

Review

In search of a framework for social discourse: The case of the state and labour formations in a post-colonial emergent Botswana

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The search for credible and stable democratic systems in post-colonial African countries takes different forms. It would appear however that whatever the modalities may be, the results invariably are not holistically beneficent to the major segments of these societies. Efforts demonstrated appear not only to lead to deferred hopes but also delayed reprioritization of priorities once political liberation has been supposedly attained. The study sets out to explore and attempt to answer the question as to whether the attainment of political dominance and sustainability are a *sine qua non* for development of or a short term goal in itself. Secondly, whether this quest for dominance is strategic or a relic of the historical connectivity wherein the post – colonial regime assumes some of the trappings of the colonial overlord such as legislative authority. Impliedly, this could also suggest a situation wherein once having achieved political independence, a reappraisal is called for during which opposing ideological *modus vivendi et operandi* are jettisoned (Onoma, 2009). Often, one of the major casualties would appear to be labour formations despite their significant contributions during the struggles for political independence. The study suggests that the answers are embedded somewhere.

Key words: Post-colonial, democratic systems, socialization, labour law.

INTRODUCTION

The philosophical premise

The study encompasses an essentially socio-legal inductive examination of a society in transition. It is premised on certain observations and facts and assumptions. The first is that Botswana is a state-centrist society created mostly by legislation, a throw-back from pre-colonial times. Secondly, although Botswana appears to be an economic success story relative to most other

African countries in terms of their growth and development, the realities do not lend credence to these perceptions. Thirdly, the seeming success is the visible pockets of affluence and consumerism of the mainly urban middle class. Fourthly, this veneer of prosperity may be a conscious creation by the state or the result of structural processes within the society. It may thus be a means to self-sustenance by the political state. However, it would appear to have no significant positive impact on

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the lives of the majority of the rural poor.

The structure and scope of the study

The paper is structured as follows; the first section deals with the introduction which covers the type of legal regime that sustained the colonial state and the juristic birth of Botswana. The second section deals with issues regarding the environment of labour law in which social interactions are expected to occur with state as both a social construct and reality alongside its institutional support structures. This is essential as a premise for the contextual analysis of a state in action. The third section deals with the consolidation and institutionalization of the state through various forms of legislation and policy formulation. In the fourth section, which is closely linked with the third, a brief survey of some aspects of the effects of the socialization processes are identified for assessment relative to the state super-structure. The last section attempts to weave together the various strands of the discussion in order to arrive at a conclusion.

Overview

The landscape of post –independence Africa is littered with the scars of internecine battles for popularity and legitimacy¹. In instances where the political machinery of the state assumed institutional dominance, the possibilities for open social partnership and discourse become elusive. This situation may have been exacerbated where and when the state also assumed legislative authority *in tandem* with its politico – social primacy². The law then becomes an instrument of social engineering, societal control and regulation. In the process, social formations such as labour bear the brunt of statist onslaught. It is important then not to see law as what is made or changed in a pristine but as the shape given to social

¹ a) In Tanzania, Nyerere had initially referred to unions as the right hand of the state. By 1964, the Federation of labour had been dissolved— *Ujamaa Freedom and Unity* p 169.

b) Before the declaration of one-party state in 1964 in Ghana, Nkrumah had described unions as the branch of a great tree. When the politicization of unions was resisted, there was serious vilification and persecution.

c) Senghor admonished unionist, who as the best educated ,must “transcend their own group interests”-*Negritude* 1961 p124

d) The latter emergence of the likes of Sekou Toure, Sam Nujoma and later, Chiluba point to the initial collaboration between labour formations and the political leadership and their subsequent neutralization once political power was attained.

² Anstey, Mark ‘*Labour Disputes*’ According to Anstey, South Africa’s trade unions escalated strike actions and hang tough on participation with the apartheid government until such time that meaningful political negotiations had been achieved. Once having achieved this objective, the labour alliance, COSATU then sought to carve its identity to indicate its own power base. Reportedly, President Mbeki suggested the SACP should register as an independent political party while COSATU wanted all its leaders demobilized back into its fold so that it can openly criticize the government. <http://wwics.si.edu/subsites/ccpdc/pubs/zart/ch13.htm> 10/10/2005

forces locked in a struggle which is thus the content which the law shapes³. This is why inevitably, the law expresses the will of the state.⁴ It is thus not surprising that in his first address to Parliament in 1968, the first President assured the house that forthcoming Bills on Labour matters would “provide for the control and regulation of trade unions, lay down procedures for settling labour disputes and the regulation of wages”

The state, in its quest for dominance, may thus create conditions in which the preoccupation with stability of the *status quo* and sustainability become confused with a subjective definition of a desired framework and environment for growth and development. To the dispassionate observer, this may signify an unconscious trajectory towards an over-administered society by a regulatory state while the state as the focal point of authority considers itself as the custodian of public welfare.

This paper observes Botswana as it evolves from its colonial regulatory situation into a post- colonial state that might yet be duplicating those tendencies that characterized the colonial state with regard to law, order and compliance or conformity. It identifies certain institutional mechanisms that have come to be identified with the drive towards statism or state-centrism. The paper hopes that the motive forces behind the utilization of juridification as a tool of governance would not see its progressive and currently localised efforts transformed into generalizations regarding social stratification and structured differentiation that might become an African signature. The paper notes that these corollaries, in and of themselves are antithetical to democratic governance, socio-economic growth and development.

The legal origins of the Botswana State

Botswana is a landlocked country that shares borders with Zimbabwe, South Africa, Zambia and Namibia. In the North – East, the Limpopo river descends into a confluence with the Shashe River which effectively bifurcates the country. It boasts of the mighty Okavango delta, the biggest wet land in the world. Botswana is also home to the Kalahari desert, diamonds and a rich wild life.

Before 1885, the traditional authorities began to send out feelers as to the possibility of becoming a British Protectorate. According to Tlou the subsequent functional web of collaboration between a reluctant colonial master and an eager protectorate was conceived by the traditional elite who would come to form the traditional component of the latter modern political state. The original plan of the Chiefs was to enter into an alliance that could protect them from the marauding bands of Boer farmers who were enslaving whole families for farm labour. Additionally, they thought such an alliance could

³ Shivji, *Law and The Working Class In Tanzania* 1986 p242

⁴ *Ibid* p 3

check the greed of Cecil Rhodes and the belligerence of Von Caprivi in German South West Africa (Tlou and Campbell, 1984). Ultimately, the tribal sovereignties were subjugated and neutralized through legislation and coercion.

With the Foreign Jurisdiction Act (1890), a formal rudimentary administration was established from Mafikeng (North West Province of South Africa). Under the Bechuanaland Protectorate Order in Council (1891), the High Commissioner (HC) of the Cape Colony was given representative jurisdiction over the territory. Thus began the legal evolution that would shape the political, ideological and class differentiations in Botswana.

