SUBJECT: PATRIOTIC FRONT – TRADE UNION DIALOGUE

ON

TRADE UNIONS – POLITCAL PARTY RELATIONS UNDER ZAMBIA'S CHANGED POLITICAL AND ECONOMIC REALITIES

VENUE: MULUNGUSHI INTERNATIONAL CONFERENCE CENTRE

DATE: 23-24 April, 2012

TOPIC: LABOUR LEGISLATION AND TRADE UNION ORGANISATION IN THE THIRD REPUBLIC

BY: FANUEL K.M. SUMAILI (DR.)
MULUNGUSHI UNIVERSITY
CENTRE FOR LABOUR STUDIES
P.O BOX 80415
KABWE

fanuelsumaili@gmail.com

INTRODUCTION

This paper is one of several, intended to commence a positive dialoque between the political players and the trade union movement in the country. It is premised on the belief that the core political players and the trade unions share certain values. By core political players, we mean the party in government as well as the major political opposition parties. But in the context of our discussion the principal political player is the Patriotic Front because it is the party that governs. But all of them, the political parties as well as the trade unions share a statement of values. To paraphrase Tony Blair, they all believe that by the strength of their common endeavour, the political players an the trade unions can achieve more than they can achieve alone " so as to create for each one of us the means to realize our true potential for all of us, a community in which power, wealth and opportunity are in the hands of the many not the few, where the rights we enjoy reflect the duties we owe, and where we live together, freely in a spirit of solidarity, tolerance and respect".[1] But because both the political parties and the trade unions have tended to compete for the political space, the party in government has tended to want to control the trade union movement, and, even to repress it.

To the extent that this paper will deal with the legislative changes since the advent of the Third Republic in 1991, it will focus on the various changes made in the statutes dealing with the formation of trade unions and the formation of federations of trade unions and federations of employers organizations, namely the **Industrial and Relations Act of 1990, The Industrial and Labour Relations Act of 1997.** It will also highlight the amendments, especially as reflected in **Act No. 30 of 1997** and **Act No.8 of 2008**. In doing so, we hope to show that on the whole, the legislative changes have tended to have a negative effect on the organization of the trade unions in Zambia and have tended to alienate the trade union movement as a whole from the political party in power as well as from participating in the common endeavour which in turn has weakened both the party in power and the trade unions.

The advent of change brought about by the September, 2011 elections, has brought back on the labour scene the hope that the "common endeavour" that Tony Blair speaks about could be re-ignited and with it, the realization of power, wealth and opportunity for many and not only for a few. The Patriotic Front public pronouncements, particularly the principle of "more money in your pockets" has genuinely captivated the Zambian worker. The Zambian worker is genuinely expectant and for now has focused his/her attention on the party in power. His are great expectations indeed; very much in the mode of Pip in Charles Dickens, **Great Expectations** except that in the fiction, the young Pip's great expectations are being funded by the outlaw Magwitch and not, as Pip thinks, by the more respected but once jilted Miss Havisham. The other difference between Pip's great expectations and those of the Zambian worker, post September 2011, it that unlike Pip who expects to receive largesse

from a benefactor, the Zambian worker expects a cooperative if not a partnership endeavour in the production of wealth, power and the creation of opportunity for many instead of a few – partnership with the ruling party. But to properly do this, it is important, in the words of Chinua Achebe, to know when and where the "rain began to beat" the Zambian worker.[2]

It is this paper's submission that the rain began to beat the Zambian worker when the political player (he party in power from 1991) began to change the legislation in order to assure hegemony over the political space. This resulted not only in the weakening of the trade union movement as we shall see, but also in the weakening of the political party itself as it lost some of its most vital source of strengthen. In turn, the schism negatively affected the levels of productivity.

It is, therefore, our hope that a chronicle of the various legislative changes and their effect on the trade unions, and thereby on labour, may encourage both the political players and the unions to adopt a cooperative or partnership spirit. Further as they chart the way forward, it is also our hope that they may look at some of the more negative changes to legislation and reverse them, and where it is possible, improve on them. We believe this will help to instill a spirit of developing Zambia as a common endeavour – common to the political party headed by the party in power (the Patriotic Front) as well as to the trade unions.

