REGIONAL LABOUR STANDARDS IN THE SADC: IS IT POSSIBLE, GIVEN THE EU EXPERIENCE?

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ABSTRACT

Globalisation and the increasing movement of capital and labour across international borders, with the exception of migrant workers who are facing major obstacles due to immigration laws, are creating a situation where laws in general and labour laws in particular are acquiring an international character. International bodies such as the United Nations, the International Labour Organisation and the European Union have adopted various international norms and standards to which most countries have agreed and which have established minimum international standards for basic universal human rights and worker rights. The Southern African Development Community is a transnational organisation that has also adopted certain basic norms and standards in its Treaty, Charter on Fundamental Social Rights and various protocols that are applicable to all citizens within the Community. In this contribution, the concept of transnational labour relations is considered. The different international approaches towards transnational labour relations are evaluated, as is the manner in which the European Union approached the integration of regional labour standards. The author seeks to establish what the Southern African Development Community can learn from the European Union's experience and in what way a transnational labour relations system or regional labour standards regime for the Southern African Development Community can be established.

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BACKGROUND

John Donne's famous saying, 'No man is an island upon himself',[1] is even more relevant today than it was in 1624, evidenced by international trade, globalisation, international treaties, and the UN. Globalisation and the increasing movement of capital and labour across international borders, with the exception of migrant workers who are facing major obstacles due to immigration laws, are creating a situation in which laws in general and labour laws in particular are acquiring an international character. Internationally, the problem of the movement of labour comes down to the asymmetrical structure between capital and labour in the context of the freedom of movement. In view of increasing globalisation, the conventions of the International Labour Organisation (ILO) have assumed greater prominence in recent years. Internationalisation and globalisation have had a growing impact in many areas, more especially on legal and economic relations.

Contrary to what Mr Robert Mugabe of Zimbabwe might think, no country can isolate itself from the international community. Without taking anything away from the sovereignty of independent states, all countries are part of a larger world community. International bodies such as the UN, the ILO, the European Union (EU) have adopted various international norms and standards to which most countries have agreed and which established minimum international standards for basic universal human rights and worker rights. The Southern African Development Community (SADC)[2] is a transnational organisation that has also adopted certain basic norms and standards in its treaty, the Charter on Fundamental Social Rights, and various protocols that are applicable to all citizens within the SADC.

ELEMENTS OF A TRANSNATIONAL LABOUR RELATIONS SYSTEM

To understand a general structure of the world's industrial relations system, the role of regional powers and transnational actors should be explained; this will help to underline the influence of global challenges.[3]

Transnational relations influence world politics in almost every issue sphere. Thousands of international non-governmental organisations (NGOs) lobby interna-

1 Donne, John. 1624. 'Mediations XVII'. In *Devotions upon Emergent Occasions and Several Steps in my Sickness*.

2 Basic facts and figures regarding the composition and aims of the SADC are provided below.

3 Aliu, A. 2012. *European industrial relations: Transnational relations and global challenges.* Munich Personal RePEc Archive.

tional regimes and interstate organisations for their own purposes, including financial support. Many multinational corporations with subsidiaries in other countries have annual financial turnovers larger than the gross national product (GNP) of several countries, and create adaptation problems for the foreign economic policies of many states.[4] The original concept of transnational relations encompasses almost every aspect of world politics, except interstate relations. This has led to a situation where many sovereign nation states were forced to take sides in establishing their political, economic, social and cultural relations and operations, which, in itself, again led to regionalism.[5]

One can therefore rightly ask: What is 'transnational'? The term would indicate that it goes beyond what is considered to be national; in other words, it refers to anything that crosses national borders. 'Transnational law' is the term commonly used for referring to laws that govern the conduct of independent nations in their relationships with one another. It differs from other legal systems in that it primarily concerns states rather than private citizens. In other words, it is that body of law that comprises the greater part of the principles and rules of conduct which states feel themselves bound to observe and therefore commonly observe in their relations with one another. These principles and rules of conduct include:

- the rules of law relating to the function of international institutions or organisations, their relations with one another, and their relations with states and individuals;
- certain rules of law relating to individuals and non-state entities, so far as the rights and duties of such individuals and non-state entities are the concern of the international community.[6]

A transnational labour relations 'regime' would be a set of structures and norms that operate across national borders to buttress national law and practices by either reinforcing national norms or superseding them.[7] Transnational labour relations can therefore also incorporate a set of rules, guidelines and/or principles that are observed by various states.[8]

4 Kappen, TR 1995. *Bringing transnational relations back in: Non-state actors, domestic structures, and international institutions*.

5 Aliu, A. 2012. *European industrial relations: Transnational relations and global challenges.* Munich Personal RePEc Archive.

6 http://encyclopedia.thefreedictionary.com.

7 Trubek, DM, Mosher, J & Rothstein, JS. 2002. Transnationalism in the regulation of labor relations: International regimes and transnational advocacy networks. *Law & Social Inquiry* 25(4): 1194.

8 For a detailed discussion of the concept of transnational labour relations, see Kolben, K. 2011. Transnational labor regulation and the limits of governance. *Theoretical Inquiries in Law* 12(2): 403; and Hoffman, R, Jacobi, O, Keller, B & Weiss, M. (eds). 2000. *Transnational industrial relations in Europe*. Dusseldorf: Hans-Böckler-Stiftung. 1–198.

