culture 1902-1936*, (Cambridge University Press, Cambridge, 2001), 410-423, and in Malawi and Zambia, see M Chanock, *Law, custom and social order*, (Cambridge University Press, Melbourne, 1985), 108.

¹⁶ Van Rooyen, *Portfolio*, above n 1, 137-8.

¹⁷ International Labour Organisation, *Labour and Discrimination in Namibia*, (ILO, Geneva, 1977), 58 (hereinafter: *Discrimination*).

Together these laws formed a tight plethora of restraints which black workers were compelled to cope with from day to day to eke out a living. From the point of view of most employers and the authorities, the laws undoubtedly constituted an effective legal mechanism for extracting the maximum benefit from the indigenous workforce, whilst simultaneously conveniently keeping them at arms [sic] length on a social and political level.¹⁸

Thus African workers could only move from their homelands as providers of labour for (white) settler farms, on mines and in the construction of a nascent transport infrastructure.¹⁹ Moreover they could only do so within a system of contract labour under which white employers obtained the services of African workers from authorised recruiting agents, after first obtaining permission from a magistrate to do so.

It was not until 1952 that Namibia had anything like a comprehensive law relating to collective labour relations. The Wages and Industrial Conciliation Ordinance 1952 established machinery for setting wages and resolving labour disputes; it contemplated lawful industrial action by registered trade unions. The 1952 ordinance was, however, mainly about labour relations among white workers: it did not apply to the agricultural and domestic service work in which most Africans were usually engaged. Nor did it apply (for the most part) to workers in the public service.²⁰ Neither could African workers register a trade union under the 1952 ordinance. Thus, any union they formed - and strictly speaking they were free under the law to form one - could not make a legally binding collective agreement on behalf of its members and could not participate in lawful industrial action. Black workers remained excluded from registering a trade union under the Ordinance until it was amended in 1978. However even then it continued to exclude workers in domestic service and agriculture.²¹

¹⁸ Van Rooyen, *Portfolio*, above n 1, 153.

¹⁹ G Bauer, 'Labour Relations in Occupied Namibia', in Klerck, *et al*, above n 11, 55-57; International Labour Organisation, *Labour in Namibia at Independence*, (ILO, mimeo, 1990), 4 (hereinafter: *Independence*).

²⁰ Van Rooyen, *Portfolio*, above n 1, 154.

²¹ Wiehahn, above n 6, 77.

The passage of the Conditions of Employment Act 1986 introduced more significant change. Modelled on the South African Basic Conditions of Employment Act 1983, it provided for minimum working conditions in a range of areas including leave, working hours, payment, and termination of employment. Its significance lay in the fact that it was the first law regulating minimum conditions that applied to agricultural and domestic service work.²² It was effectively the first protective labour law that applied to African workers' conditions of employment, given the limitations of the 1920 Master and Servants Proclamation.

Labour relations prior to independence

As I have emphasized, labour law in colonial Namibia took its place in a broader social context, and an overall policy of racial discrimination which significantly shaped patterns of labour relations.²³ Labour law itself affected labour relations in significant ways. It controlled the number and effectiveness of registered trade unions, the degree and importance of collective bargaining, the utilisation of state mechanisms for wage determination, and the prevalence and nature of strike action.

Until the mid 1980s there were very few trade unions, and none registered that represented African workers. Between 1953 and 1976 only 11 unions applied to register under the 1952 Ordinance; most had fewer than 200 members, and many fell quickly into disuse.²⁴ Labour law's constraint on the development of effective trade unions was obvious: until its amendment in 1978, the 1952 Ordinance excluded black workers. Their situation was compounded by the fact that workers' struggle was subsumed by the broader political struggle for independence. The South West African People's Organisation (SWAPO) covered the field in this respect, and workers' concerns, including the formation of trade unions, were generally not pursued with the same vigour as the fight for independence.²⁵

²² van Rooyen, *Portfolio*, above n 1, 188.

²³ Van Rooyen, *Normative Convergence*, above n 4, at 36.

²⁴ Van Rooyen, *Portfolio*, above n 1, 167.

²⁵ Bauer, above n 4.

Following the release of SWAPO leaders in 1985 from detention on Robben Island SWAPO made a concerted effort to organise workers into trade unions,²⁶ which soon saw more applications for registration under the 1952 Ordinance. There were 11 applications in 1986 alone, the first that had been received in as many years. Others followed, and by 1990 there were 16 registered trade unions, of which 12 had been registered in the previous four years. Several other active unions were not registered, for a variety of reasons.²⁷ Four of the registered unions were affiliated to the National Union of Namibian Workers (NUNW), the trade-union federation affiliated to SWAPO.²⁸ At independence, NUNW-affiliated unions represented 50,000 to 60,000 workers, that is, about 'a third of the workforce eligible for participation in the labour relations system still in existence at independence'.²⁹

A further 350,000 workers engaged in subsistence farming, migrant work on commercial farms and in domestic service remained outside the collective labour relations framework. Over time, the predominance of these individual work relations has had its own impact on the application of the formal labour law framework, and on the country's labour relations traditions, which have involved relatively little collective activity.³⁰

Not surprisingly, in the absence of either a vibrant trade union movement, or state policy of developing cooperative labour relations, or collective labour relations on a significant scale, the machinery for determining wage levels and resolving collective labour disputes were very little used in Namibia before independence. A related phenomenon was the virtual absence of collective bargaining. The provisions for regulation of wages were perhaps the least-used. Although the 1952 Ordinance provided for the establishment, on an ad hoc basis, of wages boards to make

²⁶ Van Rooyen, *Portfolio*, above n 1, 198.

²⁷ Van Rooyen, *Portfolio*, above n 1, 199. Some were not registered because they were ineligible as they represented workers in the public sector; in other cases technical requirements under the 1952 Ordinance precluded registration of employer federations, trade union federations and general unions of workers: *ibid.*

²⁸ The histories of SWAPO and the NUNW are closely intertwined. See, eg, H Jauch, 'From liberation struggle to social partnership? The challenge of change for the Namibian labour movement' in V Winterfeldt, T Fox and P Mufune, *Namibia. Society. Sociology*, (University of Namibia Press, Windhoek, 2002), 27, at 29.

²⁹ ILO, *Independence*, above n 19, 55.

³⁰ Van Rooyen, *Normative Convergence*, above n 4, at 44.

recommendations on minimum wage levels, only one was established between 1950 and 1977, and there were only three attempts.³¹ There was only one further attempt, in 1979, and that was abandoned.³²

The provisions of the 1952 Ordinance for the establishment of conciliation boards to resolve disputes were also little used. In their first 23 years there were only 24 applications, of which 11 were rejected.³³ In the last years of South African administration, the upsurge of trade union activity was associated with many more applications: there were 42 between 1978 and 1990, of which 30 were approved.³⁴ At the same time there was an increase in the frequency of collective bargaining,³⁵ however in many cases unions were required first to negotiate recognition agreements, which served to demonstrate the general lack of recognition for collective bargaining rights.³⁶

The 1952 Ordinance regulated the taking of lawful industrial action, by requiring the giving of notice and the compulsory use of conciliation boards.³⁷ As black workers could not register a trade union under the Ordinance, however, it followed that all strikes by black African workers before 1978 were unlawful. Until independence, therefore, strikes were frequently treated as criminal activity and police intervened to end them; striking workers who were migrant labourers from within the country were commonly repatriated thereafter.³⁸

Notwithstanding that strikes by African workers were generally illegal, they have occurred throughout Namibia's history of wage-employment. African workers frequently withdrew their labour in protest at the harshness of the contract labour

³¹ Van Rooyen, *Portfolio*, above n 1, 170; Wiehahn, above n 6, 38.

³² Van Rooyen, *Portfolio*, above n 1, 207.

³³ *Ibid*, 169.

³⁴ *Ibid*, 205.

³⁵ *Ibid*, 206.

³⁶ ILO, *Independence*, above n 19, 56.

³⁷ *Ibid*, 57.

³⁸ A Murray and G Wood, 'The Namibian Trade Union Movement: Trends, Practices and Shopfloor Perception' in Klerck *et al*, above n 11, 300.

system. The first recorded strike took place in 1893,³⁹ and industrial action has been occurring on and off ever since.⁴⁰ The most widely known and perhaps the most important strike in Namibia was the general strike of 1971-72. Between 13,000 and 20,000 contract workers struck, bringing the Namibian economy to a standstill. This led to rises in black wages of between 66 and 100 percent,⁴¹ but only modest reforms to the contract labour system.⁴²

PART TWO – LABOUR LAW(S) IN INDEPENDENT NAMIBIA

Labour provisions of the Namibian Constitution

Namibia's post-independence labour law dispensation began with the adoption of the country's new Constitution. It guarantees fundamental freedoms, including freedom of association to form and join trade unions.⁴³ This includes a right to withdraw labour without being subject to criminal sanction.⁴⁴ The Constitution also contains 'Principles of State Policy' that are to guide government law-making.⁴⁵ Although the principles may not be enforced directly, courts must have regard to them in interpreting laws based upon them.⁴⁶ The principles describe an expansive program of social and economic goals, many of which would directly shape, or be shaped by, labour law. Among other things, the state must promote equal opportunity for women, ensure that children are protected from harmful work, and protect workers' health. It must also adopt policies for 'active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices'.⁴⁷ The government must ensure that workers

³⁹ Bauer, above n 19, 60; Murray and Wood, above n 38, 297.

⁴⁰ It is difficult to obtain accurate data on strikes in Namibia, and this is reflected in the variation among the secondary sources concerning their frequency and duration. For different counts of the numbers of strikes in the pre-independence era see Bauer, above n 3, Murray and Wood, above n 38, Wiehahn, above n 6, and van Rooyen, above n 1, at 173 and 207-211. See also P Peltola, *The Lost May Day: Namibian Workers' Struggle for Independence*, (Finnish Anthropological Society and the Nordic Africa Institute, Uppsala, Sweden), 1995.

⁴¹ Wiehahn, above n 6, 77.

⁴² Bauer, above n 19, 64.

⁴³ Art 21(1)(e).

