

**FREEDOM OF ASSOCIATION AND TRADE UNIONISM IN SOUTH
AFRICA: FROM APARTHEID TO THE DEMOCRATIC CONSTITUTIONAL
ORDER**

by

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DECLARATION

I hereby declare that the thesis for the degree doctor of Philosophy at the University of Cape Town hereby submitted, has not been previously submitted for a degree at this or any other university, that it is my work in design and execution and all the materials contained herein have been duly acknowledged.

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23/04/2007

Date

University of Cape Town

DEDICATION

In Memory of Mrs Matodzi Murigwathoho

To Mrs Nyamukamadi Budeli

My Grandmothers.

University of Cape Town

Although I am grateful to my supervisors, I must absolve them from responsibility for the views and shortcomings, which are mine alone.

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Mpfariseni Budeli

ABSTRACT AND KEY TERMS

Abstract

This doctoral thesis deals with freedom of association and trade unionism in South Africa. Freedom of association is one of the fundamental rights and freedoms enshrined in a number of legal instruments both at the international and municipal levels. Progress and democracy require respect for human rights, including the right to freedom of association at the workplace. Trade unionism is the expression of this right. The development of trade unionism in South Africa is closely related to that of freedom of association and was instrumental to the demise of apartheid.

This work provides a theoretical, historical and legal background to freedom of association and trade unionism, both from a comparative and international law perspective. It then investigates the legal and jurisprudential protection of freedom of association and trade unionism under apartheid before dealing with their protection under the post-apartheid legal order.

The thesis argues that international law in general and international labour law in particular contributed a lot to the development of freedom of association and trade unionism in South Africa. It concludes that South Africa has gone a long way in protecting freedom of association at the workplace and trade unions played a critical role in the consolidation of democracy in the country. The prospects for the protection of freedom of association and trade unions are good. However, there are also a number of challenges, political, social, economic, and intellectual. These challenges need to be overcome to consolidate democracy and a culture of human rights. The thesis ends with some recommendations for further research to ensure the best protection of freedom of association and trade unions in South Africa and the rest of our continent.

Key terms

Freedom of Association; Fundamental Human Rights and Freedoms; Trade Unions; Trade Unionism; Apartheid; Democracy; Constitutionalism; Constitutional Order; Employees, Employers, Industrial Relations, Labour Law, Labour Relations.

LIST OF ACRONYMS

AC	:	Appeal Cases
ACTWU	:	Amalgamated Clothing and Textile Workers Union
All ER	:	All England Law Reports
ANC	:	African National Congress
AU	:	African Union
APRM	:	African Peer Review Mechanism
AZACTU	:	Azanian Council of Trade Unions
BCEA	:	Basic Conditions of Employment Act
BCLR	:	Butterworth Constitutional Law Report
BLLR	:	Butterworth Labour Law Report
CFA	:	Governing Body Committee on Freedom of association of the ILO
CC	:	Constitutional Court
CCMA	:	Commission for Conciliation Mediation and Arbitration
COSATU	:	Congress of South African Trade Unions
CODESA	:	Convention for a Democratic South Africa
CEPPWAWU	:	Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union
COIDA	:	Compensation for Occupational Injuries and Diseases Act
CUSA	:	Council of unions of South Africa
CWU	:	Communication Workers Union
DDPECG	:	NEPAD Declaration on Democracy, Political, Economic and Corporate Governance
DENOSA	:	Democratic Nursing Organisation of South Africa
EAT	:	Employment Appeal Tribunal
Eds	:	Editors
EEA	:	Employment Equity Act
ET	:	Employment Appeal
FAWU	:	Food and Allied Workers Union

FFCC	:	Fact-Finding and Conciliation Commission on Freedom of Association of the ILO
FOSATU	:	Federation of South African Trade Unions
HSGIC	:	NEPAD Heads of State and Government Implementation Committee
IC	:	Industrial Court
ICA	:	Industrial Conciliation Act
ICCPR	:	International Covenant on Civil, Cultural and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
ICR	:	Industrial Cases Reports
ICU	:	Industrial and Commercial Workers Union
IFP	:	Inkatha Freedom Party
ILO	:	International Labour Organisation
IMATU	:	Independent Municipal & Allied Trade Union
IRLR	:	Industrial Relations Law Reports
IT	:	Industrial Tribunal
ITR	:	Industrial Tribunal Reports
LAC	:	Labour Appeal Court
LC	:	Labour Court
LLB	:	Bachelor of Laws
LLD	:	Doctor of Laws
LLM	:	Master of Laws
LRA	:	Labour Relations Act
MLR	:	Modern Law Review
MUSA	:	Musicians Union of South Africa
NAACP	:	National association for the Advancement of Colored People
NAAWU	:	National Automobile and Allied Workers Union
NACTU	:	National Council of Trade Unions
NEDLAC	:	National Economic Development and Labour Council
NAPTOSA	:	National Professional Teachers' Organisation of South Africa
NEHAWU	:	National Education Health and Allied Workers Union

NEPAD	:	New Partnership for Africa's Development
NEWU	:	National Entitled Workers Union
NGO(s)	:	Non-Governmental Organisation(s)
NIRC	:	National Industrial Relations Court
No(s)	:	Number(s)
NP	:	National Party
NQHR	:	Netherlands Quarterly of Human Rights
NUM	:	National Union of Mineworkers
NUMSA	:	National Union of Metalworkers of South Africa
PAC	:	Pan African Congress
Par (s)	:	Paragraph (s)
PAWE	:	Performing Arts Workers' Equity
PEU	:	Professional Educators Union
Phd.	:	Doctor of Philosophy
POPCRU	:	Police and Prisons Civil Rights Union
SA	:	South Africa
SAAPAWU	:	South African Agricultural Plantation and Allied Workers Union
SACCAWU	:	South African Commercial, Catering and Allied Workers Union
SACOL	:	South African Confederation of Labour
SACTU	:	South African Council of Trade Unions
SACTWU	:	Southern African Clothing and Textile Workers Union
SACWU	:	Southern African Clothing Workers Union
SADC	:	Southern African Development Community
SADNU	:	South African Democratic Nurses' Union
SADTU	:	South African Democratic Teachers Union
SAFPU	:	South African Football Players Union
SAJHR	:	South Africa Journal of Human Rights
SAMA	:	South African Medical Association
SAMWU	:	South African Municipal Workers Union

SANDF	:	South African National Defence Force
SANDU	:	South African National Defence Union
SASAWU	:	South African State and Allied Workers Union
SASBO	:	SASBO: The Finance Union
SATAWU	:	South African Transport and Allied Workers Union
SATLC	:	South African Trade and Labour Council
SAYIL	:	South African Yearbook of International Law
SDE	:	Skills Development Act
TAWU	:	Textile Allied Workers Union
TUCSA	:	Trade Union Council of South Africa
TULRA	:	Trade Union Labour Relations Act
TULR (A) A	:	Trade Unions and Labour Relations (Amendment) Act
TULR(C) A	:	Trade Union Labour Relations (Consolidation) Act
UCT	:	University of Cape Town
UDHR	:	Universal Declaration of Human Rights
UIA	:	Unemployment Insurance Act
UN	:	United Nations
UNESCO	:	UN Economic and Social Council
UWUSA	:	United Workers Union of South Africa
v	:	Versus
Vol.	:	Volume

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CHAPTER 1 GENERAL INTRODUCTION

1.1. Research Problem and Subject Matter of the Study

The subject matter of this study is “Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order”. The research therefore revolves around freedom of association and trade unionism, and their protection in South Africa from apartheid to the new democratic constitutional order.

Freedom of association is rightly regarded as one of the cornerstones of liberal democracy.¹ In de Tocqueville’s words, “No legislator can attack freedom of association without impairing the very foundations of society.”² According to Woolman, associations and freedom of association are essential components of a well-ordered society. Associational freedom makes participatory politics meaningful and genuinely representative politics possible. Associational freedom secures private goods or intimate relationships. It advances and promotes economic, social and substantive equality goods.³

The principle of freedom of association constitutes one of the basic tenets of the International Labour Organisation (ILO) that was established by the Treaty of Versailles of 1919 in the wake of the First World War to improve the condition of workers and achieve universal peace through social justice. The 1944 Declaration of Philadelphia reaffirmed the fundamental principles, on which the ILO is based, and stressed that “freedom of association and expression is essential to sustained progress.”⁴ These principles were reinforced in the 1998 Declaration.⁵

¹ Ewing KD, “Freedom of Association”, in Mc Crudden & Chambers G (eds) *Individual Rights and the Law in Britain* (1992) 239.

² Alexis de Tocqueville, quoted by Woolman S, “Freedom of Association” in Chaskalson M *et al* (eds) *Constitutional Law of South Africa* (1996) 22-1.

³ Woolman *op cit* 22.1- 22.2.

⁴ See Seady HM & Benjamin PS “The Right to Strike and Freedom of Association: An International Perspective” (1990) 11 *ILJ* 440.

⁵ The Declaration of Fundamental Principles and Rights at Work (1998) 37 *ILM* 1237.

To date, many conventions and recommendations have been adopted which tend to promote freedom of association.⁶ However, the most important ILO conventions on this matter are the Freedom of Association and Protection of the Right to Organise and the Right to Organise and Bargain Collectively conventions.⁷

Special structures, such as the Committee on Freedom of Association of the Governing Body, were established to deal with complaints concerning freedom of association. Since its establishment in 1951 the Committee has considered more than 1500 cases and its jurisprudence⁸ is a rich source of international labour law concerning most aspects of freedom of association and the protection of trade union rights.⁹ South Africa adhered to the ILO when it was created in 1919. However, due to criticism over its internal policies and its representation, it withdrew in 1964¹⁰ before rejoining the ILO on 26 June 1994 after the collapse of apartheid.¹¹ We would ignore freedom of association at our own peril, at the peril of free and democratic society and at the peril of sustained progress.¹² On the other hand, democracy is meaningless and sustainable development is not possible without freedom of association in the workplace. Moreover, trade unionism is an expression of freedom of association.

⁶ The ILO Conventions and Recommendations with a bearing on freedom of association include the Convention and Recommendation Concerning Discrimination in Respect of Employment and Occupation No 111 (adopted on 25 June 1958 and entered into force on 15 June 1960); the Convention Concerning Equal Remuneration For Men and Women for Work of Equal Value No 100 (adopted on 29 June 1951 and entered into force on 23 May 1953); the Convention and Recommendation Concerning Equal Opportunities and Equal Treatment for Men and Women Workers and Workers with Family Responsibilities No 165 (adopted on 23 June 1981 and entered into force on 1 August 1981); the Convention Concerning Social Policy (Basic Aims and Standards) No 117 (adopted on 22 June 1962 and entered into force on 23 April 1964); and the Convention Concerning Employment Policy No 122 adopted on 9 July 1964 and entered into force on 15 July 1966).

⁷ Freedom of Association and Protection of the Right to Organise Convention (No 87 of 1948) and Right to Organise and Collective Bargaining Convention (No 98 of 1949). Adopted by the ILO General Conference on 9 July 1948, the 1948 Convention came into force on 4 July 1950 while Convention 98 was adopted on 1 July 1949 and came into operation on 18 July 1951.

⁸ The decisions of the Committee on Freedom of Association are published in Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (the Digest).

⁹ Seady & Benjamin *op cit* 441.

¹⁰ South Africa's withdrawal became effective in 1966.

¹¹ Rubin N, *International Labour Law and the Law of the New South Africa* (1998) 1.

¹² Woolman *op cit* 22.1-22.2.

In 1993 South Africa adopted the interim Constitution, which was later, superseded by the 1996 Constitution. The aim of the 1996 Constitution¹³ as certified by the Constitutional Court¹⁴ was to “heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights” and to “lay the foundations for a democratic and open society”.¹⁵ South Africa under the 1996 Constitution is a “democratic state”¹⁶ founded on “democratic values” including human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism and the “supremacy of the Constitution” and the rule of law.¹⁷

On the other hand, the Bill of Rights,¹⁸ which affirms the democratic values of human dignity, equality and freedom, enshrines the rights of all people in our country.¹⁹ It is not surprising that the right to freedom of association including trade union rights holds a primordial place among the rights and values entrenched in the Constitution.²⁰ It is against this background that the thesis investigates freedom of association and trade unionism and their protection in South Africa since apartheid.

¹³ Constitution of the Republic of South Africa Act 108 of 1996.

¹⁴ See *Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 (CC), which failed, and *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 1997* (1) BCLR 1 (CC), in terms of which the 1996 Constitution was eventually certified as conforming to the Constitutional Principles provided in Schedule 4 of the Constitution of the Republic of South Africa Act No 200 of 1993, according to Section 71 of the same Constitution.

¹⁵ Preamble to the 1996 Constitution.

¹⁶ Section 1(d) read with Preamble, Sections 2, 7(1) & 195(1).

¹⁷ Section 1.

¹⁸ Chapter 2.

¹⁹ Section 7(1).

²⁰ Section 18.

1.2. Aims, Rationale and Importance of the Study

Freedom of association is one of the essential ingredients for a flourishing liberal democracy.²¹ According to Woolman and de Waal, identifying freedom of association as foundational to democracy may well depend upon politics, culture, religion, family life, class or race.²²

The research aims to inquire into freedom of association and trade unionism and their protection under South African law, and international law and jurisprudence. As the literature would reveal, freedom of association in the South African workplace still needs to be researched given its importance and the role that South African workers played during the struggle for a free and democratic South Africa. The same goes for trade unionism. There are many trade unions and federations of employees and several federations of employers in the country. The Congress of South African Trade Unions (COSATU) was launched in December 1985 after four years of unity talks among unions opposed to apartheid and committed to a non-racial, non-sexist and democratic South Africa.²³ At its launch in 1985, COSATU represented less than half of the workers who were then organised in 33 unions. It now stands among the leading trade union federations on the continent due to its membership.

²¹ Woolman S & de Waal J, "Freedom of Association: The Right to be We" in Van Wyk *et al Rights and Constitutionalism* (1994) 338.

²² *Idem*.

²³ See <http://www.cosatu.org.za/affiliates.html> (accessed in May 2006).

There are 21 trade unions affiliated to COSATU,²⁴ with a combined membership of more than two million workers, of whom at least 1,8 million are paid up.²⁵ COSATU was instrumental to the demise of apartheid as a key ally to the African National Congress (ANC).

In view of its aim as outlined above, this research work is important from both theoretical and practical perspectives. The theoretical importance of the thesis will derive from its contribution to the development of knowledge on freedom of association and trade unionism in South Africa since relatively little has been written on these issues even after the apartheid legal order collapsed. From a practical perspective, the thesis will help understand the history of freedom of association at the workplace, which is closely related to the struggle for democracy in South Africa. It will also hopefully contribute to promoting freedom of association and democracy in this country.

This research work is likely to benefit a number of people in South Africa. Millions of workers and prospective workers and employers need to be conversant with their rights and responsibilities with regard to freedom of association entrenched in the Bill of Rights and in many international instruments. Lawmakers in Parliament, judges and lawyers should be aware of what this right entails in order to promote and enforce it. The police who are often called in during demonstrations or strikes and public officers need to understand the importance of freedom of association in the free and democratic society South Africans had been longing for.

²⁴ The affiliated trade unions include Chemical, Energy, Paper Printing,, Wood and Allied Workers Union (CEPPAWU), Chemical Workers Union (CWU), Food and Allied Workers Union (FAWU), Democratic Nursing Organisation of South Africa (DENOSA), Musician Union of South Africa (MUSA), National Education Health and Allied Workers Union (NEHAWU), National Union of Mineworkers (NUM), National Union of Metalworkers of South Africa (NUMSA), Performing Arts Workers' Equity (PAWE), Police and Prisons Civil Right Union (POPCRU), South African Agricultural Plantation and allied Workers Union (SAAPAWU), South African Commercial, Catering and Allied Workers Union (SACCAWU), Southern African Clothing and Textile Workers Union (SACTWU), South African Democratic Nurses' Union (SADNU), South African Democratic Teachers Union (SADTU), South African Football Players Union (SAFPU), South African Medical association (SAMA), South African Municipal Workers union (SAMWU), South African State and Allied Workers Union (SASAWU), Sasbo: the Finance Union (SASBO), and South African Transport and allied Workers Union (SATAWU).

