

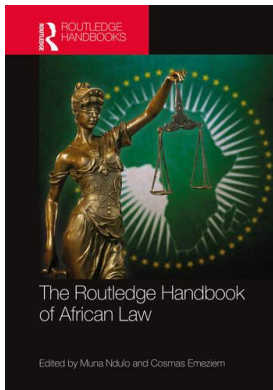
This article was downloaded by: 10.3.97.143

On: 06 Dec 2023

Access details: *subscription number*

Publisher: *Routledge*

Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: 5 Howick Place, London SW1P 1WG, UK



The Routledge Handbook of African Law

Muna Ndulo, Cosmas Emeziem

Labor law, labor market regulation, and social protection in Sub-Saharan Africa Emerging trends in comparative perspective

Publication details

<https://www.routledgehandbooks.com/doi/10.4324/9781351142366-23>

Chanda Chungu, Evance Kalula

Published online on: 24 Nov 2021

How to cite :- Chanda Chungu, Evance Kalula. 24 Nov 2021, *Labor law, labor market regulation, and social protection in Sub-Saharan Africa Emerging trends in comparative perspective from: The Routledge Handbook of African Law* Routledge

Accessed on: 06 Dec 2023

<https://www.routledgehandbooks.com/doi/10.4324/9781351142366-23>

PLEASE SCROLL DOWN FOR DOCUMENT

Full terms and conditions of use: <https://www.routledgehandbooks.com/legal-notices/terms>

This Document PDF may be used for research, teaching and private study purposes. Any substantial or systematic reproductions, re-distribution, re-selling, loan or sub-licensing, systematic supply or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The publisher shall not be liable for an loss, actions, claims, proceedings, demand or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

19

LABOR LAW, LABOR MARKET REGULATION, AND SOCIAL PROTECTION IN SUB- SAHARAN AFRICA

Emerging trends in comparative perspective

Chanda Chungu and Evance Kalula

Introduction

Labor law and policy in sub-Saharan Africa reflect the shared colonial heritage and legacy across the continent. The systems of labor market regulation that labor legislation and related policies represent, just as in many other developing countries, largely reflect norms developed in Western countries, particularly former metropolitan colonial powers.

This chapter is an eclectic attempt to sketch an overview of emerging trends in sub-Saharan African countries, keeping the historical legacy in mind. From the outset, we should lay our cards on the table, so to speak: what is covered here is not comprehensive and does not go into any great detail about specific developments. Rather, it is a broad overview of trends in diverse labor markets with similar common elements. In the absence of systematic research done on the subject, there is little material on which to rely. There is much generalization, albeit relatively well grounded, on the basis of some countries for which some materials are available. We use those countries where there is some evidence to confirm trends.

Apart from the “imposed law” that was inherited at independence, later, there was conscious “borrowing and bending.” The latter phenomenon has resulted in extensive labor law reform, driven not only by the desire to adapt policies to global imperatives but respond to changing features of internal labor market demands and imperatives. We shall return to such features presently.

Overview of the nature of African labor markets: Historical heritage, characteristics of regulation/legislation, and institutional frameworks

The nature of labor markets in sub-Saharan African countries is important to the understanding of systems of labor laws and regulation. It is therefore useful from the outset to define the terms “labor law” and “regulation.” We regard the term labor as quite extensive. It goes beyond the mere scope of the employment relationship, to embrace broader labor market dimensions, such

as the protection of the underemployed and unemployed. This broader approach is important in understanding labor markets in sub-Saharan Africa and how they are regulated. Labor markets in most African countries are characterized by high levels of underemployment and unemployment. The vast majority of workers are in the informal economy, or in poorly protected sectors that are impacted little by legislation and policies.

Similarly, the term “regulation” refers to a range of rules, from the rules made by the state to all mechanisms of economic and social control by whomsoever invokes them (see, for example, Cooney et al. 2002, 2). Since the beginning of the 1990s, labor law, market reform, and regulation have accelerated, with a phenomenon of a new labor law emerging in different jurisdictions of the continent. In many sub-Saharan countries, far-reaching changes, and in some cases, fundamental changes, have been made into labor legislation and practice. A number of jurisdictions in anglophone Africa, for instance, stand out in this respect. Thus, in such countries as Botswana, Kenya, Nigeria, South Africa, and Tanzania, there has been extensive legislative reform undertaken, with the encouragement of the International Labour Organization (ILO) and assistance in many cases. Such changes have been varied, but they also have common features. Many have sought to bring the law into line with fundamental international labor standards, promoted by the ILO, particularly, those concerned with core conventions, such as freedom of association, elimination of child labor and discrimination, social protection, and the introduction of which to enhance social dialogue.

One fundamental feature reveals the “transplanted” nature of these new labor laws. However, they have all been concerned with the regulation of formal labor markets to the exclusion of “irregular” workers, particularly those in the informal sector (Mhone and Kalula 2001). The focus of emerging systems and trends, in terms of reform, remains the formal employment sector. To the extent that vulnerable workers are targeted at all, there are limited categories, with the vast majority not included. The increasing number of atypical workers facing unemployment, as well as workers engaged in self-employment, home workers, casual and part-time workers, do not benefit from protections (Kalula 2002).

ILO and International Labor Standards (ILS): Context and impact—Core ILS ratifications, the decent work agenda, social protection floors, including recent developments and changes in progress

As a result of this borrowing and bending of the original objective of labor law, the continent began to lose sight of the necessity to cast the net wider than the employment–power relationship (Kalula 2002). This is not to say that this goal was not important, but that there was a dire need to look beyond it. For this reason, the ILO adopted international labor standards, which gave expression to human rights.¹ This was in recognition of the role of labor law in protecting fundamental rights (Benjamin 2012).