⁴⁴ Art 21(1)(f). A fundamental freedom must, however, be exercised according to law, and the government may impose 'reasonable restrictions' on its exercise: art 21(2). Fundamental freedoms may be also abridged during a state of emergency declared during a national disaster: art 26.

⁴⁵ Compare Part IV of the Constitution of the Republic of India.

⁴⁶ Art 101.

⁴⁷ Art 95.

are paid ‘a living wage adequate for the maintenance of a decent standard of living’.⁴⁸ The principles refer specifically to membership of the International Labour Organisation (ILO), and adherence to its Conventions and Recommendations. The principles also seek to guide the country’s economic order in ways that directly affect (and will be affected by) labour law, providing that it ‘shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians’.⁴⁹

Consistent with the social goals described in the principles of state policy, since independence the government has enacted a variety of legislation to regulate labour relations and working conditions. It includes laws relating to vocational training, workers’ compensation, social security, and affirmative action in employment.⁵⁰ The central element of the package, however, was the 1992 Act. It was the main vehicle by which the new government sought to overcome the major deficiencies of its colonial-era labour laws. Not surprisingly, the Ministry of Labour has described the 1992 Act as ‘[t]he most important achievement in the history of the world of work in Namibia’.⁵¹ Its stated aims included ensuring equality of opportunity for women; promotion of ‘sound labour relations and fair employment practices’ (among other things by the formation of trade unions and employers organisations); the establishment of fair basic minimum conditions of employment; protection of the health and safety of workers; and, where possible, adherence to ILO conventions and recommendations.

The Wiehahn Commission and the role of the ILO

The fundamental rights and the principles of state policy in the post-independence Constitution have certainly not been the only forces shaping the form and content of

⁴⁸ Ibid.

⁴⁹ Art 98.

⁵⁰ Above n 1. Of these laws, the Affirmative Action (Employment) Act 1998 is particularly significant in the context of efforts to overcome the history of racial discrimination in the labour market. State agencies and employers with more than 50 employees must take steps including giving preference in hiring to certain groups at certain times. They must also develop an action plan to address the issue within their workforce, under the supervision of the Employment Equity Commission. On affirmative action in Namibia prior to the implementation of the 1998 Act see H Jauch, *Affirmative Action in Namibia*, (New Namibia Books, Windhoek, 1998).

⁵¹ Ministry of Labour, *Annual Report*, (Government of Namibia, Windhoek, 1997), 57.

labour legislation in independent Namibia. On the contrary, there have been (at least) two other significant influences: first, the recommendations contained in the report of the Wiehahn Commission, delivered in 1987, and secondly, the actions of the ILO.

Wiehahn recommended compliance with international labour standards, especially in relation to the right of workers to form and join trade unions.⁵² In particular, he recommended lifting the ban on political affiliation by trade unions, which had been implemented to try to keep trade unions separate from SWAPO.⁵³ Wiehahn called for the promotion of collective bargaining to set working conditions, particularly wages,⁵⁴ provided that there should be universally legislated minimum standards.⁵⁵ To facilitate bargaining, and the resolution of labour disputes, Wiehahn called for a (regulated) right to strike and to lock out⁵⁶ and the establishment of new institutions including a functioning Wages Commission⁵⁷ and a specialist Labour Court.⁵⁸ He also suggested the creation of an office of Labour Commissioner with responsibility for (among other things) union registration and oversight of dispute settlement procedures.⁵⁹ As a cross-cutting theme, Wiehahn recommended that unfair labour practices be defined broadly, and the concept introduced into the labour relations system at various levels.⁶⁰ Much of this blueprint was implemented in the 1992 Act, although the concept of unfair labour practices had to wait for the 2004 Act.

Both the 1992 Act and the 2004 Act were also significantly influenced by the ILO, which has long played an important role in efforts to improve labour law and labour relations in Namibia. During the latter years of South African rule in Namibia, the ILO released a major study analysing labour law and discrimination,⁶¹ accepted SWAPO representation for Namibia at its annual conference,⁶² and considered the Namibian situation during its annual conference discussion on the status of workers

⁵² Wiehahn, above n 6, 23-4.

⁵³ Ibid, 93.

⁵⁴ Ibid, 37, 96.

⁵⁵ Ibid, 42-53.

⁵⁶ Ibid, 106.

⁵⁷ Ibid, 37.

⁵⁸ Ibid, 120-122.

⁵⁹ Ibid, 124.

⁶⁰ Ibid, 123.

⁶¹ ILO, *Discrimination*, above n 17. See also ILO, *Independence*, above n 19.

⁶² ILO, *Independence*, above n 19, 7.

under apartheid.⁶³ Not surprisingly, the ILO repeatedly condemned the apartheid regime in Namibia. It called for laws that protected all workers' rights without distinction; for an industrial relations system based on a process of independent collective bargaining; and for respect for the principle of tripartism in labour relations.⁶⁴

Since independence, Namibia has been subject to the ILO's regular machinery for supervision of compliance with ratified conventions. The ILO has also provided technical assistance to the government on a range of issues. This has included work on labour market policy, analysis of labour force statistics, and training of conciliators and mediators for the labour dispute resolution system. It has also included assistance in the drafting of the 2004 Act and, before that, the 1992 Act.⁶⁵

The 1992 Act in overview

It is valuable to consider the 1992 Act in a little detail: while it retained some elements of the colonial labour law regime (particularly in its reliance on courts in the resolution of certain labour disputes), it broke new ground by affording basic rights to all Namibian workers regardless of race. It also introduced a number of important institutions that are continued under the 2004 Act, such as the office of the Labour Commissioner. Thus, the 1992 Act represented a major step for African workers in Namibia, and an important stage in the development of Namibian labour law. The 1992 Act also explicitly acknowledged the policy imperative of maintaining sound labour relations in order to contribute to national economic development: the preamble referred among other things to the 'furtherance of labour relations conducive to economic growth, stability and productivity through the promotion of an orderly system of free collective bargaining'.⁶⁶

⁶³ See the periodically produced *Report of the Director General on the Application of the Declaration concerning the Policy of Apartheid in South Africa*.

⁶⁴ ILO, *Discrimination*, above n 17. See also ILO, *Independence*, above n 19.

⁶⁵ Fenwick, above n 8, van Rooyen, *Portfolio*, above n 1, and van Rooyen, *Normative Convergence*, above n 4.

⁶⁶ 1992 Act, Preamble.

Other goals of the 1992 Act referred to in its preamble mirrored some of the Constitution's principles of state policy. They included overcoming past discriminatory practices,⁶⁷ ensuring equality of opportunity for women, and promoting 'sound labour relations and fair employment practices'. The latter was to be achieved, among other ways, by the formation of trade unions and employers' organisations, the establishment of fair basic minimum conditions of employment, protection of the health and safety of workers, and, where possible, adherence to and implementation of ILO conventions and recommendations.⁶⁸

In accordance with its goals, and following many of Wiehahn's recommendations, the 1992 Act facilitated the right of all workers to form and join a trade union,⁶⁹ and the negotiation and enforceability of collective agreements.⁷⁰ In order to encourage collective bargaining it gave trade unions certain organisational rights. These included, in particular, the right to demand recognition as an exclusive bargaining agent for a bargaining unit of the trade union's own devising. It provided for dispute resolution by conciliation, arbitration or the Labour Courts, and regulated the use of strikes and lockouts as methods of dispute resolution.⁷¹ As suggested by Wiehahn, the 1992 Act underpinned its emphasis on collective bargaining with basic conditions of employment for all workers.⁷² It also regulated termination of contracts of employment, including remedies for unlawful termination in defined cases,⁷³ and created rights and duties for both workers and employers in relation to workplace health and safety.⁷⁴ The 1992 Act provided for affirmative action, and for remedies in the event of complaints of discrimination.⁷⁵ It retained the mechanism of the ad hoc tripartite Wages Commission to make recommendations that would be *prima facie* binding on government.⁷⁶

⁶⁷ 1992 Act, Preamble.

⁶⁸ 1992 Act, Preamble.

⁶⁹ 1992 Act, Part VII.

⁷⁰ 1992 Act, Part VIII.

⁷¹ 1992 Act, Part IX.

⁷² 1992 Act, Part V.

⁷³ 1992 Act, Part VI.

⁷⁴ 1992 Act, Part XI.

⁷⁵ 1992 Act, Part XIII.

⁷⁶ 1992 Act, Part X.

Regulation of bargaining and dispute resolution under the 1992 Act

The 2004 Act has made some significant changes to Namibia's system of collective bargaining and labour dispute resolution. It is useful therefore to consider briefly the system established by the 1992 Act. It regulated both the making and registering of collective agreements, and the resolution of disputes, including by conciliation boards, and the taking of industrial action by way of strike or lockout. It established a number of offices and institutions with roles in the resolution of labour disputes, including the Labour Commissioner supported by a civil inspectorate,⁷⁷ a Labour Court, and District Labour Courts.⁷⁸ It also established a tripartite Labour Advisory Council.⁷⁹

The 1992 Act sought to introduce and rely on the establishment of representative organisations that would determine working conditions through free collective bargaining. It therefore regulated both the making and registering of collective agreements, and the resolution of disputes, including by conciliation boards, and the taking of industrial action by way of strike or lockout. The introduction of a collective bargaining policy, with its emphasis on the roles of the social partners, was also part of the broader goal of instituting tripartism as a principle of state policy in labour relations. To this end the 1992 Act created a tripartite Labour Advisory Council,⁸⁰ with responsibility to investigate and report to the Minister on matters including national employment policy, promotion of collective bargaining and the prevention or reduction of unemployment.⁸¹

The office of Labour Commissioner - a Ministerial appointee⁸² - was central to the operation of the 1992 Act (and will remain so under the 2004 Act). First, the Labour Commissioner had power to superintend both representative organisations of workers and employers: the Commissioner determined applications for registration by both

⁷⁷ 1992 Act, section 3. The powers of inspectors are specified in Part XII, s 104.

⁷⁸ 1992 Act, Part IV.

⁷⁹ 1992 Act, Part III.

⁸⁰ 1992 Act, s 9. The role of the Minister or their representative as chair is only one indication that the Council may not have been created with a sufficient degree of independence from government. The Council was not created as a juristic person, and its secretariat was within the Ministry, where the Permanent Secretary controlled the performance of the Council's work: 1992 Act, s 14.