FREEDOM OF ASSOCIATION

It is a well recognized and accepted fact that the freedom to form and belong to associations, whether they be trade unions or religious groups or political parties, is regarded as an aspect of human rights. In Zambia the foundation may be found in the constitution; but on the World stage this may be found stated as a right in the **Universal Declaration of Human Rights (1948), the International Covenant on civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights** and in the **NEPAD** instruments. But more specifically in relation to trade unionism, the freedom of association is guaranteed by International Labour Organisation (ILO) Conventions Nos. 87 and 98. However, exceptions are recognized in the treaties themselves. For instance, **the International Covenant on Civil and Political Rights** allows restrictions on grounds of national security, or public safety, public order, the protection of public health or morals, or the protection of the rights of others.[3] ILO Convention No. 87 is narrower and more specific, permitting states to decide for themselves whether the police and armed forces should be given this freedom. In Zambia they are not. But in Zambia, many more others are excluded from enjoying this right. In addition to the armed forces and the police, the **Industrial and Labour Relations Act** excludes the prison service, the Zambia Security Intelligence Service and Judges, Registrars of the Court, Magistrates and Local Court Justices.

THE INDUSTRIAL RELATIONS ACT, 1990

In 1991 when the Movement for Multi-Party Democracy, (MMD) came into power as the first governing party in the Third Republic, the extant law as regards the formation and the organization of trade unions was the **Industrial Relations Act, 1990** passed by the **United National Independence Party (UNIP)** which had run the country from 24th October, 1964. That law, however, excluded the Zambia Defence Force, the Judicial Service, the Zambia Police Force, the Zambia Prison Service and the Zambia Security Intelligence Service from the enjoyment of the freedom of association. This position has remained unchanged up to the present moment. But for those permitted to enjoy the right to the freedom of association, the rights bestowed by the **1990 Act** and the subsequent acts, have remained **mutatis mundis**, the same. However, there are two provisions which existed in the 1990 Industrial Relations Act but **Industrial Relations Act** which were phased out in the subsequent Acts, and have remained outside the ambit of the law since. These are section 29 (2) © which called upon the constitution of the Zambia Congress of Trade Unions (now this would encampus the Federation of Free Trade Unions of Zambia, (FFTZ) to make "**Provision for the training of congress leaders for responsible and effective trade union leadership and the advancement of workers education and their participation in the national development programmes and projects,"** and Part XI which dealt with the coming into operation of **Works Council.** The removal of Section 29 (2) © which compelled the Congress to train its leaders for "effective trade union leadership and advancement of workers education and their participation in the national development programmes and projects" has had a debilitating effect on the growth and effectiveness of trade unions. It removed from the centre of trade union activities the element of training and education for both leaders and workers. In a fast-changing world of work, training is perhaps, the only sure way of engendering effectiveness and relevance. The absence of the training element has contributed to the widening of the information or knowledge deficit or gap between management and the workers. Sometimes this gap is so wide that any attempt at a joint-training session between management and the workers (unions) is futile. In fact, the training itself may become dysfunctional. This is very unfortunate. It is unfortunate because the management and the unions are both involved in a common endeavour which requires cooperation or partnership. But this is impossible where one party is so deprived of basic information and expertise that they are unable to benefit from much joint training. Indeed, in a country where until 2008, when Mulungushi University was set up, there was no tertiary institution offering formal training in the area of labour, the removal of this provision which encouraged or even compelled the unions to place training and education at the Centre of their activities was a real hammer-blow. Little wonder, many of our people do not know that the world of work is an area worth spending our time training for. This is despite the fact that most of us do know that we shall spend most of our lives – from 25 to 55 (65) years in the world of work. If, especially, the unions and the

Department of Labour do not place training at the Centre, who will? It is perhaps worth noting that the 1993 Act, in Section places on the employee the obligation to "maintain and co-operate with the management of the undertaking in which the employee is employed in the interest of industrial peace, greater efficiency and productivity" but does not make any demands on the Union or management to train or educate him for this role. In the premises, we think this provision ought to be revisited as we move forward in this, our communal endeavour, of producing a cadre of effective trade union leaders and in the advancement of workers education in order to realize our true potential and assure a community in which power, wealth and opportunity are in the hands of the many and not the few and in which we live together freely in a spirit of solidarity.

Part XI **Works Councils** which was dropped from the 1993 Act when the MMD came into power was an attempt at decentralizing the trade union activities to the industry and undertaking. The following were some of the provisions:

Section 95 (1) *Within six months of the coming into operation of this section, a Works Council shall be established and registered with the Commissioner in every undertaking employing.*

(a) Less than one hundred but more than twenty five eligible employees who are not members of any registered trade union.
(b) More than one hundred eligible employees who are not members of any registered trade union.