While countries in the region gradually adopted the international labor standards, social and political unrest in the early years in African states during this era inhibited the development of labor law. Later, challenges, such as unemployment, income inequality, the informalization of work, and the scope of the employment relationship, have affected the efficiency of labor law development. Even the inclusion of the achievement of fundamental human rights, parallel to that of the primary objective of balancing bargaining power, demonstrates the potential for labor law needs to be widened further.

Attempts have been made to renew labor laws in the face of globalization and other developments over the past decades, as well to advance the need for protection of the most vulnerable workers in society. For labor law to transform and modernize, we need to view labor

law as regulating the labor market. Labor market reform can be defined as “a range of uses, from rules promulgated by the state to ‘all mechanisms of social control, by whomsoever exercised’” (Baldwin, Scott, and Hood 1998, 3 in Cooney, Mitchell, and Zhu 2002, 2). Labor market regulations include a wide range of topics, which include but is not limited to social security, job creation, and training (Mitchell and Arup 2006).

The future of labor law in Africa should be driven by the need to uphold the ILO’s Declaration of Fundamental Principles and Rights at Work (ILO 1998). Therefore, any efforts to reform labor law should be informed by the need to enhance and improve labor market regulation. We had earlier suggested that this needs to be done by developing legislative frameworks and institutions (Kalula 2004). In this chapter, we will expand on this suggestion by promoting the need for the implementation of international labor standards and social security, as well as the need to expand how we view the employment relationship.

The adoption of the Decent Work Agenda, as an integral element for the achievement of the Sustainable Development Goal, places the role of international labor standards and their translation into reality as a critical element of attaining this objective. To facilitate labor law in attaining decent work, the ILO focused on the implementation of core labor standards (Gravel and Delpech 2008). International labor standards are legal instruments that are drawn up by the ILO’s constituents (governments, employers, and workers), and that set out basic principles and rights at work (ILO 2014).

The purpose of adopting international labor standards was to respond to the needs and challenges of workers and employers in the global economy. The eight conventions are regarded as embodying fundamental human rights and important for the future of labor law. The core ILO conventions relate to freedom of association,² collective bargaining,³ forced labor,⁴ child labor,⁵ equal remuneration,⁶ and unfair discrimination.⁷

The core international labor standards developed in recognition of the need for clear guidelines that seek to ensure that economic progress goes hand in hand with social justice, prosperity, and peace for all. There can be no doubt that the current systems of labor law in the Africa have been heavily influenced by international labor standards. These international labor standards have had influence in the region well before several countries received independence—indeed, independence merely proliferated the impact of the standards.

As part of the program of encouraging adoption and implementation of the international labor standards, the ILO has strongly advocated for the attainment of social protection for all. Social protection can be defined as:

... the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; [and also including] the provision of medical care; and the provision of subsidies for families with children.

ILO 1989, 3

As social protection is a critical element of the Decent Work Agenda, the ILO has gone a step further by encouraging countries to adopt social protection floors (ILO 2010, 1, 46–7). Social protection floors are nationally defined sets of basic social security guarantees that secure protection aimed at preventing or alleviating poverty, vulnerability, and social exclusion. These guarantees should ensure, at a minimum, that all citizens in need must have access to essential protections necessary to survive in society during their lifetime. The broad aim of this strategy

is to ensure social protection for all, seeking to harmonize and integrate basic social security guarantees, namely access to health care, basic social security, and income security for children and vulnerable persons, which together secure effective access to essential goods and services (ILO 2010). A strong commitment is necessary, especially in the face of serious challenges such limited funding and resources, to sustain a comprehensive and efficient social security system to manage the aims of the strategy on multiple levels.

The commitment to the core standards of the ILO through strong institutions has obvious implications for the nature of labor market regulation. The core labor standards inherently emphasize the differing purposes of labor law by emphasizing the social dimension of labor market regulation, linked to the notion of labor law as a force for establishing and protecting fundamental rights (Klare 2000, 68). The African Charter, as well as the International Covenant on Economic, Social and Cultural Rights, have been adopted by member states, which demonstrates a commitment to social protection across the continent. The main objectives of the African Charter are to alleviate poverty and ensure the social inclusion of disadvantaged and vulnerable groups in society.

There is no doubt that the African Charter, which requires countries to take reasonable measures to ensure equal opportunities and treatment for all, links to the core ILO Convention on Equal Remuneration. The concept of equal pay for work of equal value has been regarded as an important concept in South Africa. It was regarded as so important that the Employment Equity Act (EEA) was amended in 2014 to explicitly recognize equal pay for work of equal value.⁸ According to the new §6(4) of the EEA, differences in terms and conditions of employment between employees of the same employer who are performing the same or substantially the same work or work of equal value, which is directly or indirectly based on any one or more of the grounds listed in §6(1) of the Act, is unfair discrimination.

The introduction of §6(4) in South Africa must be read in conjunction with the newly crafted Code of Good Practice on Equal Pay for equal work and the Employment Equity Act regulations on equal pay for equal work. It is important to note that §6(4) is only triggered if the reason for the differentiation is one of the grounds listed in §6(1) or an arbitrary ground. The courts have stated that an employee must demonstrate a causal nexus between the differentiation and the listed or arbitrary ground.⁹

Whereas South Africa requires remuneration differentiation to be proved on any of the listed grounds and even arbitrary grounds (those not listed in the Act but have the potential to cause unfair discrimination), the Kenyan Employment Act outlaws pay differentiation for work of equal value when linked to one of the listed grounds.¹⁰ However, the Zimbabwean legislation unfortunately limits a claim for equal remuneration to that based on gender.¹¹ It is important to note that in Kenya, the Employment Act provides that where discrimination is alleged, the employer bears the burden of proving that the discrimination did not take place, whereas in South Africa, the employee bears the burden of proving a link between the unequal pay to a ground, such as sex or age.