⁸¹ 1992 Act, ss 8(1)(a), (b) and (f).

⁸² 1992 Act, s 3(1)(a).

trade unions and employers' organisations,⁸³ and exercised supervisory power over registered organisations,⁸⁴ including the content of their constitutions.⁸⁵ Secondly, the Labour Commissioner oversaw the process of recognition of trade unions as bargaining agents,⁸⁶ and acted as the registrar of collective agreements.⁸⁷ Thirdly, as noted, the Commissioner received notice of labour disputes⁸⁸ (that is, disputes over interests), and was empowered to establish a conciliation board - and determine its terms of reference⁸⁹ - where satisfied that the parties had taken all reasonable steps to resolve the dispute themselves.⁹⁰

Under the 1992 Act disputes of rights were to be resolved in the first instance in the District Labour Court, which was established at the level of the Magistrates' Courts.⁹¹ It had a particularly broad jurisdiction, encompassing complaints by an employee or an employer concerning any contravention of or failure to comply with the 1992 Act, or the terms of a contract of employment or a collective agreement.⁹² Appeals were allowed on questions of law to the Labour Court (established at the level of the High Court),⁹³ which also had jurisdiction to hear appeals against and to review judicially certain decisions of various officers under the 1992 Act, including the Minister, the Labour Commissioner, and inspectors.⁹⁴

Some efforts were made to create a system of labour courts that were user-friendly, and specialist. Litigants could appear in person in the District Labour Court (or be

⁸³ 1992 Act, s 54.

⁸⁴ 1992 Act ss 61(1)(a) (power to demand information from time to time), 61(1)(d) (power to approve application to have organisation's or union's books audited by a person other than a public accountant), 66(1) (power to apply to the Labour Court in respect of deficiencies in the winding up provisions in the constitution of an organisation or a trade union) and 64 (receives annual reports from trade unions and employers' organisations).

⁸⁵ 1992 Act, ss 61(1)(f) (power to approve alterations), 61(2) (power to receive an application to alter a constitution and to determine the content of such application) and 61(3) (power and duty to approve applications). 1992 Act s 63.

⁸⁶ The Labour Commissioner received copies of trade union demands for union recognition, employers' responses, and where necessary oversaw ballots to determine whether trade unions were representative: 1992 Act s 58.

⁸⁷ 1992 Act, s 68. Provided that they complied with the 1992 Act and the Namibian Constitution: 1992 Act, s 68(5). The Commissioner may also rectify an error in a collective agreement where it is not inappropriate to do so: s 71(2).

⁸⁸ 1992 Act, s 74(1).

⁸⁹ 1992 Act, s 76.

⁹⁰ 1992 Act, s 75.

⁹¹ 1992 Act, s 15.

⁹² 1992 Act, s 19(1)(a).

⁹³ 1992 Act, s 16.

⁹⁴ 1992 Act, s 18.

represented by any other person, including a lawyer),⁹⁵ and it was a no-costs jurisdiction save for frivolous or vexatious actions.⁹⁶ Moreover, both the District Labour Courts and the Labour Court could appoint assessors to sit with the judicial officer who comprised the court.⁹⁷ The District Labour Court also relied on a certain measure of alternative dispute resolution: its rules required an inspector to convene a conference before any trial, to try to narrow the issues in dispute, or to resolve the matter.⁹⁸ Inspectors could also assist an employee in presenting an application or appeal to the Labour Court, or a complaint to the District Labour Court, or in settling any such matter.⁹⁹

The last element of the 1992 Act relevant to prevention and resolution of labour disputes that warrants brief consideration is the Wages Commission: such a body might prove important in limiting labour unrest in those sectors of the economy in which organised labour is unable to improve conditions through bargaining. (Of course it might also play an important part in ensuring fair basic working conditions.) As noted, however, in pre-independence Namibia the institution of the Wages Commission had been largely irrelevant: most Africans worked in sectors excluded from its possible operation, and it was almost never used for those workers that might be covered by it. Nevertheless, under the 1992 Act it remained an *ad hoc* institution,¹⁰⁰ empowered only to make a recommendation to the Minister.¹⁰¹ The Minister was required either to make a wage order in accordance with the Commission recommendation, or explain in a report to the National Assembly any decision to reject the recommendation.¹⁰²

⁹⁵ 1992 Act, s 19(3). In the Labour Court, however, a party could only be represented by a lawyer: s 18(2).

⁹⁶ 1992 Act, s 20.

⁹⁷ Assessors might be drawn from lists compiled by the Minister after consultation with the social partners, or persons with 'special knowledge and experience' in a field related to the matter in question: 1992 Act, ss 16(2) (Labour Court procedure for appointment of assessors) and 17(2) (District Labour Court procedure for appointment of assessors).

⁹⁸ C Daniels, 'Resolving Labour Disputes in Southern Africa: The Case of Namibia' in S Christie and L Madhuku, *Labour Dispute Resolution in Southern Africa*, (Friedrich Ebert Stiftung and Institute for Development and Labour Law, Cape Town, 1996), 54.

⁹⁹ 1992 Act, s 104(2)(j).

¹⁰⁰ 1992 Act, 84. Where constituted, it is to be of tripartite composition: 1992 Act, s 86(1).

¹⁰¹ A recommendation had to take into account (among other things) the aims of Article 95 of the Constitution, and the likely impact of a wages order on employers' profitability and the needs of the employees concerned: 1992 Act, s 90.

¹⁰² 1992 Act, s 92.

The Wages Commission appears no more important to setting wages in Namibia today than at any time in the past: not once has a dedicated Wages Commission been instituted in the 15 years since independence.¹⁰³ Thus, while the Minister has more than once exercised the power in the 1992 Act to extend the operation of collective agreements to whole sectors of industry,¹⁰⁴ to this day, there is no universal minimum wage in Namibia. Indeed in late 1994 the Labour Advisory Council recommended *against* the introduction of a universal minimum wage in Namibia, having examined their impact in Botswana and Zimbabwe. It recommended instead a continuing emphasis on collective bargaining.¹⁰⁵

PART THREE – THE 2004 ACT

Development of the new policy framework

It is valuable for at least two reasons to outline – albeit briefly - the law reform process that preceded the 2004 Act. First, there was no major public inquiry to whose report one may have recourse to explain the origins of the new provisions. Thus, it is useful to record the policy-development context, in order to explain the goals of some of the new provision. Secondly, the 2004 Act was a long time coming: while the Bill for the Act was introduced into the National Assembly in April 2004, that event was the culmination of a very lengthy process of examination and consultation, which began no later than November 1998, and included at least one earlier Bill, in April 2002.¹⁰⁶ Some consideration of that process is useful as a basis for later hazarding a prognosis on the future of the 2004 Act. Indeed, it is all but invited by some of the

¹⁰³ In 1994 the government appointed a commission of inquiry into Labour matters: Republic of Namibia, *Labour-Related Matters Affecting Agricultural and Domestic Employees in Namibia*, Report of the Commission of Inquiry into Labour-Related Matters Affecting Agricultural and Domestic Employees, (Government of Namibia, Windhoek, July 1997).

¹⁰⁴ See for example, Declaration of registered collective agreement relating to the agricultural industry to be binding on all employers and employees in that industry: Labour Act, 1992 (Act No. 6 of 1992), No. 77 of 2003, *Government Gazette of the Republic of Namibia*, No. 2946, 1 April 2003 (extending the operation of the collective agreement from 17 March 2003). Similar steps have been taken in the construction industry, to extend the terms of agreements reached between the Construction Industry Federation and the Metal and Allied Namibian Workers Union. See eg the Notice in terms of section 70(2) of the Labour Act, 1992, No. 210 of 2002, which advises of the receipt of a request to extend a collective agreement. Discussions with officials in Namibia (including the Labour Commissioner) in April 2004 indicated that this agreement had in fact been so extended, but there did not appear to be any such record in the Government Gazettes.

¹⁰⁵ Van Rooyen, *Portfolio*, above n 1, 244; notes of interview with the Labour Commissioner, 6 April 2004, copy on file with author.

¹⁰⁶ Fenwick, above n 8.

different opinions expressed on the 1992 Act, which turned in part on an assessment of the process by which it was developed.

In his second reading speech for the 1992 Act, the then Minister of Labour and Manpower Development, Dr. Rev. Hendrik Witbooi, said that while it did not meet the expectations of all parties, as a result of the lengthy consultation process that had preceded its drafting, the 1992 Act was ‘the best compromise achievable.’¹⁰⁷ Johannes van Rooyen – who worked for the Ministry of Labour during the development of the 1992 Act - is particularly complimentary about the process, which he says could be ‘regarded as an object lesson in informal tripartite consultation’.¹⁰⁸ As I noted at the outset, Clive Thompson offered less praise: he evidently had some concerns about the process. He clearly considered that the new law would represent a significant advance, crediting it with breaking with the past and providing a framework of clear rights and duties, together with a ‘viable’ model of dispute resolution. Its weakness, in his view, was that the law had not been ‘organically produced from intensive and sustained deliberations between employers, unions and the state’; but was, rather, being ‘superimposed’. Thus he foreshadowed the possible need, at a later point, for a ‘more indigenous solution’.¹⁰⁹

Evidently it appears difficult to reconcile the divergent assessments of van Rooyen and Thompson; a full attempt to do so may have to wait for another occasion. For now, it is however possible to point to a couple of factors that may assist, and which I take up a little further in the conclusion. First, it is one thing to have a consultative process, which is what van Rooyen praised. It is another thing, however, to have a consultative process with parties that have the necessary experience and expertise to participate in the process effectively. The tripartite social partners in Namibia that engaged in the process of developing the 1992 Act could have had very little experience in such a method. Secondly, it is one thing to have a consultative process, and another to have a process that leads to a law that is well suited to its socio-economic context. The mere fact that the parties consult – subject to the limitations I

¹⁰⁷ See the extract in van Rooyen, *Portfolio*, above n 1, 231; see also G Bauer, ‘The New Labour Act: Best Compromise Achievable’ (1992) 1 *Namibian Review* 18.