By 1878, the Governor of the Cape Colony, who had then become the High Commissioner (HC), had assumed responsibility first for Basutoland, then Bechuanaland and later Swaziland in 1935. This responsibility also included the settling and adjustment of the affairs of territories in Southern Africa that were adjacent or contiguous to the eastern and north-eastern frontiers of the colony (Aguda, 1973).

Legislation for the HCTs was thus externally done and mainly through either the adaptation or adoption *in toto* of Cape Colony laws. Such laws were trans-located as Proclamations which in most cases were not even gazetted as required to validate them even if most were spatio-temporarily irrelevant. The physical proximity resulted in government by propinquity and very close identification of the HCTs with all facets of South African life, initially by default but later by design.

In 1891, Sir Henry Brougham Lock (HC) promulgated the General Administration Proclamation section 2 of which provided for the powers of the HC while section 4 empowered him to legislate by proclamation⁵. The effects that followed signified the creation of the political state by legislation. The judicial powers of a magistrate were vested in administration officers known as Justices of the Peace (JP). Appeals could only be heard by the designated High Court and then the Privy Council of England as the highest appellate court.

All powers of the Supreme Court of South Africa were subsequently vested in the said High Court of the Protectorate. The offices of Resident Commissioner, District Officer and Assistants were created in addition to the positions of Assessors. The jurisdiction of the senior courts such as there were excluded the trying of any matters related to native affairs and also civil action involving a certain amount. In effect, Africans could fend for themselves as long as they were docile and law-abiding.

On the other hand, the Subordinate Courts Proclamation Order⁶ conferred extensive civil and criminal jurisdiction on the magistrates courts that resulted in rulings that—had little in common with actual legality,

justice and equity. Though the Customary Courts Proclamation⁷ provided for appeals against Native Authority decisions, the customary law was essentially fragmented, non-codified, and barely recognized by the colonial authorities as serious basis for judicial decisions. Thus Africans were left to their own devices where rights and duties were concerned.

In essence, the General Law Proclamation⁸ enabled the realization formally and legally of the socio-political calculations of both the British colonial administration and the burgeoning South African capitalist interests. This proclamation incorporated and accepted as legal all received laws in force in Bechuanaland on 22 December 1909. This was in addition to the provisions of any Order in Council or any Proclamations or regulations in force as the laws of the Cape Colony on 10 June 1891. Such laws were, *mutatis mutandis*, to apply in the Protectorate. These legislative developments resulted in the following outcomes.

On September 14 1959, an Order in Council⁹ conferred sole administrative powers on the Resident Commissioner (RC) who was appointed by the HC in Pretoria. In 1960, the Bechuanaland Protectorate (Constitution) Order in Council established the Legislative and Executive Councils. On January 20 1965, an Order in Council established the office of Prime Minister and Cabinet portfolios as a prelude to the promulgation of the Constitution of 1965. On 30 September 1966, after eight decades, the Bechuanaland Protectorate finally became the Republic of Botswana (Aguda, 1973).

Understanding the emerging labour law and relations environment

Labour relation and its inherent dynamics are best appreciated within the frame work of labour law both conceptually and practically. Firstly, a defining characteristic of labour law is its “attention to conflicts and cooperation between, among and within different economic and social interests” (Arthurs, 1996). Secondly, modern labour law is an admixture of terms, principles, rules of common law and statute such as apply to labour dispute resolution and by extension, the protection of employees from the dominant economic power of the employer.

Though legal rules may not directly re-define the employment relationship, they rationally change the legal content and effect of the relationship. In addition, the context of work determines the nature of the work relations that legal rules regulate. Legal rules within labour law could thus oversee but not necessarily permeate the realities of the workplace. Such realities ought to be determined by a perceived need to allow market forces to

⁵ Ibid

⁶ 4 (No. 51 of 1938)

⁷ No. 1 of 1919/No. 75 of 1934

⁸ General Law Proclamation 1909 Vide Aguda supra p55

⁹ S.1 No 1620

determine the nature of the relationship between employer and employee rather than state intervention.

Thirdly, labour law may also be defined more in terms of its localized, domestic nature rather than traditionally accepted commonalities such as “individual” and “collective” labour law. This then underscores the need to closely examine local contextual practices and rules as a reflection of local dynamics or comparatively as inter-territorial differentiation. Conceptually, functionally and also therefore contextually, labour dispute resolution is part of the broad field of labour law.

Trends in labour law conceptualization and implications for the evolving state

Within the past two or more decades, there has been growing a revisionist school of thought that suggests the dysfunctional qualities of traditional labour law as defined. The group, including the likes of Hepple (1995), Ewing (1988), Mitchell (1995a), and Creighton and Andrew (2000) advocate for a labour law paradigm that responds more empathically to the realities of the workplace. Teubner (1998) and Watson (1974) postulate that opening up domestic juristic regimes to external influences through transplantation could rejuvenate the traditional labour law framework. Orucu (2000) among others argues that comparativism or internationalization of (labour) law, whether similar or dissimilar, is now due in view of globalization. The ILO considers its principles as the incontrovertible normative tenets for international labour law (Eddy 1997; Sappia, 2000).¹⁰

A major failure in the initial conceptualization of labour law is considered to be, like in the case of ‘society’, the inability to formulate a comprehensive framework, within a socio-legal context, of a construct rather than superimpose structural constraints. In other words, labour law should begin with the concept of labour and its division; the concept and the reality located within a given society. In this regard, Durkheim saw division of labour as the result of increases in social volume and density with more people getting involved in the race for survival.

There would thus appear to be a paradigmatic shift in how labour law has hitherto been conceptualized. Apart from a re-visit of the terrain of labour, there is the suggestion that a redefinition must also be premised on a clearer understanding of ‘society’. This is because if the focus of law is society, then the relevance of socio-legal studies in any society must imply defining and regulating relations at work within that social set-up (D’Souza, 2012).

With regard to the philosophical premise of the division of labour inherent in labour law therefore, the references to Durkheim, Marx and Engels become timeless truths as

their postulations, though time-worn, have become facts attested to by the daily unfolding dynamics of the world of work. Marx and Engels had stated as follows:

‘The distribution and indeed the unequal distribution both quantitative and qualitative, of labour and its product, hence property, the nucleus, that first form of which lies in the family where wife and children are the slaves of the husband. This latent slavery in the family, though still very crude, is the first form of property, but even at this stage, it corresponds perfectly to the modern definition of economists, who call it the power of disposing of the labour power of others. Division of labour and private property are, after all identical expressions, in one, the same thing is affirmed, with reference to the activity as is affirmed in the other with reference to the product of the activity’¹¹

‘Society’ then is first a theoretical construct rather than an empirical fact. Without the concept, liberal philosophy tends to produce empirical expositions which then make theoretical assumptions about society, arrogating structures, functions and relational phenomena. As a result, society becomes subsumed in structural constraints but not as the locale of labour. According to D’Souza an understanding of society at a general level would lead to the comprehension of the roots of society which are then ontologically aware, structurally astute and empirically sensitive and to which labour law can then become applicable.