In Zambia, §31(1)(e) of the Labour Act prescribes equal remuneration, according to the Gender Equity and Equality Act, with benefits and treatment with respect of work of equal value between men and women. Section 31(2)(e) prescribes that an employer should not discriminate against women when determining remuneration, social security, and retirement benefits. Zambia's amended Constitution establishes the Gender Equity and Equality Commission. This entity is responsible for monitoring, investigating, advising, and reporting on issues concerning gender equality. The entity is also responsible for taking steps to secure appropriate redress to complaints related to gender inequality, as well as ensuring institutions comply with legal requirements and other standards relating to gender equality.

The ILO has been proactive in sponsoring and supporting labor law reform to ensure international labor standards become more effective across the continent. The developments in Zambia, Kenya, Zimbabwe, and South Africa, in giving effect to the ILO's core convention of equal remuneration for work of equal value, is a step in the right direction. The ILO continues to support labor inspection and administration structures that are tasked with implementing and monitoring compliance with international labor standards. In southern Africa, the ILO provides technical assistance to countries seeking to reach objectives of the Southern African Development Community (SADC) Decent Work Programme and Charter, both of which have a well-defined link to core labor standards (SADC 2013). As a result of the ILO support, SADC countries have begun to demand of each other compliance with international labor standard obligations.

By facilitating social dialogue between important parties, ILO's ongoing approach has provided for critical conversations about the resource allocation needed to ensure social protection for all, as well as national awareness about matters relating to occupational safety and health that need to continue.

Selected key issues in labor market regulation in sub-Saharan Africa

The broad, creative, and hopeful objectives of labor market regulation and social protection in sub-Saharan Africa cannot be examined fully without discussing the challenges that may detract from the attainment of the goals elucidated in this chapter. In this section, we shall discuss three critical issues stemming from sub-Saharan "borrowing and bending" that could affect the potential for adequate labor market regulation and the attainment of social protection for all.

The definition of employee in labor legislation

In the labor legislation across the continent, the definition of "employee" limits protection to those who work under a contract of employment. In Malawi, Nigeria, Zimbabwe, and Zambia, for example, the definition of employee is predicated on a worker who works under a contract or pursuant to agreed terms and conditions. This seems fairly logical because, as highlighted previously, the common law contract of employment often has been seen as an indicator of an employment relationship (Benjamin 2004).

The contract of employment, as imposed by the common law, was a mechanism for regulating employment relations. It represents the culmination of various forms of engagement and negotiation and provides a basis for legal certainty, as it outlines the agreements on terms and conditions between the employer and employee (Theron 2014). Very importantly, the contract of employment provides a basis for distinguishing between employees and independent contractors (Theron and Godfrey 2004).

Having reflected upon the harmonization of labor with the infusion of human rights through international labor standards, a key issue needs to be addressed. The requirement of a contract for the existence of an employment relationship is proving to be a serious hurdle. This is because traditional social security systems, which are employment-based, are selective, and therefore, exclude those employed in the informal sector. In assessing what the future of African labor law holds, this critical question needs to be resolved.

As highlighted throughout this chapter, labor law needs to evolve beyond the need to balance bargaining power. This need, therefore, calls for labor law to go beyond the mere scope of the employment relationship to embrace labor market dimensions that include protection of the unemployed (Cooney et al. 2002, 13), or in the narrower sense, those who work without a

contract of employment, such as those in the informal sector or self-employed (Fourie 2015). Simply because workers are not in the formal sector or lack a clear employer–employee relationship in the informal sector should not exclude these workers from receiving protection from modern labor law (Kalula, Okorafor, and Bamu 2011).

There is no doubt that the creation of the common-law employment contract was based on the belief that labor law and the protection it offers is concerned only with workers in the formal sector (Mpedi 2012). This position is untenable and completely out of kilter with current trends in society that involve the “informalization” of employment and a large majority of people engaged in nonformal forms of employment (Fourie 2015). The contract of employment can no longer be the ultimate determinate of an employment relationship, but, as South African courts have suggested, should be one of several factors considered.¹²

Although there have been far-reaching and fundamental changes to labor legislation in Africa, especially in the SADC region, since 1993 (Kalula 1993), more major changes need to be embraced (Temba 2013). These fundamental changes of the 1990s were heavily influenced by ILO Convention 102 Social Security (Minimum Standards), which prescribed minimum benefits such as maternity, illness, employment injury, and old age benefits.¹³ The focus of these benefits on those employed in the formal sector has largely excluded workers outside formal employment from accessing certain benefits, including social security. It therefore follows that the employer–employee relationship established via contract was the gateway to receiving protection in labor law (Kaseke 2004, 3). For these reasons, this chapter calls for a complete revamping of the definition of employee in most labor and social protection legislation, which limits employment benefits and protection, especially social protection, to those with a contract of employment.