Section 96: *the functions of a Council shall be to promote and maintain the effective participation of workers in the affairs of the undertaking for which the Council is established and to secure the mutual cooperation of workers and management of the undertaking in the interests of industrial peace, greater efficiency and productivity.*

Section 97 (1): *Whenever section ninety-five applies to an undertaking, the management of the undertaking, shall form a working party comprising of four members nominated by the management and four members nominated by eligible employees.*

(2) *The working party formed under subsection (1) shall do all such things as may be necessary to facilitate the establishment of a council for the undertaking and shall –*

(a) Explain to the employees in the undertaking the purpose and effect of the provisions contained in this Part and the nature and functions of the Council;

(b) Classify the employees as to who shall be members of management and who shall be eligible employees;
(c) Determine, having regard to the total number of eligible employees in the undertaking, the number of members of which the Council shall consist;
(d) Call for an receive nominations of candidates for election or appointment to the council; and
(e) Organise, hold and supervise elections for members of the council.

We are attracted not only to the spirit of decentralization which these deleted parts embody, but also to the attempt to legislate the requirement that unions and management are involved in a common endeavour and must not only work together, but share information on a regular basis. Many a time we have heard complaints from union officials, during collective bargaining talks, that they are often kept in the dark regarding some of the vital company information, especially finances, which information is important for them to make meaningful proposals at the bargaining table. Sometimes, we have had to suggest to management that they invite the union officials to their quarterly meetings so that company information is given to them in bits and pieces, in proportion which they can assimilate instead of off-loading everything on the union leaders at the time of collective bargaining. It must be granted that much of this information may be both unusual and difficult to understand for many workers and the matter is significantly compounded when it is given to them in chucks which cannot be understood let alone assimilated. We are particularly interested in the provisions under section 96 which if properly effected would ensure that the work place becomes not only tranquil but an efficient place of production.

INDUSTRIAL AND LABOUR RELATIONS ACT, 1993

The 1993 Act was the first real act by the new government in the Third Republic to put its own stamp on the law relating to the formation and the organization of trade unions in the country. But given the fact that the trade unions had been a major supporter and collaborator in the formation of the Movement for Multi-Party Democracy (MMD) and the ushering in of the Third Republic, the governing party was understably reluctant to tinker with Part II of the Act which dealt with trade unions. Instead, the new Act left the issues of rights, formation and organization of trade unions in almost the exact place they had been under the 1990 Act formulated by UNIP. Fully cognisant that the trade unions had lent the new governing party financial and material support and had lent its leaders to help run it, when in power, the new leaders attempted to

return the favour. To this end they amended Section 22 of the 1990 Act to add the following completely new provisions.

22 (3) The Minister may, by statutory instrument, order an employer to deduct, at the end of each month, from wages of an eligible employee, the subscription prescribed by the constitution of a trade union.

(4) The Minister shall not make an order under subsection (3) unless he is satisfied that the number of eligible employees named in the order exceeds sixty per cent of the total number of employees.

(5) The Minister shall inform the employer concerned before making the order under section (3).

(6) The employer may make written submissions to the Minister objecting to the order within thirty days.

(7) The Minister may accept or reject the submissions made to him.

This was meant to help with union finances. It is obvious that in a case where sixty percent of the eligible employees refused to remit their subscriptions, (subsection 4) the trade union would die as a living organism; it would be there in name only. So the party in government wanted to return the favour to trade unions by ensuring that the life blood provided by subscriptions continued to flow. But these were still early days and the honey-moon between the trade unions and the MMD was very much alive. It took nearly six years before this honey-moon came to an end, and this end is exemplified by Act No. 30 of 1997 of the **Industrial and Labour Relations Act** and Act No. 8 of 2008 to which we now turn. To a very large extent, these two amendments savaged the trade unions so badly that unless some of these provisions are reversed, it will be impossible to run the trade unions in the country in an effective manner and comply with our international obligations as espoused in Convention 87 of the International Labour Organisation (ILO). In fact, we dare say that unless this conference commits itself to revisiting some of these amendments, the positive, cooperative relationship that this conference hopes to initiate between the political players, headed by the Patriotic Front, and the trade unions, might experience a still-birth. A still birth because in their current state, many unions are caught between a rock and a hard place: They are experiencing diminishing membership due to large scale unemployment, fragmentation, essentially caused by lack of training and education in and among the workers, and a legislative regime that has assaulted the trade union very right to exist. This assault began with **Act No. 30 of 1997** and reached its Zenith with **Act No.8 of 2008** to which we now turn respectively.