Labour law is also considered as flawed due to certain observable shortcomings. First, there is the external dimension that labour law impedes efficiency, flexibility and development. Further, it reduces employment and is partial to the ‘labour aristocracy’ while leaving the informal sector and other categories of workers unprotected from predatory labour contractors and unscrupulous employers¹². Internally, traditional labour law has enabled labour law practitioners to question the coherence of the discipline, its relevance to new empirical realities in the world of work and its normative resilience in the current world order.

It is also observed that there is a decline in and transformation of the founding paradigms of labour law particularly in the developed countries. From a socio-legal perspective, this shift is principally due to the impact of trans-nationalization on productive processes and the attendant employment relations which dictate a rethinking about labour law’s purpose and context (Moreau, 2013). As a result, to comprehend labour law better as a functional tool, it is postulated that legal institutions can be characterized as being distinct legal systems that

¹⁰ Committee On Freedom Of Association Report 326, 2001 and ILO 1998 Declaration Of Fundamental Principles and Rights.

¹¹ Marx and Engels, *The German Ideology (1845-46)* trans. Lough in Marx and End Engels *Collected Works* Vol. 5 (NY) International Publishers 1976 at 46 in Colvin, Eric ‘*The Division Of Labour*’ Osgood Hall Law Journal York University Vol.17 No.3 1979.

¹² Guy, Davidov, Langville, Brian, *The Idea Of Labour Law* OUP 2011

regulate certain forms of social behaviour such as within the labour relations environment.

In Botswana, the operative framework of labour law does not exist in absolute terms. Constitutional provisions underpin fundamental rights and obligations. Codes of Practice seek to humanize and fill the gaps arising from statutory provisions. Legislation explicitly regulates the nature of the employment contract, basic floor of rights, registration and recognition of unions and collective agreements, dispute resolution mechanisms and administrative oversight by the state. However, there is, currently, active state intervention in labour relations as indicated by the practicalities of the regulatory framework above.

From the foregoing, the prospects for effective industrial relations, peace and stability under current labour law, rules and practices need careful examination. While the International Labour Organisation (ILO) is assisting in the revision of labour legislation and practice in Botswana as per current international normative standards. These on-going interventions may form a critical part of the future development of labour law and the subsequent domestication of international minimum labour standards. How long these international conventions can act as a buffer against current international trends remains to be tested. Most importantly, how willing the political state is to operate on a common deliberative platform with the other social actors in finding solutions to developmental problems rather than assuming a prescriptive dominance will ultimately determine the timbre of intra-societal discourse.

The foregoing notwithstanding, both labour peace and stability are now subject to the intersection between the old school of labour law and emerging developments and how that affects labour disputes. This is because, circumscribed as the institutionalized individualization of contract and the employer's powers currently are, they still constitute some of the potent causes of labour disputes. This being so, the following sub-section lays the basis for a closer examination of the contentious and vexatious problem of persistent labour agitation and resultant disputes.

Labour disputes in perspective

Work relations are partially reflective of social dynamics. As such, in examining issues relating to disputes within the field of labour law, an exploration of a combination of factors becomes necessary. These include the statutory framework, principles of contract, property relations, obligations and the political trajectory of the state (Mitchell, 1995b). This assumption is explained below.

Worker aspirations have, in the past, been defined rightly or not in terms of the polarization of relations between capital and labour. This is what Kahn-Freund referred to as "relations of power" (Khan-Freund, 1972).

Modern trade unions were, at that time, seen as the vibrant successors to the trade guilds and early combinations. Their roles included winning concessions and making gains from the employer but in a regulated manner.

Labour legislation has since then moved from the notion of conferring rights on workers to one of regulating the business environment through balancing management autonomy and worker protection (Davis, 1995). The regulatory mechanism leaves a scope for common law principles and judicial decisions, none of which is adequate. Regulation can therefore be described as state intervention in private spheres of activity to realize public purposes. As a result, there is the public perception that the state acts in the public interest when it establishes specific legal framework for actualizing specific regulatory objectives such as those enacted within labour legislation regimes.

A management state *vis-vis* the employee is where forms of permitted decentralization enable staff to organize the exercise of labour power by workers within laid down boundaries in capacities similar to supervision but not deregulation. In effect, as shall be demonstrated, legislative intervention, common law principles and judicial rulings have neither assuaged the anxieties nor lessened the aspirations of workers. This is because workplace arrangements cannot always be justified as grounded in consent (Grint, 1994). As such, insecurity is often engendered by the individualization of the contract of employment and the unilateral rights of termination earlier referred to.

This study argues that the function of law is to acknowledge the need to strike a balance between determination from outside through regulatory controls and the level of intervention required to open up a wider range of choice for the employee through forms of resistance to perceived bad practices by employers. As such, ascertaining the objectives of legislation demands an assessment of the ethos of the state and the political construction of the extant political economy.

From the foregoing, the regulation of labour disputes can be assumed as an indicator of the potential to destabilize the industrial environment. Taken to its logical conclusion, labour disputes have the capacity to destabilize the state and social structures. Procedurally and substantively, the role of labour law therefore is not to deal with labour disputes perfunctorily. Rather, it should also generate mediatory policies aimed at ensuring that socio-economic activity is not held hostage by mass industrial action.

Therefore, in the context of an emergent state, it could be productive to accept that, deductively, de-regulation as in neo-liberalism could be the removal of formal controls and allowing common law controls to operate, thus freeing labour law as captive of social forces and active state intervention within the labour market. This study intends to suggest that the inherent, even if not

necessarily desirable place of disputes should be recognized. This could provide a better attitude and approach towards dispute resolution. Legislation and policy may impose order and instrumental compliance but they do not necessarily generate legitimacy.

The evolution and transformation of the state: Conceptualization and institutionalization process

The institutionalization process

The institutionalisation process becomes key to the general paradigmatic conceptualisation of labour law. Crouch says an institution is constituted as;

'patterns of human action and relationships that persist and reproduce themselves over time, independently of the identity of the biological individuals performing within them. Sociologists have long understood such a concept, but much of this earlier history has been ignored by recent political scientists and others who have come autonomously to the idea of the institution n as they sought to convey the idea of behaviour being shaped and routinized, fitting into patterns, which are not necessarily those that would be freely chosen by a rational actor needing to decide what to do.'

However, all institutions do undergo change. Institutional change is defined as change in an entire class or organizations. Institutional change, at its deepest level, refers to changes in the ideas that govern institutions and as these ideas change, rules and practices shift as well. Institutional change on the shop floor may suggest that this clear-cut division is replaced by a fragmented landscape of labour relations. In terms of institutional change, the analysis reveals a specific form of incremental transformative change, namely a shift in the meaning of formally stable legal-political institutions.