²⁵ See <http://www.cosatu.org.za/affiliates.html> accessed in May 2006.

Outside South Africa, especially in the rest of the African continent, many people would be interested in learning from the history of freedom of association and trade unionism in order to know what has been achieved in this regard in South Africa and in their own countries, to identify the challenges and the best ways to deal with them.

1.3. Scope and Delimitation of the Study

The title of the thesis implies at least a three-fold limitation of its scope namely, *ratione materiae*, *ratione loci* and *ratione temporis*.

1.3.1 *Ratione Materiae* Delimitation

Freedom of association and trade unions (unionism) are the basic concepts of the subject matter of this thesis. Freedom of association is a broad concept. As a fundamental right, it is related to a number of other freedoms and rights. On the other hand, as Woolman remarked, associations are of several orders.²⁶

The nature of associations that may be set up is almost indefinite. They may be political, intimate, cultural,²⁷ economic, social, ideological or religious associations, small or big, national or international, legal or illegal.

²⁶ Woolman *op cit* 22.5 – 22.7.

²⁷ According to Woolman & De Waal, the justification for protecting intimate associations under the freedom of association- that the state should not be able to determine the most significant aspects of our self-definition- could also provide the grounds for extending the same protection to cultural associations. Cultural practices and affiliations like intimate relationship often form an integral part of our self-understanding. For them, cultural associations sustain these practices and affiliations. If we therefore, wish to safeguard these basic or primordial attachments from undue state interference, then we must be willing to place cultural associations securely within the freedom's protective sphere.

Associational freedom serves many masters and mistresses. Freedom of association need not only be a vehicle for political participation. As Woolman and de Waal observed, whom we love, how we love them, whom we live with, how we live together, whom we like, how we engage them are decisions about our most intimate, most meaningful relationships and may also be protected by freedom of association.²⁸ The justification for this protection is that such relationships form an absolutely integral part of our self-understanding and that we as individuals must have relatively unfettered control over such decisions. If we are to be truly free to make these self-defining choices, then we need the protection provided by the freedom of association in order to prevent the state from exercising a too substantial influence over our decisions about whom we love and how to love them, for instance. As stressed earlier, everyone is entitled to the right to freedom of association,²⁹ and associations may be of different nature, political, economic, cultural or social.

Freedom of association goes far beyond labour law relations. Workers and employers are entitled to freedom of association.³⁰ While the right to freedom of association is a much broader concept, trade unionism, which expresses itself through the creation of trade unions, is confined to the field of labour law. Accordingly, the study deals with workers' right to freedom of association, which enables them to form or join a trade union and participate in its activities in order to protect and promote their interests at the workplace.

1.3.2. *Ratione Loci* Delimitation

Freedom of association and trade unions are protected in international law. At the domestic level, their protection may vary from one municipal system to another. *Ratione loci*, the thesis will be a case study of freedom of association and trade unionism in South Africa.

²⁸ Woolman & de Waal *op cit* 339.

²⁹ Section 18 of the 1996 Constitution of the Republic of South Africa.

³⁰ Section 23.

Although reference may and will definitely be made to international, regional and foreign law, it is mainly concerned with the protection of the right to freedom of association and trade unionism in South Africa.

1.3.3. *Ratione Temporis* Delimitation

Arguably, South Africa and Africa have known the right to freedom of association and various forms of trade unionism since times immemorial. To those “Eurocentrists” who could refer to human rights, including the right to freedom of association, as a European or Western invention, one would invoke some scholars who rightly denied to Europe and the West any “paternity” of the discourse on human rights and democracy.

About the greeks and athenians who are generally referred to as the “fathers of democracy”, Parkinson noted:

In commenting upon the course of history, St. Augustine is shrewd to suggest (as did Sallust before him) that the Athenians exceeded other people more in their publicity than in their deeds. Most subsequent scholars have been more credulous, one result being a surprisingly widespread belief that the Athenians were the inventors of democracy... What we owe to the Athenians (and Westerners or Euro-Americans) is not the thing itself or even its name but the earliest account of how a democracy came into being, flourished and collapsed. Of the Indian democracies, which were probably older, we have all too little precise information.³¹

³¹ Parkinson CN, quoted by Nzongola-Ntalaja G, “The State of Democracy in Africa” in Nzongola-Ntalaja G & Lee M (eds) *The State and Democracy in Africa* (1997) 10.

As for Mamdani,

It is difficult to accept, even in the case of Europe, that human right was a conception created by the 17th century Enlightenment philosophy. True, one can quote Aristotle and his ideological justification of slavery as evidence that the idea of human rights was indeed foreign to the conscience of the ruling classes in ancient Greece...What was unique about Enlightenment philosophy, and about the writings of the French and American Revolutions, was not a conception of human rights, but a discussion of these in the context of a formally articulated philosophical system.³²

On the contribution of the West to the “invention” of human rights and democracy, Hountondji expressed the same view as Parkinson:

It produced, not the thing, but a discourse on the thing, not the idea of natural law or human dignity but the work of expression concerning the idea, the project of its formulation, explanation, analysis of its pre-suppositions and consequences, in short the draft of a philosophy of human rights.³³

In view of the above, the scope of this thesis will also be limited *ratione temporis*. It will not deal with the right to freedom of association and trade unionism in pre-colonial South Africa, as it is even difficult to pinpoint when this country came to be known as South Africa. On the other hand, it will not investigate them since independence, as the exact date of South Africa's independence cannot be determined as the case is for many African countries.

³² Mamdani M, “Social Movements and Constitutionalism in the African Context” in Shivji I (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 236-237.

³³ Hountondji P, quoted by Mamdani *op cit* 237.

As Dugard pointed out,

It is difficult to pinpoint the exact moment at which South Africa became independent...the correct view, it seems South Africa acquired full international status at the moment that it acquired the capacity to enter into relations with other states and this capacity was recognised by Britain. 1926 therefore appears to be the year in which South Africa became a full sovereign independent state under international law.³⁴

The study will therefore deal with freedom of association and trade unionism since the establishment of the apartheid order in the 1940s.

1.4. Literature Review

There is hardly any scientific work *ex nihilo*. Science developed over centuries and ages, thanks to scholars and researchers who were capable of critically revisiting and building on previous scientific works. This work is definitely not the first of its kind on the subject. A number of remarkable studies have already been undertaken and need to be revisited in order to highlight the contribution of this study to the existing corps of knowledge. Reviewing the literature on freedom of association and trade unionism from the apartheid to the new democratic order in South Africa is a difficult task. The reason for this is that not only because a lot has been written on this subject matter by more competent and otherwise renowned labour law scholars, but also because of the diversity of their approaches and perspectives. As expected, in law like many other social science disciplines, there is no single voice or discourse on freedom of association and trade unionism in South Africa or anywhere else for that matter. The various and sometimes divergent voices came from people expressing themselves from different backgrounds or contexts, some being more authoritative than others, making the task of any reviewer a particularly challenging one. The literature review presents any researcher with a number of problems.

³⁴ Dugard J, *International Law. A South African Perspective* (2000) 76.

First, given the great amount of research material produced on the subject, the paucity of university libraries, coupled with space and time constraints, it is difficult if not impossible to list all the publications already undertaken by other scholars or experts. On the other hand, scientific production is an unfinished business. As I write and even when I will be putting the final touch to this work, the latter will not be the final answer. Contrary to what Fukujama might be understood to have predicted, there is no “end to the (hi) story.”³⁵

Freedom of association and trade unionism in South Africa has got many “followers” and people will continue to reflect on these critical issues in and outside this country. Like democracy and other human rights, the right to freedom of association and trade unionism are not cast in stone. They are part of an ongoing struggle of everyday life. The discourse on this matter continues and the final whistle is unlikely to be blown. Scholars will keep on reflecting on these issues and it would be too pretentious to review all the literature critically. Accordingly, a literature review is based on a number of research works, somehow arbitrarily selected by the author, and lends itself to criticism as the reviewer would hardly lay claim to more authority than the authors whose works are reviewed.

Second, following from the above, even for those few who have time to peruse and comprehend all the pieces of the literature under review, it would equally be unrealistic to assess them.

Third, the problem of scientific objectivity is so easily dismissed in social sciences. The work of some writers may be judged unfairly as compared to others, leaving the reviewer herself or himself *à la merci* and exposing her or him to harsh criticism of those whose works are reviewed and who would disagree with the reviewer about her or his judgment on their works, no matter the care she or he might have taken to make such judgment.

³⁵ Fukujama F, *The End of History and the Last Man* (1992).

Finally, there is a tendency by reviewers to undermine previous research work and over-emphasise their own work as a better contribution to the advancement of knowledge. Although this author will strive to address the above problems, she cannot, unfortunately, guarantee a scientifically “infallible” literature review and would rather content herself with an overview of such literature.

As I now embark on a review of the literature on freedom of association and trade unionism from apartheid to the new democratic constitutional order, it is only correct, scientifically, to first acknowledge those who earlier contributed to the promotion of freedom of association at the workplace in the world in general and in South Africa in particular, before apologising to those whose works would have been unfairly judged.

As it will be pointed out later, freedom of association is not only a labour law or labour relations’ concept. It is a much broader concept that goes beyond to embrace the political or public sphere. Even in labour relations or in the workplace, the right to freedom of association is a basket that comprises several other rights or freedoms. These include, for the workers or employers, the right to form or join a trade union or an employers’ organization, the right to strike or lock out, and the right to participate in collective agreements such as agency shop or closed shop agreements and even the right not to associate at all.³⁶ Moreover, human rights are interrelated and indivisible.³⁷ As will also be stressed later, the struggle for freedom of association even in the workplace cannot be separated from the struggle for freedom of association in the political arena, for the enjoyment of other rights and freedoms, whether civil, political, social, economic or groups’ rights, individual and collective rights, and even for the broad struggle for democracy given the close relationship between them.

³⁶ Section 23 of the 1996 Constitution of South Africa.

³⁷ Mangu AMB, *The Road to Constitutionalism and Democracy in Post-colonial Africa: The Case of the Democratic Republic of Congo* (2002) 145.

Union rights, labour or industrial relations' rights are human and democratic rights. Accordingly, the right to freedom of association was inimical to the apartheid system that denied virtually all rights to the majority of the African people on racial grounds. It rather finds in a democratic order the best environment for its exercise. Moreover, sub-regional and regional integration is currently high on the African agenda as part of the African response to the much celebrated but controversial phenomenon of globalisation.

Freedom of association and trade unionism in South Africa cannot be investigated fully without reference to the developments that have occurred in Southern Africa, on the rest of the continent and in the world. These developments include the creation of organisations such as the Southern African Development Community (SADC), the African Union (AU) and the launching of initiatives such as the New Partnership for Africa's Development (NEPAD) and its African Peer-Review Mechanism (APRM). In the rest of the world, the globalisation of standards to govern labour relations has been an ongoing process since the creation of the International Labour Organisation (ILO).

International law, including human rights and labour law, has developed tremendously and played an important role in the dismantling of the apartheid system and the establishment of a new legal dispensation in South Africa. The Constitution of South Africa recognises the relationship between international law and municipal law, particularly in the protection and promotion of the rights entrenched in the Bill of Rights.³⁸ Freedom of association and trade unionism cannot therefore be dealt with without reference to international law and even foreign law.

Freedom of association as a much broader human right without specific reference to its exercise in the workplace, has been very much discussed by constitutional and human rights scholars under the main topic of constitutionalism, democracy and human rights.³⁹

³⁸ Section 39 (1) (b)-(c) of the 1996 Constitution.

³⁹ See Beatty "Constitutional Labour Rights: Pros and Cons" (1993) 14 *ILJ* 1-16; Brand D & Russell S (eds) *Exploring the core Content of Socio-Economic Rights. South African and Comparative Perspectives* (2002); Cheadle H et al (eds) *Fundamental Rights in the Constitution* (1997); Davis et al (eds)

Most writers deal with freedom of association in the context of labour law, as part and parcel of labour relations rights embodied in the Bill of Rights. Freedom of association is generally more dealt with under labour law than under constitutional human rights law and related to it as an indispensable component of the labour relations in a democratic state.⁴⁰

Moreover, most labour law scholars attach freedom of association in the workplace to one of its components such as the right to form or join a trade union,⁴¹ the right to strike or lock out,⁴² the right to engage in collective bargaining,⁴³ or in collective agreements such as agency shop,⁴⁴ or closed shop agreements.⁴⁵

Fundamental Rights in the Constitution (1997); de Waal *et al*, (eds) *Bill of Rights Handbook* (1999); Idem (2001); Idem (2005); Devenish GE, *A Commentary on South African Bill of Rights* (1999); Grant B, "Majoritarianism and Freedom of Association" (1993) 14 (2) *ILJ* 305-314; Louw R *et al*, (eds) *South African Human Rights and Labour Law Yearbook* (1996); Robertson M *et al*, (eds) *South African Human Rights and Labour Law Yearbook* (1990); Idem (1991); Togni LS, *The Struggle for Human Rights. An International and South African Perspective* (1994).

⁴⁰ See Bassom D *et al*, (eds) *Essential Labour Law* (2000); Idem (2001); Brassey M, *Labour Relations Under the New South African Constitution* (1994); Cheadle H *et al*, (eds) *Current Labour Law* (1995); Idem (1998); Idem (2003); Davis D, "Constitutionalisation of Labour Rights" in Van Wyk *op cit*; Du Toit D *et al*, (eds) *Labour Relations Act of 1995* (1998); Idem *Labour Relations Law* (2000); Finnemore M, *Introduction to Labour Law in South Africa* (2002); Finnemore M & Van Rensburg R, (eds) *Contemporary Labour Relations* (2000); Grosset M & Venter R, *Labour Relations in South Africa: A Comprehensive Guide for Managers and Practitioners* (1998); Kalula E, (ed) *Labour Relations in South Africa: Proceedings of a Conference on Labour Relations in Southern Africa* (1993); Kiltner M *et al*, (eds) *Labour Law under the Apartheid Regime* (1989); Rycroft & Jordaan, *A Guide to South African Labour Law* (1990); Idem (1992); Slabbert JA *et al*, (eds) *Managing Employment Relations in South Africa* (1998); Swanepoel JPA, *Introduction to Labour Law* (1992); Thompson C & Benjamin P, (eds) *South African Labour Law* (2003); Van Jaarsveld SR & Van Eck BPS, *Principles of Labour Law* (1998); Idem (2002).

⁴¹ See Madima T, "Freedom of Association and the concept of Compulsory Trade Union Membership" (1994) 3 *TSAR* 545-555.

⁴² See Cheadle H *et al*, (eds) *Strikes and Lockouts in Current Labour Law* (1997); Seady & Benjamin *op cit* 439-459.

⁴³ See Jones R A, *Collective Bargaining in South Africa* (1982); Thompson C, "Collective Bargaining" in Robertson M *et al*, (eds) *op cit*; Simamba BH, "The International Labour Organisation and the Right to Collective Bargaining: An African Perspective" (1989) 106 *SALJ* 517-533.

⁴⁴ Landman A, "No Free Ride: The Agency Shop in South Africa" (1996) 6 *Contemporary Labour Law* 1-9; Madima T, "The Agency Shop" (1993) 9 *Employment Law* 4.

⁴⁵ See Albertyn C, "Closed Shop and Fairness" (1991) 7 *Employment Law* 3; Idem "Closed Shop, Closed Mind" (1994) 10 *Employment Law* 5; Idem "Freedom of Association and the Morality of Closed Shop" (1989) 10 *ILJ* 981-1005; Landman A, "The Closed Shop" (1989) 2 *Labour Law Briefs* 12; Le Roux PAK, "The Closed Shop and the Industrial Conciliation Act" (1980) *MB* 69-77; Olivier MP & Potgieter O, "The Right to Associate and Closed Shop" (1994) *TSAR* 289-305.