ACT NO. 30 OF 1997

The fundament amendment brought in by the above named Act related to the liberalization of the trade union space. Whereas earlier, it was common to hear people speak of "one industry-one union", the world of unionism had undergone or sea-change. This perhaps stemmed from an English case, ***Young, James and Webster V U.K***. (1981), where the European Court of Human Rights ruled against the United Kingdom government, which at the time allowed and practiced the concept of the "closes shop." This allowed a situation where for one to get a job in a place where there was in existence a trade union, such a person had to join the existing union or undertake to do so soon after. In the above case, the court held, by a majority that Article 11 of the European Charter of Human right was contravened by English law which permitted the closed shop at the time, because employees risked being dismissed if they did not join the union. The majority view was that compulsion to join one union restricted freedom of association because it prevented workers from forming or joining another; a concurring minority was prepared to go so far as to say that the positive necessarily implied the negative i.e. the right to associate (join) also meant the right not to associate or join.[4]

This decision forced the English to change their domestic law relating to unions and barred the concept of the closed shop. Because we derive our common law jurisprudence largely from the United Kingdom, Zambia too, felt compelled to change the law. This change meant that the law ought to permit more than one union in a place because the reverse would result in infringing our own constitution which guaranteed individuals the right to freedom of association, further, failure would have brought the country in conflict with convention 87 of ILO which guarantees the right of freedom of association. The result was that whereas the long title of Act No. 27 of 1993 said: "An Act to revise the law relating to trade unions, the Zambia Congress of Trade Union ..", Act No. 30 of 1997 avoided the use of the name the Zambia Congress of Trade Unions and instead, stated: "An Act to revise the law relating to the formation **of trade unions and employers representative organizations, including the formation of federations of trade unions and federations of employers organizations..."** This meant that at the apex, the ZCTU would not longer enjoy monopoly, that there would be other federations of trade unions envisaged. Indeed, the 1997 Act introduced an amendment to section seventeen which in 17 (1) (d) permitted: "***two or more registered unions which were not affiliated to the Congress, or which were not affiliated to the Congress or a federation of trade unions may, in accordance with their constitutions establish or form a federation of trade unions of their choice and shall register the federation under this Act".***

This, therefore, allowed for the formation of rival federations of trade unions, provided that any two trade unions so wished.

Section three of the principal Act was amended so that whereas the 1993 Act spoke of "eligible employee" as meaning a "unionised employee" other than a member of the management of an undertaking, the 1997 speaks of "eligible employee" as meaning "a unionisable employee." This suggests that virtually any employee may claim the right to be a member of a union of his/her choice. Even definitions of such terms as "bargaining unit'" "trade union" were redefined to make them conform to the new more liberal practice of the right of the freedom of association.

The immediate effect of these amendments has been the proliferation of trade unions in many industries such as in the mines, education, the financial sector, agriculture etc. Given the fact that Zambia's formal employment figures suggest that there are only about 600,000 people in formal employment, this translates into even much fewer members per union and hence the financial base of many a trade union is weak and vulnerable. The liberalization of the trade union space has taken away from the trade unions and the federations much of the statutory support which came with the monopoly agenda such as the closed shop. But in truth we do not think that this trend of liberalizing the trade union space is reversible neither is it desirable. The unions have only one choice – to learn to live with the changed situation. They need to learn to cooperate and partner with one another, even when we know that greed and selfishness are part of the human nature. But in the long run, the answer may lie in education, education and even more education. The leadership and the workers need to be educated on the changing trends in the world of work. The world does not guarantee any of us a livelihood and or survival. That, we do, individually and collectively is the result of our ability to adopt to changing environment and education and training is perhaps, the best key for survival. Those that do not succeed fall to the bottom of the heap and at worst, they die. We refuse to let our trade unions go that way. Hence the plea to embrace training and worker education.

ACT NO. 8 OF 2008

We shall now turn to a discussion of the amendments brought about by Act No. 8 of 2008. These amendments were more thorough and produced greater detriment in the way the trade unions were to be formed and run. Consequently we shall attempt to review as many of the amendments as possible, clearly indicating the consequences for the trade unions, consequences which the unions are still reeling from.