Even in the allegedly stable core areas, the institutions of labour relations are gradually transformed from market-constituting institutions to market-dependent variables. Vertical disintegration plays an important role in this process of institutional commodification. It not only moves the core-periphery boundary; it is also deployed to subjugate collective bargaining, workplace co-determination and the utilization of labour law to firm-level economic calculations.

Institutions do not only disintegrate, they also become passive and ineffective with time or as a result of concerted onslaught. Institutional atrophy with regard to practical labour law results from the effects of flexibility in the labour law regulatory framework. An example is the ineffectiveness of institutionalized labour standards. Labour market flexibility which is essentially an approach to public policy that places almost exclusive reliance on the competitive and simulated market mechanisms, has,

in its own way, reconfigured the dynamics of labour law and relations. In effect, legal concept such as labour market, as conceptualized and formulated, creates its own institutions such as the formal contract of service between employer and employee.

The Evolution of the State

Institutionalisation of the state in this context implies the creation of support structures with defined roles aimed at shoring up the centrality of the state through strategic policy and legislation that would ensure the sustenance of the political leadership and its coalition. This in turn provides a reward avenue for those who not only make it happen but also ensure that it remains intact. Within this tapestry is interwoven the clannish rule-making of the bureaucratic adjunct of administrators whose primary motive is to enhance their proximity to the largesse of the state through its functional reliance on them.

In the context of Botswana, one may define the state as the political leadership comprising the President, the Speaker, the deputy, members of parliament, ministers, assistant ministers, councillors, and members of the *ntlo ya dikgosi* (House of Chiefs). The House has recently been increased to 35 members who are all salaried public officers as per the Chieftainship Act and subject to the political authority of the Minister of Local Government. In a sense, this is the continuation of the colonial strategy of dependence. Included in this group would be the remote but active members of the business community such as the owners of ranches, farms, tourist, hotel, hospitality and other service enterprises. Added to these would be the coterie of co-opted academics, those with access to political power and patronage and then the higher echelons of the public bureaucracy.

Statism as a process-oriented concept examines the importance of the state, its institutional mechanisms, actions and failures. The state is seen as the prime mover behind socio-economic events and how its apparatus and modus operandi affect its relations with other social groups such as paid workers, destitutes and the unemployed youth. In effect, the question is whether, for example, in Botswana, the quest for the centrality of the state has overshadowed the need for measures designed for the social good rather than that of the state. Statism also concerns the structures of dominance, instruments of legal and administrative rule making, implementation and enforcement. The concept helps to analyse the mediatory, interventionist role of the state such as in labour matters. Such intervention must be understood as an admixture of self-preservation and maintenance of order and stability under the status quo. Recently, a new Ministry of Justice, Defence and Security was created to oversee the security needs of Botswana. it is one of the recent additions to the growing state bureaucratic machinery.

The political philosophy of the state becomes equally important as a signal of the accommodation of pluralistic aspirations. For example, assuming the form of democracy is elitist, then in the Botswana environment, the forms of articulation of power, mainly juridical and judicial become crucial. This is because they help in shaping jurisprudential and civic libertarian cultures. They also impact on how such a socio-political system internalizes and actualizes functional collaboration among local formations including trade unions.

By way of illustration, membership of tripartite bodies is admittedly more symbolic than real meaningful participation. For example, the National Employment, Manpower and Incomes Council (NEMIC) is one of the most powerful policy structures. However, it is dominated by 7 Permanent Secretaries, the Governor of the Bank of Botswana, the Vice Chancellor of the University, 3 members from private industry and only 4 members of the trade unions and public sector workers. This Council is further serviced by the Employment Policy Unit. The council was charged with deliberations and decisions on all matters which pertain to employment, incomes, manpower and training. This role has not changed.

Other control-oriented bodies included the Economic Committee of Cabinet (ECC), the National Industry Training and Technical Education Council (NITTEC) and the Regulations Review Committee in the office of the President. At the moment, there are also the High Level Consultative Council (HLCC), the Government Policy and Implementation Co-ordination Unit (GPICU) and the Business Economic Advisory Council (BEAC) among others.

Given the lessons of history, the mentality of the Botswana state constitutes a pivotal determinant of the degree of accessibility to the modes of internal collective change that might obtain in the country. A key indicator here is the fact that though the state functions within the context of liberal democracy, in reality it functions as a de facto one-party state with extreme fusion of powers between the Executive and the Legislature. This is the culmination both of the fragmented opposition over the years and an effective political strategy of accommodation and reward. Both the political and juridical structures are thus used to entrench that state paraphernalia. For example, it was observed as far back as 1995 that public administration in Botswana has been characterised by "highly xenophobic, control-oriented and regulatory attitudes"¹³.

The politics of regulation and juridification

The state arrogates to itself certain roles including that of creating structures for bargaining agreements, regulating

working conditions, which has had a huge impact on the behaviour of managers, trade unions and employees. The objective of the state in employment relations in broad terms, is often reasoned to be that of intervening in employment relations to achieve economic and social goals for the nation as a whole. One of the prime tasks of government is to manage the economy so that it is prosperous, and this means it has to try to achieve four broad economic policy objectives, each one of which can easily conflict with the others.

These are to maintain high levels of employment, to ensure price stability, to maintain a balance of payment surplus, to protect the exchange rate. While the actual government of the day is, by definition, a transient body, the above objectives are operationalized as per the ideological orientations of the state and the most appropriate ways of achieving these aims within a framework of economic and social objectives and the pragmatics of its political ideology.

The functional state appropriates to itself other functions. It proceeds to typically hold and exercise sovereign legislative power as well as a virtual monopoly of the means of violence. Thus it controls both the power of the sword as well as the power of the purse, the power to tax as well as the power to spend. The characteristic feature of the state, in theory and in practice, is its claim to legislative sovereignty. The state distinguishes itself from other systems of rule by its claim to be above the law in the very specific sense of being the supreme or only source of law itself and not just of its administration and enforcement a premise of *quod principi placet, legis habet vigorem* (Dundon and Rollinson, 2011) that ought to be subjected to democratic evaluation.

This is a far more radical 'principle' than the traditional rule that the king or ruler is not bound by his own commands, an assumption of the notion of *princeps legibus solutus* (Dun, 1995). The latter maxim means that the king's laws cannot be invoked against the king himself, and perhaps also that he enjoys immunity with respect to the sanctions for transgressing the law. It does not say anything about his having a lawful right to bind anyone by his mere commands, when these are not founded on justice but designed to maintain or restore adherence to law (Dundon and Rollinson, 2011).

Juridification presupposes that the essence of the state within society is to primarily impose a form of structured regulation whose ultimate objective is to sustain the political status quo. The state sets the limits on private conduct within the ethical parameters of the political and ideological choices it makes. Formal institutional structures act as agents for the forms and nature of various social formations.