On the other hand, considering the close relationship between South African labour law with the labour law of many SADC countries and in the context of sub-regional or regional integration and globalisation, labour law scholars, especially those from other African countries, including the promoter and joint promoter of this thesis, adopted a more comparative approach required by the said integration.⁴⁶

Others went beyond Southern Africa to adopt a more continental perspective.⁴⁷ On the other hand, apart from some sections or chapters in books or journals and despite the important role they played against apartheid and in the advent of the democratic dispensation, trade unions do not seem to have attracted a great deal of attention from South African labour law experts.⁴⁸

The strengths of the labour movement in South Africa, its weaknesses, its impact on economic growth and social justice, and even its collusion with the democratic government, its use and abuse as well as the chance or the danger it may represent for the consolidation of democracy in this country still need to be researched more fully and critically. It may also be deplored that most scholars have been interested in freedom of association in the workplace and trade unionism only in the private sector.

⁴⁶ See Kalula E, "In Search of Southern African Comparative Labour Law Perspectives" (1993) 14 *ILJ* 322-332; Kalula E, "Present at the creation or another false start in Africa? Labour market regulation, social protection and the future of labour law in Southern Africa" (2003); Kalula E & Fenwick C, "Law and labour market in East Asia and Southern Africa: Comparative Perspectives" (2004); Okpaluba C, "The opportunity to state case in the law of unfair dismissal in Swaziland in the light of the developments in South Africa and the United Kingdom" (1999) 11 *African Journal of International and Comparative Law* 392; Feys T, "Labour Standards in Southern Africa in the Context of Globalisation: The Need for a Common Approach" (1999) 20 *ILJ* 1445-1482; Takirambudde PN, "The new Labour Law in Southern Africa" in Kalula & Woolfrey *op cit*; Woolfrey D, "Harmonization of Southern Africa's Law in the Context of Regional Integration" (1991) 12 *ILJ* 703-720.

⁴⁷ See Budeli M, "Freedom of Association in Contemporary International and South African Labour Law: (2003) 17 *Speculum Juris* 229-251; Saley S & Benjamin P, "The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa" (1992) 13 *ILJ* 731-790.

⁴⁸ Exceptions to this are Hepple B, "Trade Unions and Democracy in Transitional Societies: Reflections on Russia and South Africa" in Ewing KD *et al*, (eds) *Human Rights and Labour Law: Essay for O'Higgins* (1994); Scheepers SA, "The Challenge Facing Trade Unions in South Africa" in Coetzee JA (ed) *Industrial Relations in South Africa* (1976); Wall B & Luckard K, *Organise or Starve: The History of the South African Congress of Trade Unions* (1980); Walker IL, *A History of the Trade Unions and the Labour Movement in the Union of South Africa* (1961).

Apart from some exceptions,⁴⁹ freedom of association and trade unionism in the public sector have received little attention while domestic employees and employers have been almost completely neglected.

Some conclusions may be drawn from the overview of the literature on freedom of association and trade unionism in South Africa. First, the international and regional perspectives of freedom of association and trade unionism are not particularly developed, especially among South African scholars. This is regrettable considering South Africa's commitment to the ideals of good governance in Africa and progress in an increasingly globalised world where the country intends playing an important role. The history of labour relations in South Africa is well documented and generally includes sections on trade unions. A number of studies adopt a much more historical approach than a legal one. The role played by the judiciary and the workers themselves in promoting the right to freedom of association is not always stressed in the literature. Trade unionism *per se* and trade unions such those comprising COSATU have not yet managed to make the titles of labour law publications. Despite the progress that has been achieved in the promotion of human rights, including the right to freedom of association, and democracy, the latter are not guaranteed. Nor are they immune to attacks. Accordingly, the government, intellectuals and the employees should constantly and consistently defend them.

In a field where few black South African scholars have taken a voice, the present thesis intends to be my contribution to the development of knowledge in labour law and human rights, as it will necessarily complement the existing literature. It will consider freedom of association and trade unionism not only under the Apartheid regime but also under the new regime to give a sense or help with understanding the struggle for freedom of association as part of the national struggle for democracy.

⁴⁹ Budeli M, "Freedom of Association for Public Sector Employees" (2003) *Codicillus* Vol. XLIV 49-60, Gillian Morris, "Employment in Public Services: The Case for Special Treatment" *Oxford Journal of Legal Studies*, Vol. 20, No. 2 (2000), 167-173.

The methodological approach will be historical, legal and comparative. South Africa is part of the African continent and any study of freedom of association in South Africa should refer to the developments that have taken place on the rest of the continent and the world at large. The role of South African courts in enforcing the right to freedom of association in the workplace, whether in the private or the public sector, as enshrined in the Bill of Rights will receive due attention.

Researching in an African context where it may be debatable whether there is a place for the development of knowledge just for the sake of it, given the importance of the right to freedom of association for social peace, democracy, progress, and economic growth, the work should also be politically, economically and socially relevant. The author hopes it will constitute a useful addition to the existing literature.

1.5. Research Questions

The thesis will investigate a number of research questions. The first question relates to the meaning and scope of freedom of association and its protection under international law. The second concerns the scope of freedom of association under the evolving South African labour law. The third deals with the relationship between international law and domestic law relating to freedom of association.

The topic of the thesis puts it clear that most questions will refer to freedom of association and trade unionism in South Africa, namely, their protection and promotion since the apartheid rule and their association with the anti-apartheid struggle. The key questions are those relating to the scope of freedom of association in South Africa and the relationship between South African municipal law and case law on the one hand, and international law and jurisprudence on the other, as far as the protection of freedom of association and trade unionism is concerned, together with the challenges and prospects.

1.6. Assumptions and Expected Findings

The research is based on a number of assumptions. Trade unionism contributed to the extension of the frontiers of freedom and the struggle for democracy in South Africa. Freedom of association in the Constitution and labour law of the Republic of South Africa under the post-apartheid legal order was inspired by and meets the standards set in international labour law instruments, especially the ILO Conventions 87 of 1948 and 98 of 1949 on the right to freedom of association.

On the other hand, the ILO jurisprudence impacts on the protection of freedom of association in South African labour law and jurisprudence and South Africa may learn from it as well as from that of some countries to better enforce and promote freedom of association and the labour law.

The study has confirmed these assumptions and also stated that there are areas in which the law and jurisprudence on freedom of association and trade unions may be developed. On the other hand, there is a need for consistency and courts need to do more to promote freedom of association. The promotion of freedom of association and trade unionism in South Africa will also depend on the involvement of the civil society, particularly the workers, employers and their federations, and the knowledge of the principles of international or domestic labour law that regulate and protect this freedom.

1.7. Research Methodology

Methodology relates to the approach used by the researcher to tackle the subject matter and also explains how the conclusions were reached. It is therefore essential to any research work and the quality of the latter largely depends on the methodology used. Freedom of association and trade unionism are not a novelty in South Africa. Nor are they a South African invention.

The concepts of freedom of association and trade unionism are predominantly legal concepts used in Constitutional and Labour Law, both at the international and the domestic levels. On the other hand, South Africa adopted a system of labour law that reflects the form and content of the systems prevalent in Western countries, but created by the ILO.

As Cooney and others would rather put it, labour law may be described as “Western transplants” or “imposed law”.⁵⁰ Western (labour) laws being considered a model,⁵¹ the bulk of labour law in African and Asian countries derived from “borrowing and bending”, to use Clive Thompson’s words.⁵² Sometimes, like at independence, it was not even a question of “borrowing”, as when the “colonial powers” only imposed their law on people who could hardly oppose what was seen as a sign that they ultimately deserved independence and admission in the “civilised world”. This has been a result of the influence of colonial powers, and more recently the efforts of the ILO (both through standard-setting and through technical cooperation).⁵³

Kalula rightly stressed the need to go “beyond borrowing and bending” to adapt the borrowed law to the imperatives of development as one of the critical challenges to the development of labour law in underdeveloped countries in general and Southern African countries in particular.⁵⁴ However, as a Latin maxim would put it, *ibi societas ibi lex*. Our countries have to be more imaginative to also go even beyond “adapting the borrowed law” to invent their own laws that take into account their particular situation to better promote their development. On the other hand, domestic law cannot escape the influence of the laws of other countries.

⁵⁰ Cooney S *et al*, “Labour Law and Labour Market Regulation in East Asian States: Problems and Issues for comparative inquiry” in Cooney *et al*, (eds) *Law and Labour Market in East Asia* (2002) 3; Kalula E “Present at the creation ...” *op cit* 5.

⁵¹ Cooney *op cit* 4.

⁵² Thompson C, “Borrowing and Bending: The Development of South Africa’s Unfair Labour Practice Jurisprudence” in Blanpain R & Weiss M, (eds) *The Changing Face of Labour Law and Industrial Relations* (1993) 109-132.

⁵³ See Kalula “Present at the creation...” *op cit* 5-6; Kalula & Fenwick *op cit* 3.

⁵⁴ Kalula “Present at the creation...” *op cit* 13.

Freedom of association and trade unionism in South Africa cannot be understood without considering the history of this country, which has now gone a long way from apartheid to democracy. Against this background, it is submitted that the methodological approach to this subject-matter will be a legal, comparative and historical.

1.7.1 Legal Approach

Law regulates freedom of association and trade unionism. At the municipal level, freedom of association, including the right to establish trade unions, is entrenched in the Constitution. It is protected in a number of legislation passed by the national Parliament and it is the duty of domestic courts to develop the jurisprudence on this fundamental right enshrined in the Bill of Rights. Labour rights in general and freedom of association in the workplace in particular are embodied in the Constitution and are constitutional rights.⁵⁵ This is a legal fact, which prevents any further debate on whether they should be constitutionalised or not; whether we actually believed in the constitutionalisation of labour rights or not; and whether it would be a failure, as Arthurs argued in the case of the Canadian Charter of Rights and Freedom.⁵⁶

In the South African context, the debate between the “pros and cons” was brought to an end when the Constitution finally entrenched freedom of association in the workplace as well as labour rights.⁵⁷ Since the coming into operation of the 1993 Constitution, an important jurisprudence on freedom of association and labour rights has emerged from the judiciary, especially from the Constitutional Court and the labour courts.

⁵⁵ See Beaty *op cit* 5; Solomon M, “Labour Law under the New Constitutional Dispensation” (1997) Vol. XXXVIII *Codicillus* 24.

⁵⁶ Arthurs H, *The Constitutionalisation of Labour Rights*, Institute of Development and Labour Law, University of Cape Town, Occasional paper I/2004, 5-14.

⁵⁷ Beaty *op cit* 5.

On the other hand, South Africa's courts, tribunals or fora must consider international law and may consider foreign law when interpreting and enforcing the rights in the Bill of Rights,⁵⁸ including freedom of association and labour rights. They have systematically adhered to in their adjudication of cases on this subject.⁵⁹

South Africa ratified and adopted a number of international Conventions. Some of these Conventions, which constitute international labour law and human rights law, are binding on the Republic and were instrumental in the elaboration of the Bill of Rights and subsequent national labour legislation. Predominant among them are the ILO Conventions on freedom of association and the right to collective bargaining.⁶⁰

The abundant jurisprudence developed within the ILO to protect and promote freedom of association and workers rights cannot be ignored by South African courts in promoting the same freedom and rights within their jurisdiction. This is a constitutional imperative. Accordingly, freedom of association and trade unionism in South Africa cannot be studied without due consideration given to the domestic, international and even foreign law or jurisprudence.

⁵⁸ Article 39 (1) (b) & (c) of the 1996 Constitution.

⁵⁹ See *South African National Defence Union v Minister of Defence and Another* (1999) 20 ILJ 2265 (CC), *South African National Defence Union v Minister of Defence and Another* (2003) 24 ILJ 1495 (T) (SANDU 2), *National Union of Metal and Allied Workers of SA and Others v Bader Bop (pty) Ltd* (2003) 24 ILJ 305 (CC), *National Education Health Allied Workers Union v University of Cape Town and Others* (2002) 23 ILJ 306 (LAC).

⁶⁰ See Conventions 87 of 1948 and 98 of 1949.

1.7.2. Comparative Approach

In the true spirit of the constitutional imperative and in advancement of the South African labour jurisprudence, reference is made to comparative law in this study. A little clarification is however necessary. For the duration of the 20th century, the term “comparative law” was considered a viable method,⁶¹ although the definition of the term was never satisfactorily explained. Scholars such as Constantinesco, Watson, and Kokkini-Iatridou saw comparative law as a science in its own right while others such as Peter de Cruz, Kleyn, Viljoen and the present author rather considered it a research method.⁶²

According to Constantinesco, the purpose of the science of comparative law is to classify the legal systems of the world into few large families.⁶³ As for Watson, comparative law is an academic discipline that studies the historical relationship between legal systems or between rules of more than one legal system.⁶⁴

Although Kokkini-Iatridou takes note of the Anglo-American tendency, contrary to the continental and Latin-American approach, not to consider comparative law to be a science, she nevertheless concludes that it is capable of developing into an independent scientific discipline.⁶⁵ On the other hand, Peter de Cruz is of the opinion that comparative law is neither a branch of law, nor a body of rules, but rather a method of study.⁶⁶

⁶¹ Venter F, *Constitutional Comparison* (2000) 1.

⁶² Venter *op cit* 16-17; Kleyn D & Viljoen F, *Beginner's Guide for law Students* (2002) 267-268.

⁶³ Constantinesco, quoted by Venter *op cit* 15.

⁶⁴ Watson, quoted by Venter *op cit* 16.

⁶⁵ Kokkini-Iatridou quoted by Venter *op cit* 16.

⁶⁶ Peter de Cruz quoted by Venter *op cit* 17.

As de Cruz put it,

Modern comparative law draws from a range of disciplines, but is eclectic in its selection. It recognizes the important relationship between law, history and culture and operates on the basis that every legal system is a special mixture of the spirit of its people and is the product of several intertwining and interacting historical events which have produced a distinctive national character and ambience.⁶⁷

In the words of Kleyn and Viljoen, legal comparison is the study of foreign legal systems for the sake of comparing them with one's own legal system.⁶⁸ Comparative law is undoubtedly an excellent tool of education.⁶⁹ It contributes to the better perception of one's own national system, besides it enriches one's own approach to an understanding of industrial relations.⁷⁰ Although legal systems differ from one country to another, there are often remarkable similarities. Sometimes there are historical reasons to these similarities. For example, in South Africa, the influence of English law clearly links our legal system to that of Britain. On the other hand, our legal system is based on Roman-Dutch law and this links us to continental Europe in general and to the Netherlands in particular.⁷¹

The depth of the comparative exercise being undertaken and the level of knowledge of the material that is being compared will clearly co-determine the method that can be employed.⁷² According to Blanpain, comparativism is no longer a purely academic exercise, but has increasingly become an urgent necessity for industrial relations and legal practitioners due to the growth of multinational enterprises and the impact of international and regional organisations aspiring to harmonize rules, always resort to it.⁷³

⁶⁷ Venter *op cit* 17.

⁶⁸ Kleyn & Viljoen *op cit* 267.

⁶⁹ Blanpain *et al*, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2001) 4.

⁷⁰ Blanpain *op cit* 4.

⁷¹ Kleyn & Viljoen *op cit* 267-268.

⁷² Venter *op cit* 18.

⁷³ Blanpain *op cit* IX.

Legal comparison is important for a number of reasons. Firstly, the world has become a 'global village' through developments in a number of social aspects. No country exists in isolation from one another any more.⁷⁴ We have contact with foreign legal systems on a daily basis. This process is furthered by international organizations such as the UN, the ILO, the EU, the African Union, and so forth. These bodies promote international cooperation in various fields. Secondly, internationally accepted ideologies, such as the protection of human rights, encourage countries to conform to or move closer to international norms. Thirdly, legal comparison is necessary for the development of one's own legal system. Much may be gained by looking at how other countries address certain problems. In South Africa, legal comparison is often applied in daily adjudication in our courts.⁷⁵

The South African legal system in general and labour law system in particular as "transplant", has been very often compared to Western systems like those of the United States,⁷⁶ Russia, or even to international law, sometimes confused with the law of some Western countries of Europe and the Americas. Most African legal scholars and judges have been educated in the Western models.

However, comparison should no longer be limited to the comparison between African systems and those of American and European countries seen as models to which ours have to conform or derive their legitimacy. If there are lessons to learn, there are also lessons that African systems can teach others, including the systems of Western and non-Western societies and even from other African countries.

⁷⁴ Kleyn & Viljoen *op cit* 268.