Section 2 (1) which deals with "Application and Power of exemption," has always been problematic. It has always exempted the Defence force, the Zambia Police Service, the Zambia Prison Service, the Zambia Security Intelligence Service, and judges, registrars, Magistrates and Local Court Justices. Yet the **Freedom of Association and Protection of the right to**

Organise Convention, 1948 (No.87) gives "the right of workers and employers, without distinction whatsoever to establish and join organizations of their own choosing."[5] The guarantees of this c Convention should apply to all workers and employers without any distinction whatsoever. The only exceptions provided by the Convention are the armed forces and the police. Therefore, provisions prohibiting the right to organize for specific categories of workers such as appears in this section breach a Convention to which Zambia is signatory. Indeed there is no reason for wanting to be in breach. We therefore implore that the government embrace the spirit of cooperation with the trade unions and revisit this section to ensure that the Zambian worker enjoys the right of the freedom of association without distinction whatsoever and that we comply with Convention No. 87..

Section 3 which deals "interpretation" introduced new definitions, including, as we noted earlier, for terms such as "bargaining unit" and "management." Whereas the 1993 Act defined bargaining unit as meaning:

(a) In relation to collective bargaining at the level of an undertaking other than an industry, the negotiating team representing management of the undertaking together with the trade union representatives of employees in such undertaking; and

(b) In relation to collective bargaining at the level of an industry, a joint council.

"Bargaining Unit" means:-

(a) The management of the undertaking and the most representative trade union representing employees in the undertaking where collective bargaining is at the level of an undertaking other than industry; or

(b) The negotiating team representing the employers' organization and the negotiating team representing the most representative trade union in the industry concerned where collective bargaining is at the level of an undertaking or industry.

As can be seen, Act No.8 of 2008 introduced the concept of "most representative" without explicitly indicating how the minority trade unions would enforce and their rights to represent their own members' interests. An often given example of a possible complication is where there are three union each representing 41%, 39% and 20% respectively. Would it be acceptable for the union with 41% to form an alliance with that which has 20%. If so how does the union with 39% ensure that the views of its members are represented?

Further, the term "dispute" is defined in a very narrow sense to apply only to "disputes of right" limiting the coverage to disputes based on a recognition or collective agreement and thereby missing conflicts that might arise over new areas and proposed fresh rights (referred to as "interest disputes") that may not be contained in existing collective agreements.

Third, there is a new definition for "management" which, in addition to the usual elements, now includes a person:

(c) *Who is the head of a department in an institution or undertaking and has authority in the financial, operational, human resource, security or policy matters of the institution or undertaking.*

This obviously now covers individuals who have only limited managerial authority strictly speaking, but now find themselves removed from enjoying the right of the freedom of association which the Act affords employees. The effect, for the trade unions, of such a catchment, is to remove from the ranks of the unions most of the people that may offer leadership that may grow the unions.

Section 9 (3) "Application for registration of trade unions" varies this from the 1993 Act which said:

On being satisfied that an application for registration as a trade union has complied with the conditions of registration prescribed under this Act and that the constitution of the proposed trade union provides for matters set out in the Schedule of this Act, the Commissioner shall register the group of employees as a trade union and issue the trade union with certificate of registration in the prescribed form, upon payment of the prescribed fee.

It introduces an amendment after the words "Commissioner shall "so that it now reads: "**The Commissioner shall within a period of six months from the date of the application for registration, register the group of employees as a trade union.."**

What this means is that the prospective members of the envisaged trade union may be required to endure a six month waiting period; and there is no reason for such a delay. The effect of such a delay may in fact raise issues of compatibility with Article 2 of **Convention No. 87** which calls for the non interference in the setting up of workers' and employers' organizations and such an inordinate delay might reasonably be seen as such. To address this, there would be need to facilitate the Department of Labour in order to ensure that registration of trade unions is done speedily.

Section 18 which deals with disqualification for election or appointment as an officer of a trade union has generated a lot of debate as it is the one section which the government has used to devastating effect against those union leaders it perceived were not "friendly" to it. In its original form this section simply stated that:

18 (1) No person shall be qualified for election or appointment as an officer of a trade union if he:

(a) has not been engaged or employed for a period of twelve months or more in the trade, occupation or industry with which the trade union is directly concerned:

Provided that the trade union may, if satisfied as to the suitability of a particular candidate, allow him to stand for such election, or be appointed, notwithstanding that he has been so engaged or employed for a period of less than twelve months.

But the amended version says that a person shall be qualified for election or appointment as an officer of a trade union if he:-

(a) is not currently engaged or employed in the trade, occupation or industry with which the trade union is directly concerned and has served for at least twelve (12) months or more;

(b) "No person shall be qualified for election or appointment as an officer of a trade union or trade union secretariat who is not employed outside the trade union or trade union secretariat.