INTERNATIONAL APPROACHES TO TRANSNATIONAL LABOUR RELATIONS

The above is a summary of the global and regional framework in which labour law has to evolve. The various levels at which decisions can be taken that can have an impact on labour relations and employees are the level of the undertaking, the national or state level, the regional level (such as the SADC) and the international level. Should labour relations decisions be taken at all these levels? Should one consider establishing worldwide fundamental social rights? Is there a need for regional rules, such as those of the SADC, or should legislation be limited to national rules at enterprise level?[9]

It would appear that there are currently three basic approaches which are followed internationally when it comes to the implementation of a regional or transnational labour relations system. These are:

- The Labour Side Agreement of the North American Free Trade Agreement (NAFTA), which ensures that countries enforce their own domestic laws in the areas covered by the agreement. If one member state of NAFTA feels that another is not following their own laws in one of the areas covered, the matter is reported to a Commission for Arbitration, and this can ultimately lead to a judgment against the errant member state.
- Social dialogue at a European level is both inter-professional (ETUC, Business Europe, and CEEP) and sectoral (more than 40 branches of activity). International Framework Agreements (IFA) can be concluded and implemented 'in accordance with the procedures and practices specific to management and labour and the Member States', as found in art 155, para 2 of the Treaty on the Functioning of the EU (TFEU). Inter-professional framework agreements have been reached on, for example, tele-work (2002), stress in the workplace (2004), harassment in the workplace (2009) and inclusive labour markets (2010). These framework agreements are not legally binding on the national actors; their function is to offer the actors guidance on a national scale and to enrich their imagination.[10]
- A more voluntary approach, which can include codes of conduct, guidelines and the adoption of fundamental principles. These are monitored by way of either reporting or the soft-law approach. These codes can be determined by international bodies such as the ILO or the Organisation for Economic Co-operation and Development (OECD), or they can be the result of multinational

9 Blanpain, R. 2010. *European labour law.* 12 ed. Amsterdam: Kluwer Law International. 45.

10 Weiss, Manfred. 2012. The long way to the European Social Model Lecture delivered at the Tshwane University of Technology in Pretoria, 30 August.

enterprises' establishing codes of conduct. It would appear that this is the approach followed by the SADC.

- The integration approach is followed by the EU: it established minimum regional standards that are binding on member states, who must adapt their national legislation to meet the requirements of the minimum regional standards. Minimum standards can be enforced by the European Court of Justice (ECJ), and member states that fail to comply are liable to substantial fines.

THE EU EXPERIENCE[11]

Industrial relations in most countries of Europe initially developed locally or sectorally (reflecting the contours of labour markets), but in the 20th century it became partially consolidated within a national institutional framework, namely that of the EU. Every European country's industrial relations system has unique characteristics, reflecting the distinctiveness of the economic structure, political traditions and social practice in each particular country.[12] It would appear, though, that there are important common features to the European industrial relations system. For instance, all countries in the EU accept that the labour market must be regulated by the social partners and that collective bargaining is the desired mechanism for employee involvement. Trade unions and employers' associations are viewed as legitimate institutions within the collective bargaining process.

At first glance, it would appear that within the EU there is a transnational labour relations system, but there are substantial differences between the different members of the EU in this regard, in particular in the degree to which employment conditions and collective bargaining are legally regulated, the existence or absence of workplace representative structures aside from trade unions, and the relative weight of antagonistic relations or 'social partnership'.[13]

It is accepted that the member states of the EU have succeeded in creating a truly internal market with a single currency (currently in only 12 of the 27 member states), a free trade area, and freedom of movement of goods, services and technology, as well as freedom of movement of EU citizens. The market freedoms in the EU include the freedom of movement of capital, services and goods, and workers. The question is whether the achievement of an EU market has brought the different national systems of labour law and labour relations in each individual member state closer together in a more harmonised or even uniform system.

11 See Blanpain, R. 2010. *European labour law.* 12 ed. Amsterdam: Kluwer Law International. Chapter 1 The Institutional Framework for a discussion on the structures of the EU. 65–122.

12 Hyman, R. 1999. National industrial relations systems and transnational challenges: An essay in review. *European Journal of Industrial Relations* 5(1): 89–110.

13 Hyman, R. 1999. National industrial relations systems and transnational challenges: An essay in review. *European Journal of Industrial Relations* 5(1): 89–110 at 91.

Roger Blanpain argues that, in order to prevent and combat competition falsification, the labour-law and labour-relations systems of Europe should at least be harmonised or, if possible, uniform labour-law rules should be established.[14] The fact that it is easier to dismiss a worker in the United Kingdom than in the Netherlands disturbs the market. To harmonise labour-law rules and labour relations across the EU is a duty of the European authorities, who need to see that the rules are the same for everybody, or that they are at least compatible. There is currently great diversity in the labour laws and labour relations systems in the different EU member states.[15] The following examples clearly illustrate this diversity:

- *Formality of the systems* – Germany has the most formal labour-law and labour-relations system in the EU, whereas the Italian system is highly informal.
- *Degree of unionisation* – In Belgium and Denmark, approximately 50 per cent of the workers are organised into trade unions, compared to France and Spain, each at less than 10%. There is also great diversity in the different trade union structures: in Germany, trade unions mostly function per sector of industry, and the United Kingdom still has craft unions. Diversity can also be found in the trade union ideology: unions in the north of the EU have more or less integrated into the neo-capitalist system, whereas British unions are still characterised by an adversarial approach, and the biggest trade union in France, the *Confédération Générale du Travail,* is still run according to very strict communist principles.
- Another example of diversity in the EU labour-law and labour-relations system can be found in the structure and role of the employers' associations. Some are more centralised than others, which also reflects the labour-relations system of their respective countries. The *Bundesvereinigung der Deutschen Arbeitsgeberverbaende* is much more centralised than the British Confederation of Industries.
- Probably the most important distinction is to be found in the different legal cultures, especially between those of the United Kingdom and Continental Europe.[16] In the United Kingdom, working conditions, labour laws and labour relations are mostly left to social partners to negotiate, and should it appear that one of the social partners has too much power, there might be legal intervention. Margaret Thatcher, in the 1980s, took steps to curb union power. In 1988, she said that she was not going to accept labour-law rules from Brussels. Since the premiership of Tony Blair, the United Kingdom has been subject to the Social Protocol of Maastricht, which is now integrated in art 153 of the TFEU. On the other hand, continental Europe is generally more legally interventionist, as is reflected in the labour-law codes.