⁷⁵ For example in the case of *Feldman (pty) Ltd v Mall* 1945 AD 733, the Court had to decide whether an employer could be held liable for delicts committed by employees, the court looked at English law on this point and remarked as follows "where there is no difference in principle our courts have always sought and obtained guidance from the decisions of the English courts." Again in *Government of the Republic of South Africa v Ngubane* 1972 2 SA 601 (A), Holmes JA remarked "In seeking to do justice between man and man it is at the least interesting and sometimes instructive to have some comparative regard to the law of other countries..."

⁷⁶ Piennar G, "Freedom of Association in the United States and South Africa – a Comparative Analysis" (1993) XXVI *CILSA* 148.

Kalula and Fenwick correctly hold that there are, for instance, differences and similarities between the East Asian and Southern African regions and law and labour market regulation in the latter can also benefit from the East Asian experience.⁷⁷ In the context of regional and sub-regional integration through AU and SADC, the required harmonization of African and Southern African law also necessitates legal comparison.⁷⁸ South African labour law can enrich and contrary to the conventional racist wisdom that dominated the past discourse, it can also learn from the labour law of other SADC countries. The contribution of scholars such as Kalula and others in this regard is encouraging.⁷⁹

No standard recipe can be devised for valid comparative research as long as the objects of the study of legal systems, their positive rules and principles, continue to be so diversified as to defy any other kind of classification than one which is meaningless because of generalisation and over simplification.⁸⁰

The comparative approach has gained momentum in recent literature. Whilst this move should be welcomed and encouraged, case studies like this one remain important to redress the shortcomings of over-generalisation and simplification.⁸¹ Being overly concerned with the nature and methodology of the pursuit of legal comparison, may in itself, constitute an obstacle to the achievement of useful results.

⁷⁷ Kalula & Fenwick *op cit* 1-30.

⁷⁸ Woolfrey *op cit* 703.

⁷⁹ See Kalula E, "Labour Law and Trade Union rights in Southern Africa: Problems and prospects", Paper presented to the Conference on Labour Law and Trade Union Rights in Southern Africa, Manzini, Swaziland, 9-12 November 1992; Kalula E, (ed) *Labour Relations in Southern Africa* (1993); Clarke M, Feys T & Kalula E, *Labour Standards and Regional Integration in Southern Africa: Prospects for harmonization* (1999); Kalula E, "To Borrow and bend: The Challenge of Comparative Labour Law in Southern Africa" *African Journal of International and Comparative Law* 1995; Kalula E, "National legislation and Institutional Arrangements: Glimpses from Southern Africa", Regulatory Framework in the Global Economy (ILO World Commission on the Social Dimension of Globalization), Geneva, 21-22 November 2002; Kalula E, "In Search of Southern African Comparative Labour Law ..." 322.

⁸⁰ Venter *op cit* 17.

⁸¹ Mangu *op cit* 96.

According to Kahn-Freund, the use of comparative method requires knowledge not only of the foreign law, but also of its social and above all its political context.⁸² Much in the process of legal comparison depends on the purpose for which it is undertaken. The purpose of one's comparative work can vary widely.

There can be no doubt that the primary purpose of any exercise in legal comparison should be the creation or knowledge of the law. On the other hand, as Fenwick and Kalula pointed out, labour law in Southern Africa is quite fundamentally a field of comparative law.⁸³ However, legal comparison also embraces history.

1.7.3. Historical Approach

The nature of the study will require that consideration be given to historical developments. Freedom of association and trade unionism in South Africa has got a history that may be traced back to the beginning of the 19th century. Their development and vicissitudes are closely related to the struggle of the South African people against apartheid that was a negation of virtually all rights that could be claimed by the majority of the people, particularly their civil, political and social and economic rights, including the right to freedom of association.

Accordingly, the history of the right to freedom of association and trade unionism is also the history of an unfinished struggle that will continue despite the establishment of a new democratic order whose consolidation is necessarily long term. Therefore, researching freedom of association and trade unionism in the context of South Africa calls for an historical approach. As legal scholars always do about their discipline considered crucial for the existence and survival of any organised society, historians are right to remind us of the importance of history.

⁸² Kahn-Freund O, "On Uses and Misuses of Comparative Law" *Modern Law Review* (1974) 27.

⁸³ Fenwick & Kalula *op cit* 2.

As Mangu has pointed out, “When one does not know one’s past, one cannot know where one comes from or even where one is going”.⁸⁴ However, this thesis is primarily a research work by a law student, not by an historian who would focus on history, or by a sociologist who would privilege empiric methods based on observation or a political scientist who would concentrate on the phenomena of power. Yet history, comparison and other social science methodological approaches will certainly assist and be used in the study although priority will be given to the legal approach, despite its own shortcomings, without making fetishism of legalism or indulging in any “triumphing *juridicisation*”.⁸⁵ As French constitutional scholar Leclercq once put it, a world without law and where “doctors of law” are banned would be a world doomed to disappear in a particularly violent manner.⁸⁶

Georges Burdeau added:

To study the rule of law, particularly in the constitutional domain, is to follow as an attentive witness the motion, which has ever pushed political societies to organize, following a certain order. But also, to understand this movement, to know the forces stimulating it and the figures it takes. Such an enterprise requires of course enlarging analysis beyond the strict comment on the texts, but it does not imply to consider old-fashioned the viewpoint of the legal scholar.⁸⁷

In view of the above, the methodological approach will be legal and theoretical but also comparative, and historical. Finally, since law is also a social science, one should be aware of the conclusion drawn by Jean-Marc Ela on research methodology: “Interdisciplinarity has come to be the fundamental rule of research in the social sciences”.⁸⁸

⁸⁴ Mangu *op cit* 94.

⁸⁵ *Idem*.

⁸⁶ Leclercq Cl, *Institutions politiques et droit constitutionnel* (1981) 17-18.

⁸⁷ As translated from French by Mangu *op cit* 90.

⁸⁸ Ela JM, “Les sciences sociales à l’épreuve de l’Afrique: les enjeux épistémologiques de la mondialisation” Paper presented to the 9th General Assembly of the Council for the Development of Social Science Research in Africa (CODESRIA), Dakar, Senegal, 14-18 December 1998, 12.

1.8 Research Problems

Before embarking on the study, it is worth stressing a number of problems encountered in carrying out this research and which may have impacted on the final product. First, the subject matter appeared to be vast. Accordingly, some details or important developments on the subject may have been overlooked as some cuts had to be made. On theoretical issues, as is evident in the social sciences, labour law scholars and judges hardly speak the same language. This has the potential of misleading younger scholars in the field.

Secondly, the literature and case law abound. It is quite clear that despite a great deal of efforts made, some important pieces of the literature and jurisprudence might have been neglected. Lack of adequate sources and also their unavailability in our university libraries may explain this.

Thirdly, the literature review on the particular subject of freedom of association and trade unionism in South Africa still need to be enriched. Whilst this has provided us with the opportunity to mostly contribute to the development of labour law on this issue, it has deprived us of a comprehensive set of materials at hand. As far as legal comparison is concerned as legal approach is used in the study, it required good knowledge of the systems that had to be compared with the South African, especially from other African countries in the context of regional integration and harmonization. Information on African labour law, even in the SADC countries, is scarce.

We tend to be more informed about the legal systems and jurisprudence of European, American and even Asian countries than about those of African and even neighboring countries. Our libraries contain more Western materials than African. This is likely to impact negatively on our knowledge of our continent and even sub-continent and subsequently on the quality of our research work and conclusions. Finally, labour law is a field that has known a tremendous development over the last decades.

When the thesis is brought to an end and submitted for the examination, it is likely to inadvertently overlook the most recent developments that would have occurred in relation to the promotion of freedom of association and trade unionism in South Africa.

1.9 Research Outline

All in all, this study consists of six chapters of unequal length and scientific value. As already observed, Chapter 1 offers a general introduction, outlines the research problems, the subject matter of the study, its aims, rationale, importance and its scope. It also contains a literature review and highlights the main research questions and assumptions and anticipates the findings. The methodology used is presented and the research problems uncovered prior to the research outline itself.

Chapter 2 deals with the theoretical background. It defines the key concepts used in the study and their relation to the subject matter. These concepts include employees, employers, industrial relations, freedom of association, trade unions and trade unionism, apartheid, democracy and constitutionalism.

Chapter 3 deals with labour relations, freedom of association and trade unionism under South African colonial and apartheid legal orders. It revisits the particular history of labour relations and trade unionism in South Africa, their protection under apartheid and the role played by South Africa's courts in this regard through an overview of the relevant case law.

Chapter 4 relates to freedom of association and trade unionism in foreign and international law. The history and protection of freedom of association and trade unions in foreign law of some countries are presented. The chapter also focuses on the protection of freedom of association and trade unions in international law, which includes African regional law.

Chapter 5 analyses freedom of association and trade unions under the democratic and post-apartheid legal order. It refers to the development of labour relations and trade unionism, and their legal protection. It finally reviews the abundant jurisprudence on freedom of association that has emerged from South African courts based on their interpretation and application of the interim Constitution of 1993 and the 1996 final Constitution.

Chapter 6 concludes the study. It contains the research findings and indicates some challenges and prospects for the protection for freedom of association and trade unionism in South Africa. On the other hand, since this work cannot and will not be the end of history on freedom of association and trade unionism in South Africa, it contains some recommendations for further research and investigation for the development of labour law and consolidation of constitutionalism and democracy in the context of African experience and globalisation. The study ends with a comprehensive bibliography that refers to the various research materials (textbooks, chapters in books, articles, conference papers, case law, and legal instruments) used as sources for the analysis undertaken in the study.

CHAPTER 2 THEORETICAL BACKGROUND

2.1. Introduction

As Chandler, Ensln and Renstrom wrote, "Precise language is a basic requirement of every intellectual discipline. This is particularly true in the field of law."⁸⁹ Yet, as they acknowledged,

The political and social sciences suffer more than most disciplines from semantic confusion. This is attributable, *inter alia*, to the popularization of the language, and to the focus on many diverse foreign political and social systems.⁹⁰

The legal discipline has been blamed and slighted by other social scientists and even by lawyers themselves, especially the proponents of the Critical Legal Studies School and positivists, for its lack of precision. However, even in natural or the so-called "exact" sciences, precision or exactitude is as impossible as the absolute truth.

Freedom of association and the right to collective bargain are fundamental human rights in the workplace that form an integral part of democracy. Any study on freedom of association and trade unionism in general and in South African labour law in particular would require one to be as precise as possible on the concepts used in the study. This chapter therefore strives to define the key concepts used in this study as a theoretical background to the subject matter. These include concepts such as employees, employers, industrial relations, freedom of association, trade unionism, apartheid, democracy and constitutionalism. As will be demonstrated in the following pages, these concepts are closely interrelated.

⁸⁹ Chandler RC, Ensln, RA & Renstrom, PG, *The Constitutional Law Dictionary* (1985) XIV.

⁹⁰ *Idem*.

As pointed out earlier, the present study deals with freedom of association of employees in labour or industrial relations. Labour relations presuppose the existence of employees and employers. It is the exercise of freedom of association in labour relations that led to the emergence of trade unionism as a movement and to the establishment of trade unions as institutions. On the other hand, the impact of apartheid on human rights in general and freedom of association in particular, as well as the relationship between trade unions and the apartheid system cannot be ignored in any study of freedom of association in labour relations in South Africa. Finally, freedom of association is a democratic and constitutional right and can only flourish within the context of democracy and constitutionalism. In view of the above, employees, employers, industrial relations, freedom of association, apartheid, democracy and constitutionalism will be examined to provide a theoretical background to the study.

2.2 Employers, Employees, and Industrial Relations

Employees and employers are critical in any definition of industrial relations. The employment contract presupposes the existence of one or group of employers on the one hand and one or group of employees on the other hand. There can be no valid employment contract in the absence of these two parties.

2.2.1 Employers

The concept of employer is not defined in international labour law. The ILO Convention concerning Freedom of Association and Protection of the Right to Organise⁹¹ as well as the Convention concerning the Application of the Principles of the Right to Organise and Bargain Collectively⁹² do not define an “employer”. South African labour law, which was inspired by the ILO Conventions, also failed to define it.

⁹¹ ILO Convention no 87 of 1948.

⁹² ILO Convention no 98 of 1949.

The definition section⁹³ of the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA)⁹⁴ do not refer to it. South African labour law experts do not even expend on it, defining an employer by reference or in opposition to an employee only.⁹⁵ The employer is rather defined through his/her characteristics, duties and rights. Arguably, an employer is a natural or a juristic person who engages or employs the services of a natural person or a group of natural persons in exchange for remuneration.⁹⁶

However, the Unemployment Insurance Act (UIA)⁹⁷ defines an “employer” as

Any person, including a person acting in a fiduciary capacity, who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds, excluding any person who is not acting as a principal.⁹⁸

The Compensation of Occupational Injuries Act (COIDA)⁹⁹ also defines an “employer” as

Any person, including the state, who employs an employee, and includes any person controlling the business of the employer ; if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person ; a labour broker who against payment provides a person to a client for the rendering of service or the performance of work, and for which service or work such person is paid by the labour broker.¹⁰⁰

⁹³ Section 213 of the Labour Relations Act 66 of 1995 as amended.

⁹⁴ Section 1 of Act 75 of 1997.

⁹⁵ See Basson *op cit* 35; Grogan *op cit* 15-25; Du Toit *op cit* 79-89.

⁹⁶ Basson *op cit* 35; Swanepoel JPA, *Introduction to Labour Law* (1992) 30

⁹⁷ Act 63 of 2001.

⁹⁸ Section 1 of UIA.

⁹⁹ Act 130 of 1993.

¹⁰⁰ Section 1 of COIDA.

Employers may be natural or juristic persons. Sometimes, it is difficult to identify who the true employer is. In *Buffalo Signs Co Ltd & Others v De castro & Others*,¹⁰¹ the Labour Appeal Court examined the question of who is the true “employer” in a case of sale or transfer of business. In this case, the second appellant, a firm called Safotec, bought all the shares from Buffalo Signs. When it became apparent to the members of the board of Safotec that the business of Buffalo Signs was going from bad to worse, it was decided that Safotec would “withdraw” from the sale and that Buffalo Signs would be informally wound up. Buffalo signs then informed its employees that their contracts would be terminated and that, due to its precarious financial position, no severance package would be paid.

The Court found that this was a deception. The true employer in this case was not Buffalo Signs, but Safotec which was not in a poor financial position. Accordingly, Safotec should have carried out the retrenchment of the Buffalo Signs employees, and should have discharged its obligation in that regard. Safotec was therefore the true employer in this case.

2.2.2 Employees

Unlike the employer, the concept “employee(s)” is defined in domestic and international labour law as well as in the literature. In international labour law, the ILO Conventions rather refer to “workers” and “workers’ organizations” and ignore the concept of “employee(s)”.¹⁰² Similarly, the 1996 Constitution of the Republic of South Africa refers to “worker” and ignores “employee”.¹⁰³

¹⁰¹ (1999) 20 ILJ 1501 (LAC).

¹⁰² See ILO Conventions Nos 87 and 98.

¹⁰³ See Section 23 of the Bill of Rights, Chapter 2 of the Constitution.

The concept of “worker”¹⁰⁴ is much broader than that of “employee” as it can include a person who is self employed so long as he or she is under an obligation to perform the work himself or herself.¹⁰⁵

The statutory definition of employee in South African labour law is provided by the LRA:

Employee means –

- a. any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- b. in any manner assists in carrying on or conducting the business of an employer.¹⁰⁶

This definition excludes independent contractors, who were not excluded by the LRA of 1956. The LRA of 1995 also excludes the members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service.¹⁰⁷ The limitation of the rights of these categories of employees is based on the limitation clause.¹⁰⁸

The BCEA, the Employment Equity Act (EEA)¹⁰⁹ and the Skills Development Act (SDA)¹¹⁰ also retained the definition found in section 213 of the LRA.¹¹¹

¹⁰⁴ Section 30 of the Trade Union and Labour Relations Act of 1974, for instance, defines a “worker” as an individual who either works or seeks to work under either a contract of employment or any other contract by which he agrees to perform personally any service for another, and also includes government servants.