The introduction of this stricture in (18) (10 (b) is particularly unwelcome because it defies logic. Why should one who has, upon election, been offered a full time job by the trade union still be required to be on the register of another employer?

As we have said elsewhere; the new Amendment removes the discretion, recognized by the previous law that trade unions were voluntary organizations of members and therefore members could accept an officer to serve the union even of that officer had been employed in the trade or occupation for less than twelve months.
"one would have thought that it is reasonable to surmise that where one is a full time employee of the trade union, such an individual will appear on the pay roll of the union and would contribute to Pay as You Earn (PAYE) through the union. This means that his/her allegiance would be to the union and that if the is union satisfied with

his/her integrity and performance, the individual ought to qualify for election or appointment as an officer of the trade union."[5]

The trade unions realized what the provision was meant to achieve. It was meant to be used as a hammer blow against any trade union officer who created discomfort or unease with government. The government would use its considerable influence to lean on the employer of such an individual to either terminate his/her contract or refuse to have it renewed. This is precisely what happened in the case of the former Mine Workers Union of Zambia (MUZ) President who could only stand for an elective officer in the Zambia Congress of Trade Unions if his employers – who had seconded him to the union –retained him on their register as an employer. Unfortunately for him the government, who are shareholders in Chambeshi Metals Plc, his former employer, compelled the employer to retire him. He was neither sickly nor had he reached the statutory retirement age of 55 years! But the point was made. He could nor stand for elections as President of the ZCTU unless he passed the government's vetting mahinery.

Indeed, the Federation of Free Trade Unions of Zambia (FFTUZ) had seen through this amendment earlier. They saw it as an attempt to disqualify their President from holding office and so commenced court process by way of an application for judicial review. May be it is the court process that has saved her.

The point to be emphasized is that given what happened to the former MUZ President, this provision has the practical effect of weakening or reducing the "free choice" that trade unions may have in electing their leadership. Anyone not wanted by government to lead a trade union or a federation of trade unions may be visited by the same fate. In the premises, it is a provision which the trade unions and the party in power ought to amend a they begin to forge a cooperative or partnership relationship. Further, it ought to be pointed out that this provision is in conflict which Article 3 of **Convention No. 87** which stipulates that members must have the right to elect representatives in full freedom.

Section 21 which deals annual report of a trade union was amended to confer on the Commissioner of Labour, powers to suspend and appoint interim executive board of a trade union as well as to dissolve the board and call for free elections.

Sections 21 (5) and (6) are important and we reproduce them below for ease of reference:

21 (5) The Commissioner shall, where the auditor makes a recommendation under paragraph (b) of section (4) –

(a) Recommend the suspension of a trade union members or executive board, as the case may be, to the Tripartite Consultative Labour Council constituted under section seventy-nine.
(b) Request the membership to nominate from amongst themselves the members to constitute an interim committee of the trade union; and
(c) Appoint from among the nominations submitted under paragraph (b), an interim committee to oversee the operations of the trade union.

21 (6) where the report of an auditor appointed under subsection (3) established that the officers of a trade union have misused, unsupplied or misappropriated the funds for purposes contrary to eh objects of the constitution of the trade union, the Commissioner shall recommend the removal of a trade union member or dissolution of the Board as the case may be, to the Tripartite Consultative Labour Council constituted under section seventy-nine.

This is a very draconian form of interference in the operations and organization of an entity that ought to be run by members. We need to reject the notion that an outsider can arrogate to themselves the powers to remove or suspend trade union officers if we believe and value the right to freedom of association. We cannot emphasise more that any removal or suspension of a trade union officer must be the result of an internal decision of the members of the trade union themselves. To accept these provisions going into the future is to seriously interfere in the exercise of the trade union office to which the officers have been freely elected by the members of their trade unions. Any provisions which permit the suspension and removal of trade union officers by the administrative authorities are clearly in violation of **Convention No. 87.** Instead, when matters go wrong and an auditor so finds, the law should aim at protecting the members and the organization. In doing so, there must be regard for the rights of the accused and the principle of "innocent until proven guilty" should be upheld and the principles of "natural justice" must be applied.

It is, therefore, our submission that in order to ensure respect for the above principles, the trade unions and the government must move quickly to review and amend these provisions.

Section 65 A: This deals with the termination of a recognition agreement. This is a completely new section in the law. It reads:

65A (1) A party to a recognition agreement may apply to the Commissioner for the termination of the recognition agreement, stating the reasons therefore.

(2) The Commissioner shall, where the Commissioner receives an application under subsection (1), inform the other party to the recognition agreement in respect of which the application is made and set a date on which the application shall be heard.