Most countries’ social security systems only cater to, for the whole or part, the formally employed, so marginalizing those out of work, the self-employed, and those in the informal sector (Olivier, Kalula, and Jansen Van Rensburg 2002). The changing nature of employment, globalization, and the “informalisation” of employment requires us to rethink the contract of employment as a primary basis to establish an employment relationship (Kaseke 2004, 9). Failure to do so may result in the stagnation of labor law’s objective, fixated merely on the balancing of bargaining power between employee and employer who have a formal relationship based on a contract (Benjamin 2012). The employment contract may prove to be a hurdle in the achievement of social protection, which is an important pillar in the realization of the Decent Work Agenda in Africa.

To alleviate some of the issues caused by the borrowing and bending of ILO Convention 102 into labor legislation in the region, the ILO adopted Recommendation 204, pertaining to the transition from the informal economy to the formal economy (ILO 2015b). The Recommendation makes no mention of the contract of employment, but rather seeks to facilitate increased protection for those in the informal sector, recognizing that those in this sector lack the protection of labor laws. Infused as principles in Recommendation 204 are the principles of protecting human rights, decent work, and nondiscrimination for those in vulnerable groups.¹⁴

Member states’ requirement of a contract of employment for the existence of an employment relationship deprive many, especially the most vulnerable, from receiving critical benefits. Kaseke (2004, 8) predicted that the number of people who will receive social protection benefits and other benefits, as outlined in labor legislation, will continue to be low for these reasons. Considering that the majority of workers on the continent work without a formal contract, are self-employed, or are in the informal sector may be reason to embrace a broader notion of the contract of employment (Mhone and Kalula 2001). This will ensure that less employers conceal

the true nature of employment relationships, as well as allow for the goals of human rights in the ILO standards to reach the most vulnerable workers in society (see Le Roux 2014, 35).

Although the employment contract may be a barrier in providing social security protection for informal workers, this chapter submits that an alternative approach may be taken. Changing the approach to the definition of employee in labor legislation is one way that nations can provide for social protection. In Tanzania, the National Social Security Fund Act provides for social security to both formal and informal sector workers.¹⁵ The approach in Tanzania is to have the formal social security complement a system for informal employees, rather than try to fit all employees under the formal system (see Smit 2008, 194–5).

The Tanzanian approach mirrors that in Zimbabwe, where informal employees are covered in phase three of the Pensions and Other Benefits Scheme.¹⁶ Seeking to cover employees in the informal sector in this manner would mitigate against the challenges that arise from requiring comparatively lower paid informal employees to contribute, in the same manner that employers in the formal sector do.

The informal economy

ILO Recommendation 204 defines the informal economy as all economic activities by workers and economic units that are not covered by formal arrangements. Recommendation 204 further defines economic units in the informal economy as: units that employ hired labor; units that are owned by individuals working on their own account, either alone or with the help of contributing family workers; and cooperatives and social and solidarity economy units (ILO 2015b).

The informal economy describes the economic activities that are usually carried out by the poor, who are not recognized, regulated, or protected by the public authorities. Very often, the informal sector/economy absorbs excess labor not being employed in the formal economy.

The first challenge affecting the extension of social security to employees in the informal economy is the definition of “employee” in labor and social security legislation. As highlighted previously, the definition of who is an employee in labor legislation across sub-Saharan Africa does not fully make provision for informal sector employees to participate in and gain access to social security. This excludes many workers from social insurance schemes. Without being able to fit into the definition, these workers will not be covered by most legislation.

It is clear that legislation is oriented toward protecting employees in the formal sector, as it requires workers to have an employment contract, as well the need for both employer and employee contributions. Very often, informal sector employees lack a contract of employment, and because most are self-employed, this mechanism marginalizes them. This section has advocated for the broadening of the definition of employee to allow for more employees to access social security.

However, this will not be enough. There is also need for relevant institutions in each nation to realize that social security for formal sector employees needs to differ from the way that it is administered for informal sector employees. For this reason, integrating the system for the regulation of social security for formal sector employees should not operate in the same manner as it does for the informal sector—this will require the relevant institutions to facilitate a comprehensive mechanism to ensure a tailor-made social security scheme that suits the various natures of work.

However, even some workers who fit into the definition of an employee are excluded from social protection coverage, such as those in the agricultural and construction sector, who are excluded due to the informality of their employment relationships and the seasonal or

short-term nature of their employment. This means that these employees would not qualify to receive retirement, disability, or sickness benefits, as they need to make a certain number of contributions over a period of time to gain a benefit.

Furthermore, there is a view that the informal economy is incapable of being organized in the same way that the formal economy is. Because the nature of informal sector employment varies in size, range, and type, it may be difficult for social insurance schemes to provide a meaningful basis to assist these groups of persons. The lack of organization, therefore, would make it difficult to monitor and administer any scheme that will assist these workers.

Also, most informal economy employers and employees are not interested in registration for social protection, which could be time consuming. Additionally, because the informal economy is unpredictable and vulnerable, these employers and employees may be anxious about the penalties that could be charged for unpaid contributions.

Of the social risks identified by the ILO, there is no doubt that those in the informal economy are susceptible to a wider range of challenges and external shocks. Informal sector employees are susceptible primarily to growing urbanization. For these reasons, it may be a huge risk to cover such employees and provide them with the necessary protection, when the risk they are exposed to is unpredictability.

Lastly, there is no doubt that, compared to employees in the formal economy, those employed in the informal sector lack or have a lower contributory capacity due to earning a generally lower income. The lack of a capacity to contribute toward social insurance schemes affects the ability of the schemes to provide the necessary protection. However, coverage under social insurance schemes is necessarily low, due to high unemployment levels and the number of people employed in the informal sector. In addition, many of the informal employees are reluctant to contribute to the schemes because of the requirement that they pay double contributions, that is, the workers' contributions and the employers' contributions.