¹⁰⁵ See *Broadbent v Crisp* (1974) I.C.R 248.

¹⁰⁶ See Section 213 of the LRA of 1995; Section 1 of the Employment Equity Act of 1998; Section 1 of the BCEA of 1997.

¹⁰⁷ Section 2 of the LRA of 1995.

¹⁰⁸ Section 36 of the 1996 Constitution.

¹⁰⁹ Act 55 of 1998.

¹¹⁰ Act 97 of 1999.

¹¹¹ COIDA, in its section 1 defines an “employee” as any person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and include-

- a) a casual employee employed for the purpose of the employer's business;
- b) a director or a member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;

However, the legislature has recently attempted to assist the courts as to who is an “employee” by adding a new deeming provision found in sections 83A¹¹² and 190A.¹¹³ These sections create a presumption that, regardless of the form of the contract a person is an employee if that person is “subject to the control or direction of another person” or forms part of the employer’s organisation, or who has worked for the other person for an average of at least 40 hours per month for the past three months, or is economically dependent on the other person, or works for only one person, or if the other person provides the tools of the trade.¹¹⁴ The presumption provided by these sections extends the categories of people belonging to the statutory definition of “employee.”

By definition, unlike in the case of employers, only natural persons can be employees. Any natural person can be an employee, but there are some statutory limitations.¹¹⁵ Juristic persons cannot be employees; they can only be independent contractors. The first part of the statutory definition of an “employee” expressly excludes an independent contractor from the definition. This calls for a distinction between the two concepts. Drawing a distinction between an employee and an independent contractor has always been one of the most important and difficult questions in our law. Our courts have formulated a number of tests for drawing the distinction.

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- c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker.

On the other hand, UIA of 2001 defines an “employee” as any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.

¹¹²Section 83A of the BCEA of 1997 as amended.

¹¹³ Section 190A of the LRA of 1996 as amended.

¹¹⁴ See Grogan *op cit* 16.

¹¹⁵ Section 43 of the BCEA for instance prohibits the employment of children under 15 years.

The first test, the control test was formulated in *Mutual Life Assurance Society Ltd v Macdonald*¹¹⁶ where it was remarked:

One thing appears to me beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which such work has to be done.¹¹⁷

Accordingly, in terms of this test, an employee is subject to the control of the employer in the sense that the latter has the right to prescribe not only what work has to be done but also the manner in which such work is to be done. The independent contractor, on the other hand, can be directed only as to what work must be done, and not on how it is to be done. This test has been criticised for its inadequacy if it is applied in isolation with other tests.¹¹⁸

Discontent with the nature of the control test led the courts to develop another test, the organisation test. According to this test, if a person is incorporated or related to the organisation of the employer, that person will be regarded as an employee or a worker even though the employer might actually exercise little control. This test was rejected by the Appellate Division in *S v AMCA Services and Another*¹¹⁹ and also in *Smit v Workmen's Compensation Commissioner*¹²⁰ as being too vague to be of any use.¹²¹ The deficiencies of the control and the organisation tests led to the formulation of the third test namely, the “multiple or dominant impression test.”

¹¹⁶ (1931) AD 412.

¹¹⁷ *Idem* at 434-435.

¹¹⁸ Grogan *op cit* 17. It was pointed out that this test creates some problems. For instance some employees have a wide discretion as to how to perform their work. It will be ridiculous to render those employees independent contractors.

¹¹⁹ 1962 (4) SA 537 (A).

¹²⁰ 1979 (1) SA 51 (A) at 63.

¹²¹ It was pointed out that the problem with this test is that it is not always possible to measure the extent of the integration nor it is always possible to know the degree of integration which would be sufficient to qualify someone as a worker or employee.

According to this test, instead of looking at just one factor, courts must look on various indications to determine whether one is an employee or an independent contractor.¹²² This test calls for the examination of all “relevant factors.” While it is impossible to compile an exhaustive list of relevant factors the more significant are the right to supervision, whether the employer has the right to supervise the other person;¹²³ the employer’s right to select who will do the work; the employees’ obligation to work for a given time or certain hours; whether remuneration is paid for time worked or for a particular result, whether the employer provides an employee with tools or equipment to the work; the employer has the right to discipline the worker and so forth.¹²⁴ This test has been criticised for its apparent question begging than giving indication on the nature of the features. The test has thus far been applied only in the context of the Workmen’s Compensation Act, which ties compensation for work-related injuries to the existence of a contract of employment.¹²⁵

However, in *Niselow v Liberty Life Association of SA Ltd*,¹²⁶ the Supreme Court of Appeal (SCA) endorsed Brassey’s formulation¹²⁷ that an employee is a person who makes over his or her capacity to produce to another person while an independent contractor is a person whose commitment is to produce a given result.¹²⁸ This test was also said to be suffering from the same flaws as other attempts at identifying a defining characteristic and it is now common for employees, particularly at the managerial level, to be identified in terms of results to be achieved.¹²⁹

¹²² Basson *et al*, *op cit* 28.

¹²³ The distinction between the control test and the dominant impression Act was noted in *Smith v Workmen’s Compensation Commissioner*. The court pointed out that in the dominant impression test, the existence or absence of control is only one factor that must be taken into account, whereas under the control test, control is the determining factor.

¹²⁴ Grogan *op cit* 17 & Basson *et al op cit* 28.

¹²⁵ See Rycroft A & Jordaan B, *A Guide to South African Labour Law* (1990) 32.

¹²⁶ (1998) 19 ILJ 752 (SCA).

¹²⁷ Brassey M, “The Nature of employment” (1990) 11 ILJ 889.

¹²⁸ (1998) 19 ILJ 752 (SCA) at 753H.

¹²⁹ In *Medical association of SA & Others v Minister of Health & Another* (1997) 18 ILJ 528 (LC) at 536D-E, where Zondo AJ commented that Brassey’s formulation is not a total answer to the question. See also Benjamin P., “An accident of History: Who is (and Who Should Be) an Employee Under South

In *Rumbles v Kwa-Bat Marketing*,¹³⁰ the Labour Court adopts the approach that the contractual relationship is not definitive as to the nature of the legal relationship and a court must examine the true nature of the relationship between the parties.¹³¹

Lately, in *Denel (pty) Ltd v Gerber*¹³² the Labour Appeal Court applied what it termed the “reality test.” In this case, Ms Gerber had an interest in Multicare Holdings (pty) Ltd. At one point she was described as the owner of the business, but it seems that her husband was also a share holder. Multicare in turn concluded an agreement with Denel in terms of which human resource-related services were provided to the company in the form of a designated consultant. Ms Gerber was a designated consultant. For a number of years, she provided the required services to Denel. After some years Denel cancelled the contract in circumstances where it at the same time applied related redundancy obligations to Gerber in her personal capacity to the extent of offering her a severance package in the absence of any alternative employment. Gerber declined the offer and claimed that she had been unfairly retrenched. On the other hand, Denel argued that Gerber had never been its employee. It further argued that if Gerber had been employed, her employer was Multicare and in these circumstances the court had no jurisdiction to hear an unfair dismissal claim against Denel.

The Labour Appeal Court (LAC) conducted an exhaustive examination of the contractual terms between Multicare and Denel, and the factual circumstances in which Gerber rendered services to Denel. The Court pointed out that Gerber had clearly been well integrated into the organisation of Denel since she had been described in the internal company memoranda as an executive of the company, and rendered services to no one else.

African Labour Law” (2004) 25 *ILJ* 787 at 794.

¹³⁰ See *Rumbles v Kwa-Bat Marketing* (2003) 24 *ILJ* 1587 (LC) at para. 19.

¹³¹ *Idem* at par 19.

¹³² (2005) 26 *ILJ* 1256 (LAC). See also Van Niekerk A, “Personal Service Companies and the Definition of ‘Employee’ - Some Thoughts in *Denel v Gerber*” (2005) 26 *ILJ* 1904.

Zondo JP remarked:

If regard is had to the reality of the relationship between the appellant and the respondent in this case, it seems to me that in truth and in reality the relationship was that of employer and employee respectively.¹³³

Accordingly, the LAC concluded that Gerber was Denel's employee, despite the terms of the agreement between Denel and Multicare.¹³⁴ The LAC found that in South African law, even where there is an intermediary that comes between the person providing services and the beneficiary of those services, it is possible that the person providing services can be an employee of the beneficiary. The court emphasised that in determining the employment status, the court "must have regard, not to the labels but to the realities"¹³⁵ of the relationship between the three parties. In other words, substance rather than form must determine the relationship."¹³⁶

2.2.3 Industrial Relations

Industrial or labour relations relate to those relations between employers and employees/workers and their respective rights and duties. The industrial or labour relationship is a mercantile one to the core. The employer hires the employee because he wants a job done and is prepared to pay accordingly.

¹³³ (2005) 26 ILJ 1256 at 1325E.

¹³⁴ *Idem* at 1325H.

¹³⁵ The approach followed by the LAC in the Denel case is analogous to the one followed by the English Court of Appeal in *Young & Wood v West* (1980) IRLR 174 (CA), where it was held that where there was an agreement in terms of which a party would render services to another on the basis of being self-employed, the court was entitled (if not obliged) to determine the reality of the relationship from all of the relevant facts and to ignore whatever label the parties has chosen to attach to their agreement.

¹³⁶ (2005) 26 ILJ 1256 at 1296G.

The employee, on the other hand, agrees to be hired because he wants the payment and is prepared to do the job to get it, and the exchange continues until each party no longer gets the expected commercial advantage.¹³⁷

As opposed to the employment relationship which concerns the contractual relationship between employer and employee as individual, industrial relations presupposes a collective relationship between employees as a group (trade union) and the employer or employers' organisation on the other hand. Thus as a discipline, industrial relations evolved a study of economic class conflict between employers on the one hand and increasingly organised workers on the other hand.¹³⁸

Industrial or labour relations are regulated by law, whether international or municipal law. Labour relations in South Africa are now governed by the 1996 Constitution of the Republic¹³⁹ and the Labour Relations Act.¹⁴⁰ The right to freedom of association is the cornerstone of industrial or labour relations. However, the law regulating trade unions derives from common law and statutes. Historically, legislation played little part in regulating the internal affairs of trade unions.¹⁴¹

¹³⁷ Brassey M, quoted by Rautenbach F, *Set the workers Free: Why Deregulation will Solve South Africa's Labour Problems* (1993) 2.

¹³⁸ Yesufu TM, in his book entitled *The Dynamics of Industrial Relations: the Nigerian Experience* at 6, defined industrial relations as the "whole web of human interactions at work which is predicated upon, and arise out of the employment contract." The scope of industrial relations thus embraces relations and interrelations between the employers or managements, and employees as individuals or as groups; between the supervisor and the workers, and between the worker and his or her trade union. The interaction between one trade union and another union or federation of unions, management and the state are equally of central importance and fall within the preview of industrial relations.

¹³⁹ Section 23 of the 1996 Constitution..

¹⁴⁰ Act 66 of 1995.

¹⁴¹ See Morns & Timothy *Trade Unions, Employers and the Law* (1993) 85.

2.3 Freedom of Association

Freedom of association is enshrined in the following international instruments: Universal Declaration of Human Rights,¹⁴² International Covenant on Economic, Social and Cultural Rights,¹⁴³ International Covenant on Civil and Political Rights,¹⁴⁴ ILO Conventions 87 of 1948 and 98 of 1949 as well as the African Charter on Human and Peoples' Rights.¹⁴⁵ In South African domestic law, freedom of association in general is enshrined in the Bill of Rights.¹⁴⁶ Freedom of association at the workplace is protected under labour relations' rights.¹⁴⁷ As such, it is related to other fundamental rights.

2.3.1 The Concept of Freedom of Association and Its Components

Freedom of association, one of the cornerstones of liberal democracy, stems from a basic human need for society, community, and shared purpose in a freely chosen enterprise. It is an essential feature of (liberal or social) democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society.¹⁴⁸

¹⁴² Hereinafter the "UDHR", Article 20.

¹⁴³ Hereinafter the "ICESCR", Articles 8.

¹⁴⁴ Hereinafter the "ICCPR", Articles 21 & 22.

¹⁴⁵ Hereinafter the "ACHPR", Article 10.1.

¹⁴⁶ Section 18 of the 1996 Constitution.

¹⁴⁷ Section 23.

¹⁴⁸ *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545. See also Ewing KD, "Freedom of Association and Trade Union Rights" in Harris D & Joseph S., *The International Covenant on Civil and Political Rights and the United Kingdom Law* (1995) 465.

2.3.1.1 The concept of Freedom of Association

According to Alex de Tocqueville, the right to freedom of association is almost inalienable in its nature as the right of personal liberty.¹⁴⁹ Freedom of association is in fact, indispensable to democratic and accountable government, for it provides the constitutional basis of the right to form and join political parties, to take part in the activities of pressure groups and to meet with others to discuss matters of common concern.¹⁵⁰ However, freedom of association is important not only to facilitate effective participation in civil and political society. It is equally important in the field of social and economic activity and is particularly significant as a basis for securing trade union freedom from interference by the state on the one hand and the government on the other.¹⁵¹

There are different views on what the term freedom of association actually means, what purpose it serves and what legal approach is to be attached to it. These views fall into two categories.¹⁵² Some see freedom of association as a liberal-political right, derived from the libertarian notion that all persons should be entitled to associate or not with other persons of their choice in a totally non-coercive way, subject only to such compelling considerations as national security or public morals. Others, on the other hand, consider the right to freedom of association as a functional guarantee, which is protected in order to secure a clearly defined social purpose, that is to say the attainment of some sort of equilibrium of bargaining power between employers and workers.¹⁵³

¹⁴⁹ Alex de Tocqueville as quoted by Ewing *op cit* 239.

¹⁵⁰ Ewing *op cit* 239.

¹⁵¹ *Idem*.

¹⁵² Ferdinand von Prondzynski *Freedom of Association and Industrial Relations: A Comparative Study* (1987) 225.

¹⁵³ *Idem*.

According to Ferdinand von Prondzynski, freedom of association is no more than a useful shorthand expression for a bundle of rights and freedoms relating to membership of associations and does not tell us anything very precise about what these rights and freedoms are.¹⁵⁴ It is not a static concept. It is capable of being expressed in different ways.

In Olivier's words, the right to freedom of association in labour relations can be defined as those legal and moral rights of workers to form unions, to join unions of their choice and to demand that their unions function independently.¹⁵⁵ This right is determined and influenced by binding international law, government policy and regulations and binding collective agreements.¹⁵⁶

According to Kirkland, freedom of association means simply the right of ordinary people who share common interests to form their own institutions in order to advance those interests and to shelter them against the arbitrary power of the state, the employer or other strongholds of self-interest.¹⁵⁷

The right to freedom to associate confers neither the right nor license for a course of conduct or for the commission of acts, which in the view of the legislature are inimical to the peace, order, and good government of the country. Thus the freedom of association protects one's membership in any organisation that is not involved in criminal activity.¹⁵⁸

¹⁵⁴ Ferdinand von Prondzynski *op cit* 14.

¹⁵⁵ Olivier MP, "Statutory Employment Relations in South Africa", in Slabbert *et al*, (eds) *Managing Employment Relations in South Africa* (1999) 5-60.

¹⁵⁶ *Idem*.

¹⁵⁷ Kirkland L, "Promoting Democracy: Labor's Enduring Commitment" at <http://www.iri.org/common4.asp> accessed on 2 July 2006.

¹⁵⁸ Per Wooding CJ, in *Collymore v Attorney General of Trinidad and Tobago* (1970) A.C. 538.

Bentham wrote that governments were free to recognise “the liberty of public association or the security with which malcontents may communicate their sentiments, concert their plans and practice every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them.”¹⁵⁹

According to Woolman and De Waal, the sphere of liberty secured by freedom of association is important for two basic reasons. First, it enables individuals and groups to pursue or maintain those attachments, which they believe, are constitutive of their being. Such attachments might be intimate, cultural, religious or social. Secondly, the sphere of liberty secured by the freedom enables individuals and groups to realise a most important instrumental goal: a rich and varied civil society. This rich and varied civil society in turn serves many ends such as facilitating social debate and participatory politics providing a buffer between the individual and the state, sustaining vibrant culture and ensuring economic progress and advancement.¹⁶⁰

The right to freedom of association has been associated with economic individualism and social policy and was given its early intellectual basis by Adam Smith. He argued for a free market in labour and against anything which ‘obstruct the free circulation of labour.’ He believed that society would best be served by a state of affairs ‘where things were left to follow their natural course, where there was perfect liberty, and where every man was perfectly free both to choose what occupation he thought proper, and to change it as he thought proper’.¹⁶¹ Smith believed that the advancement of individual rights and more particularly of individual self-interest was for the good of the society as a whole.