14 Blanpain, R. 2010. *European labour law.* 12 ed. Amsterdam: Kluwer Law International. 268
15 Blanpain, R. 2010. *European labour law.* 12 ed. Amsterdam: Kluwer Law International. 269.
16 Blanpain, R. 2010. *European labour law.* 12 ed. Amsterdam: Kluwer Law International. 270.

- Member states of the EU also differ regarding the legally binding effect of collective agreements that have been concluded.[17] Here, once again, the United Kingdom appears to be at odds with the rest of Continental Europe. The extension of collective agreements can lead to stronger employers' associations, and can therefore have a basic influence on labour law and labour relations.
- The role of governments in labour relations, especially in so far as it relates to income policies, also exerts an influence on EU labour relations. In certain EU countries, the government plays a very active role and often directly intervenes in wage policies; this has occurred in Belgium, France, Greece and Spain. In Germany, the government can, at most, bring the social partners together and offer guidelines.

Clearly, in the EU, diversity is the order of the day, and it would seem that there is no single unique European system of labour relations. This diversity, fuelled by cultural differences, seems set to continue. The national system of labour relations in every member state of the EU is the result of a balance between social factors and actors; it has developed over years, and to now establish a uniform set of rules, codes and procedures for all enterprises and situations within the EU appears to be unworkable.[18]

However, it is also apparent that the EU market plays a very important role, and that it will continue to push national systems together in order to create harmonisation. There seems to be an unavoidable convergence of labour relations within the EU, supported by political and trade union pressure, which will eventually bring the different national systems together while still respecting the diversity of members. The Treaty of the European Community (TEU) and TFEU, among other agreements, have established certain basic codes, principles and guidelines that are now basic rights of every citizen within the EU, and national labour laws and labour relations systems must take this into account. Accordingly, the basic rights of every EU citizen are legally enforceable, not only through the national legal system of each member state, but also by the European Court of Justice (ECJ).[19]

METHODS OF INTEGRATION OF LABOUR POLICIES IN THE EU

One of the methods used in the EU to integrate social and labour policies is the so-called 'Open Method of Co-Operation' (OMC). This can be described as a

17 See Blanke, T & Rose, E. (eds). 2002. Collective bargaining and wages in comparative perspective. Germany, France, the Netherlands and the United Kingdom. *Bulletin of Comparative Labour Relations* 56, 176 pp. Amsterdam: Kluwer Law International.

18 Blanpain, R. 2010. *European labour law.* 12 ed. Amsterdam: Kluwer Law International. 272.

19 Blanpain, R. 2010. *European labour law.* 12 ed. Amsterdam: Kluwer Law International. 270. See chapter 4 European labour law: Trailer or locomotive? for a detailed discussion. 203–273.

> [d]ecentralised but carefully co-ordinated process, involving the exchange of best practices, the use of benchmarking, national and regional target-setting, periodic reporting, and multi-lateral surveillance.[20]

Its methods are intergovernmental and not really supra-national, and it was modelled, to a certain degree, on the methods of fiscal and economic co-ordination between EU member states.[21] Under the OMC method, a member state remains responsible for the implementation of its employment policies, and the OMC relies on soft law rather than on legal sanction. The OMC is also concerned with achieving commonly agreed-upon employment outcomes through joint action.[22] The OMC strives towards the integration of employment, economic and social policies. It is viewed as a weakness that the OMC applies only incentives and peer pressure, making no provision for penalties for failure to adhere to the European Council's recommendations.

SOCIAL DIALOGUE AS METHOD OF INTEGRATION

'Social dialogue' is Eurojargon[23] for participation of the social partners, European-level employer's organisations, and trade unions in the formulation of legislation and policy at EU level. It can be viewed as a regulatory technique that can potentially overcome the regulatory problems affecting EU decision-making and implementation processes.[24] During the process of consultation between the social partners, framework agreements were negotiated which established procedural rules and minimum standards. These framework agreements do not include exact legal rights and obligations, but rather embody aspirations.[25]

The European Commission views social dialogue as an important tool that can assist in providing innovative solutions to employment development, as well as the improvement of the quality of life and work at local level. Owing to the fact that minimum wages, the right to association and the right to strike are excluded from the EU's legislative competence,[26] social dialogue as an integration method is prevented from fulfilling the role of collective negotiation in the European industrial relations system.[27] It must be noted that the TEU gives prominence to 'The Social Partners and

20 De la Porte, C. 2002. Is the open method of co-ordination appropriate for organising activities at European level in sensitive policy areas? *European Law Journal* 8(1): 38

21 De la Porte, C. 2002. Is the open method of co-ordination appropriate for organising activities at European level in sensitive policy areas? *European Law Journal* 8(1): 40–41, as cited by Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 225.

22 Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 227.

23 So called by Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 230.

24 Lo Faro, A. 2000. *Regulating social Europe: Reality and myth of collective bargaining.* Oxford: Hart Publishing. 159.

25 Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 233.

26 EC article 137(6).

27 Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 237.

Autonomous Social Dialogue' under Title VI: 'The Democratic Life of the Union'. Wedderburn wrote that social dialogue as an integration method means very little to workers if those who can defend the core rights of labour fail to do so.[28]

FUNDAMENTAL RIGHTS AS AN INTEGRATION METHOD

No express recognition was given to fundamental human and social rights in the original EEC treaty. Many provisions of the treaty dealt with the rights of individuals, such as the right not to be discriminated against, the right to establish businesses, and the free movement of citizens of the EU.[29] The EC also adopted a directive that made equal treatment of men and woman in terms of pay, access to employment, vocational training, promotion and working conditions an enforceable right in the EU.