(3) The Commissioner may, where the Commissioner hears the parties pursuant to subsection (2): -

(a) Approve the termination of the agreement; or
(b) Reject the application and give the applicant the reasons therefore.

As we have pointed out this is a new section. But rather than bringing coherence and clarity to the law, such as it was, it introduced a level of uncertainty which weakened the binding effect of a recognition agreement by allowing a party to apply for termination of the agreement. Normally such agreements would embody in themselves the conditions for termination, without relying on the principal Act. Further, it must be noted that the provision gives the Commissioner of Labour, absolute discretion, without any recourse to the Tripartite Consultative Labour Council or even to the Courts, to hear the parties upon such a termination claim; he is given powers to either approve or reject by simply giving his reason for his position. We fear that such broad powers are prone to abuse and in fact undermine the principles of freedom of association enshrined in the **Zambian constitution** the ILO Convention No. 87 and in some parts of this very Act. We propose, therefore, that some changes be effected to ensure that abuse of power by a single authority hearing a claim may be checked.

Section 78 deals with failure to reach settlement by conciliation.
It reads:

Section seventy-eight of the principal Act is amended:-

(a) In subsection (1)
(i) By the deletion of the words "parties" and the substitution therefore of the words "either party".
(ii) By the deletion of the word "or" in paragraph (a);
(iii) By the deletion of the full stop at the end of paragraph (b) and the substitution therefore of a semi-colon and the word "or"; and

(iv) By the insertion immediately after paragraph (b) of the following new paragraph.

(v) Refer to the arbitration and the provisions of the arbitration Act shall apply accordingly.

Read together with the amendment, this section introduces a number of unwelcome restrictions to the right of the workers to enjoy freedom of association.

First, subsection (4) imposes referral of the dispute to the Industrial Relations Court if the dispute is not solved following a 14 days strike. It must be noted that the imposition to proceed to arbitration by legislation as well as at the behest of a single party to the dispute is in conflict with the very principle of voluntary negotiation of collective agreements. Parties freely agree to collectively bargain, and similarly, where a dispute arises, it ought to be the parties to freely and voluntarily agree to refer the matter to arbitration. Otherwise this provision may only serve to restrict the right of the workers' organizations to organize their activities, and could escalate to an absolute ban on the right to strike, which in turn, may take away from the workers their weapon of last resort. Such an eventuality would obviously be contrary to the freedom of association.

Second, section 78 (4) limits the duration of any strike action to fourteen (14) days, after which, if the dispute remains unresolved, the matter is sent to court. This clearly limits the means available to trade unions to further and defend the interests of their members, as well as their right to organize their activities and formulate their own programmes and, is therefore, not compatible with Article 3 **Convention No. 78.**

Third, section 78 (b) allows the Minister, after consultation with the Tripartite Consultative Labour Council, to apply to Court to have the strike discontinued if it "is not in the public interest." It may be very hard to find a strike action that may overwhelmingly viewed to be in the public interest because when they occur, strikes are always in order to further the interests of the party striking; and because trade unions operate in the public arena, some section of the "public" is bound to suffer or experience inconvenience. So we do not thinks that public interest alone should be the sole criterion for allowing or refusing a strike action to continue provided the said strike action is not in those areas defined as strictly essential services.

Section 107 concerns areas that are defined as essential services and where strike action is banned. Section 107 (10) (g) defines essential services broadly and includes the following:

(a) any service relating to the generation, supply or distribution of electricity;

(b) any hospital or medical service;

(c) any service relating to the supply and distribution of water;

(d) any sewerage service;

(e) any fire brigade; or

(f) any service for the maintenance of safe and sound conditions in mines and sewerage services.

We think that the "essential services" are defined so broadly as to lose the import of the concept of "essential"' especially by including "any service for the **maintenance** of not only **safe** but **sound conditions** in mines..." It appears obvious to us that any service where there is no **maintenance** of **safe** and **sound conditions** will not only fail to provide the service it was intended to offer but will endanger life. But is this the basis for declaring the service "essential"? We fear not; for otherwise every service may be essential. In this vein, the urge to legislate restrictions ought to be curbed, and instead, allow for negotiated services.