¹⁵⁹ Bentham J *Fragments on Governments* (1988) 45.

¹⁶⁰ Woolman & De Waal, “Freedom of Association: The Right to be We”, in Van Wyk *et al op cit* 340.

¹⁶¹ Smith A, quoted by Ferdinand von Prondzynski *op cit* 226.

The ILO Committee of Experts explained what can be regarded as the correct approach concerning freedom of association and social policy in 1983. In the Committee's view, freedom of association should be guaranteed in such a way as to allow trade unions to express their aspirations and to provide an indispensable contribution to economic development and social progress.¹⁶²

It is important to bear in mind, therefore, that the reason why freedom of association was given protection in national and international law was not primarily designed to protect individual interests but rather to seek to secure a more equitable distribution of power within the working environment and the society as a whole. But as Lord Wedderburn discusses, individuals do of course deserve legal protection in this as in other contexts, so that their conscience, religious beliefs, freedom of expression, bodily integrity and so forth are safeguarded. But such protection can be and ought to be guaranteed under other headings so that freedom of association itself does not need to be turned into an individualistic, anti-collective concept.¹⁶³

It would be both unfortunate and strange if the main substance of freedom of association, which was first introduced to allow workers to combine, were now to be seen as the right of individuals to "an isolated existence".¹⁶⁴

Freedom of association is one of the avenues employed by the LRA to ensure comprehensive protection of the existence, support, power and functioning base of trade unions.¹⁶⁵ It is both an individual and a collective human right. The individual dimension entails the autonomy of the group to determine its own membership, and to regulate its method and manner of government.

¹⁶² See Ferdinand Von Prondzynski *op cit* 232.

¹⁶³ Wedderburn quoted by Ferdinand von Prondzynski *op cit* 232.

¹⁶⁴ Ferdinand von Prondzynski *op cit* 233.

¹⁶⁵ Olivier *op cit* 5-59.

When addressing this, the Supreme Court of Canada recognised in *Lavigne v Ontario* that “the essence of freedom of association is the protection of the individual interests in self actualisation and fulfilment that can be realised only through combination with others.”¹⁶⁶ The right to associate concerns an individual as an active participant in social activities and it is in a sense a collective right in so far as it can be exercised by a plurality of individuals.

The collective dimension entails the liberty or autonomy of the group to act together, to develop its own programmes of action and fulfil its goals.¹⁶⁷ Freedom of association must therefore be seen as the foundation of the collective bargaining process.¹⁶⁸ There must be a legal protection of the freedom of persons to join collective entities before those entities are protected. It would serve little purpose to protect collective bargaining if the parties to that process do not themselves enjoy protection by the law.

Again freedom of association gives rise to the establishment of democratically sanctioned institutions such as trade unions, which promote democracy both in the workplace and in the society at large.¹⁶⁹ Madima submits that the right to freedom of association should mean more than just the right to belong to an association with like-minded others.¹⁷⁰

In Madima’s words,

An all-embracing definition of the right of freedom of association remains illusive, or rather; there is a lack of consensus among labour lawyers and other labour commentators on what this concept entails. Free association has been described by so many different people in so many different ways that the field remains open for further debate.¹⁷¹

¹⁶⁶ *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545 at 623.

¹⁶⁷ *Ewing op cit* 240.

¹⁶⁸ *Basson et al op cit* 26.

¹⁶⁹ Landman A A, “Freedom of Association in South African Labour Law”, *Acta Juridica* (1990) 89.

¹⁷⁰ Madima T, “Freedom of Association and the Bill of Rights”, in Kalula E, (ed) *Labour Relations in Southern Africa* (1993) 116.

¹⁷¹ Madima T, “Freedom of Association and the Concept of Compulsory Trade Union Membership” (1994) 3 *TSAR* 545.

He pointed out that it was difficult to come up with a uniform definition of freedom of association and definitions differ depending on whether one adopts a literal and narrow or a purposive and broad interpretation of this right.¹⁷²

Freedom of association is the right to associate and entails that individuals are entitled to come together and collectively organise in order to defend their interests. It has sometimes been argued that it must be understood broadly and also negatively to mean the right not to associate or to dissociate.¹⁷³

However, it is its positive dimension that is generally underscored by the ILO Constitution, the ILO Conventions, and international and domestic Bills of Rights.¹⁷⁴

Freedom of association complements and consolidates other individual freedoms and without it, individuals may not express themselves as a group, defend their common interests and positively contribute to the development of their societies. It is essential to liberal democracy and to democratic politics.¹⁷⁵ Similarly, freedom of association is necessary to create and maintain intimate relationships, which are valuable for their own sake as well as for the pleasure that they offer to the society.

According to Gutmann, by associating with one another, people engage in camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity and kind of self-expression and self-sacrifice that are possible only in association with others.¹⁷⁶ Freedom of association is essential as a means of engaging in charity, commerce, industry, education, health care, religious practice, professional life, music and art.

¹⁷² Madima T, "Freedom of Association and the Concept ..." *op cit* 546.

¹⁷³ See Albertyn C, "Closed shop, closed mind" (1994) 10 *Employment Law* 101-102; Madima "Freedom of Association and the Concept..." *op cit* 546, 552-554; Fung-Kuen BC, "Compulsory Membership and Freedom Not to Associate: An Interpretation and Application of Article 18 of the Hong Kong Bill of Rights" (1994) 1 *HKSLR* 33-45; Blanpain R, (ed) *Trade Union Democracy and Industrial Relations* (1988) 2, Olivier MP & Potgieter O, "The Right to Associate Freely and Closed – Shop (continued) (1994) *TSAR* 289, Weiss M, "Trade Union Democracy in Germany" in Blanpain *op cit* 30.

¹⁷⁴ Madima "Freedom of Association and the Concept..." *op cit* 553.

¹⁷⁵ Gutmann A, *Freedom of Association* (1998) 64.

¹⁷⁶ *Idem*.

An organisation or association does not in any sense promote the fragmentation of the society, but it works for different ideological, philosophical, social, economic and political tendencies that may exist in a community.¹⁷⁷

Sir Hugh Wooding CJ stated that freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest of the associating group.¹⁷⁸ These may be religious, political or philosophical, economic or professional, educational or cultural, sporting or charitable.

Associations differ from one another, depending on their size, aims, membership, and nature. There are small and large associations. They may be political, economic, religious or cultural.¹⁷⁹ Some are legal and protected by the law; others are not.

2.3.1.2 Components of Freedom of Association

Summers argued that the concept of freedom of association comprises three distinct elements namely, the freedom to organise in terms of which individual workers join together, choose a spokesperson and combine economic resources for the common goods; the freedom to choose between organisations so as to enable the worker to join and work through the organisation which she/he believes speaks best for her/his needs and desires; and the freedom not to join trade unions at all, this entails the right of individual to refuse to participate in collective action and to insist on acting alone.¹⁸⁰

¹⁷⁷ Bartolomei de la Cruz HG, *The International Labour Organisation* (1996) 166.

¹⁷⁸ See *Colleymore v Attorney General Trinidad and Tobago* 1967 12 W.I.R. (S.C.A.) at 15; (1970) A.C. 532 at 547 (PC).

¹⁷⁹ *Woolman op cit* 22.8-9.

¹⁸⁰ Summers CW, "Freedom of Association and Compulsory Union Membership in Sweden and the United States", *Pennsylvania Law Review* (1964) 647

Summers observed that these freedoms are not always mutually enforceable in the sense that the exercise of one may at the same time be at the expense of the other. On the other hand, Lord Wedderburn reckons that the concept of freedom of association can be interpreted either purposively or emasculatingly.¹⁸¹ In the former sense, the term connotes protection of the collective aims of an association, though to what extent this should go remains for argument in a given situation. The latter sense will have none of the above as it sees freedom of association as no more than the right of persons to associate.

Freedom of association is the entitlement of individuals to extend their personal freedom and improve their position by organising into trade unions and dealing collectively with their employer (s) through their representatives. This right can be translated into a straight forward duty placed upon employers not to interfere by using their powers to dismiss or otherwise deter or penalise trade union membership or activities.¹⁸²

According to Sachs

The key, absolutely fundamental rights of workers are those rights that enable the working people to fight for and defend their rights. These rights comprise the first group of rights. This group of rights consist of three rights namely, the right to establish and join trade unions; the right to collective bargaining and the right to strike. These are the three pillars of the working people, of their capacity to defend all their other rights.¹⁸³

Thus, as far as the employees are concerned, the right to freedom of association includes their right to freely organise, form or join a trade union in order to defend and protect their interests. This also includes the right to bargain collectively and the right to strike.

¹⁸¹ Wedderburn "Freedom of Association and the Philosophies of Labour Law" 18 *ILJ* (UK) (1989) 16.

¹⁸² Anderman SD, *Labour Law: Management Decisions and Workers Rights* (2000) 306.

¹⁸³ Sachs A, "The Bill of Rights and Worker Rights: An ANC Perspective" in Patel E (ed) *Workers Rights: From Apartheid to Democracy – What Role for Organised Labour* (1994) 47.

2.3.1.2.1. The Right to Form and Join Trade Unions

The right to form and join a trade union is a special aspect of freedom of association which first and foremost protects employees against victimisation for union membership by employers. A variety of international, regional as well as municipal or national measures enshrine the basic right of workers to join a trade union of their choice and to take part in union activities and to be protected against any discrimination in the exercising of those rights. On the significance of the right to form and join an association, Olivier remarked:

A legal scheme aimed at protecting employees' and their unions' right to bargain collectively with the employer and to embark upon strike action would be meaningless if the underlying right to first belong to that union was not safeguarded. Conversely, freedom of association would remain ineffective if the right to bargain collectively and to strike were not well recognised.¹⁸⁴

Writing on the importance of association in a civil society in the early 19th century, a French political theorist Alex de Tocqueville observed that:

No country need association more- to prevent either despotism of parties or the arbitrary role of the prince than those with a democratic social state...In countries where such associations do not exist, if private people did not artificially and temporarily create something like them, I see no other dike to hold back tyranny of whatever sort, and a great nation might with impurity be oppressed by some tiny fraction or by a single man.¹⁸⁵

States and employers are not entitled to restrain parties from associating together or forming unions or associations based on common interest or concern. They are also generally precluded from forcing individuals to be part of organisations of which those individuals disapprove.

¹⁸⁴ Olivier MP, "Statutory Employment Relations in South Africa" in Stabbert JA *et al.*, (eds) *Managing Employment Relations in South Africa* (1991) 5-61.

¹⁸⁵ Alex de Tocqueville *Democracy in America* (1994) 192.

The right to join an association does not provide that one has the right to join any association. It is generally open to a private association or union to exclude persons for what ever reasons it considers proper.¹⁸⁶ Applicants must comply with the union's constitution. But even if they do so, membership is not an automatic right. A trade union being a legal persona, can itself decide whom to admit and whom not to admit as a member.

In *Tierney v Amalgamated Society of Woodworkers*,¹⁸⁷ the Supreme Court rejected the contention that the defendant, a craft union, could be forced to accept the plaintiff, an allegedly under qualified carpenter as a member. The court held that freedom of association entailed that the defendant, as a voluntary organisation, had the right to accept and reject potential members.¹⁸⁸

Similarly, the European Commission on Human Rights pointed out in *Cheall v UK*¹⁸⁹ that the right to form and join trade unions as protected by Art. 11 of the European Convention on Human Rights "involves, for example, the right of trade unions to draw up their own rules, to administer their own affairs and to establish and join trade union federations."¹⁹⁰ The Commission further indicated that the right of an employee to join a trade union "for the protection of his interest", does not give a worker the right to join a trade union of his choice, irrespective of the rules of the union.¹⁹¹

Thus, if freedom of association means that the group must have the right to its own membership, it also means that the group must have the right to regulate its own procedures for government and administration.¹⁹²

¹⁸⁶ This is usually stipulated in a union constitution.

¹⁸⁷ (1959) I.R. 254.

¹⁸⁸ *Idem* 256.

¹⁸⁹ *Cheall v UK* (1986) 8 EHRR 74. See also *Ewing KD.*, in *Harris and Joseph, op cit* 470.

¹⁹⁰ *Ibid* par 4.

¹⁹¹ *Ibid* par 6.

¹⁹² *Ewing op cit* 254.

In *Post Office v Union of Post Office*,¹⁹⁷ the House of Lords pointed out that employees may take part in trade union activities on the employer's premises using the facilities normally available provided that it does not cause excessive expense or inconvenience to the employer or fellow workers.

Employees who are officials of a recognised trade union are also entitled to have reasonable time off with pay to carry out any duties of a union and to receive training on issues of industrial relations relevant to their duties. This right is subjected to the qualification that the time off must be reasonable in the circumstance.

In *Beal v Beecham Group Ltd*,¹⁹⁸ the Court held that union representatives could be given paid time off to attend a national trade union advisory meeting to co-ordinate the next pay claim, since duties related to industrial relations were not limited to the immediate process of collective bargaining but extended to preparatory and explanatory work by officials. In the case of *Luce v Bexley*,¹⁹⁹ the EAT stressed that the activity should be linked to the employment relationship.

Related to the right to form and join trade unions and to participate in their lawful activities is the right to organise and bargain collectively. The right to form and join trade unions will be futile if those unions cannot organise and negotiate on behalf of their members.

2.3.1.2.2. The Right to Organise and Bargain Collectively

The right to organise does not exist in a vacuum. Workers organise for the purpose of giving a unified voice to their need for just and favourable terms and conditions of employment, when they have freely decided that, collective representation is preferable to individual bargaining or management's unilateral exercise of power.

¹⁹⁷ (1974) 1 All ER 229.

¹⁹⁸ (1982) ICR 460.

¹⁹⁹ (1990) IRLR 422 EAT.

Collective bargaining assumes freedom for workers to organise in independent trade unions to bargain independently and effectively with the employer. The freedom to combine in autonomous associations is essential to individual workers to alleviate their subordination.²⁰⁰ Union representatives acting on behalf of employees are able to secure better terms and conditions of employment than individuals negotiating on their own behalf.

The right to bargain collectively stems unbroken from the principle of freedom of association and the right to organise. Protecting the right to bargain collectively guarantees that workers can engage their employer(s) in exchange of information, proposals and dialogue to establish better terms and conditions of employment.

Collective bargaining is the most common form of workers participation in the workplace as it provides workers, through their trade unions, with greater leverage and equality of negotiating power in the bargaining process with employers. The word “collective” refers to the fact that employees join together in trade unions to enhance their power in bargaining with employers over wages, working conditions and any other matters of mutual interest between them.²⁰¹ It is a means by which the fundamental right of association moves into the real and enduring life of workers and employers. As such, the right to bargain collectively is a “real” implementation in the economic and social setting of the “ideal” civil and political right of association.

²⁰⁰ Lord Wedderburn, *The Worker and the Law* (1986) 7.

²⁰¹ Finnemore M & Van Rensburg R. *Contemporary Labour Relations* (2002) 223; Steenkamp A *et al.*, “The right to Bargain Collectively” (2004) 25 *ILJ* 943 at 944.

Collective bargaining deals with all aspects of the employment relationship.²⁰² The process frequently includes negotiation on matters such as the day-to-day work rules and procedural issues important to workers and the functioning of a trade union in its relationship with the employer.²⁰³

It is through this system of collective representation that workers can obtain influence over their employers and become involved in decisions that have a bearing on their experience of work. In the same way, it is through the negotiation and administration of written agreements with management that a union becomes an effective instrument of workers representation in industry.