The development of fundamental rights as standards that are binding on all European Community institutions came from the ECJ at the time it asserted the supremacy of Community law when it decided that the protection of fundamental rights was a general principle of Community law. In 2000, the EU Charter of Fundamental Rights was adopted.[30] The ECJ's case law is complemented by the charter. It can be argued that the charter can be viewed as a bill of rights that forms part of the political constitution of a future federal Europe.[31] The charter contains 54 articles, grouped into seven chapters that deal with issues such as dignity, freedoms, equality, solidarity, citizens, rights, justice and general provisions. The charter forms a direct link between EU law and existing human rights structures.

The charter provides EU judges and institutions with a clear and systematic statement of fundamental rights that have been endorsed at the highest political level.[32]

SADC – AIMS AND FACTS

It is important to examine the establishment of the SADC, its structures and its aims, in order to determine whether there is anything to learn from the EU regarding the establishment of a transnational labour relations system.

The SADC was originally founded in April 1980 as the Southern African Development Coordination Conference (SADCC) by leaders of the so-called frontline states in southern Africa. The original aim was to create a mechanism by which member states could formulate and implement projects of common interest in selected areas in order to reduce their economic dependence on, particularly, the Re-

28 Wedderburn, L. 1997. Consultation and collective bargaining in Europe: Success or ideology? *Industrial Law Journal* 26(1): 33.
29 Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 238.
30 Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 240.
31 Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 241.
32 Hepple, B. 2005. *Labour laws and global trade.* Oxford: Hart Publishing. 245.

public of South Africa. It was conceived as an economic dimension of the struggle for liberation from colonial and white minority rule and the economic domination of the sub-region by the apartheid regime in South Africa.[33]

The founders made it clear that trade and market integration were not its priorities; the desire was for genuine and equitable regional integration. Trade liberalisation and market integration became part of the SADC's common agenda when the SADCC became the SADC under the Windhoek Declaration and Treaty of 1992. This treaty provided for regional economic communities (RECs) for the different sub-regions of Africa and the SADCC had to be repositioned as the REC for the southern African sub-region. South Africa was included as a member, and trade liberalisation and market integration were prioritised. In 1996 a protocol on trade was signed by 11 member states – excluding Angola – which provided for the establishment of a free trade area (FTA). This protocol came into force in January 2000, when it was ratified by two-thirds of the members.[34]

The basic structures of the SADC can be described as follows:

- *The Summit* is the meeting of the heads of state of member countries and is the supreme policy-making body of the SADC; it is responsible for the policy direction and control of the SADC. Decisions are taken by consensus.[35]
- *The Council* comprises one minister of every member state. It oversees the function and development of the SADC, implements policies, advises the summit on matters of overall policies, and reports to and is accountable to the summit. Decisions are taken by consensus.[36]
- *Commissions* report to and are accountable to the council.[37]
- *The Standing Committee of Officials* is a technical and advisory committee to the council, and its decisions are taken by consensus.[38]
- *The Secretariat* is an executive institution of SADC, responsible for planning, management of programmes, and financial and general administration.[39]

The main economic objective of the SADC is to promote sustainable and equitable economic growth and socio-economic development that will lead to poverty alleviation. The main political objectives are: to promote common political values and systems through institutions that are legitimate and democratic, and to consolidate,

33 Ngongola. C. 2012. SADC law: Building towards regional integration. *SADC Law Journal* 2(2): 124.
34 Ngongola, C. 2012. SADC law: Building towards regional integration. *SADC Law Journal* 2(2): 124.
35 Article 10 of the SADC Treaty.
36 Article 11.
37 Article 12.
38 Article 13.
39 Article 14.

defend and maintain democracy, peace, security and stability. Social and cultural objectives include combating HIV/AIDS and other communicable diseases.

In pursuit of these objectives, member states are encouraged to ensure the harmonisation of political and socio-economic plans; develop economic, social and cultural ties; participate fully in the implementation of SADC projects; develop policies that can lead to the elimination of obstacles to the free movement of people, labour, capital, goods and services; promote the development of human resources, and aid the development, transfer and mastery of technology. Eight areas of co-operation have been identified; each area is administered according to a protocol. A protocol enters into force if it has been ratified by at least two-thirds of the member states and is binding only on a member state that has ratified it.[40]

The above discussion makes it clear that there is more to the SADC than trade liberalisation and market integration. The current member states of the SADC are indicated in Figure 1, below.

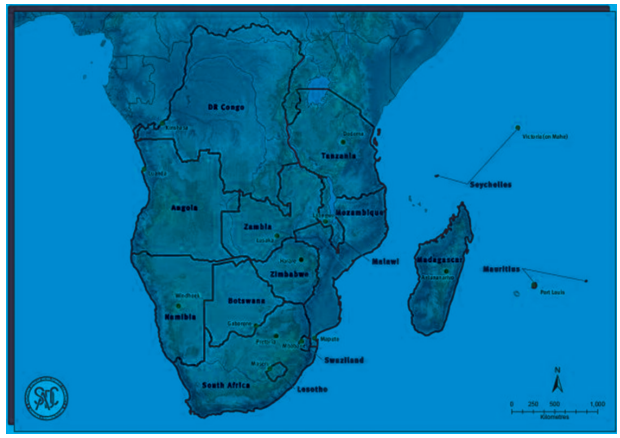

Figure 1: Current member states of the SADC

40 See Nogongola, C. 2008. The legal framework for regional integration in the Southern African Development Community. *University of Botswana Law Journal* 8: 3–46.