Regime theory analysts premise regulations as political acts at macro level and as the value level basis for the features of state organization of public life. The factors responsible include the degree of formal concentration of decision-making authority in specific interests such as in

¹³ Quill, Herman- Former Governor. Bank Of Botswana, BOCCIM Seminar, Business gazette, 11 Oct. 1995p.10.

a state-centrist system or the degree of governmental control as compared to private organization in specific spheres like the labour market¹⁴.

The state operates as an employer in its own right and as an incomes regulator and economic manager, ensures the de-commodification and consequent valorisation of labour. The state also acts as provider and protector of social citizenship rights¹⁵. However, it is in the areas of corporatism, rule-making and legislation or juridification that the full impact of the state is felt.

Juridification is a term increasingly occurring in the widest range of contexts. Its use is, however, probably nowhere more justified than where the structure and the objectives of labour regulations are being discussed. It could be said that, labour law constitutes the classic paradigm for juridification. In terms of both the background and the evolution of the juridification process, the context of the origin and the development of labour law provides a practically suitable environment which can be best appreciated¹⁶. This captures the phenomenon of path dependency where the past exerts sway over the present indirectly¹⁷.

This is because, having created the structures within which exchanges are enacted, the state then proceeds to create rules that condition behaviour, regulate and stabilise the environment of transactions. Usually, where the state institution is unable to control and regulate those without any affiliations who tend to be personal and individualistic, a third party with coercive authority is required to oversee, supervise and regulate transactional conduct, norms and practices. The performance of such tasks may be undertaken by the coercive apparatus of the state such as the police, paramilitary and military formations in the given society.

The role of juridification in matters of national security help to explain the first the time- tested reliance on the coercive apparatus of the state for is revisited for the entrenchment of the state .Note is taken of the fact that at Botswana's independence, the first indication of a regulatory state was the Public Order Act. This Act was intended to regulate and control public meetings and processions. It also empowered the declaration of 'controlled areas' by the Minister and gave power to certain categories of police officers to restrict the mode of public processions. Permits for public gatherings by civic groups such as workers were thus introduced.

In 1966, the Public Safety Act of 1907 was re-enacted. Its purpose was to ensure the maintenance of peace and good order within Botswana. It gave the President authority to cause to be deported anyone considered a

danger to the peace. The movement of such people may also be curtailed. The Emergency Powers Act enabled the President to declare a state of Emergency whose effect was to legalise the detention, search, arrest and deportation of non-citizens. A state of emergency would also operate to amend or suspend any existing law and shall not be deemed as inconsistent with any enactments in operation. It did make provision for compensation any way.

The National Security Act of 1986 was conceived as an Act to make provision for National Security and other activities prejudicial to the interests of the nation . In essence, the purpose of the Act was to secure the state while securing the nation because, much as allusions are made to national security, the instruments of such are embedded within the form and structure of the state. In reality, there is little, if any, distinction between the nation, the political state and its power apparatuses.

In furtherance of the security of the state, the Intelligence and Security Bill was enacted into law and gazetted in 2007 The Act seeks to establish a Directorate of Intelligence and Security, a Central Intelligence Committee, an Intelligence and Security Council and a Central Intelligence Community. It defines 'threat to national security' to include inter alia, any activity directed at undermining, or directed at or intended to bring about the destruction or overthrow of, the constitutionally established system of the Government of Botswana by unlawful means.

Furthermore, the Act also covers any threat or act of violence or unlawful harm that is directed at or intended to achieve, bring about or promote any constitutional, political change. While it also alludes to disruptive social protest, it refers more directly to the safety of persons in political authority. Contextually, the maintenance of the status quo would appear to be the paramount aim. Secondly, the objective assessment of these events gives way to an institutionally subjective determination that may be security rather than nation oriented.

These regulatory mechanisms are not being assessed in terms of abuse or effect. Rather, the point is that by providing the state with such authority, power and discretion, preventive and pre-emptive legislation has, as of old, consolidated the dominance of the state. The constitution itself defers to the authority of the state with regard to fundamental rights and freedoms. To implements these laws, the state would then have the justification to create more bureaucratic and coercive structures. In effect, the state can decide when to invoke any or all of these laws if its hegemony is perceived as under threat.

The state becomes increasingly active in its interventionist role in labour relations, since the role of government is now limited only as a mediator based on the request of disputing parties. It also promotes the individualisation of labour relations by granting access for any individual workers to bring any cases they may have

¹⁴ Menocal., Rocha, Aina "And If There were No State?;Critical reflections on Bates, Polanyi and Evans on The Role Of The State In Promoting Development" Third World Quarterly Vol. 25 No.4 pp.765-777,2004

¹⁵ Francis ,J *Politics of Regulation* op. cit.

¹⁶ Spiros, Semitis ""The Juridification of Labour relations"" Winter 1986 CLL& Policy Journal 7 Comp. Lab. 93

¹⁷ Dundon et al op.cit

to the court without having to be represented by a trade union. This situation may undermine the unions' ability to defend the collective interest of workers just as they were starting to develop their institutional capacity.

It would appear that Botswana has already acquired a keen appreciation of the instrumentality of juridification. Such a situation has vested the state with unchallenged authority and clothed its bureaucratic adjunct with unfettered administrative discretionary authority. The most graphic illustration of the state's relentless use of juridification and its armada of coercive force is captured in the evolution of labour legislation and relations in South Africa.

On one hand, it succeeded in the fragmentation, emasculation and subsequent strangulation of labour formations. On the other, it nurtured a subculture of instrumental and strategic compliance as a veneer for latent anger and rebellion. Tandem with the regulatory framework of labour movements by the state signals the collapse of functional pluralism as the successor of the voluntarism of the past. Factually and legally, the Botswana state has fashioned the route to union recognition, imposes and defines pre-conditions for strikes and essential services. Through labour legislation and the way it manages the public sector, the state has sought to vindicate its preferred modes of labour relations. Non-compliance may invite a withdrawal by the state or a complicit employer from institutions such as collective bargaining structures constructed or guaranteed by the state.

It is understood therefore that in comparative terms, the active state such as in Botswana, does control unique capacities to generate space for its agents within the public bureaucracy to determine new shapes and forms for labour relations, construct and embed them within the fabric of the wider political system. Furthermore, the modern state has been engaged in 'regulatory', 'constitutive' and 'facilitative' roles that re-emphasise its centrality, even as some analysts claim, the state may be increasingly irrelevant in the face of globalisation. In reality however, the state is also partially a captive of the coalition of business and other social actors capable of garnering political power.

The essence of these structural creations is not inadvisable per se. The question however is the manpower resources so deployed, their emoluments and the pockets of bureaucratic power being spawned in the process. In addition to the sub-culture of the public bureaucracy, these structures are not open to communal access. It is natural therefore to say that they go to buttress the political and economic controls already at the disposal of the state.