Davies and Freedland, on the primary objectives of trade unions engaging in collective bargaining observed:

By engaging in collective bargaining with management, organised labour seeks to give effect to its legitimate expectations that wages and other condition of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that job should be reasonably secured.²⁰⁴

²⁰² Collective bargaining may take place with a number of employers at a "sectoral" level, or with a single employer or related employers at a company level.

²⁰³ Barrow C, *Industrial Relations Law* (1997) 152.

²⁰⁴ Davies P & Freedland M, *Kahn-Freund's Labour and the Law* (1983) 69.

Nevertheless, the right to collective bargaining is more than an exercise of the pure right of association by workers, since it involves another party, the employer. It is important for a trade union to be recognised by an employer as a bargaining agent for its employees.²⁰⁵ Thus recognition of a trade union as a bargaining agent of employees in any given undertaking is the prelude to collective bargaining.²⁰⁶

There is little point in workers belonging to a trade union unless that union has power to negotiate on their behalf. Collective bargaining is the basic reason for the existence of a trade union, but it can only take place if the employer recognises a union for this purpose.²⁰⁷ Accordingly, collective bargaining is undermined where unions are unable to organise effectively, such as where trade union members and officials are discouraged or formally penalised for participating in trade union affairs.²⁰⁸

Similarly, collective bargaining cannot be effective if a union is a “house union” controlled by the employer or if its members have no right to refuse to work on the terms offered by the employer.

Collective bargaining is a continuous process. Its merits are that it enables parties with differing outlooks and compulsions to reach agreement on a variety of issues to which the market mechanism fails to supply satisfactory solutions. It is a flexible instrument resting on voluntary acceptance and backed by the threat of economic force.²⁰⁹

Where individual contracts of employment allow little scope for employees to influence the conditions under which they work, collective action appears to present a solution. In this manner, workers are able to co-ordinate their demand and strategies.

²⁰⁵ By recognizing a trade union as a representative of employees and bargaining with it in “good faith”, management loses some of its authority. Consequently, a set of rules and procedures which are jointly adopted by a union and management, replaces unilateral action by management. However, recognition is not compulsory. An employer has discretion to recognize a union or not.

²⁰⁶ Okpaluba C, “Recognition as Collective Employee Representative in Swazi Labour Law” (1998) 19 *ILJ* 1329 at 1331. See also *Colleymore v AG Trinidad and Tobago* (1969) 2 All E.R. 1207 at 1212.

²⁰⁷ Pitt G, *Employment Law* (1992) 224.

²⁰⁸ Barrow *op cit* 143.

²⁰⁹ Lester R, *Labor and Industrial Relations: A General Analysis* (1953) 151.

2.3.1.2.3. The Right to Strike

Strike is integral to the system of collective bargaining.²¹⁰ It is usually taken to consist of the simultaneous and co-ordinated withdrawal of labour by workers. It is basic to the distribution of power between capital and labour and also forms part of the problem of the autonomy of groups and their relationship to the State.²¹¹

The right to strike is fundamental to sound industrial relations. The capacity of a trade union to bring workers out on strike is in the final instance the only reason why a manager is compelled to seek genuine agreement with organised labour. Without the right to strike, trade unions become pathetic, powerless bodies and the rule of management is absolute.²¹²

The right to bargain collectively is compromised without the right to strike. Without this right, there cannot be genuine collective bargaining and collective bargaining will be nothing else but collective begging.²¹³

In 1967 Grunfeld remarked:

If one set of human beings is placed in a position of unchecked industrial authority over another set, to expect the former to keep the interests of the latter constantly in mind and, for example to increase the latter's earnings as soon as the surplus income is available...is to place on human nature a strain it was never designed to bear.²¹⁴

Human nature has not changed since 1967. Accordingly, Strikes and other forms of industrial actions are essential parts of the collective bargaining process. They are the final stage if a negotiation agreement cannot be reached.²¹⁵

²¹⁰ Myburgh SC, "100 Years of Strike Law" (2004) 25 *ILJ* 962 at 966.

²¹¹ Ben-Israel R, *International Labour Standards: the Case of the Freedom to Strike* (1987) 1

²¹² Patel E, (ed) *Workers Rights: From Apartheid to Democracy – What Role for Organised Labour* (1994) 22.

²¹³ Blanpain R, *Labour Law, Human Rights and Social Justice* (2001) 190.

²¹⁴ Grunfeld quoted by Pitt *op cit* 251.

²¹⁵ Pitt G *op cit* 251.

The right to organise, the right to bargain collectively and the right to strike unfold seamlessly from the basic right to freedom of association. They all have in common the balancing of the unequal equilibrium of employers and employees.

On the relationship between freedom of association, collective bargaining and strike, Ben-Israel commented:

By presenting the concept of freedom of association in a three-dimensional manner as set forth below, the complementing rights principle tends to the conclusion that denial of the freedom to strike is a great affront to justice. The organised and collective power of the workers within the framework of trade unions by itself is not sufficient in order to balance the labour relations system, and therefore it must be supplemented by two complementary freedoms. The first of these two freedoms is the freedom of collective bargaining. It is only by collective bargaining that the workers can make use of their combined power, which stems from the fact that they are organised within a trade union in order to improve their working conditions....but that, too, is insufficient. The freedom to associate and to bargain collectively must be supplemented by an additional freedom, which is the freedom of strike. Hence, freedom to strike is a complementary freedom of the freedom of association since both are meant to help in achieving a common goal which is to place the employer-employee relationship on an equal basis.²¹⁶

In general, the view seems to have developed that the right to strike is implicit when constitutions and laws guarantee the right to freedom of association and collective bargaining.

However, once the right to freedom of association is clearly established, does this by itself imply that a person has the right to be free not to associate? This is another question that arises when dealing with freedom of association, whether it protects the position of people who do not wish to join the associations.

²¹⁶ Ben-Israel *op cit* 93.

2.3.1.2.4. The Right not to Associate

The right not to associate aims at protecting the individual against being grouped together with other individuals with whom he or she does not agree or for the purposes which he or she does not approve.

Unlike the positive right to freedom of association, the negative right to choose not to join a trade union is not explicitly dealt with by legislation. There are different views on this. Some scholars feel that “any freedom” worth the name must involve the freedom to refuse to do something, along with the freedom to do it.²¹⁷ Others differ and are of the view that it does not.²¹⁸

Rautenbach defined freedom of association as including both the positive right to associate and the negative right not to associate. According to him, freedom of association means that adult people have the right to associate with or dissociate from, whom they choose.²¹⁹ They may join a trade union, if they so wish or they may not.

In Albertyn’s view, freedom of association means that one can choose whether one wants to join an association or not to join any association. In a just society which recognises human rights, one should not be compelled to associate with either those whom one does not want to meet, or to involve oneself in matters which are not of one’s interest or concern.²²⁰

²¹⁷ See Anderman D, *op cit* 307; Leader S, *Freedom of Association* (1992) 30-32.

²¹⁸ See Leader *op cit* 12. According to him, there are two ways in which we might understand the notion of “freedom of association” and the freedom not to associate. The first indicates that one is both free to associate and free to refuse to associate, whereas the other entails that one is free to associate while not necessarily being free to do so. Leader referred to what Hart called “Unilateral” and “Bilateral” liberty. To be free to do something in a bilateral sense indicates that one is neither under a duty to do something nor under a duty not to do something. On the other hand, to be free to do something in a unilateral sense indicates that one is at liberty to do something, that is, one is under no obligation not to do it. One may be at the same time under an obligation to do it.

²¹⁹ Rautenbach F, *Set the workers Free: Why Deregulation will Solve South Africa’s Labour Problems* (1993)28.

²²⁰ Albertyn C, “Freedom of Association and the Morality of Closed Shop” (1989) 10 *ILJ* 981 at 985.

According to Justice Budd, "If it is the 'liberty' that is guaranteed in freedom of association, that means that the citizen is "free" to form and join such associations and unions, and if he is free to do so, that obviously does not mean that he must form and join those associations, but that he may if he so wishes."²²¹

Hayek also condemned compulsory union membership arrangements not only as undermining individual freedom but also as a means of reinforcing trade union power by coercive means. According to him, "closed shop" agreements should be treated as contracts in restraint of trade and should be denied the protection of the law.²²²

As for Leader, the right to freedom of association is, in its strongest form, a bilateral liberty, indicating that one is neither under an obligation to associate or not to associate, and this is coupled with an immunity from any imposition of any contrary duty as well as by a claim right against other forms of interference either by the state, private groups or individual. On its weakest form, the right to freedom of association is a unilateral liberty, indicating that one is, at the moment the right exists, under no obligation not to associate.²²³ The right to freedom of association is best understood as an independent and not a derivative right. It should therefore not be limited to the protection of other specific interests which are the subjects of separate constitutional rights, but should range as widely as do the liberties enjoyed by all subjects extending from the most important things to the most trivial. It is a right which should normally be thought to contain both the negative as well as the positive right to freedom of association.²²⁴ The crucial questions are not whether the right to dissociate exists but rather what weight it should have *vis-à-vis* other rights.

²²¹ See *Educational Company of Ireland v Fitzpatrick* 1961 IR 345.

²²² Hayek FA, *The Constitution of Liberty* (1960) 264-267.

²²³ Leader *op cit* 15.

²²⁴ *Idem*.

On the other hand, Kahn–Freund argues that it is “bad logic” to conclude from the positive to the negative freedom. The fact that a given Constitution guarantees the positive freedom of organisation does not mean that it guarantees the negative freedom of organisation.²²⁵

Leader finds support in Mc Carthy’s view that “the inevitable restrictions on personal liberty produced by the closed shop ... seem to be the price which must be paid if the unions are to be allowed the freedom they require in order to pursue their objectives in the most effective way.”²²⁶

To sum up, freedom of association contains in general both the positive right to form and join associations and the negative right not to join those associations. The right to freedom of association indicates that the state has not simply refrained for the time being from imposing a duty to associate or not to associate, but also that the state cannot at any time legitimately impose such duty. Thus, the freedom to join a trade union implies another freedom, the freedom not to join any trade union.

2.3.2 Freedom of Association and Other Fundamental Human Rights

Freedom of association is a fundamental right. As such, it is related to other rights given the indivisibility and interrelation between all human rights. It is linked to civil, political, social and economic rights.

²²⁵ Kahn – Freund O, quoted by Leader *op cit* 15.

²²⁶ Leader *op cit* 36.

Freedom of association, as it applies to voluntary associations, societies, clubs and political parties is an aspect of both civil and political freedom. It is closely related to freedom of speech, expression and conscience since there cannot be freedom of association without freedom of speech, expression and conscience.²²⁷

These civil and political rights are vital vehicles for the promotion and protection of economic, social and cultural rights. In turn, the full exercise of civil and political rights is dependent on the extent to which economic, social and cultural rights are enjoyed. Accordingly, civil and political rights cannot be enjoyed fully if people are deprived of the right to freedom of association. This is particularly true of democratic rights. As it applies to trade unions, freedom of association is also an aspect of social and economic freedom. It is related to the right to work, earn and secure a livelihood.²²⁸ In *Nagle v Feilden*²²⁹ when emphasising the connection between freedom of association and the right to work, Lord Denning said:

The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The court will not give effect to it.²³⁰

²²⁷ Ferdinand von Prodzynski *op cit* 225.

²²⁸ *Idem*.

²²⁹ (1966) 2 QB 633. Also summarized in Painter R *et al Cases and Materials on Employment Law* (2000) 683. In this case, Mrs. Nagle was refused a license to train racehorses by the Stewards of the Jockey Club in pursuance of their unwritten policy of refusing membership to a woman. Mrs Nagle sued for an injunction and a declaration that the practice was against public policy, but her statement of claim was struck out as disclosing no cause of action. She appealed against this decision. The Court of Appeal granted an interlocutory injunction on the basis that she had an arguable case.

²³⁰ *Idem*.

Again, in *Edward v Soga*²³¹ Lord Denning remarked:

I do not think the defendant union, or any other trade union, can give itself by its rules an unfettered discretion to expel a man or to withdraw his membership. The reason lies in a man's right to work. This is now fully recognised by law. It is a right which is of especial importance when a trade union operates a 'closed shop' or '100 per cent membership', for that means that no man can become employed or remain in employment with a firm unless he is a member of the union. If his union card is withdrawn, he has to leave the employment. He is deprived of his livelihood. The courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules, nor in the enforcement of them.²³²

Similarly, freedom of association cannot be dissociated from freedom of assembly. Without regular gatherings, members of an association cannot have an effective existence. These two rights are said to be mutually dependent, since effective protest in groups (assembly) depends upon those groups having legal status and some sort of structure (association).²³³

In political as well as in practical terms, freedom of association occupies a special place as the most fundamental of workers' rights. It is considered the single essential right for workers, from which other rights flow and without which other rights are illusory. It is therefore regarded as a "shorthand expression for a bundle of rights and freedoms relating to membership of associations of workers and employers."²³⁴

²³¹ (1971) Ch 354. Also summarized in Painter R *et al Cases and Materials on Employment Law* (2000) 614 & 683.

²³² *Idem* 683.

²³³ Le Sueur A *et al, Principles of Public Law* (1999) 493.

²³⁴ See Creighton B, "Freedom of Association" in Blanpain R *et al* (eds) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (1987) 173, Von Prondzynski, *op cit* 13.

2.4 Trade Unions and Trade Unionism

At the workplace, trade unions are the embodiment of freedom of expression. However, they should be differentiated from trade unionism which is another key concept in this study. To understand this concept one must first understand what a trade union is and what its objectives and activities are.

2.4.1 Trade Unions

The status of employed persons in the industrial economy is one of dependence with little or no individual power of direct decision. The individual contract of employment between an employee and an employer does not reflect a position of equal strength on the two sides.²³⁵ The employer usually holds all the trumps, but for few exceptionally talented people, most employees are in greater need of an employer than the employer is in need of them.²³⁶ A single worker is rarely in a position to negotiate with the employer about the terms and conditions of employment. The only choice is to take it or leave it. However, workers can equalise the situation if they act collectively. Individually they are weak, but an employer cannot ignore them if they combine and act as a group. As a result of employee's vulnerability in labour relations, employees decided to group themselves and form a structure (trade union), which represents them against the powerful employer. This is the *raison d'être* and the principal justification for trade unions, whose solemn duty was to match the perennially economic power of the employer.

²³⁵ Hughes J & Pollins H, *Trade Unions in Great Britain* (1973) 27; Yesufu TM, *The Dynamics of Industrial Relations: The Nigerian Experience* (1984) 91.

²³⁶ See Pitt *op cit* 2, Leader *op cit* 15, Davies & Freedland *op cit* 18, Cheadle *et al*, *South African Constitutional Law: The Bill of Rights* (2002) 367.

For Clegg, the justificatory foundations of trade union's legitimate oppositional role in industry lay in the insights of social democracy.²³⁷ Social democracy demanded a re-drawing of the boundaries of the political arena, given its fundamental insight that a preoccupation with power wielded by the state provided an incomplete account of power relations in society. Its creed advocated attention to the very real power wielded by capitalist enterprises, primarily over their workers, who stood in a relationship of subordination with their employers.²³⁸

It is thus clear that the real importance of trade unions lie in their social, economic and industrial power. They are nevertheless legal entities subject to the law and as such are given a number of legal duties as well as privileges.

Salomon defined a trade union as "any organisation whose membership consist of employees which seeks to organise and represent their interests both in the workplace and society and in particular, seeks to regulate their employment relationship through the direct process of collective bargaining with management."²³⁹ This definition highlights two aspects of trade unionism. Firstly, trade unionism requires organisation. A union does not merely happen, it may be established by few employees or interested persons but thereafter it has to recruit members in order to strengthen its power base.

Secondly, a union also seeks to improve the position of its members in a society at large. This may be done by the improvement of their general economic position, but may mean that the union has to play a social and political role.²⁴⁰ The latter objective brought about the formation of labour parties at the cradle of trade unionism.²⁴¹

²³⁷ Clegg H.A. quoted by Bogg AL., "The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness" *MLR* Vol. 64 (2001) 875-889 at 876.

²³⁸ *Idem*.

²³⁹ Salomon quoted by Bendix S, *Industrial Relations in South Africa* (1992) 55.

²⁴⁰ *Idem* 56.