SUMMARY

Table 1: Summary of key data regarding 15 current member states of the SADC

Indicator	Information	Indicator		Data
Member state	15	Trade	Total imports	US$91 608.15 (million)
			Total exports	US$89 151.33 (million)
Year established	1992	Average government debt (% of GDP – 2011)		40.4%
Land areas	554 919 km²	Average life expectancy (2009)		55.1
Total population	277 million	Average HIV prevalence rate (2009)		12.6%
GDP annual growth rate (2011)	5.14%	Gender (proportion of seats held by women in parliament — 2011)		34%
GDP (2010)	US$575.5 billion	GDP contribution: Services		51%
Inflation (2011)	7.7%	GDP contribution: Industry		32%
Fiscal balance (2012)	–3.6%	GDP contribution: Agriculture		17%

Source: FAO 2003. State of forest and tree genetic resources in Dry Zone Southern Africa Development Community Countries (for the period 2000 to 2010).

From the table above, it is clear that the current 15 member states of the SADC cover a land area of 554 919 km² and – in 2010 – had a combined population of approximately 277 million people. This immediately indicates that an acceptable and mutually agreed-upon system of transnational labour relations and regional labour standards can be of benefit to a very large number of employees and other people.

SADC CHARTER ON FUNDAMENTAL SOCIAL RIGHTS

In 2003, the SADC adopted the Charter on Fundamental Social Rights which, among other aims, seeks to provide a framework for regional labour standards. It obliges member states to create an enabling environment consistent with ILO core conventions, to prioritise ILO core conventions and to take the necessary action to ratify and implement these standards. The charter further requires member states to create an enabling environment to ensure equal treatment for men and women and the protection of children and the youth.[41]

41 See Van Niekerk, A, Christianson, M, McGregor, M, Smit, N & Van Eck, S. 2012. *Law@work* 29–30.

Unfortunately, the charter cannot be enforced directly and, unlike ILO conventions, there is no independent supervisory mechanism to call members to account for any breach of the charter.

The main objectives of this charter are to:

- ensure the retention of the tripartite structure of the three social partners, namely, governments, and employers' and workers' organisations;
- promote the formulation and harmonisation of legal, economic and social policies and programmes that contribute to the creation of productive employment opportunities and the generation of income in member states;
- promote labour policies, practices and measures that facilitate labour mobility, remove distortions in labour markets, enhance industrial harmony and increase productivity in member states;
- provide a framework for regional co-operation in the collection and dissemination of labour market information;
- promote the establishment and harmonisation of social security schemes;
- harmonise regulations relating to health and safety standards at work places across the region, and
- promote the development of institutional capacities as well as vocational and technical skills in the region.

It is also important to pay attention to some of the most important articles of the charter that relate directly to labour relations and labour standards. The article on universal and basic human rights, as proclaimed by the UN Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of the ILO, and the Declaration of Philadelphia are to be observed (art 3).

The article on freedom of association and collective bargaining requires member states to create an enabling environment consistent with ILO conventions on freedom of association, and the right to organise and collective bargaining (art 4). This means that:

- employers and workers in the SADC shall have the right to form employers' associations or trade unions;
- employees and employers have the freedom of choice to join or not to join a trade union or employers' association;
- trade unions and employers' associations can conclude collective agreements according to the national laws of every member state;
- an independent labour dispute-resolution system should be established through a process of tripartite consultation;
- employees have the right to strike or to participate in other forms of collective action, and

- the organisational rights for representative trade unions shall include access to employers' premises, the deduction of trade union membership fees, the right to elect your own trade union representatives and union officials, leave for trade union representatives, and the right to disclose information.

Article 5 on the conventions of the ILO requires member states to establish a priority list of ILO conventions, which must include conventions on the abolition of forced labour (Nos 29 and 105), freedom of association and collective bargaining (Nos 87 and 98), the elimination of discrimination in employment (Nos 100 and 111) and the minimum age of entry into employment (No 138). Member states must take the necessary steps, as a priority, to ratify and implement the core ILO conventions.[42]

The article on the equal treatment of men and women requires that men and women be treated as equals in all aspects of the work life (art 6).

The protection of children and young people, in line with ILO Convention 138, deals with employment age, the remuneration of children and young people and vocational training (art 7).

The issues of elderly people, retirement age and social benefits for the elderly who do not have a pension but have reached normal retirement age are also addressed (art 8).

The treatment of persons with disabilities in the workplace and their access to training and social security are contained in art 9 of the charter. Employees with disabilities may not be discriminated against in any way, and employers must make a special effort to accommodate such persons.

All employees will have access to social protection, social security benefits and social assistance, irrespective of the type of employment (art 10).

All member states must strive towards improving the living and working conditions of employees by addressing issues such as working hours, rest periods, paid leave and maternity leave (art 11).

Every employee in the SADC has the right to a healthy and safe working environment. The basic work environment and occupational health and safety standards must meet the requirements set out in ILO Convention No 155 (art 12).

Member states are also required to create an enabling environment so that industrial and workplace democracy are promoted. It is also stipulated that employees have the right to be involved in a consultation process, and that they have the right to information with regard to restructuring of the workplace and termination of employment resulting from the operational requirements of the employer (art 13).

Member states are required to submit regular progress reports to the Secretariat regarding the implementation of the charter. Unfortunately, the charter does not specify what is meant by 'regular reports', nor does it stipulate what steps can be taken against a member state that fails to adhere to the charter.