¹⁰⁸ Van Rooyen, *Portfolio*, above n 1, 230.

¹⁰⁹ Thompson, above n 3, 101.

have just mentioned – does not exclude the possibility of the adoption of a model of labour regulation that is ill-adapted to the labour market it is to regulate.

Thompson's emphasis on the importance of labour law being developed in its own context is echoed by Bob Hepple. Writing on the prospects for the South African Labour Relations Act of 1995, he addressed the question whether labour laws - and collective labour laws in particular - might satisfactorily be 'transplanted' from one jurisdiction to another.¹¹⁰ His suggested model for success has four conditions:

(1) a social consensus between business and labour; (2) an organic relationship between a specific social need and the form of regulation adopted; (3) an internationalist and open-minded legal culture; and (4) the form of labour law adopted must contribute to improved national economic performance.¹¹¹

Elements of this model can serve as a useful framework within which to consider the law reform process leading to the 2004 Act, and perhaps therefore to lead to some indication of its prospects for success.

The process began no later than January 1998, when the Ministry of Labour and the social partners resolved to establish a tripartite task force to review the 1992 Act.¹¹² That taskforce met for five days in March 1998, 'exhaustively deliberating the development of a new dispute prevention and resolution system'.¹¹³ Among its conclusions were that the system should retain its basic features, including the Labour Court, the office of Labour Commissioner, and the compulsory conciliation of disputes. Issues that particularly needed to be addressed included the operation of the District Labour Courts, the prospects for arbitration of rights disputes, the insufficient

¹¹⁰ See in particular O Kahn Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1. For a differing view see G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *Modern Law Review* 11. See also the introduction and conclusion in S Cooney, T Lindsey, R Mitchell, and Y Zhu, *Law and Labour Market Regulation in East Asia*, (Routledge, London, 2002). On the success or otherwise of the 1992 Act from a comparative point of view, see Fenwick, above n 8.

¹¹¹ B Hepple, 'Can Collective Labour Law Transplants Work? The South African Example' (1999) 20 *Industrial Law Journal (South Africa)* 1, 2-3.

¹¹² ILO, *Explanatory Memorandum on Proposed Amendments to Namibian Labour Act, 1992*, undated, 1 (copy on file with author) (hereinafter: *Explanatory Memorandum*). According to Dr van Rooyen, who participated in the law reform processes for both the 1992 and 2004 Acts, there were earlier discussions about the inadequacies of the 1992 Act, from as early as 1997, following a lengthy strike at Tsumeb Copper (now Ongopolo Mining and Processing Limited) in 1996: interview with Dr Johannes van Rooyen, 3 April 2004, copy on file with author.

¹¹³ *Explanatory Memorandum*, above n 112, 2.

use of conciliation procedures, and the fact that the dispute resolution machinery was ‘primarily reactive in nature and adversarial.’¹¹⁴

To remedy these perceived deficiencies, a number of principles were agreed to underpin the changes to be made to the 1992 Act. First, the Minister should have a greater role, through a power to issue codes of good practice to guide the parties in exercising their rights and duties, and through a power to intervene in so-called (but undefined) ‘pathological situations’.¹¹⁵ Secondly, the role of the Labour Advisory Council should be expanded by giving it a consultative role in relation to the appointment of members of the Labour Court, and to the office of Labour Commissioner, as well as responsibility for drafting codes of good practice.¹¹⁶ Thirdly, the role of the Labour Commissioner should be expanded. Due to dissatisfaction with the (necessarily) adversarial nature of the District Labour Courts and their outcomes, rights disputes should first be referred to the Labour Commissioner for conciliation, together with all interest disputes. Should conciliation fail, these disputes would proceed (respectively) to arbitration or to resort to industrial action. It was agreed that the Labour Commissioner should be given responsibility for all conciliation and arbitration services, in the hope of coordinating and centralising them. Expanding the scope of conciliation was intended to ensure a higher proportion of disputes would be resolved before the commencement of adversarial action, whether in court or by way of industrial action.¹¹⁷ Fourthly, the role and composition of the Labour Court should be changed to ensure that there would be at least two High Court judges assigned principally to work in the Labour Court, and that its jurisdiction would primarily be one of appeal and review, other than in the case of urgent interdicts.¹¹⁸

The activities of the tripartite task force were coordinated by an ILO project in the region, for which funding has come since 1995 from the Swiss Government.¹¹⁹ It took

¹¹⁴ Ibid, 3.

¹¹⁵ Ibid, 4.

¹¹⁶ Ibid, 4.

¹¹⁷ Ibid, 5-6.

¹¹⁸ Ibid, 7.

¹¹⁹ A brief description of the ‘ILO/Swiss Project to Advance Social Partnership in Promoting Labour Peace in Southern Africa’ can be found in ILO, *Technical Co-operation Projects: InFocus Programme on Social Dialogue, Labour Law and Labour Administration*, available at <<http://www.ilo.org/public/english/ifpdialogue>> (accessed 23 August 2003).

responsibility also for identifying a technical expert to draft the new bill,¹²⁰ which was then transmitted to ILO headquarters for technical comments on its compliance with international labour standards. These were then to be conveyed back to the social partners through the director of the ILO/Swiss project.¹²¹ That project has been working in the region since 1995, and operates according to a well-developed methodology for assisting the social partners to agree on a model for their dispute resolution system. By this process, the project encourages the social partners to identify the faults in their existing system, and to devise institutions and procedures that will overcome them. The project then goes on to prepare draft legislation and where necessary codes, that are later further discussed with the tripartite partners. The project also carries out related activities to ensure that the social partners have the institutional capacity to carry out the roles to be assigned to them under the revised legal framework.¹²²

Thus, the ILO again played a significant role in the development of labour law in Namibia. It was under its auspices that Namibia managed the development and passage of the 2004 Act. Not surprisingly, it introduces many of the changes foreshadowed in the March 1998 meeting of the tripartite task force. In particular, it provides for conciliation and arbitration of labour disputes, replacing the District Labour Courts as the first line of dispute resolution. It thereby restructures the role of the Labour Court as a jurisdiction largely of appeal and review, other than in hearing applications for interdicts against strike action. The 2004 Act also creates a Committee for Dispute Prevention and Settlement. Other key features include a new chapter on fundamental rights,¹²³ retention of chapters regulating basic conditions of employment and occupational health and safety,¹²⁴ the continuation of the Wages Commission¹²⁵ and the Labour Inspectorate,¹²⁶ and provision for registration and

¹²⁰ In this case, Professor Halton Cheadle, University of Cape Town.

¹²¹ *Explanatory Memorandum*, above n 112, 1 (note 1).

¹²² See ILO, *A Consensus Based Approach to Dispute System Design – Presentation to IFP/Dialogue Dispute Prevention and Settlement Workshop, Geneva 2-4 April 2003*, April 2003, copy on file with author.

¹²³ 2004 Act, Chapter 2.

¹²⁴ 2004 Act, Chapters 3 and 4 respectively.

¹²⁵ 2004 Act ss 102-111 (Part C of Chapter 9).

¹²⁶ 2004 Act, ss 121-125.

regulation of trade unions and employer organisations, and the negotiation and legal effect of collective agreements.¹²⁷ The Act also regulates strikes and lockouts.¹²⁸

Fundamental rights

As its title suggests, the short chapter of the 2004 Act dealing with fundamental rights protects those rights that are enshrined in the ILO's core labour standards,¹²⁹ and also in its Declaration on Fundamental Principles and Rights at Work, 1998. There are sections on each of child labour,¹³⁰ forced labour,¹³¹ discrimination in employment and occupation,¹³² and freedom of association.¹³³ Disputes over these rights are to be resolved, after referral to the Labour Commissioner, by arbitration, although disputes about discrimination must be resolved by conciliation.¹³⁴ As appears further below, the difference between these two courses may be more apparent than real, as an arbitrator is obliged to try first to conciliate a dispute that has not already been the subject of conciliation.¹³⁵

A curious feature of the provision for resolution of disputes about fundamental rights is that the Labour Commissioner is *empowered* to appoint an arbitrator, rather than *required* to do so. Neither is there any indication by what criteria the Labour Commissioner ought to decide whether to exercise the power of appointment. Conferring this power ('may . . . appoint an arbitrator') is also inconsistent with the approach elsewhere in the Act to disputes that are to be resolved by arbitration. The provision relating to disputes about unfair labour practices¹³⁶ and the general

¹²⁷ 2004 Act, Chapter 6.

¹²⁸ 2004 Act, Chapter 7.

¹²⁹ The ILO's Core Labour Standards are those dealing with freedom of association and the right to engage in collective bargaining (Conventions Nos 87 and 98), freedom from forced labour (Conventions Nos 29 and 105), freedom from harmful child labour (Conventions Nos 138 and 182), and freedom from discrimination in opportunity and remuneration in employment (Conventions Nos 100 and 111). For an incisive, critical analysis of the emergence of 'core' labour standards see P Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2004) 15 *European Journal of International Law* 457.

¹³⁰ 2004 Act, s 3.

¹³¹ 2004 Act, s 4.

¹³² 2004 Act, s 5.

¹³³ 2004 Act, s 6.

¹³⁴ 2004 Act, s 7.

¹³⁵ 2004 Act, s 83(6).

¹³⁶ 2004 Act, s 50(3).

provision concerning referral of disputes to the Labour Commissioner for arbitration each *require* the appointment of an arbitrator ('must . . . appoint an arbitrator').¹³⁷

Turning to specific protections of fundamental rights, there is a general prohibition on employing a child other than under the conditions prescribed in the 2004 Act. Forced labour (as defined) is also prohibited, although it does not include labour referred to in Article 9(3)(a) to (e) of the Namibian Constitution. Those provisions exempt from the general prohibition on slavery and forced labour certain forms of work that have a flavour of public benefit to them, including in particular the forced work of prisoners.¹³⁸ It will be an offence to engage a child in work other than as permitted, or to be involved in contravening the prohibition on forced labour. In each case the penalty is to be a maximum fine of \$N4,000, or 12 months' imprisonment or both.¹³⁹ Even taking into account low income levels in Namibia, on its face the available maximum fine appears far too low to provide any sort of deterrent, particularly to a corporate defendant.