Without doubt, the objective of social protection for all emphasizes the need to remove barriers that hinder the seamless and gradual attainment of this goal. The definition of who is an employee and the lack of focus on protection for informal employees or unemployed persons have been identified as hurdles that need to be overcome. The authors of this chapter are strongly in favor of strict and even expansive adherence to international labor standards and social protection floors as important mechanisms for extending protection to vulnerable and excluded persons in Africa. To come to fruition, labor market institutions must be strong and have room to flourish.

Implementation deficits

Finally, it is worth noting that the issues discussed thus far will continue to undermine the attainment of the broad aims of a wider and more meaningful impact for labor law in sub-Saharan Africa. Unless the purpose of labor law is to be seen in purely symbolic terms, it is only meaningfully assessed in the light of the mechanisms employed to implement it (Kakula 2004, 286). The purpose of labor law, as outlined in this chapter, cannot be attained without the assistance of key institutions and structures. These structures include, but are not limited to, trade unions, labor inspectors' offices, social partners, and respective government agencies. However, these labor institutions often lack the capacities to do the jobs assigned to them by law. The capacity limitations relate to having sufficient qualified personnel, finances, and other resources.

Offices of labor inspectors, for example, lack qualified personnel and resources, such as adequate equipment and transport facilities. This lack is compounded by poor staff motivation

and limited career prospects for inspectors. Low levels of knowledge of the law, corruption in labor standards enforcement, high levels of unemployment, and the lack of adequate social security all increase the pressure on workers to ignore rather than report instances of non-compliance by their employer.

Without doubt, one of the most significant structures are the labor courts (Fashoyin 1998). In seeking to adequately address the challenges facing labor law today, especially with regard to embracing the multiple objectives of labor market regulation, our courts play a critical role (Fenwick, Kalula, and Landau 2007). It is the vital duty of the judiciary to interpret and apply national constitutions and legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law (Lord Lester of Herne Hill 1999).

Apart from a deficit of adequate resources, labor institutions lack the capacity to do the job assigned to them by law. As a result, these institutions, including offices of labor inspectors, could remain on the periphery in terms of enforcing the objective of social security for all. The importance of strong institutions that support the attainment of social security for all cannot be underestimated. The strengthening of particular labor market institutions, such as the courts, labor inspectors, and managers of pensions and social security payments, is vital as they provide public services and, like trade unions and employer organizations also, are all tasked with maximizing protection for all. For these reasons, it is important that the implementation of the Decent Work Agenda and social security for all requires an obligation from relevant parties to ensure institutions tasked with implementing ILO instruments have the requisite capacity needed to attain these objectives.

Regarding the adjudication of labor disputes in sub-Saharan Africa, most countries have established specialized courts dealing with labor matters. There is the Labour Court in Tanzania, South Africa, Lesotho, and Zimbabwe; the Industrial Court for Botswana and Swaziland; and the Industrial Relations Court in Malawi and Zambia. In Namibia, the High Court sits as a labor court if it has to determine a labor-related issue. With the exception of the Democratic Republic of Congo (DRC), Angola, and Mozambique, most Southern African nations' systems of law are common law jurisdictions that have a dualist approach with respect to international law (Lord Lester of Herne Hill 1999). As opposed to the monist approach, dualism can be described as a legal system that prescribes that international law can only be applied by courts when it has been transformed into legislation (Kabau and Njoroge 2011). With respect to customary law, most constitutions in the region prescribe that courts should apply customary international law unless inconsistent with the country's constitution or an act of parliament.¹⁷

As a result of the dualist approach adopted in most nations, our courts had initially been timid about applying and implementing international law and the core labor standards, some of which have not yet been incorporated into legislation. Although this is perfectly legitimate, considering the need not to bypass each nation's legislature, it is imperative that the courts limit themselves to mere dispute resolution and contract of employment matters (Khabo 2008, 11). Whereas legislation may often constrain the powers of a labor court, our courts have shown little thirst for adventurism when the opportunity to apply international human rights law or labor standards opens (Fenwick, Kalula, and Landau 2007, 25).

The limited role played by courts in labor law development is the result of a combination of factors, some of which are due to an acute lack of capacity in terms of qualified personnel and resources, both of which slow down court processes. For the labor courts in the region to have the power to make the meaningful changes advocated for, the courts need to become better resourced. This requires the courts to be competently enabled with the appointment of a sufficient number of judicial officers with the requisite specialist knowledge (Khabo 2008, 14).

African courts need to facilitate the well-organized and expeditious resolution of labor disputes. For far too long, issues relating to delays and backlogs have dogged labor dispute mechanisms in the region (ILO 2015a, 24–5). Resource and personnel constraints, as well as the inefficient resolution of disputes, may continue to be problems. The issue of insufficient resources will always plague the efficiency of our courts. It therefore falls upon judges and legal practitioners, as well as organizations such as the South African Society for Labour Law (SASLAW), to ensure that we play our role in improving efficiency and providing access to justice (Van Niekerk 2015).

Our courts need to take an active role in developing labor law jurisprudence that goes beyond the mere basics of resolving disputes based on contracts. As already highlighted, this may be difficult given that some courts are not completely independent from executive control or do not have the same status and rank as the High Court.¹⁸ Recent developments have shown instances in which efforts have been made to strengthen the court, for example the Tanzanian Employment and Labour Relations Act of 2004, which defines the Labour Court as the “Labour Division of the High Court,”¹⁹ or the South African approach, in which appeals in labor matters go from the Labour Court to the Labour Appeals Court and not to the Supreme Court.²⁰ The recently adopted Kenyan Constitution has established an Employment and Labour Relations Court, which has the same status as a High Court and has both original and appellate jurisdiction for all labor relations matters.²¹ These developments demonstrate a step in the right direction in establishing the labor court as a force for making meaningful impact in industrial relations.