Section 79. The Tripartite Consultative Labour Council which is set up under this section was already in existence when the Third Republic came into being and it has remained almost unaltered as part of the law throughout. Its mandate is to "advise the government on all issues relating to labour matters, manpower development and utilization and any other matter referred to the council by the government." The Council is supposed to be the key tool in "fostering social dialogue and cooperation between government, employers, and workers' organizations and in bringing about social and economic progress. Dialogue within the Council is supposed to promote consensus building and democratic involvement of those with vital stakes in the world of work. It is supposed to help government, employers' and workers' organizations establish sound labour relations, adapt labour laws to changing economic and social circumstances and improve labour administration."[6]

This is a very wide and large mandate which is not supported by the administrative structure of the Council. It is supposed to be serviced by the Commissioner of Labour, who is himself/herself already burdened by the responsibility of over-seeing a department under siege by both the employees and employers for failure to fully and properly supervise the world of work. It has no secretariat of its own. This makes it difficult to attain the councils statutory mandate of advising the "government on all issues relating to labour

matters, manpower development and utilization and any other matter referred to the Council by government" (Section 83). Unfortunately, the "any other matter referred to the Council by Government has tended to include judicial functions such as determining which officers of trade unions should be suspended or removed, and even the appointment of interim committees as we saw when discussing the amendment to Section 21 in **Act No. 8 of 2008.**

The Tripartite Labour Council ought to function as the "parliament" for matters related to labour and both the frequency of meetings as well as the membership need revisiting. Currently, , the minimum number of meetings is put at two per year, while the membership should be no "less than 21." We think these are areas which need to be looked into in order to allow the Council to fulfill its mandate.

CONCLUSION

This paper has attempted to show that during the Third Republic, that is, from 1991 to the present, the legal framework relating to the formation, organization and running trade unions has progressively been amended but that the amendments have not translated to more efficient or more effective or more powerful trade unions. Instead the amendments have tended to weaken the trade unions. For instance, the amendments brought about by **Act No. 30** of **1997,** while welcome in that they complied with **Convention No. 87** and that for the first time workers could join trade unions of their choice and form federations of trade unions, the more visible **practical** effect has been the birth of smaller splinter trade unions with fewer membership as well as a weaker financial base for all trade unions. The various amendments brought about by **Act No.8 of 2008** have tended to place control of trade unions, which are voluntary associations of members, in the hands of the Deparment of Labour and the responsible Minister. The membership do not feel that they are in control of their own affairs, including the section of those that may lead them. This has given rise to the view that the Department of Labour, is more concerned with the control of trade union activities than anything else; that they are not concerned with the enforcement of labour laws as seen by the Ministry's failure to facilitate the training, and deployment of labour officers throughout the country to supervise the employer. Instead, the concentration has been on the trade unions, including the insistence that the Minister must regulate the conduct of ballots, including the elections by members of their leaders. Put simply, the trade unions in the Third Republic had progressively operated in a very constrained atmosphere.

This explains the hopeful enthusiasm that the change brought about by the September, 2011 tripartite elections has generated in the ranks of trade unions. Indeed the very fact that we are having this conference which has brought together the representatives of the party in power and leaders of the trade union movement so soon after the changes is a manifestation of the Great Expectations which the workers have in the new dispensation. In

respect of the legal framework, it is our great expectation that all provisions which place strictures on the enjoyment of the right to freedom of association by the workers will be reviewed and, accordingly, amended; and that the law shall fully recognize that trade unions are voluntary organizations for and run by members and that the government is an outsider. As such, the law should revert to its proper role, which is the regulatory function; and shall refrain from meddling in the internal affairs of voluntary organizations such as organizing elections for such bodies or vetting or in any way influencing who can lead these bodies. The law ought to recognize that the unions and the government are involved in a common endeavour, which is to create a better Zambia. To this end, the Tripartite Consultative Labour Council where the employers, the workers and the Government meet to dialogue, ought to be facilitated to play its social dialogue role and create the necessary harmony for production. As for the workers, there is no short-cut to expanding creative solutions to the many problems facing the workers in the fast changing world of work than education and training , and we dare say, education and training is required for the Department of Labour officers.

NOTES

1. Tony Blair, **A Journey** (London: Arrow Books, 2010) P. 87.
2. Chinua Achebe in **African Writers Talking** (London , HE.B, 1970).
3. Gwyneth Pitt, **Employment Law, Seventh Edition** (London: Sweet and Maxwell 2007) P. 32.
4. Gwyneth Pitt, P. 334.
5. Fanuel Sumaili, "Legal Framework for the operation of Trade Unions in Zambia", in Friedrich Ebert Stiftung. **The Labour Movement in Zambia** (Lusaka: Friedrich-Ebert Stifftung, 2011) PP 35 – 45.
6. Fanuel Sumaili PP 35 - 45