The 2004 Act includes a general protection of freedom of association: a person must not 'prejudice an employee or an individual seeking employment' because of their exercise of trade union rights, or other rights conferred under the Act.¹⁴⁰ This protection is evidently to be enforced by individuals themselves, directly and by means of civil proceedings. Disputes arising out of the application of this provision are to be conciliated, and arbitrated if that is unsuccessful. An arbitrator is empowered to award a sum for damages or compensation, and in some cases, for costs.¹⁴¹

The 2004 Act also includes a general prohibition on discrimination, whether directly or indirectly, in an 'employment practice', which is defined to include (among other things), access to training, employment, security of tenure and termination of employment.¹⁴² The proscribed grounds of discrimination include race, colour and

¹³⁷ 2004 Act, s 83(5).

¹³⁸ The exemptions conform with those found in international human rights instruments that prohibit slavery and forced labour, in particular ILO Convention 29, Art 2(2). For analysis of some of these provisions, see C Fenwick, 'Private Use of Prisoners' Labour: Paradoxes of International Human Rights Law (2005) 27 *Human Rights Quarterly* 249.

¹³⁹ 2004 Act ss 3(6) (child labour) and 4(6) (forced labour).

¹⁴⁰ 2004 Act, s 6.

¹⁴¹ 2004 Act, ss 83(15)(e) and (f).

¹⁴² 2004 Act ss 5(1)(b) (definition of 'employment practice') and 5(2) (prohibition on discrimination).

ethnic origin, sex, family responsibilities and physical disability. They do not include sexual orientation, although this was included in the 2002 Bill.¹⁴³ The Act does proscribe discrimination against a person on the ground of being AIDS or HIV status, although this ground was not included in the Bill presented to the National Assembly in March 2004. The specific mention of AIDS or HIV is welcome, as it ensures protection in a wider range of circumstances than does protection against discrimination on the ground of disability: the status of being HIV-positive does not always amount to a physical or mental disability as defined in the Act.¹⁴⁴

There are at least two other weaknesses to the provisions on discrimination. First, they do not include a provision equivalent to s 107(4) of the 1992 Act, under which the burden of proof is reversed after a complainant reaches an evidentiary threshold.¹⁴⁵ Secondly, it has been suggested that the 2004 Act might be deficient in its prohibition of discrimination on the ground of pregnancy, which case law from other jurisdictions has shown is not always comprehended by a general prohibition against discrimination on the ground of sex.¹⁴⁶

Unfair labour practices

The 2004 Act introduces a general concept of ‘unfair labour practice’, as was recommended by Wiehahn, but which did not find its way into the 1992 Act. These include dismissal of an employee without a valid and fair reason or without a fair process.¹⁴⁷ It also includes unilaterally altering any term or condition of a contract of employment.¹⁴⁸ A dispute about an alleged unfair labour practice may be referred by a party to the Labour Commissioner, who must appoint an arbitrator to resolve it.¹⁴⁹

¹⁴³ Namibian Employers’ Federation, *Comments on the Labour Bill 2004 by the Executive Committee of the Namibian Employers’ Federation*, 18 February 2004, p 1, copy on file with author. See also Gender Research & Advocacy Project, Legal Assistance Centre, *Comments on Draft Labour Bill 2004 Looking at the Bill from a Gender Perspective*, undated, p 2, copy on file with author.

¹⁴⁴ *Letter from Legal Assistance Centre to The Speaker of the National Assembly*, 8 March 2004, p 1, copy on file with author.

¹⁴⁵ Gender Research & Advocacy Project, above n 143, p 1.

¹⁴⁶ *Ibid*, p 2.

¹⁴⁷ 2004 Act, ss 32 and 47.

¹⁴⁸ 2004 Act, s 49.

¹⁴⁹ 2004 Act, s 50.

It is an unfair labour practice for a registered trade union to refuse to bargain collectively where required to do so (under the terms of a collective agreement, for example), or to bargain in bad faith, to subvert bargaining or otherwise to intimidate, or to fail fairly to represent any person in a bargaining unit.¹⁵⁰ It is also an unfair labour practice for an employee to subvert orderly bargaining or to intimidate another person.¹⁵¹ Similar conduct by an employer also amounts to an unfair labour practice, as do other failures. These include failure to disclose information to a union representative where it is reasonably required so that a union representative may perform a function under the Act, or seeking to control any trade union or federation of trade unions.

That so many of the defined unfair labour practices relate to workplace bargaining is at first glance something of a curiosity: the 2004 Act does virtually nothing to regulate the conduct of collective bargaining, other than by the general means of making available conciliation for disputes over interests, and then lawful industrial action where conciliation is exhausted. The answer may lie in the possibility that the parties themselves will agree to conditions to regulate their bargaining, or that recommendations about bargaining could be included in a code of practice issued under the Act. It might also be possible for the Minister to promulgate regulations on the matter, pursuant to s 133(1).

Trade union rights and registration

The 2004 Act retains strong and simple provisions for implementation of the right of freedom of association.¹⁵² A union or employers' organization may be registered, provided it has a constitution that complies with the legislative and constitutional requirements.¹⁵³ A registered union has certain legislated rights that will provide a measure of trade union security and enable it better to carry out its functions.¹⁵⁴ These include a right of access to employer premises where required,¹⁵⁵ and the right to have

¹⁵⁰ 2004 Act, s 48(1).

¹⁵¹ 2004 Act, s 48(2).

¹⁵² 2004 Act, ch 6.

¹⁵³ 2004 Act, s 52.

¹⁵⁴ 2004 Act, ss 58 and 62-67.

¹⁵⁵ 2004 Act, s 63.

union fees deducted from an employed member's salary.¹⁵⁶ Parties to a collective agreement may include provision for further organisational rights for trade unions.¹⁵⁷ A related right is that of workers to elect workplace representatives according to a sliding scale where more than 10 members of a registered union are employed at a workplace.¹⁵⁸ Both registered trade unions and employer organizations may form federations and affiliate with and participate in the activities of international level organizations.¹⁵⁹

Trade unions retain (from the 1992 Act) a right to be recognized as an exclusive bargaining agent for a bargaining unit, provided that the unit is 'appropriate' and that they represent a majority of the employees in the unit.¹⁶⁰ Application for recognition must be copied to the Labour Commissioner. If a demand is ignored or rejected, the union may refer the matter as a dispute to the Labour Commissioner, who must then refer it to arbitration. The arbitrator will have power to declare the union to be representative of the bargaining unit, or of another appropriate bargaining unit. In deciding what is an appropriate bargaining unit the arbitrator will be required to take into account both the organizational structure of the employer and the need to 'promote orderly and effective collective bargaining with a minimum of fragmentation of an employer's organisational structure'.¹⁶¹ Disputes about any of these union rights, other than recognition, may be referred to the Labour Commissioner who must refer them to conciliation, and then to arbitration if conciliation is not successful.¹⁶²

Collective negotiations and industrial action

The 2004 Act regulates the process of collective bargaining in the main by prescribing conditions for the taking of lawful industrial action. Parties to a dispute of interests

¹⁵⁶ 2004 Act, s 64(2).

¹⁵⁷ 2004 Act, s 66.

¹⁵⁸ 2004 Act, s 65. Compare s 80 of the South African Labour Relations Act 1995, which provides for the creation of a 'workplace forum' in any workplace with more than 100 employees: the threshold is greater, but not based on the minimum number of workers required belonging to a trade union. For analysis of this aspect of South African labour law see, eg, D du Toit, *et al*, *Labour Relations Law – A Comprehensive Guide*, (4th Edn, LexisNexis Butterworths, Durban, 2003), Ch VII.

¹⁵⁹ 2004 Act, s 58.

¹⁶⁰ 2004 Act, s 62.

¹⁶¹ 2004 Act, s 62(10).

¹⁶² 2004 Act, s 67.

may strike - or lock out - although these rights are more stringently controlled than under the 1992 Act.¹⁶³ First, industrial action will be unlawful while a dispute is being conciliated, or during the 30 day period that the 2004 Act provides for conciliation.¹⁶⁴ Secondly, industrial action must conform to rules for its conduct. These may be agreed by the parties, or may be imposed by a conciliator, including by reference to any code of good practice issued under the Act.¹⁶⁵ Thirdly, the right may only be exercised on 48 hours' notice (as is presently required under the 1992 Act).¹⁶⁶ Fourthly, the right is not available to workers and employers engaged in an industry that is designated an 'essential service', which is defined in terms that closely follow the relevant principles under ILO Conventions.¹⁶⁷ Like the South African Labour Relations Act 1995,¹⁶⁸ the 2004 Act now creates an Essential Services Committee to make these determinations.¹⁶⁹ The frequency of unlawful industrial action following the introduction of the 1992 Act was one of the key reasons for the changes introduced in the 2004 Act.¹⁷⁰ The effectiveness of the new regime in controlling industrial action will therefore be an important litmus test for the new regulatory model, especially those provisions relating to dispute resolution.

The 2004 Act also regulates the outcomes of collective bargaining. Importantly from the point of view of ensuring fair minimum conditions for all Namibian workers, there have been some important changes to the Minister's power to extend the operation of a collective agreement to an entire industry, which arguably constrain the discretion that was available under the 1992 Act. The 2004 Act identifies matters that the Minister must consider, including any objection to an application for extension, whether the agreement provides for arbitration of disputes about its application, and

¹⁶³ 2004 Act, s 72.

¹⁶⁴ 2004 Act, s 73 (a person must not take part in a strike or lockout unless they have complied with s 72, which includes the requirement to have a dispute referred to conciliation).

¹⁶⁵ 2004 Act, s 72(1)(d).

¹⁶⁶ 2004 Act, s 72(1)(c).

¹⁶⁷ 2004 Act, ss 73(1)(e) (prohibition on taking industrial action where engaged in an essential service) and s 75(2) (a service may be designated as 'essential' where its interruption 'would endanger the life, personal safety or health of the whole or any part of the population of Namibia). See also ILO, *Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, (4th (revised) edition, ILO, Geneva, 1996), 111-113, and ILO, *Freedom of Association and Collective Bargaining*, (ILO, Geneva, 1994), 69-72.