Speedy and efficient justice is one of the fundamental pillars of labor law across the world. There is currently an apparent trend in Africa, wherein labor courts are assuming similar status to the High Court, leading to the courts becoming more effective in labor market regulation and spearheading the enforcement of labor rights. The Industrial Court of Botswana in the *Moatswi* case followed international labor standards and ILO conventions when prohibiting gender discrimination, notwithstanding the fact that Botswana labor legislation at that stage did not explicitly outlaw discrimination based on sex.²² In *Kioka*, the Kenyan Industrial Court relied on ILO conventions, which promote equal remuneration and fair treatment, when they ordered the employer to pay damages for discriminating against a female employee based on her HIV status.²³ These progressive judgments by courts from across the subregion is a welcome development.

However, to ensure sustained improvement in this trend, there is a need to address some of the challenges highlighted previously in this chapter. This includes the need to have important judgments published to inform litigants of the developments in the law. When court cases are reported, it ensures that a coherent body of jurisprudence is developed that guides the development of labor law and market reform in the region. Another challenge that also needs to be addressed is equipping the court with a satisfactory level of staff and resources. Notwithstanding the progress made, only when we adequately address the challenges highlighted can our labor courts truly live up to the role that they should be playing in the region (Fenwick, Kalula, and Landau 2007).

Summation and conclusions: Analysis, assessment, deduction, and possible future directions

Our aim in this chapter has been rather limited, particularly by two main factors of inadequate availability of information across the continent and the varied nature of many labor markets. Southern Africa, comprising the SADC subregion, has been used as proxy, not simply

because the authors are more familiar with developments there, but also because many of the developments are similar across sub-Saharan Africa.

Although it can be reasonably asserted that many of the current labor law reform efforts in Africa appear to be in line with the broader expectations of the Decent Work Agenda, a little more work needs to be done to fulfill a set of objectives. In all jurisdictions, attaining specific goals under the four pillars of decent work continues to be easier said than done. This chapter has highlighted the importance of two pillars: namely, social protection and the fulfillment of the international labor standards as significant aspects that will allow labor law in Africa to attain the objectives of the Decent Work Agenda.

Political will is needed to allocate a certain share of existing government resources for social security and increase them when needed. Whereas the need for political decisions is needed to ensure more resources are allocated, there is a need for political will with respect to maximizing the resources that are already available. The encouragement of the effective use of these resources would undoubtedly minimize the waste of resources while maximizing bodies tasked with providing social protection.

However, in spite of the recognition of the importance of the local context, the universal ideals of the ILO, as enunciated in various instruments and programs such as the Decent Work Agenda, continue to be important, to highlight universal goals as well. Similarly, there are emerging norms at the subregional level, for instance, with the SADC founding Treaty, the Charter of Fundamental Social Rights, and the Code on Social Protection. Instruments such as these provide what has been called “surrogate corporatism,” coupled with the desire for democratic governance, reinforcing the need for socially conscious labor market regulation.

Social protection for all requires a comprehensive system that ties together multiple parties on multiple levels. This system should be comprised of a scheme tasked with managing the various pillars and institutions in an efficient manner. Local institutions bear the burden of implementing the Decent Work Agenda and social protection for all and, therefore, need to be equipped and managed in a coherent way to ensure they play their respective roles. Because these institutions may have limited capacity, there is thus a need for an overarching structure that monitors and supports them, within available resources.

As we have seen, emerging trends in Africa suggest developments in labor law, labor market regulation, and social protection are works in progress, influenced not only by global developments and international obligations, but also by the imperatives of changing environments within the contexts of various countries.

Thus, the changes under way are concerned with such issues as how international and received norms are “bent” to enhance their efficacy to local conditions. Important among such needs is the recognition of the nature of labor markets that are overwhelmingly informal. How should regulatory norms and institutions be framed?

Undoubtedly, the potential for the attainment of decent work and social protection for all through labor law and adequate labor market regulation is possible. The emerging trends throughout the continent illustrate that we are not so far from fully implementing fundamental ILO conventions and realizing social security for vulnerable people in Africa. There is no doubt that it is increasingly now accepted that it is necessary to go “beyond borrowing and bending,” to tailor norms and institutional mechanisms to enhance the effectiveness of regulation.

In doing so, it is also recognized that there is need for linkages between reform and the development agenda, in particular, in respect of the nature of predominantly informal economies and basic needs. As discussed, labor law should be an instrument for labor market regulation, which must strive to influence work beyond the formal sector with social protection for all as a critical objective. For this to occur, some of the challenges that have the potential to

hold us back need to be overcome, the first and most blatant being the need for political will. The prevailing political will, without doubt, defines the priority and level of financial support a government is willing to allocate toward the identified objective.²⁴