42 These conventions are discussed below.

STATUS OF ILO CORE CONVENTIONS IN SADC MEMBER STATES

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. The declaration is an expression of the commitment by governments, as well as employers' and workers' organisations to uphold basic human values — values that are vital to our social and economic lives. The declaration commits member states to respecting and promoting principles and rights in four categories, whether or not they have ratified the relevant conventions. These categories are:

- freedom of association, including the right to collective bargaining;
- the elimination and prohibition of forced or compulsory labour;
- the abolition and prohibition of child labour, and
- the elimination of discrimination in respect of employment and occupation.[43]

The ILO declaration of 1998 makes eight core conventions binding on member states, irrespective of whether these conventions have been ratified or not. There is currently a discussion within the ILO to include the conventions on health and safety and the convention on a living wage in the core labour rights.

Article 5 of the SADC charter requires member states to establish a priority list of ILO conventions and, specifically, to ratify and implement the core conventions of the ILO.

The table below indicates the 15 member states of SADC and the year in which a particular core convention of the ILO was ratified.[44]

43 See www.ilo.org.
44 www.ilo.org.

Table 2: Years in which 15 SADC member states ratified core conventions of the ILO

Member	C29	C87	C98	C100	C105	C111	C138	C182
Angola	2001	1976	1976	1976	1976	1976	2001	2001
Botswana	1997	1997	1997	1997	1997	1997	1997	2000
DRC	2001	1969	1960	2001	1969	2001	2001	2001
Lesotho	1966	1966	1966	2001	1998	1998	2001	2001
Madagascar	1960	1960	1998	1962	2007	1961	2000	2001
Malawi	1999	1965	1999	1999	1965	1965	1999	1999
Mauritius	2005	1969	1969	1969	2002	2002	1990	2000
Mozambique	1996	1996	2003	1977	1977	1977	2003	2003
Namibia	1995	1995	2000	2000	2010	2001	2000	2000
Seychelles	1978	1999	1978	1978	1999	1999	2000	1999
South Africa	1996	1996	1997	1997	2000	1997	2000	2000
Swaziland	1978	1978	1978	1979	1981	1981	2002	2002
Tanzania	2000	1962	1962	1962	2002	2002	1998	2001
Zambia	1996	1996	1964	1965	1972	1979	1976	2001
Zimbabwe	2002	1998	1998	1998	1989	1999	2000	2000

It is argued that the SADC Charter of Fundamental Social Rights and the seven core ILO conventions that have been ratified by all the member states of the SADC could form the basis of a transnational labour relations system in the SADC. The main aims of the SADC charter will not be achieved in so far as it concerns the place of work and employees if these core ILO conventions have no real impact on the shop floor or on the lives of employees.[45]

THE SADC TRIBUNAL

The SADC Tribunal was established in 1992 by art 9 of the SADC Treaty as one of its institutions. In accordance with art 4(4) of the Protocol on the SADC Tribunal, the Summit of Heads of State or Government, which is the supreme policymaking institution of the SADC, appointed the members of the Tribunal during its Summit of Heads of State or Government held in Gaborone, Botswana, on 18 August 2005. The inauguration of the Tribunal (now disbanded) and the swearing-in of its members took place on 18 November 2005 in Windhoek, Namibia.[46]

45 Smit, PA. 2013. *Transnational labour relations: A dream or possibility in SADC.* Paper delivered at the 21st international conference in commemoration of Prof Marco Biagi in Modena, Italy.

46 www.sadc-tribunal.org.

The SADC Tribunal was regulated by the Protocol. Under international law, the Tribunal was viewed as an international court, similar to the ECJ. According to art 16 of the SADC Treaty, its main objective was to ensure that member states adhered to the provisions of the treaty and other subsidiary instruments. The Tribunal's mandate was to ensure that member states did not fall foul of SADC law.[47]

The Tribunal was not a human rights court per se, but had jurisdiction to entertain human rights matters. It was also not a criminal court, and did not have criminal jurisdiction. Any person, natural or juristic, could bring a matter before the Tribunal, alleging a violation of SADC law by a member state. The working languages of the Tribunal were English, French and Portuguese. Decisions of the Tribunal were to be enforced in member states, in accordance with member states' laws and rules of civil procedure for the enforcement of foreign judgments.

The decisions of the Tribunal were final and binding upon the parties, and there was no appeal against its decisions. Should it appear that a party had no intention of complying with the Tribunal's decision, the Tribunal would report the matter to the SADC Summit, which was responsible for the overall policy direction and control of functions of the Community and which is made up of all SADC heads of state or government, effectively making it the policymaking institution of the SADC. The Summit is under a legal duty to take 'appropriate action' against recalcitrant parties.[48]

Zimbabwe became bound by the SADC Treaty and all its institutions when President Mugabe signed it in August 1992 and it was ratified by the Zimbabwean parliament. Numerous matters against the government of Zimbabwe and President Mugabe were brought by individuals before the Tribunal for adjudication; some are outlined below.

In *Campbell v Zimbabwe,* the Tribunal held as follows*:*

- by unanimity, the Tribunal has jurisdiction to entertain the application;
- by unanimity, the applicants have been denied access to the courts in Zimbabwe;
- by a majority of four to one, the applicants have been discriminated against on the ground of race, and
- by unanimity, fair compensation is payable to the applicants for their land unilaterally acquired by the respondent.

The SADC Tribunal held further that Zimbabwe had breached the SADC Treaty.

President Mugabe and the Zimbabwean government have refused to recognise the jurisdiction of the SADC Tribunal. In February 2009, the Deputy Chief Justice of Zimbabwe stated that the SADC Tribunal lacked jurisdiction to hear and determine

47 Anonomous. 2013. The SADC Tribunal in 20 questions. Available at www.sadc-tribunal.org (accessed, downloaded 30 January 2013).