¹⁶⁸ Section 70 of the South African Labour Relations Act 1995. For comment, see, eg, du Toit, *et al*, above n 158, 310-314.

¹⁶⁹ 2004 Act, s 101.

¹⁷⁰ On the frequency of unlawful industrial action following the introduction of the 1992 Act, and in particular the correlation with trade union involvement, see Fenwick, above n 8.

whether it contains conditions more or less favourable to employees than those they already enjoy. Having considered these matters, the Minister's power is limited: they must not extend an agreement that fails to meet the criteria, but must extend one that does.¹⁷¹

The new provisions on collective agreements continue the emphasis on non-adversarial dispute resolution: to be registered, an agreement must include 'an arbitration procedure' for resolution of disputes about its application.¹⁷² Where there is a dispute, however, either party may refer it to the Labour Commissioner if the dispute settlement procedure is not functioning, or if one party 'frustrates the resolution of the dispute in terms of the collective agreement'.¹⁷³ The Labour Commissioner may appoint an arbitrator in terms of the agreement, or refer it to arbitration more generally.¹⁷⁴ There is no indication in the Act as to how the Labour Commissioner might make that choice.

Dispute resolution

As noted, new methods of dispute resolution are central to the 2004 Act. It depends in particular on shifting emphasis from adversarial methods of dispute resolution – or at least from courts - in favour of a greater emphasis on conciliation and arbitration. Virtually every labour dispute, whether of rights or of interests, will have to be conciliated. A key feature of conciliation under the 2004 Act is that the conciliator must try to resolve the dispute within 30 days, although the parties may agree to a longer period.¹⁷⁵ Where conciliation is unsuccessful, disputes of rights will be subject to compulsory arbitration, while disputes of interest may be pursued further by taking industrial action. The Labour Commissioner will be a central figure, being the officer to whom notice of a dispute must be sent, and the one required to oversee the processes of conciliation and arbitration. The 2004 Act also places new emphasis on the use of private arbitration, and creates new powers and institutions for dispute resolution: the Minister acquires certain powers, and there will be a new tripartite

¹⁷¹ 2004 Act, s 69(4).

¹⁷² 2004 Act, s 71.

¹⁷³ 2004 Act, s 71(2)(c).

¹⁷⁴ 2004 Act, s 71(4).

¹⁷⁵ 2004 Act, s 80(4).

Committee for Dispute Resolution and Prevention.¹⁷⁶ The Committee will report to the Labour Advisory Council on dispute resolution in general and in particular on the dispute resolution activities of the Labour Commissioner.

Under the 2004 Act, the following types of disputes are to be referred for conciliation:

- Disputes about application of the requirement not to discriminate in employment;¹⁷⁷
- Disputes about the application of those parts of the Act relating to formation and registration of trade unions, and the exercise of their rights in relation to premises and the like.¹⁷⁸ (Disputes about the recognition of trade unions as exclusive bargaining agents are to go to arbitration); and¹⁷⁹
- Disputes mentioned in s 79, that is: disputes of interest, disputes concerning the application of the Affirmative Action (Employment) Act 1998, disputes referred by the Minister under s 78(1)(a), and any dispute referred by the Labour Court under s 115(2)(a).

A dispute should be referred to the Labour Commissioner, who must appoint a conciliator who has powers (among other things) to subpoena evidence and to administer oaths.¹⁸⁰

In some cases the parties might seek voluntary arbitration of a matter not resolved at conciliation: the 2004 Act empowers them to do so by agreement.¹⁸¹ A question that arises here concerns the apparent ability of a party to refuse to have a matter that has not been successfully conciliated referred to such arbitration. If the matter is a dispute of interest, then the party obviously has other rights under the Act, in particular to participate in a strike or a lockout. However, this is not obviously so in relation to some of the other categories of dispute, in particular those arising from the Affirmative Action (Employment) Act 1998.

¹⁷⁶ 2004 Act, s 97.

¹⁷⁷ 2004 Act, s 7.

¹⁷⁸ 2004 Act, s 67.

¹⁷⁹ 2004 Act, s 62(6) – (13).

¹⁸⁰ 2004 Act, s 80(10).

¹⁸¹ 2004 Act, s 80(8).

On the other hand, compulsory arbitration is a key feature of the 2004 Act. In its application to disputes of rights under a contract of employment or a collective agreement, it largely replaces the role formerly played by the District Labour Court. The following types of dispute are to be referred for compulsory arbitration:

- Disputes about the application of the fundamental rights in chapter 2 of the 2004 Act, other than those relating to discrimination;¹⁸²
- Disputes about the application of the provisions of chapter 3 of the 2004 Act, which prescribe basic conditions of employment;¹⁸³
- Disputes about the application of chapter 4 of the 2004 Act, which set out obligations in relation to occupational health and safety;¹⁸⁴
- Disputes about unfair labour practices;¹⁸⁵
- Disputes about recognition of a registered trade union as an exclusive bargaining agent;¹⁸⁶
- Disputes of interest arising in industries that are the subject of a determination by the Essential Services Committee;¹⁸⁷ and
- Disputes referred to in section 82 of the 2004 Act, that is, disputes about contracts of employment or a collective agreement, disputes relating to s 45 of the Affirmative Action (Employment) Act 1998,¹⁸⁸ and disputes referred under s 80(8) by agreement after unsuccessful conciliation.

Like a conciliator, an arbitrator will have power, among others, to subpoena evidence and to administer oaths.¹⁸⁹

A dispute must be referred for arbitration within 6 months in the case of dismissal from employment, or one year in other cases.¹⁹⁰ The Labour Commissioner must then

¹⁸² 2004 Act, s 7.

¹⁸³ 2004 Act, s 37.

¹⁸⁴ 2004 Act, s 46.

¹⁸⁵ 2004 Act, s 50.

¹⁸⁶ 2004 Act, s 62(8).

¹⁸⁷ 2004 Act, s 76.

¹⁸⁸ Disputes between an employee and a relevant employer that have been brought to the attention of the Labour Commissioner.

¹⁸⁹ 2004 Act, s 83(9).

¹⁹⁰ 2004 Act, s 83(2).

appoint an arbitrator.¹⁹¹ The arbitrator must then attempt to resolve the dispute by conciliation unless that has already been attempted.¹⁹² The 2004 Act does not provide a specific right to a party to object to an arbitrator continuing to deal with a matter after failing in such attempted conciliation. This might be compared, for example, with the situation in Australia. There, members of the Australian Industrial Relations Commission (AIRC) regularly exercise both conciliation and arbitration powers in relation to the same dispute. The Workplace Relations Act 1996 (Cth) however provides an express right to seek to have a matter arbitrated by a different member of the AIRC than the one who conciliated.¹⁹³ Such an explicit right allows for the obvious possibility that an arbitrator may, in conciliating a matter, form a view or appear to form a view that might be prejudicial to a party's interest. It may be that any concerns about this under the 2004 Act could be resolved by other means, including by application to the Labour Court for an order to review.

Arbitration is clearly intended to be user-friendly and relatively informal: parties are generally to represent themselves,¹⁹⁴ although a legal practitioner may appear with the leave of the arbitrator if the parties agree, or if the dispute is of such complexity that it is required, and the other party would not be prejudiced thereby.¹⁹⁵ Arbitration is also evidently to be both binding and, where possible final. An arbitration order binds the parties, but in addition either party to an award, or the Labour Commissioner, may file it in the Labour Court, whereupon it becomes a court order.¹⁹⁶ Generally an appeal from an arbitration award lies only on a question of law, to the Labour Court. An exception to this is disputes about the fundamental labour rights protected in Chapter 2 of the 2004 Act.¹⁹⁷

As noted, the 2004 Act also provides expressly for private arbitration of labour disputes. The parties to a collective agreement may agree that disputes over the application and interpretation of the agreement (which must be the subject of a

¹⁹¹ 2004 Act, ss 83(4) and (5).

¹⁹² 2004 Act, 83(6).

¹⁹³ See Workplace Relations Act 1996 (Cth) s 105.

¹⁹⁴ 2004 Act, s 83(13).

¹⁹⁵ 2004 Act, s 83(14). Compare Workplace Relations Act 1996 (Cth) s 42(3).

¹⁹⁶ 2004 Act, s 84.

¹⁹⁷ 2004 Act, s 86.

disputes-resolution provision) are to be referred to private arbitration.¹⁹⁸ Beyond that, however, parties to ‘a dispute contemplated’ under the 2004 Act may agree in writing to refer it to private arbitration.¹⁹⁹ The 2004 Act defines ‘dispute’ as: ‘any disagreement over a question of law or fact between an employer or an employers’ organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter’.²⁰⁰ An arbitrator under such an agreement will have power to administer oaths, and to subpoena evidence.²⁰¹ The award of a private arbitrator is to have effect in terms largely identical to awards of arbitrators otherwise appointed under the Act.²⁰² Thus, generally speaking, there can only be an appeal against the award of a private arbitrator on a question of law. The Labour Commissioner is also required to refer back to the parties for private arbitration any matter covered by such an agreement.²⁰³

It is not clear from the 2004 Act, or from the (admittedly limited) research on the policy development process on which I rely here, why private arbitration has been introduced. The only obvious reason is to continue to encourage the parties to take responsibility for the resolution of their own disputes, in ways that do not involve taking industrial action or having recourse to the courts. There are however a number of factors that may make private arbitration unattractive. First, the parties will have to pay for it, while the public conciliation and arbitration services will be free of charge. Secondly, there may be little advantage in terms of speed, given the requirement that conciliation generally be completed within 30 days of the notification of a dispute. (There is a similar time limit for the completion of private arbitration, which is slightly different in that it does not appear to provide for an extension of time beyond the 30 days, although it appears that the original agreement for private arbitration may provide for a longer period.)²⁰⁴

¹⁹⁸ 2004 Act, s 71(1).

¹⁹⁹ 2004 Act, s 88(2).

²⁰⁰ 2004 Act, s 1.

²⁰¹ 2004 Act, s 88(7).

²⁰² Sections 84 to 87 of the 2004 Act, which deal with the effect of awards, variation and rescission of awards, appeals against awards, and their enforcement, apply (with necessary modifications) to private arbitrator’s awards: 2004 Act, s 88(12).