Within such an environment of state-centrist dominance, it becomes necessary to locate critical organs such as the office of the Commissioner of Labour and the Industrial Court within the legal framework. One can then examine how they impact on constitutional validity of laws in relation to basic rights such as freedom

of expression and the right to associate and collectively organise. Civic groups or social partners such as trade unions would, normally, then be observable as being in a better position to function both as pressure and interest groups advocating their contribution to the social and national agenda.

In Botswana, there is constitutionally guaranteed freedom of association such as relates to the formation and joining of trade unions. However, the same constitution allows legislation to exclude some sections of the society from full enjoyment of such rights.¹⁸ For example, the Trade Unions and Employers Organisations Act excludes the following from the definition of; 'employee' for the purposes of formation and joining of trade unions. These are the Botswana Defence Force, the Botswana Police Service, the Local (Tribal Administration) Police and the Prisons Service.¹⁹ In addition, members of management as defined are not allowed to be represented by any negotiating body apart from their own. A cursory examination of this group as defined includes supervisory staff literally of all levels within an enterprise.²⁰

Employers, in this instance represented by the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM), being affiliates of the state, could, in response, welcome such developments. They, in their turn would advocate for new forms of regulation or mechanisms ensuring that their prerogatives are not unduly diluted. The state then mediates between employers and employees using legislation and structures thus created. This mediation could then assume a conscious, selective accommodation of exogenous influences such as international labour standards. However, for these standards to take root successfully certain social preconditions must exist that are allowed or tolerated by the state.

The institutional coalition of the state

The clearest convergence of interests among the elites is private capital accumulation manifested in cattle farming. This choice is the result of both the nature of the terrain and a deliberate colonial policy of nurturing a specific form of capital accumulation based on a distinct "class of cattle accumulators" including the "new intelligentsia".²¹ In his analysis, Tsie traced the functional collaboration of the elites and Civil Servants in the mutual need to control the resources related to cattle accumulation and the erection of stable structures that would ensure access to the labour power of the dominated segments of the

¹⁸ s 13 (2) Constitution of Botswana

¹⁹ s 2 (1) (a) Trade Unions and Employers Organizations Act [Cap 48:01]

²⁰ Ibid s 48 (2) (3)

²¹ Tsie B, *The Political Context of Botswana's Economic Performance*

Department of Political and Administrative Studies, University of Botswana p

society.²²

Take as an example, the collaborative, symbiotic role of the institution of the traditional elite. This could be because of superficial historical generalisations about socio-economic processes which distort the historical linkages between groups in hierarchically structured societies where chiefly authority is cultural rather than political. Pragmatically, they have been able to forge mutually beneficial collaboration with the capitalist, bureaucratised political state. This in part derives from the commonality of claims within the political economy. In sum, there is an invisible but direct, definitive, functional relationship between the traditional elite and the state which facilitates their co-optation through the instrumentality of legislation.

Within this process therefore, the political leadership have been able to indulge in the creation of a generally powerful bureaucracy capable of formulating and effecting development policy. As Tsie acknowledged, the net result was and has always been a state engineered and centrally dominated administrative process that ascertains firm control of the allocation of developmental resources,²³ and normalizes a stable, cohesive stratification of society. The consequent trade-offs such as overlapping directorships, subsidies and even accommodation of bureaucratic excesses as earlier mentioned have operated to confirm the indispensability of the bureaucracy in tandem with the proliferation of its organic interests. Given the current climate of maladministration, the public bureaucracy might yet justify observations in the past that it suffers from 'gross mismanagement and dishonesty'.

The state's non-neutrality is often contrived or an unintended outcome, but not always so. Officials constantly formulate new administrative policies and introduce new regulations with proud declarations of their intention to enforce particular 'moral choices', to treat one thing as a 'merit good' and another as an evil²⁴. This phenomenon of delegated legislation carries its own normative implications particularly in an over-regulated and administered labour relations environment²⁵.

These bureaucrats '*also justify intrusive policies with blatantly paternalistic arguments—remember their promise, or was it threat, to take care of us "from the cradle to the grave"—, with self-congratulatory references to an unspecified 'responsibility of the government'*²⁶. *There is no more direct negation of the role of private morality than the claim that one discharges one's own responsibility by depriving others of the opportunity to*

*exercise theirs. As far as protection against onerous interference is concerned, the presumption of innocence—which is the linchpin of the rule of law—counts for very little. One delinquent person or business entity is often enough to let loose the regulatory juggernaut on everybody in the same group or category. In short, the question, whether the welfare state is neutral to personal morality, is largely rhetorical and academic.*²⁷

Path-dependency and the regressive state

Path dependence could be said to feature as an important player in the corporatist development of ownership and governance structures in these post-colonial societies. It helps to explain the connectivity of the present to the past. The sources of path dependence can also explain why though powerful global forces appear to press toward convergence in an increasingly competitive and global marketplace, the advanced economies still replicate important divergent ways in their patterns of corporate ownership and governance. The identified path dependence indicates then that some important differences do persist. Thus, though countries of study may exhibit similar historical origins there may be structured divergences along their developmental path (Bebchuck et al., 1999).

There are two main sources of path dependence. One uses the state ideologically in terms of a state-centrist world view, manipulated by key socio-political and legal actors in uncertain conditions. To do this, change choices are rationalised by removing the problem of alternatives and selection which plurality of opinion regarding choice would have offered. Ideologies driven by self-preservation become institutionalised. The result is the consolidation of the rules that govern a society, the ties that define social relationships and shape political, legal, social and economic exchanges. In simple terms, identification with the ruling political party and its paraphernalia of power becomes a *sine qua non* within a given institutionalized framework²⁸. Structures are then created, both formal and legal, to assist in defining individual choices, thereby reducing uncertainty and minimising the cost of consensual transactions.

The structures so created form the apparatus, legal, political or otherwise through which groups are expected to articulate and pursue their aims. Working within the state institution, these structures, hitherto referred to as the public bureaucracy, through informed feedback, are able to assist the institution of state along a certain trajectory. In other words, the political machinery of state, through its bureaucratic organs is able to oversee the attainment of a given trajectory of political, industrial,

²² Ibid p4

²³ Ibid pages 3,16

²⁴ Von Wangenheim, Georg "Production of Legal Rules by Agencies and Bureaucracies" 9300 University of Hamburg (publisher JEL Classification: D73,H11,K23.29 (date ,publisher, unconfirmed)

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

social or economic objective or change in Botswana²⁹.