Notes

- 1 International labor standards include, but are not limited to, the Constitution of the ILO, and a wide range of decisions, recommendations and conventions, reports and instruments of the ILO supervisory bodies.
- 2 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), ILO, Geneva.
- 3 Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ILO, Geneva.
- 4 Forced Labour Convention, 1930 (no. 29) and Abolition of Forced Labour Convention, 1957 (No. 105), ILO, Geneva.
- 5 Minimum Age Convention, 1973 (no. 138) and Worst Forms of Child Labour Convention, 1999 (No. 182), ILO, Geneva.
- 6 Equal Remuneration Convention, 1951 (No. 100), ILO, Geneva.
- 7 Discrimination (Employment and Occupation) Convention, 1958 (no. 111). ILO, Geneva.
- 8 Act No. 55 of 1998, South Africa.
- 9 *SA Municipal Workers Union & another v. Nelson Mandela Bay Municipality* (2016) 37 ILJ 1203 (LC) at para. 26.
- 10 Kenyan Employment Act, Chapter 226 (2012), http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/EmploymentAct_Cap226-No11of2007_01.pdf.
- 11 Definition of “equal remuneration” in the Zimbabwean Labour Act [Chapter 28:01], <https://zimlil.org/zw/legislation/act/1985/16>.
- 12 *Denel (Pty) Ltd v Gerber* (2005) 26 ILF 1256 (LAC).
- 13 ILO Social Security (Minimum) Standards Convention 102 of 1952, www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C102.
- 14 ILO (2015), Point 4 and 5.
- 15 National Social Security Fund Act 28 of 1998, §6(1) and (2).
- 16 Pension & Other Benefits, National Social Security Authority (NSSA), Zimbabwe, www.nssa.org.zw/schemes/pension-other-benefits/.
- 17 See art. 211 of the Constitution of the Republic of Malawi and §§326 and 327 of the Constitution of the Republic of Zimbabwe.
- 18 The preferred approach would that found in the Tanzanian Employment and Labour Relations Act of 2004, which defines the Labour Court as the “Labour Division of the High Court.”
- 19 Definition of “Labour Court” in the Tanzanian Employment and Labour Relations Act of 2004.
- 20 Section 4 of the Constitution of South Africa, Seventeenth Amendment Act, 2012, amending §168 of the Constitution.
- 21 Constitution of Kenya, art. 162(2).
- 22 *Moatswi and another v. Fencing Centre (Pty) Ltd*, 2002 (1) BLR 262 (IC).
- 23 *Kioka v. Catholic University*, IC Case No. 1161 of 2010.
- 24 In addition to specific references cited, the authors have taken the liberty of drawing upon some of their previous work. Among such other work, ideas have been taken from Kalula (2003, 2004); Evance Kalula, “International Labour and Employment Relations Association (ILERA) and the Future of Work: Challenges and Opportunities in the Quest for Universal Decent Work and Social Solidarity,” ILERA 18th World Congress, Seoul, July 23–27, in *Global Labour and Employment Relations: Experiences and Challenges*, edited by Mia Rönnmar and Dong-One Kim, 28–39 (Seoul, Parkyoung Publishing Company, 2020).

References

- Baldwin, Robert, Colin Scott, and Christopher Hood. 1998. *A Reader on Regulation*. Oxford: Oxford University Press.
- Benjamin, Paul. 2004. “An Accident of History: Who Is (and Who Should Be) an Employee under South African Labour Law.” *Industrial Law Journal* 25: 787–804.

- Benjamin, Paul. 2012. "Labour Law beyond Employment." *Acta Juridica* 2012(1): 21–40.
- Burman, Sandra B., and Barbara E. Harrell-Bond, eds. 1979. *The Imposition of Law*. London: Academic Press.
- Cooney, Sean, Tim Lindsey, Richard Mitchell, and Zhu Ying, eds. 2002. *Law and Market Regulation in East Asia*. London: Routledge.
- Fashoyin, Toyo. 1998. *Industrial Relations in Southern Africa: The Challenge of Change*. ILO Southern Africa Multidisciplinary Advisory Team. Harare, Zimbabwe: ILO.
- Fenwick, Colin, Evance Kalula, and Ingrid Landau. 2007. "Labour Law: A Southern African Perspective." Discussion Paper DP/180/2007, International Institute for Labour Studies, ILO, Geneva.
- Fourie, E. 2015. "Exploring Innovative Solutions to Extend Social Protection to Vulnerable Female Workers in the Informal Economy." International Society for Labor Law and Social Security (ISLSSL) 2015, Cape Town, South Africa, September 15–18.
- Gravel, Eric, and Quentin Delpech. 2008. "International Labour Standards: Recent Developments in Complementarity between the International and National Supervisory Systems." *International Labour Review* 147 (4): 403–15.
- ILO (International Labour Organization). 1989. *Introduction to Social Security*, 3rd edn, 2nd impression. Geneva: ILO.
- ILO (International Labour Organization). 1998. "ILO Declaration on Fundamental Principles and Rights at Work." Adopted by the International Labour Conference, Eighty-sixth Session, Geneva, June 18. www.ilo.org/declaration/lang--en/index.htm.
- ILO (International Labour Organization). 2010. *Extending Social Security to All: A Guide through Challenges and Options*. ILO, Geneva. www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_146616.pdf.
- ILO (International Labour Organization). 2014. *Rules of the Game: A Brief Introduction to International Labour Standards*, 3rd rev. edn. (First published 2005). Geneva: ILO. www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_318141.pdf.
- ILO (International Labour Organization). 2015a. *HIV and AIDS and Labour Rights: A Handbook for Judges and Legal Professionals*. International Labour Office. Geneva: ILO.
- ILO (International Labour Organization). 2015b. "Recommendation 204: Recommendation Concerning the Transition from the Informal to the Formal Economy." Adopted by the ILO Conference, 104th Session, Geneva, June 12. www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_377774.pdf.
- Kabau, Tom, and Chege Njoroge. 2011. "The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System." *Comparative and International Law Journal of Southern Africa* 44 (3): 293–310.
- Khabo, Fumane. 2008. "Collective Bargaining and Labour Disputes Resolution—Is SADC Meeting the Challenge?" Issues Paper No 30, ILO Sub-Regional Office for Southern Africa, Harare, Zimbabwe.
- Kalula, Evance R. 1993. "To Borrow and Bend: The Challenge of Comparative Labour Law in Southern Africa." *African Society of International and Comparative Law*, Proc. 5, 345.
- Kalula, Evance R. 2002. "National Legislation and Institutional Arrangements: Glimpses from Southern Africa." Paper presented at Regulatory Frameworks in the Global Economy, Knowledge Network Meeting, International Labour Organization World Commission on the Social Dimension of Globalization, Geneva, November 21–22, 2002.
- Kalula, Evance R. 2003. "Present at the Creation or Another False Start in Africa? Labour Market Regulation and Social Protection and the Future of Labour Law in Southern Africa." Professorial Inaugural Lecture, University of Cape Town.
- Kalula, Evance R. 2004. "Beyond Borrowing and Bending: Labour Market Regulation and Labour Law in Southern Africa." In *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC*, edited by Barnard, Catherine, Simon Deakin, and Gillian Morris, 275–87. Oxford: Hart Publishing.
- Kalula, Evance R., Ngozi Okorafor, and Pamhidzai Bamu. 2011. "Towards an Effective Regulatory Framework for Labour Rights and Social Protection in South Africa." In *The Legal Empowerment Agenda: Poverty, Labour and the Informal Economy in Africa*, edited by Banik, Dan, 15–39. Farnham, UK: Ashgate.
- Kaseke, E. 2004. "Social Protection in the SADC: Developing an Integrated and Inclusive Framework—A Social Policy Perspective." In *Social Protection in SADC: Developing an Integrated and Inclusive Framework*, edited by Olivier, M. P., and Evance Kalula, 1–11. Cape Town: Institute of Development and Labour Law, University of Cape Town.