48 The meaning of 'appropriate action' and its impact or effectiveness are not clear.

the *Campbell* case. President Mugabe, during his birthday celebrations, described the SADC Tribunal's decision as 'nonsense' and 'of no consequence' and stated that land distribution would continue, as Zimbabwe's land issues are not subject to the SADC Tribunal.[49]

The SADC Tribunal has been proven to be ineffective in enforcing its judgment against Zimbabwe. *Campbell v Zimbabwe* was adjudicated on the premise of international law and contained elements of human rights. The SADC Tribunal had authority to hear the case, but the case clearly illustrated how difficult it is to enforce judgments made by an international tribunal when a sovereign nation is involved.[50]

After these judgments and rulings against the Zimbabwean government,[51] the Tribunal was de facto suspended at the 2010 SADC Summit. This decision was confirmed by the Council of Ministers of SADC at an extraordinary meeting in Windhoek, on 20 May 2011, where the following was decided:

- the non-reappointment of members of the Tribunal whose term of office expired on 31 August 2010;
- the non-replacement of members of the Tribunal whose term of office will expire on 31 October 2011;
- the dissolution of the Tribunal in its present form, which is expressly barred from hearing any new or pending cases, and
- the establishment of a new Tribunal, with a different jurisdiction and a new membership, after the Ministers of Justice/Attorneys-General have amended the relevant SADC legal instruments, for example the SADC Treaty and the Tribunal Protocol, and submitted a progress report to the Summit in August 2011, followed by a final report in August 2012.[52]

On 17 August 2012, in Maputo, Mozambique, the SADC Summit addressed the issue of the suspended SADC Tribunal. The Summit resolved that a new Tribunal should be negotiated, and that its mandate should be confined to interpretation of the SADC Treaty and protocols relating to disputes between member states.[53] This, in effect, means that individual citizens of member states would be precluded from approaching the SADC Tribunal.

49 Johnson, J. 2011. Enforcing judgments in international law. *JD Supra Law News*.

50 Johnson, J. 2011. Enforcing judgments in international law. *JD Supra Law News*. 21.

51 It was especially the ruling of the Tribunal in *William Campbell v Republic of Zimbabwe* (SADC (T) 03/2009), which stipulated that the respondent, the government of Zimbabwe, is in breach of a former ruling of the Tribunal and in contempt of the Tribunal, that led to the decision of the SADC summit in 2010 to disband the Tribunal.

52 Speech delivered by the former President of the SADC Tribunal, Ariranga Pilay, at a workshop of the Law Society of Namibia held in Windhoek, 22 July 2011.

53 As at 30 January 2013, a new Tribunal had not yet been established, and currently there is no mechanism to enforce and ensure compliance with SADC law, the Charter, or protocols.

The suspension of the SADC Tribunal may have created the impression that the SADC is nothing but a puppet in the hands of some powerful leaders within the SADC, and that some leaders within the SADC community, such as President Mugabe, have the ability to force their will and/or views on other heads of state. The SADC member states have made no effort to put any pressure on the Zimbabwean government to adhere to the judgment by the SADC Tribunal but, instead, opted for the suspension of the Tribunal.

The question can rightly be asked whether the Charter and the SADC Treaty are only paper tigers, and whether they can have any impact at all. Without an independent monitoring mechanism, such as the SADC Tribunal, that can also enforce decisions, treaties, charters, and protocols on member states, the SADC will be nothing more than a very expensive and exclusive tea club for heads of government.

TRANSNATIONAL LABOUR REGULATION IN SADC BASED ON THE EU EXPERIENCE

Having considered the EU 'experiment' with regard to the integration of labour policies at an EU level and described the structures of the SADC, the SADC Charter on Fundamental Social Rights, as well as the unfortunate demise of the SADC Tribunal, it would seem that the SADC should consider implementing the following measures.

Regional treaties

The main aim of transnational labour regulation should be to promote social justice across national borders in a regional context, as the EU or SADC is intended to do. The social and employment dimensions of regional economic treaties, such as those of the EU, have broadened the scope of labour law to now include previously excluded groups in all member states. Based on these dimensions, the EU has followed an open method of co-ordination and social dialogue against the background of fundamental rights. In this regard, Hepple stated the following:

> 'Synchronised co-ordination (not convergence) of social and employment policies, through a social dialogue between the main interests groups, offers an important, even if not wholly adequate, means of overcoming competition for capital among national and regional workforces. Fundamental rights based on a European consensus about the essential values shared by the governments and peoples of the region provide the necessary basic principle for these developments.'[54]

What is currently lacking in this form of European integration is collective labour law. The current EU treaties are a product of the negotiations between governments advancing their own national interests rather than a supra-national ideal. Collective

54 Hepple, B. 2005. *Labour laws and global trade*. Oxford: Hart Publishing. 272.

bargaining across national borders in the EU is very limited or almost non-existent, and there has been no democratic participation in this process by all the social partners. However, these treaties form a framework for reconciling market freedoms with social and labour rights under the rule of law.

Given the demise of the SADC Tribunal, it is also questionable whether SADC 'law', fundamental social and labour rights, SADC protocols, the SADC Charter and the SADC Treaty can be enforced in member states. Given the enormous differences at an economic development level and in the rule of law, levels of social development, free market principles and democracy that exist among the member states of the SADC, it is doubtful whether a system of synchronised co-ordination through social dialogue will be effective within the community. The SADC Charter and the various protocols adopted by SADC member states can provide a framework for social and labour rights at a regional level; however, there seems to be a lack of willingness and political will among certain member states to adhere to these instruments — Zimbabwe and Swaziland being prime examples.