There is no reference to war or external attacks on the sovereign integrity of Botswana as a justification for these legislative interventions. In these minefields of juristic engineering and confusing legal interpretation the ordinary citizen is disengaged from social discourse outside the mundane issues of subsistence and survival. Once again, securing the sanctity of the state by legislation would appear to be the overriding concern whenever legal rules are fashioned. It must be noted that prior to independence, there had been put in place a plethora of emasculatory legislation³⁰. As a result, it became necessary to caution that 'no useful purpose' would be served by these laws and assuming there were read, would not have been understood (recast).³¹ Nevertheless, in the post-independence euphoria, this practice was actively continued albeit without any clear justification except as a form of exercise in continuity as asserted during the tabling of the Trade Union Bill in 1969.³²

Other dimensions to the regulatory regime that help to accentuate state centrality with regard to labour matters include the Minimum Wages Advisory Board (MWAB) which was established by order published in the Gazette as per the Third Schedule of the Employment Act. The Labour Advisory Board (LAB) may not be directly involved in wage fixing but its role in legislation and the formulation of rules and regulations regarding labour matters makes it important.

In 1992, a decision was taken to convert the industrial class category of public sector employees from 'industrial' class to permanent and pensionable status. This category of workers has since then been declared 'employee' for the purposes of the Employment Act (as amended).³³ The Trade Disputes Act as amended, essentially, is to re-visit, restructure and re-configure the rabbit warren of procedures for dispute resolution, bringing in as many alternate and informal channels as functionally possible between the administrative role of the Commissioner of Labour and the judicial functions of the Industrial Court.³⁴

At times, political institutions that determine values and ideology are mistaken as the state rather than its mechanisms. The state exists to harness, guide and stabilise the contradictions in society as the political

leader of that coalition of peak groups. It decides who gets what, when and how. Through legislation and policy, the state has evolved into a centrist creature, capable of determining, via mobilisation, acculturation, conditioning and other means, the socio-economic direction of the country. Precisely because of its roots, it also becomes reluctant to change and respond, in a deliberative manner, to social demands.

As history has shown, institutionalised states often also become path-dependent. Path-dependent systems are those that are unable to shake off the effects of some past events (Mattei and Heiner, 1999). Such episodes along the historical continuum, such as labour agitation and strikes though occurring randomly, have shaped the arrival at choice specifics that ensure stability and continuity. Trapped in this historically determined value system, it becomes difficult or impossible to make contemporary efficiency predictions at the expense of the *status quo*.³⁵

To operate within the framework of the *status quo* and be able to yield incrementally to societal pressures, a social system of a network or web of relations and interrelationships is used to provide a number of positive feedback mechanisms. In reality, each actor, supplicant or providing agent within this crafted web of functional interrelationships engages in a game of self-serving and calculated or instrumental loyalty and allegiance. This is done by not disagreeing overtly with a decided legal rule or policy direction. As earlier observed, such support itself derives from instrumentalist calculations regarding incentives and cost held together mostly through patronage.³⁶

Society, once accustomed to compliance and non-engagement in combative social discourse, makes choice transactions cheaper, even if repetitive. This forges a condition where the critical mass of public opinion is ultimately inured to change. Change as in access to institutions, facilities and resources for equitable socio-economic growth and development is then held hostage by prescriptive and selective allocation of resources.

In such a path dependent mode the state uses ideological models in terms of a state-centrist world view, manipulated by key socio-political and legal actors in uncertain conditions. To do this, change choices are rationalised by removing the problem of alternatives and selection which plurality of opinion regarding choice would have offered. Ideologies driven by self-preservation become institutionalised. The result is the rules that govern a society, the ties that define social relationships and shape political, legal, social and economic exchanges. In simple terms, identification with the ruling political party and its paraphernalia of power becomes a *sine qua non*. Structures are then created, both formal and legal, to assist in defining individual

²⁹ Part 1S 2(c)

³⁰ Confidential Savingram From Commonwealth Relations office to the High Commission Territories (1/8/53- Pretoria to Mafikeng) S115/12 National Archives, Gaborone

³¹ Despatch No.1565/6 X (ES)from Mafikeng 31/12/52 SII5.National Archives, Gaborone

³² Hon Peter Nwako M.P.K (MP- Tswapong North), then Minister of State.

BNB 1737 National Archives, Gaborone p.29 12 May

³³ Stat. Inst.. I-50 [Cap 47:01]

³⁴ Part I Section 2 Cap 48:01 (1969)

Section 61 (12) (C) Cap 48:01 (1969)

Sections (41), (43), (44) of Cap 48:01 (1969)

³⁵ Ibid

³⁶ Ibid

choices, thereby reducing uncertainty and minimising the cost of consensual transactions.³⁷

The structures so created form the apparatus, legal, political or otherwise through which groups are expected to articulate and pursue their aims. Working within the state institution, these structures, hitherto referred to as the public bureaucracy, through informed feedback, are able to assist the institution along a certain trajectory (Fernard, 1977). In other words, the political machinery of state, through its bureaucratic organs is able to regulate and administer society in a particular manner using selective allocation of resources as part of its strategy of sanction and reward. Having created the structures within which exchanges are enacted, the state then proceeds to create rules that condition behaviour, regulate and stabilise the environment of transactions. Usually, where the state institution is unable to control and regulate those without any affiliations who tend to be personal and individualistic, a third party with coercive authority is required to oversee, supervise and regulate transactional conduct, norms and practices.

Lessons from state dominance

Whatever economic successes there may have been, such developments must be read in conjunction with the salary disparities, and the existing socio-economic inequalities in household income distribution coupled with a widening gap between conspicuous consumption and abject poverty.³⁸ Unemployment may, in retrospect, be a structural phenomenon in Botswana.

Though the Botswana state currently presides over a free market economy, one inevitable corollary of this has been the rural dependency on wage labour from the urban centres. As such, wage labour is a critical element in the socio-economic life of the majority. This, paradoxically but factually and perhaps also unintentionally, it serves to enhance the power of Government as the largest employer. This has also precipitated the interventionist role of the state in labour relations and sensitivity to agitation particularly in the diamond-mining sector which is the principal economic activity. This sensitivity is therefore the result of the fact that labour agitation is wage-driven due to the dependency on paid work.

³⁷ Ibid

³⁸ Ibid See also:

- a) Good, K. "Interpreting the Exceptionality of Botswana", *Journal of Modern African Studies* Vol. 30,1 (1993)
- b) Hope, K., Wedge, R., "Growth With Uneven Development: Urban-Rural Socio-Economic Disparities in Botswana", Geoforum, Elsevier Science Ltd, Britain
- c) Good, K. "Corruption and Mismanagement in Botswana: A Best Case Example?" *Journal of Modern African Studies* (1994)
- d) Tsie, B. "The Political Context of Botswana's Development Performance", unpublished paper, Dept. of Political and Administrative Science, University of Botswana, p.4

Labour legislation, policy formulation and market regulation have thus been informed by conscious calculations, containment and continuity. It should be noted however that this regulatory regime could not stop the strikes of 1974-1991. Neither have they been able to stem the tide of trade disputes in the workplace.³⁹ It would seem therefore that over the years, social commentaries have not had much reformatory effect on the trajectory of the state, given ground realities.