- Klare, Karl. 2000. "Countervailing Workers Power as a regulatory Strategy." In *Legal Regulation of the Employment Relation*, edited by Hugh Collins, Paul Davies, and Roger Rideout, 63–82. London: Kluwer Law International.
- Le Roux, Rochelle. 2014. "Employment: A Dodo, or Simply Living Dangerously." *Industrial Law Journal* 35, Pt. 1: 30–46.
- Lord Lester of Herne Hill. 1999. "The Challenge of Bangalore: Making Human Rights a Practical Reality." *European Human Rights Law Review* 1999 (3): 273–92.
- Mhone, G. Z., and E. R. Kalula. 2001. "Report of a Study on the Formulation of Policy Objectives, Priorities and Strategies for the SADC." Report prepared for the SADC Employment and Labour Sector." SADC Secretariat.
- Mitchell, Richard, and Christopher Arup. 2006. "Labour Law and Labour Market Regulation." In *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, edited by Arup, Christopher, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell, and Anthony O'Donnell, 3–18. Sydney NSW, Australia: Federation Press.
- Mpedi, L. G. 2012. "The Evolving Relationship between Labour Law and Social Security." *Acta Juridica* 2012(1): 270–85.
- Olivier, Marius, Evance R. Kalula, and Linda Jansen Van Rensburg. 2002. "Social Protection, Poverty Alleviation and Social Security in the SADC Region: The Need for Developing a Co-ordinated Social Security Paradigm." *Proceedings of the Third International Labour and Employment Relations Association (ILERA) African Regional Congress*, Cape Town, South Africa, March 5–8. www.ilo.org/public/english/iira/documents/congresses/3rdAfrica/13.pdf.
- SADC (Southern African Development Community). 2013. Decent Work Programme, 2013–2019, May. www.sadc.int/files/5014/6194/0315/SADC_Decent_Work_Programme_30513_JTM.pdf.
- Smit, Nicola. 2008. "Institutional Framework, Legal Instruments and Legal Techniques Relating to the Promotion of Access to Social Security to Informal Sector Workers: An International Perspective (ILO)." In *Access to Social Security for Non-citizens and Informal Sector Workers: An International, South African and German Perspective*, edited by Becker, Ulrich, and Marius Olivier, 193–208. Stellenbosch: Sun Press.
- Temba, Ferdinand M. 2013. "The Evolution and the Changing Face in Contract of Employment in Tanzania." *Open University Law Journal* 4 (2): 51–72.
- Theron, Jan. 2014. "Decent Work and the Crisis of Labour Law in South Africa." *Industrial Law Journal* 35, pt. 2 (7): 1829–50.
- Theron, Jan, and Shane Godfrey. 2004. "Changing Nature of Work and 'Atypical' Forms of Employment in South Africa." *Current Labour Law 2004*, edited by H. Cheadle, C. R. Thompson, P. A. K. le Roux, and A. van Niekerk, 135–54. Durban: LexisNexis Butterworths.
- Thompson, Clive. 1993. "Borrowing and Bending: The Developing of South Africa's Unfair Labour Practice Jurisprudence." In *The Changing Face of Labour Law and Industrial Relations: Liber Amicorum for Clyde W. Summers*, edited by Blanpain, Roger, and Manfred Weiss, 109–32. Baden Baden: Nomos.
- van Niekerk, André. 2015. "Speedy Social Justice: Streamlining the Statutory Dispute Resolution Processes." *Industrial Law Journal* 36 (2): 837–48.