²⁰³ 2004 Act, s 88(13).

²⁰⁴ 2004 Act, s 88(11).

One significant advantage to private arbitration may be the possibility of streamlining the dispute resolution process in certain cases. As noted, disputes of rights that are not satisfactorily resolved through conciliation must be referred to arbitration, while unresolved disputes of interest may be further pursued by strike or lock out. In the latter case particularly, the parties might consider it more appropriate and efficient to refer matters to private arbitration rather than to leave them to be the subject of industrial disputation. This analysis is supported by the provision elsewhere in the 2004 Act that parties might preclude their right to strike and lockout by such an agreement.²⁰⁵ Indeed, this may prove to be the most important use of the provision, as a de-facto ‘peace obligation’ in return for the conclusion of a collective agreement. It does not appear that the 2004 Act otherwise limits the right to take strike or lockout action by reference to the existence of a collective agreement, as is common in many labour dispute resolution systems.²⁰⁶

Two further innovations in dispute resolution in the 2004 Act are the new powers given to the Minister, and the role of the Committee on Dispute Prevention and Resolution. As contemplated by the tripartite task force, the Minister now has power to act in the ‘national interest’:²⁰⁷ he or she may refer any dispute *or potential dispute* to the labour Commissioner for conciliation.²⁰⁸ Further, the Minister may (after consultation with the Labour Advisory Council), appoint a tripartite panel of persons to investigate ‘any industrial conflict or potential conflict’ and make recommendations to the Minister and the Labour Advisory Council.²⁰⁹ It seems likely that the scope of these powers could be the subject of legal challenge and judicial elucidation: neither ‘national interest’ nor ‘industrial conflict’ is defined in the 2004 Act.

The Committee for Dispute Prevention and Resolution (whose members may be members of the Labour Advisory Council, or appointed by it)²¹⁰ will regularly review

²⁰⁵ 2004 Act, s 73.

²⁰⁶ See for example A Jacobs, ‘The Law of Strikes and Lockouts’ in R Blanpain (Ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, (Kluwer Law International, The Hague, 7th edition, 2001), at 573, and 592-5.

²⁰⁷ 2004 Act, s 78(1).

²⁰⁸ 2004 Act, s 78(1)(a).

²⁰⁹ 2004 Act, s 78(1)(b).

²¹⁰ 2004 Act, s 98.

the ‘performance of dispute prevention and resolution by the Labour Commissioner’,²¹¹ and report to the Council on the activities of the Labour Commissioner when the Council calls upon it to do so.²¹² More broadly, the Committee will oversee dispute settlement generally, having responsibility for promulgating rules, policies and guidelines for conciliation and arbitration, and also codes of ethics for conciliators and arbitrators. It will make recommendations about the qualifications and the appointment of conciliators and arbitrators.²¹³

Institutions

As noted, the 2004 Act has created two important new institutions: the Committee for Dispute Prevention and Resolution, and the Essential Services Committee. It has also made some major changes to existing labour relations institutions. In particular, the Labour Advisory Council and the Labour Commissioner each have new powers and a new relationship to each other, while the Labour Court system has been significantly restructured.

The Labour Advisory Council will continue to serve an advisory and research function, but has acquired some new roles. It is now empowered to make recommendations to the Judge-President of the High Court²¹⁴ on the designation of Labour Court judges.²¹⁵ It may also nominate members of the panels appointed by the Minister to resolve disputes in the national interest under s 78.²¹⁶ The Labour Advisory Council will also play a more or less direct role in overseeing the activities of the Labour Commissioner. Its members may be designated as members of the Committee for Dispute Prevention and Resolution, and in other cases the Council may *appoint* the members of that Committee.²¹⁷

²¹¹ 2004 Act, s 97(f).

²¹² 2004 Act, s 97(g).

²¹³ 2004 Act, s 97(e).

²¹⁴ The term ‘Judge-President’ is not defined in the 2004 Act, but its delineation with capital letters suggests it is a defined term elsewhere, and presumably refers to the Judge-President of the High Court of Namibia.

²¹⁵ 2004 Act, s 90(2)(a); see also s 114.

²¹⁶ 2004 Act, s 90(2).

²¹⁷ 2004 Act, s 98.

The Labour Commissioner is now empowered to conciliate and to arbitrate. As noted, in the first instance all disputes, whether of rights or of interests, are to be referred to the Labour Commissioner, who must then attempt to have them resolved by conciliation or arbitration, as appropriate. The Labour Commissioner now has power to advise on any aspect of the Act, including those relating to registration and regulation of trade unions and employers' organizations.²¹⁸ The latter may be explained by reference to the number of applications for registration of trade unions under the 1992 Act, many of which were unsuccessful or processed slowly, principally because of deficiencies in the applications due to poor understanding of the legal requirements and the prospects for success.²¹⁹

The Labour Court continues, with all the powers of the High Court of Namibia,²²⁰ and all its members must be members or acting members of that Court.²²¹ Under the 2004 Act the Labour Court is therefore no longer described as a division of the High Court. It is not clear, however, what difference this will make in terms of the composition and control of the Labour Court, as the Judge-President has responsibility for designating the senior labour judge, and indeed of appointing the members to it, on the recommendation of the Labour Advisory Council.²²² The Labour Court will have jurisdiction over appeals against decisions of the Labour Commissioner, arbitrators, and the Essential Services Committee. It will have power to review arbitrators' awards, and to review decisions of the Minister and other officials under the 2004 Act, including decisions of the Essential Services Committee. It will also have power to review decisions of any other official or body that exercises a power within the scope of the 2004 Act.²²³ The Labour Court continues as a no-cost jurisdiction, other than where proceedings are instituted, pursued or defended in a frivolous or vexatious way.²²⁴ Although the 2004 Act does not appear (in so many words) to abolish the District Labour Courts, the issue is moot given that they no longer have any functions.

²¹⁸ 2004 Act, s 119.

²¹⁹ Interview with the Labour Commissioner, above n 105.

²²⁰ 2004 Act, s 112.

²²¹ 2004 Act, s 114.

²²² 2004 Act, s 114.

²²³ 2004 Act, s 115.

²²⁴ 2004 Act, s 116.

Finally, the civil labour inspectorate continues, with powers and responsibilities similar to those under the existing law.²²⁵ The Wages Commission also continues.²²⁶

Codes of practice

Under the 2004 Act the Minister may issue codes of good practice, and guidelines for the administration of the Act.²²⁷ As noted, these may be issued in relation to strike action, among other things. They may also be reviewed and replaced by the Minister as the occasion demands. They are to have wide reaching significance: '[a]ny person interpreting or applying' the provisions will be required to take into account any relevant code or guideline.²²⁸ As at July 2000, an extensive draft version of codes and guidelines had been prepared, with the assistance of the ILO/Swiss project. The draft codes covered sexual harassment in the workplace, termination of employment, organizational rights (rights of access to premises, workplace union representation and deduction of union fees), collective bargaining (particularly recognition, bargaining in good faith and disclosure of information), strikes and lockouts, picketing and employment discrimination. There were also draft guidelines relating to conciliation and arbitration, and draft rules of the many functions to be performed by the Labour Commissioner under the new provisions.²²⁹

The introduction of codes of practice and guidelines is potentially a significant development in the regulatory scheme and approach. In general terms, reliance upon such advisory material, or 'soft law', offers greater flexibility to both the regulator and the regulated community. Codes and guidelines can usually be produced, amended and replaced more quickly than regulations or legislation, and can be developed over time in light of events and developments in parties' practices. The use of codes in relation to the conduct of industrial action may be particularly useful in light of the fact that until now one of the significant problems in the Namibian labour dispute system has been the frequency with which unions have resorted to illegal strike action.²³⁰ Codes and guidelines may also be particularly useful in relation to

²²⁵ 2004 Act, Chapter Nine, Part F (ss 121-125).

²²⁶ 2004 Act, Chapter Nine, Part C (ss 102-111).

²²⁷ 2004 Act, s 135.

²²⁸ 2004 Act, s 135(3).

²²⁹ See generally Fenwick, above n 8.

²³⁰ Ibid.

sexual harassment and other types of discriminatory behaviour in the workplace. Finally, codes and guidelines are likely to be particularly useful in shaping the conduct of collective bargaining, as to which there is relatively little regulation in the 2004 Act other than by the definition of particular unfair labour practices, and the provision of a regulated right to take industrial action.

CONCLUSION: PROSPECTS FOR NAMIBIA'S NEW LABOUR LAW

The 2004 Act has substantially altered labour law in Namibia. Among other things, it has focused attention on protection of fundamental labour rights, and significantly altered the framework for resolution of labour disputes. The new dispute resolution procedures and institutions were introduced to address the concern that instability in labour relations can pose a danger to economic growth and, in particular, to the country's ability to attract much-needed foreign investment. In this regard, however, the changes fit within the broader goal expressed in the preamble to the 2004 Act, which is to implement 'a policy of labour relations conducive to economic growth, stability and productivity.'²³¹ Whether, and if so how well the 2004 Act contributes to this goal appears likely to depend on (at least) the following considerations: the success of the new dispute resolution machinery; the relationship between labour law and the labour market environment in which it is to operate; and the extent to which the process of developing the law produced, and was produced by, social consensus around its goals and content.

The changes to the machinery for resolution of labour disputes reflect a consensus that their predecessors in the 1992 Act were not working effectively. Among other things, there was too much unlawful industrial action. As I have shown elsewhere, the majority of reported strikes between 1990 and 2001 were illegal, and yet involved trade unions, who might have been expected to play a role as negotiators *within* the legal framework.²³² Looked at from this point of view, a key measure of the new provisions for dispute resolution, with their emphasis on conciliation and then arbitration, will be whether or not there is a fall in the frequency of industrial action, and particularly in the number of illegal strikes. A major consideration may well be

²³¹ 2004 Act, Preamble.