Transnational corporations (TNCs) and international framework agreements (IFAs)

Numerous TNCs and IFAs in the EU embody a culture of corporate social responsibility, and have adopted voluntary codes of conduct and collective agreements as well as best practice principles.[55]

TNCs and IFAs usually provide for better wages, working conditions and social security benefits, as they tend to be concentrated in capital-intensive, highly skilled professions and employ effective managerial and organisational techniques. The problem with the codes of TNCs and IFAs is their ineffective implementation in host countries, coupled with local workers' having almost no means of reporting non-compliance. There is also very often an absence of monitoring to see that a TNC actually follows the code, and that an IFA is implemented. Corporate codes and IFAs are private-sector initiatives that tend to be more selective in their choice of human and labour rights than public regulatory frameworks.

In the SADC context, the codes of TNCs and principles of IFAs can have a spill-over effect in domestic firms. For these codes of TNCs and the IFAs to have any real impact on the creation of regional labour standards, they should specify ILO core standards as a minimum. The national laws of each member state should also place TNCs and the parties to IFAs under a legal obligation to observe their own codes; in addition, regional conventions such as the SADC Treaty, the SADC Protocol and the SADC Charter should also be strengthened and directed at TNCs and IFAs.[56]

55 Hepple, B. 2005. *Labour laws and global trade*. Oxford: Hart Publishing. 272.

56 See Hepple, B. 2005. *Labour laws and global trade*. Oxford: Hart Publishing. Chapter 3 and 272–273.

There should also be an independent monitoring system and an effective national and regional complaints mechanism within the SADC to ensure that TNCs and IFAs comply with their own codes. The now defunct SADC Tribunal could have fulfilled such a role.

Empowering local actors

Local actors in the EU, such as unions, women's social movements, consumers, students and human rights activists, have the necessary skills and knowledge to create awareness of the abuses of labour rights. Their role in the creation of public awareness of human rights, social rights and labour rights in the EU can never be underestimated.

Within the SADC, the strong trade union movement, as well as other human rights activist groups in South Africa, has played a major role in the dismantling of apartheid, and continues to have a major impact on the establishment of social and labour rights in South Africa. The political environment within South Africa is such that local actors can exert a positive influence on the establishment of regional labour standards within the SADC, as stated above. The same can, however, not be said for the local actors in Zimbabwe, Swaziland, Madagascar and the Democratic Republic of the Congo (DRC). These countries are marked by either internal conflict and war or governments that do not recognise trade union rights, and there is no real democracy.

The empowerment of the local actors in all the member states of the SADC can contribute towards the establishment of regional labour standards within the community, if the local actors were able to operate freely in each country without fear of oppression or imprisonment in a free and democratic society.

ILO standards

Another way of creating transnational or regional labour standards is to ensure the application of international labour standards set by the ILO. All the SADC member states have ratified the core conventions of the ILO, but ratification does not mean implementation.

In recent years, the ILO has attempted to revitalise international labour standards by promoting the 1998 Declaration of Fundamental Principles and Rights at Work, revising labour standards to ensure a more integrated and coherent approach through its campaign for 'decent work'. For ILO standards to be effective in the SADC, however, they should not only focus on or be limited to those employees in formal employment, but should also include workers in the informal sector. It is also suggested that the cosmetic distinction between recommendations and conventions be replaced by a few framework conventions that provide principles, including a

code of practice that is directed at very specific groups.[57] The SADC should also follow a rights-based approach to implementing these principles by making compliance and implementation a condition of membership of the SADC. There should also be a complaints-based enforcement mechanism. Persuasion and a soft-law approach for member states to comply with and implement ILO standards within the SADC region will not work unless there is ultimately a sanction that can be invoked.

CONCLUSION AND RECOMMENDATION

The EU is a very different association from the SADC in almost every respect, but there are a number of lessons to be drawn from the EU 'experiment' that the SADC might find useful:

- The EU still recognises the differences between member states, and the EU system accommodates these differences. If a system of regional labour standards is developed for the SADC, it must take cognisance of differences between countries in terms of culture, language, history and their different legal systems.
- The system that has been designed for the EU and that is currently in place is uniquely European and cannot be transferred to the SADC as is. The SADC must therefore not try to replicate the EU system of regional labour standards.
- The proposed system of transnational labour relations for the SADC should be a combination of the following:
    - The SADC Treaty, certain SADC protocols, and the SADC Charter should be adapted, extended and strengthened to make provision for minimum regional labour standards. This treaty on minimum regional labour standards should include, as a bare minimum, requirements of the ILO core standards, the UN Declaration of Human Rights and employees' rights at work.
    - A code of best practices for TNCs and IFAs should be established, providing minimum labour standards for any TNC and IFA that wants to establish a business enterprise in any SADC member state.
    - The local actors in all SADC member states should be empowered through a process of training so as to provide them with the necessary skills, knowledge and expertise to create public awareness of human, social and labour rights. The local actors in each member state can play a significantly positive role in ensuring that governments adhere to the minimum regional labour standards.
    - An independent monitoring system that brings governments, employers, TNCs and IFAs to task for failure to comply with minimum regional standards should be established. The SADC Tribunal should become

57 Hepple, B. 2005. *Labour laws and global trade*. Oxford: Hart Publishing. 274.

operational as soon as possible, and its mandate should be extended so that it can also act as a labour standards watchdog. The new Tribunal should have the power to take appropriate steps against not only employers or TNCs, but also against governments. These powers can include imposing fines on transgressors.

A regional labour standards regime or transnational labour relations system for the SADC is possible, and it can assist in providing certain minimum protections and labour rights for millions of people. It is, however, of the utmost importance that all the roleplayers from all the member states be involved in this process. These must include not only governments and politicians, but also employers' associations, trade unions and other local actors. Rules will be needed at the appropriate levels so that economic principles and justice can go hand in hand, and the standards and the issues at stake can have a transnational or supra-national character. Therefore, the SADC must have its own, unique social policy and, consequently, also its own fully fledged labour relations system.

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