As has been observed, the years 2011 to 2013 saw a state approaching a siege mentality and thus reacting accordingly.

'Battles with trade unions at the Bargaining Council outside parliament were later fought in parliament through amendments of some Acts to suit the government of the day. For example, following the prolonged public sector strike in 2011, the government amended legislation classifying essential service workers to include teachers in an effort to prevent more civil servants from striking'⁴⁰.

In one stroke, veterinary services, teaching services, diamond sorting, cutting and selling services, and all supporting services related to them became "essential" The list was so embracing that the ILO intercedes but to no avail⁴¹ It is needless to debate the arguments advanced by the state but one issue became glaring, which was the impunity with which the executive amended a statute circumscribing parliamentary oversight as stipulated by the constitution with regard to the composition of essential services⁴². Another dimension is that when these issue ended up for judicial determination, all the interdict handed down by the Industrial Court which were reversed by the High Court were promptly reconfirmed in favour of the state by the Court of Appeal as the highest court of the land.⁴³

Conclusion

The key objective of this study has been to demonstrate

³⁹ 21st Annual Report, Department of Labour and Social Security op.cit p 28

⁴⁰ Botswana Guardian, August 22 2014 p8 www.botswanaguardian.co.bw

⁴¹ ILO CEACR Report 2011(Committee of Experts on Application of Conventions and Recommendations

⁴² With regard to amendments to the Essential Services Schedule in Section 49(TDA Cap 48:02) per SI 49/57 see Section 9 of the Statutory Instruments Act(Cap 01:05

⁴³ a) *Botswana Public Employees Union and Others v Minister of Labour & Home Affairs and Others* (MAHLB-000674/09/082012) HC

b) *Botswana Land Boards & Local Authorities Worker's Union and Others v The Director Of Public Service Management and The Attorney General* (CA - Civil Appeal No.CACLB-043-11 /IC Case No. IC UR 13-11)

c) *The Attorney General v Botswana Land Boards & Local Authorities Workers Union and Others*

Court Of Appeal-Civil Appeal No.CACGB-053-12/HC Civil Case No. .MAHLB -000631-11

that within an emergent post-colonial state, there could develop an incipient certain degree of pre-occupation with prescriptive legislation and its accompanying bureaucratic and coercive machinery. The purpose is largely to fortify the political state and its coalition's dominance of such a society. The study further argues that, in a sense, this should not be surprising if one examines the colonial state and its penchant for rules and regulation. It observes that, since the state is intrinsically linked with the political economy, there must essentially be the dominant and dominated groups, where such dominance is also expressible in social, political and economic terms. This necessitates certain conclusions as below.

Historically, the state needed to create the structural conditions for the emergence of a labouring class.⁴⁴ The question therefore remains whether the motive forces of the colonial state were assimilated by the independent state in Botswana such as can provide a historically determined role of the state. To a large extent, the period after independence suggests that, indeed, the Botswana state was quite apprehensive of and therefore reactive to what organized labour could do. This apprehension was inherited from the colonial state and the way it sought to put in place legislative and administrative measures against such future events. Though the events unfolded later, precisely because of this, the post-colonial state instinctively saw processes of juridification, accompanied by the use of the coercive apparatus of state as the best way to contain labour agitation and ensure the *status quo*.

However, in a developmental state, certain pre-conditions rather than a maze of legislation is expected. The first is the generation of social consensus which derives from overt and robust social dialogue between the partners as it presupposes a desire to achieve common ground. The next is social need determination which is a deductive process from the socialisation of the partners.

In effect, it is only actual industrial pluralism that can enable a concise identification of the particular social problems labour wants to see addressed.⁴⁵ In the theoretical scheme of things legislation can energise the process of participatory economic empowerment if it is accepted and legitimised as an instrument for pluralistic social engineering that does not necessarily underscore the pre-eminence of the political state. It can also then become an embodiment of the objective direction of social development and a provider of security for comprehensive and constructive social interaction. This *desideratum* is premised on the degree and forms of statism in practice (Fung, 2003).

⁴⁴ Richards, G, *Race, Labour and the Colonial State* in St. Kitts-Nevis 1897-1922, <http://www.uwichill.edu.bb/bnccde/skrm/conference/papers/GRichards/html>

p.1

⁴⁵ Ibid

In an ideal situation, the state would facilitate open debate about the socio-political and economic context of labour relations and workplace norms and practices. In effect, facilitating substantive consensus around acceptable conduct would have acknowledged public power, ownership and accountability for those standards. The state would have then evolved from the class-conscious coalition into a desirable engine of social responsibility, accountability, justice, welfare and therefore of social relevance.⁴⁶

In Botswana, the centrality of the state in the establishment, maintenance and reconstruction of industrial relations institutions is evident. It can be said, therefore, that the construction of effective industrial relations institutions is a major role for the modern state. It is understandable therefore if the Botswana state were to be ideologically averse to aggressive and voluble trade unionism. This may also explain why it seeks to re-define the role of unions through comprehensive legislative intervention coupled with administrative authority. The state also appears to be concerned with the implied over-democratisation of the workplace and the politicisation of workplace issues which could be assumed if one were to domesticate international labour conventions in their totality.

Furthermore, the attitude of the state to worker formations and labour relations appears still essentially suspicious and paternalistic. It appears to still ascribe a potential for social disequilibrium to worker formations. This results in the tendency to legislate and to regulate only to fall back on coercive social order when it fails. Over the years, it would seem that the Botswana state continuously perceives the need to adopt a strategy of structured and organised neutralisation of organised interest groups such as worker formations through legislation and close administrative supervision.

It also perceives a need to maintain order and subordination of all other interests to its authority. The need for stability has often been used to justify a strong demand for law and order. The rationale has always been that "companies who invest here must obtain a reasonable return on their investment and (SIC) skilled expatriates feel their lives and property are safe"⁴⁷.

There is no doubt that there has been growth with development in Botswana over the years. However, in its quest for security and stability, the state would appear to be prescriptive rather than co-regulatory particularly with regard to labour affairs. The state is unquestionably entrenched. This entrenchment would have come at a price even in economic terms. It also raises the question of whether, in emphasizing the primacy of the state, the process has been of significant beneficence to society at large particularly workers.

However, it is comforting to note that the state has not

⁴⁶ Ibid

⁴⁷ Sir Seretse Khama. Hansard 6-9 8/68 Pp141, 146, 147, 151

transformed into a militarized, combative organic structure. Similarly, labour formations are not yet bellicose and radicalized. In effect, as a society in transition, there is still the possibility of identifying a common platform for deliberative and collaborative engagement in the search for a consensual trajectory for mutual growth and development in Botswana.

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