²³² Fenwick, above n 8.

whether the promise of conciliation within 30 days is made good. There are several things that might be done to contribute to the goal of reducing the incidence of unlawful industrial action. They include encouragement of different approaches through the new provision for codes of practice and guidelines, and advice from the Labour Commissioner about the measures available under the Act, including the use of the private arbitration provisions.²³³ As noted, both of these are likely to be important in light of the lack of regulation in the 2004 Act of the process of collective bargaining.

The relative success or failure of the new dispute resolution procedures will of course have to be assessed in the broader context of Namibian labour relations, and in particular the country's experience and history of trade unionism. This is significant as the 2004 Act depends in large part on bipartite and tripartite structures for management of labour relations and resolution of labour disputes. These require in turn the operation of a functioning trade union movement. However it is only in relatively recent times that most Namibian workers have been represented by anything like functioning trade unions: they began to emerge only in the last few years before independence, and thus many have around a twenty-year history. This is a relatively short time in which to become familiar with the procedures and activities of modern labour relations law. A broader issue that affects the operation of Namibian trade unions is their relationship with the governing party, SWAPO. Throughout their combined histories, SWAPO has tended to subordinate the interests of workers and their representatives: first, to the fight for independence, and subsequently, to the needs of economic development.²³⁴

Keeping these considerations in mind does not suggest that the new dispute resolution procedures will not or cannot be effective. Indeed, the emphasis on non-confrontational, user-friendly procedures over adversarial and court-focused methods seems highly likely to suit the parties to Namibian labour relations. It does suggest, however, that other strategies might also be required to contribute to the effectiveness of the measures implemented, and to the larger goal of stable labour relations. These

²³³ 2004 Act, s 119.

²³⁴ That said, the NUNW remains affiliated to SWAPO, and while that is not necessarily a difficulty, in practice it appears that workers' interests continue to be subordinated to other priorities for SWAPO: Fenwick, above n 8; Bauer, above n 4.

might include, for example, provision of institutional support and capacity-building for the parties, particularly trade unions.

The relationship between the new dispute resolution procedures and the structure and operation of Namibian trade unions is only one example of how the prospects for the 2004 Act must be assessed within the broader labour market context in which they will operate. This is a particularly important consideration: it is necessary to consider how effective the new labour law is at bringing about positive change for Namibian workers, who for so long suffered systemic discrimination.

While it is valid and, I hope, useful, to focus (as for the most part I have) on presenting the doctrinal developments in the 2004 Act in their longer historical context, and analysing them on their own terms, Namibian labour market conditions mean that it is necessarily an exercise that is likely to be of limited relevance to the majority of Namibian workers. This is so for two reasons. First, a significant majority of the Namibian labour force is not engaged in work that will be captured by the operation of much of the 2004, and in particular by the dispute resolution procedures and institutions. Unemployment in Namibia remains extremely high, at more than 30 per cent.²³⁵ In addition, substantial numbers of people remain outside the formal labour market. Many workers are engaged in subsistence agriculture, or in domestic service, where individual employment relationships predominate, and collective organisation is exceptionally difficult. To these factors might be added a range of other characteristics of labour relations in Namibia that van Rooyen has described as ‘dysfunctional attributes’:

‘high adult illiteracy, low education and training levels, lack of entrepreneurship, inappropriate work ethics, and conflicting objectives, value orientations and normative frames of reference between management and labour in the formal sector.’²³⁶

Accepting that this picture is accurate, plainly relatively little in the 2004 Act is directed at overcoming these failings.

²³⁵ Government of Namibia, *2001 Labour Force Survey*, (Government of Namibia, Windhoek, 2004).

²³⁶ Van Rooyen, *Normative Convergence*, above n 4, at 40.

A second (and related) reason why the 2004 Act is likely to be of limited relevance to many Namibian workers is that its sophisticated model of regulation may contribute to greater exclusion of workers from its scope. Assessing the impact of the 1992 Act, Klerck noted the paradoxical outcome that the introduction of a stronger legal and social safety net for the 'standard' employment relationship was accompanied by greater proliferation of non-standard forms of work.²³⁷ He attributed this to segmentation in the Namibian labour market, between a small protected primary labour market, and a large secondary labour market comprising the unemployed and underemployed, those in the informal sector, and workers on temporary and fixed-term contracts.²³⁸ He further argued that exploitation of the underlying segmentation in the labour market is a necessary element of labour market policies that emphasise flexibility, including those behind the 1992 Act and, it might be said, the 2004 Act, both of which sought to make the labour market more competitive, flexible and productive in a global economic environment.

According to this analysis of the relationship between the labour market and labour law

labour market institutions have establishing and exclusionary effects as well as protective and stabilising effects. The creation of shelters in the labour market has therefore simultaneously established incentives to undermine these sources of protection.²³⁹

A related phenomenon is the increasing divergence between the legislated floor of minimum working conditions, and those obtained through processes of collective bargaining.²⁴⁰ In short, the Namibian model of labour market regulation that relies on legislated minimum conditions, together with a privileged place for bipartite and tripartite labour market institutions, tends to exacerbate existing power differentials in two ways. First, it encourages employers to select casualised or 'flexible' methods of acquiring labour power that fall beyond the scope of labour law's protective function. Secondly, it provides a privileged place for those workers in the organised and formal

²³⁷ G Klerck, 'Labour Market Regulation and the Casualisation of Employment in Namibia' (2003) 27 *South African Journal of Labour Relations* 63, at 64.

²³⁸ *Ibid*, 66.

²³⁹ *Ibid*, 73.

²⁴⁰ *Ibid*, 75.

sector of the labour market. The outcome of labour law innovation for the majority of the Namibian labour force may therefore be neutral at best.

There appears to be little in the 2004 Act that might serve to bring about a more positive outcome. While it has introduced a right to workplace representation, it is a right of those workers who are union members in a given workplace.²⁴¹ Thus, it depends upon existing labour market institutions that exclude the majority of Namibian workers: those not belonging to a union, and those not employed in a 'standard' formal sector job. There may be some hope of a more positive outcome for the majority of Namibian workers in the new provisions regulating the Minister's power to extend the operation of a collective agreement throughout a sector of the economy. As noted, however, this provision has been relatively little used in the past, and not for the benefit of the large number of workers in domestic service. In any event, it is difficult to see how it could be used to address, for example, the working conditions of those in the informal sector.

Considering the model of labour law implemented by the 2004 Act, and its relationship to the labour market in which it will operate, brings me to the third and final matter I want to consider in addressing the prospects for the new law: the process by which the new policy model was developed. It can't be denied that the changes were introduced after what - by any measure - was a very long process of negotiation and consultation. With its beginnings in a meeting in January 1998 (or perhaps earlier), the process lasted over six years. To put that in context, it is three times longer than the period of consultation leading to the adoption of the 1992 Act, and only a year less than half the country's life as an independent nation to that point. The extent to which the social partners were involved in the lengthy process by which the 2004 Act was developed may of course serve to ensure that its provisions operate as intended. In this sense, it might meet the concerns of both Thompson and Hepple noted above. The deliberations certainly appear to have been 'intensive and sustained',²⁴² and to represent a 'social consensus between business and labour'.²⁴³

²⁴¹ 2004 Act, s 65.

²⁴² Thompson, above n 3, 101.

²⁴³ Hepple, above n 111, 2-3.

But the process by which the 1992 Act was developed was not the only matter upon which Thompson commented in advance of it coming into force. He also remarked on the difference of approach that it represented from what went before:

In their evolution, Namibia's labour laws skipped a generation . . . Namibian employers and workers will find themselves launched into a new [industrial relations] orbit. If they become somewhat bewildered, few will blame them. Unlike us, they will not have had the luxury of a slow transition to fair employment practices . . . Overnight, they will be expected to walk when they have barely got used to crawling.²⁴⁴

In similar vein, the ILO had warned in 1990 of the difficulties that Namibian labour law would face in seeking to overcome its past:

The lack of a labour law tradition in Namibia may perhaps prove to be one of the biggest obstacles on the way to the development of a comprehensive and balanced labour law system, not only because there are hardly any labour lawyers in the country, but especially because an awareness of the problems in labour matters and of a means of solutions is not very common.²⁴⁵

Indeed it is only necessary to recall briefly the history of Namibian labour law and labour relations to see its likely effect on the operation of new labour laws. From that point of view, it could not have been a great surprise that the 1992 Act did not operate as satisfactorily as may have been hoped. Nor, in a sense, could it have been unexpected that the process of its development might not have produced a law that would operate well in its new environment. While the process in and of itself may well have been very consultative and transparent, that begs the question whether the groups with whom there was consultation were participating as effectively as possible. It must be recalled that the process started soon after independence in 1990: that is, only four years from the first introduction of tripartite labour relations, and the establishment of successful unions representing African workers, and only 12 years after the legalisation of registered trade unions for African workers. In short, it is expecting a lot of trade unions – and the other social partners – to be able to participate effectively in tripartite negotiation processes, given their own limitations and the very short history of tripartism in Namibia.

²⁴⁴ Thompson, above n 3, 98.

²⁴⁵ ILO, *Independence*, above n 19, 67.

Since the introduction of the 1992 Act, one can only assume that all the social partners have developed to a significant extent in their understanding of and ability to work within a tripartite labour relations framework. This alone may have assisted in the development of the new labour relations framework under the 2004 Act, and may also serve to ensure that the social partners operate more consistently within its provisions into the future. If that is so, then it may serve to overcome the difficulties experienced by the country's dispute resolution system. From this perspective, however, timing, rather than process or consensus, might prove to be the most important determinant of the success of the 2004 Act.

This in turn suggests that the conditions of the Namibian economy and labour market may need to develop further – in particular through greater industrialisation and growth in formal sector employment – before Namibian labour law can operate as intended. This is especially so given the extent to which the 2004 Act maintains the emphasis of its predecessor on regulation of the formal labour market, including by giving privileged roles to trade unions and employer organisations, and by promoting bipartite and tripartite negotiation processes. As I have suggested, that model may be out of step with the needs of the majority of Namibian workers. I have also noted that the 2004 Act contains a number of concepts that might fairly be said to have been 'borrowed' or 'transplanted' from South Africa: the provision for workplace representation, and the creation of an essential services committee. Taken together, these factors suggest that it remains to be seen whether the 2004 Act represents, for Namibia, a satisfactory 'indigenous solution'.