²⁴¹ For instance the formation of the Labour Party in UK. The British union movement founded the Labour Party as its political wing in 1900 and even today British unions continue to support it, being its largest financial contributor.

Webster international dictionary defines a trade union as a voluntary association of people organised to further or maintain their rights, privileges and interests with respect to wages hours and conditions of labour, efficiency, education, mutual insurance, customs and so forth.²⁴² It is an organisation whose principal objective is to regulate relations between employees and employers or employers' association.

Cole defined a trade union as an essential body of workers designed to do for its members, by combining things which these persons acting in isolation, could not do for themselves.²⁴³

According to Webb, a trade union is a continuous association of wage earners for the purpose of maintaining or improving the conditions of their employment.²⁴⁴

Under the LRA, a trade union is defined as an association of employees whose principal purpose is to regulate the relations between employees and employers, including employers' organisations.²⁴⁵

In terms of its objectives and functions, a trade union may be defined as an association of employees for the promotion and protection of the terms and conditions of employment of its members. It is an association of workers, which exists to protect their interests. Its rightful function is to maintain and improve the working conditions of its members, and any alliances into which it may enter to increase its power and authority must remain subservient to its main purpose.²⁴⁶ Therefore, a trade union is a voluntary association, which fulfils vital functions in the interest of the public.²⁴⁷

²⁴² Neilson AW, *Webster New International Dictionary of the English Language* (1936) 2684.

²⁴³ Cole GDH, *Introduction to Trade Unionism* (1953) 13.

²⁴⁴ Webb B, *The History of Trade Unionism* (1902) 1.

²⁴⁵ Section 213 of the LRA of 1995.

²⁴⁶ Bottomley A, *The Use and Abuse of Trade Unionism* (1963) 11.

²⁴⁷ Trade unions have a number of functions, some which have been more prominent than others at different periods in history. Ewing identified five functions of a trade union namely, service function, representation function, regulatory function, government function and public administration function.

From the definition, the association must consist wholly or mainly of “workers” or “employees” as defined in the Acts. An association of people who are not workers or employees does not qualify as a trade union. In *NEWU v Mshali & Another*,²⁴⁸ the Labour Court held that a union was not entitled to amend its constitution to permit job seekers to join as members.

Secondly, the principal purpose of the association must include the regulation of relations between workers and employers. The Act does not, however, state that the principal purpose must be the regulation of relations with employers, but only that it must be one of the principal purposes. In *Midland Cold Storage v Turner*²⁴⁹ it was held that while a shop steward’s committee was an “organisation” and consisted of “workers” (for the shop stewards were members), its objects did not include the necessary “principal purposes.” Donaldson J remarked:

Its most apparent activity seems to consist of recommending the taking and abandonment of industrial action ... Thereafter it does not seem to enter into negotiations with the employer but leaves this task to the established union machinery... no body whose principal objects included (the regulation of relations between workers and employers) could fail to at least seek recognition from employers.²⁵⁰

It is legal to organise workers into trade unions. Employers may do nothing to undermine a trade union as a representative of its workers. Likewise, employers may not persuade employees by offer of better conditions or wages or dismissal not to join or to leave a trade union.²⁵¹

²⁴⁸ (2000) 21 ILJ 1166 (LC).

²⁴⁹ (1972) I.C.R. 230.

²⁵⁰ *Idem* 248.

²⁵¹ Section 23 of the 1996 Constitution; Chapter 2 of the LRA 66 of 1995 and the ILO Conventions 87 of 1948 and 98 of 1949.

In *Harrison v Kent Country Council*,²⁵² the Employment Appeal Tribunal (EAT) accepted that the Employment Tribunal (ET) could conclude that a person who was refused employment for past trade union activism, was refused employment for trade union membership. Again, in *Speciality Care v Pachela*²⁵³ the EAT held that it was open to the ET to hold that a dismissal for engaging the assistance of a trade union in a protest over a change in hours was a dismissal for trade union membership...

Moreover, not all dismissals for trade union activities will be viewed by Judges as part and parcel of dismissal for union membership. In *Associated Newspapers v Wilson*²⁵⁴ it was held that the employer's purpose of offering financial incentives to employees who switched to personal contracts instead of collectively agreed terms and conditions was not to deter employees from remaining members of the union but to end collective bargaining. In any event, that could not be said to deter employees from union membership or penalise them because of their membership since those who signed the new contracts were free to remain union members.

Within any individual country, trade unions reflect the prevailing class and status divisions as well as the wider social relationships that bind people together. They adopt the preoccupations and the expectations of their members or perhaps their leaders at one time and react to the conditions created by government and employers.

Each country's trade union movement develops its own style, its own character and its own approach. Trade unions are thus positioned differently in different countries.²⁵⁵ They are the end result of trade unionism.

²⁵² (1995) ICR 434 EAT.

²⁵³ (1996) IRLR 248 EAT.

²⁵⁴ (1995) IRLR 258.

²⁵⁵ In countries such as South Africa, trade unions are respected organisations which are part and parcel of the political system allied with political parties.

2.4.2 Trade Unionism

Trade unionism is a movement or trend for workers to come together to organise in order to champion their rights or interests. According to Salomon, trade unionism may be seen as a social response to the advent of industrialisation and capitalism.²⁵⁶

Trade unionism has a valid and important role to play in a society. Trade unions strive to enhance the dignity of workers and their control over their working lives. The feeling of collective identity enhances the economic freedom of the individual freedom, which rests on the knowledge that unity is strength.²⁵⁷ Just as the bargaining strength of the individual is enhanced when he/she combines with fellow workers in a group at a place of employment, so on a wide plane, trade unions grow in size and extent to become whatever may be the most effective combination of work people to advance and protect those interests arising from their employment which they have in common. Solidarity is thus valuable to the workers as ownership and/ or management is to the employer. To show their solidarity in a union, workers use anthems like-

When a union's inspiration thru the workers' blood shall run, there can be no greater power anywhere beneath the sun. Yet what force on earth is weaker than the feeble strength?
 But the union makes us strong!
 Solidarity forever!
 Solidarity forever!
 For the union makes us strong!
 It is we who plowed the prairies, built the cities where they trade, dug the mines and built workshops, endless miles of railroad laid.
 Now we stand outcast and starving amidst the wonders we have made.
 Solidarity forever!
 Solidarity forever!
 For the union makes us strong!²⁵⁸

²⁵⁶ Salomon *op cit* 56.

²⁵⁷ Hughes *op cit* 28.

²⁵⁸ Rose AM, *Union Solidarity: the Internal Cohesion of Labour Unions* (1952) 3

The above anthem of a union states some of the premises on which union solidarity is based. Firstly, by joining a trade union, workers can get a larger share of the economic product than they can by individual bargaining. Secondly, by forming a fellowship of the individually powerless, workers can secure a measure of control over the environment that otherwise almost completely controls them. The third premise can be expressed in the terminology used in the UDHR that “labour is not a commodity.”

Solidarity is considered an existing fact, a feeling that workers have in certain measure, which can rise and fall depending on the changing strength of several influences.²⁵⁹ In a democratic society, the existence of a union is evidence that a degree of solidarity exists among its members.

In the past, labour was regarded as a commodity, as a “factor in production.” Under these circumstances, it was natural for men to try to protect themselves, to reduce the risks and to increase their power by collective action.²⁶⁰ It is the philosophy of collective strength that gives a trade union its *raison d'être*. At the very least, it protects its members against the possibility of an employer exercising power arbitrarily and unreasonably.²⁶¹

Unions are made up of millions of ordinary people, blacks and whites, men and women, young and old, the fit and the sick, the clever and the dull, all human beings are involved. Whether we like it or not, unions are needed in one form or another. They are the unique means whereby men and women in employment can themselves decide how their interest can best be furthered. The essential characteristic of trade unions is that they are responsible to the workpeople themselves who comprise their membership and cannot be directed by any outside agency. Being a free and spontaneous choice of working people, their purposes and practices are continually subject to the wishes of the membership, through a process of democratic choice.²⁶²

²⁵⁹ Rose *op cit* 4.

²⁶⁰ See Rose *op cit* 7; Sherman B A, *The State of the Unions* (1986) 2.

²⁶¹ Sherman *op cit* 2.

²⁶² Hughes & Pollins *op cit* 28; Davies I, *African Trade Unions* (1966) 10.

Trade unionism in Africa is comparatively recent in origin. In South Africa, the organisation of white workers has a much longer history.²⁶³ Although the Africans represented a major part of the labour force, they were not regarded as “workers” or “employees” under the law. The apartheid government considered that they did not fall within the limits of legislation for trade unions.²⁶⁴

2.4.3 Trade Unions, Trade Unionism and Freedom of Association

Trade unions play an important role in labour relations. The formation of unions, that is the organisation of labour, is the counterpart of accumulation of capital. There can be labour relations without employers’ associations though this would be difficult and very undesirable, there cannot be labour relations without trade unions.²⁶⁵ Indisputably, trade union rights do, however have a close relationship with the more general right of freedom of association.

Of all commonly enumerated human rights related to trade unionism and trade unions, the most important is the right to freedom of association not only because it is the bedrock principle of trade unionism but because it enables and defends the exercise of all other human rights at the workplace. The fundamental concern of trade union movement has been the struggle to secure the right of workers to form and join independent trade unions and to bargain collectively with their employer.

Accordingly, workers’ organisations or trade unions cannot exist if workers are not free to join them, to work for them and to remain in them.²⁶⁶ Thus, trade unions can only exist where individuals are free to combine in associations.

²⁶³ Davies *op cit* 10.

²⁶⁴ *Idem*. The Industrial Conciliation Act of 1921 also excluded blacks from the definition of employee and as such they could not form and join trade unions.

²⁶⁵ Kahn-Freund O, *Labour and the Law* (1972) 165.

²⁶⁶ *Idem* 165.

ILO instruments²⁶⁷ refer to “freedom of association” for trade union purposes. According to Davies, in most cases in which trade unions and their members have sought to rely on the general freedom of association, courts have preferred the protection of individual interests over the collective interests that are so important for trade union activities. In some countries, it has been difficult for trade unionists to persuade courts that their interests and activities such as closed shop,²⁶⁸ strikes²⁶⁹ and collective bargaining are necessarily protected through the right to freedom of association.²⁷⁰

In South Africa, courts have taken a different view. Courts have held in a number of cases that the right to freedom of association includes the unions’ right to organize, and bargain collectively with the employer.²⁷¹

Furthermore, it is important for a trade union to be recognized by an employer as the bargaining agent for its employees. There is little point in workers belonging to a trade union unless that union has the power to negotiate on their behalf. Accordingly, collective bargaining is the basic reason for the existence of trade unions but it can only take place if the employer will recognize the union. Satisfying workers’ needs is one of the union’s main goals, both manifest and latent. This view is shared by labour economists. Neil Chamberlain, for instance, described union goals in terms of members’ needs such as security for the union and its members, recognition and self-expression.²⁷²

²⁶⁷ See Article 2 of the ILO Convention 87 and Articles 1 & 2 of the ILO Convention 98.

²⁶⁸ For instance, in *National Union of Railwaymen v Sullivan* (1974) I.R. 77, The Irish Supreme Court held that a statute which restricted the choice available to a worker to membership of those trade unions which had been granted “sole bargaining rights” was unconstitutional, the crucial passage in the judgment being: ‘both logically and practically, to deprive a person of the choice of persons whom he will associate, is not a control of the exercise of the right of association, but a denial of the right altogether.’

²⁶⁹ In *Swedish Train Drivers Case* (1976) 1 EHRR 617, the ECHR stated that freedom of association under Art. 11 of the European Convention on Human Rights included the freedom to protect the occupational interests of trade union members’ but gave no indication of the specific measures of protection which were embraced by the principle. It held that under Art. 11 the appellant union did not have the right to separate collective bargaining with the government. The court was reluctant to extend the protection under Art. 11 to the right to strike, but it left open the possibility of a positive right to collective bargaining.

²⁷⁰ See the discussion in Davies “Constitutionalisation of Labour Rights” in Van Wyk *et al op cit* 441-444.

²⁷¹ *SANDU v Minister of Defense and Other* (2003) 24 I.L.J. 1495 (T).

²⁷² Chamberlain NW, *The Union Challenge to Management Control* (1948) 100-111.

Ewright Bakkie finds from interviews with workers that they join unions in order to satisfy some needs that relate to the society and respect of other people, comforts and economic security possessed by the most favoured of their customary associates, independence in and control over their own affairs, understanding the forces and factors at work in their world, and integrity.²⁷³

Employers are forbidden to compel employees not to join a trade union by means of provisions to that effect in the conditions of employment. Likewise, an employee may not be prevented by any law from becoming a member of a trade union or any employees' organisation. Trade unions are bearers of power. They must have power in order to play their role effectively in the society. This power may result from their participation in the decision making process of this country. During apartheid, their power in South Africa depended on the pressure they could exercise on the apartheid system which denied most human rights to the majority of African people, including their right to freedom of association. This explains the active participation of African trade unions in the struggle against apartheid.

2.5 Apartheid

Freedom of association and trade unionism in South Africa cannot be understood without reference to the apartheid regime, which governed this country for over four decades. Apartheid had implications for the protection of human rights, including the right to freedom of association at the workplace.

²⁷³ Bakkie E, "Why Workers Join Unions" (1945) XXII *Personnel* 37-46.

2.5.1 The Apartheid Regime: Establishment and Development in South Africa

When the white nationalists came to power in 1948, they exerted a grip on South African politics that only loosened in the mid 1990s. Internationally, they became known as the inventors of “apartheid”, a race policy increasingly at odds with international norms since it was based on the denial of virtually all-civil and political rights to the black people who constitute the overwhelming majority of the population in South Africa.

The word “apartheid” was used by the nationalist government in the 1940s to protect the interests of whites in general and Afrikaners in particular. Afrikaner Nationalists did not invent apartheid in 1948. It was actually pioneered by the British colonial governments of Natal and the Cape long before the nationalist government.

The Afrikaans word “apartheid” literally means “separation” or “apartness”. In English, it came to mean any legally sanctioned system of ethnic segregation such as the one that existed in South Africa between 1948 and the early 1990s.

For many, apartheid was a set of segregationist measures designed to reserve certain facilities and areas for use by white people only. In its strict sense, apartheid refers to the set of policies evolved by the white controlled state to rule and administer blacks indirectly. Blacks were not represented within the political system, which their vastly greater numbers would inevitably dominate, but they were incorporated under their traditional leadership within areas they had been restricted to in the process of conquest.²⁷⁴ A flood of laws enacted to formally institute the dominance of white people over other races followed the coming of the National Party to power in 1948.

The principal apartheid laws included the Prohibition of Mixed Marriages Act of 1949, the Amendment to the Immorality Act of 1950, the Population Registration Act of 1950, and the Group Areas Act of 1950.

²⁷⁴ Kahn-Freund *op cit* 192.

The apartheid regime finally came to an end in the 1990s. From a human rights and a labour law perspective, apartheid had serious implications for human rights in general and the right to freedom of association at the workplace in particular.

2.5.2 Apartheid, Human Rights, Freedom of Association and Trade Unions

The apartheid regime denied many human rights to the overwhelming majority of African people, especially their civil and political rights. They were not entitled to rights such as equality, human dignity, or the right to participate in the government. They were deprived of the right to freedom of association and the right to join or form trade unions at the workplace.

The history of freedom of association in South Africa may be divided into two main eras. The first was characterised by the legal construction of a racially exclusive system. The end of this era was marked by a transition from exclusion to participation. The second and current era is that of inclusion and the quest for non-racialism.²⁷⁵

The first legislation that aimed at regulating industrial relations, protecting employees and employers and securing freedom of association was passed under apartheid. However, it is only after apartheid that the right to freedom of association was constitutionalised and new legislation was enacted accordingly to provide for such a right at the workplace. Legislation on freedom of association and industrial relations under apartheid was dominated by two Acts, namely the Industrial Conciliation Act (ICA) 11 of 1924 and the ICA of 1956.

The ICA of 1924 was South Africa's first comprehensive piece of labour legislation. It was passed following more than a decade of spiralling labour unrest within an inadequate statutory framework that culminated in the revolt of white mineworkers on the Rand in 1922.

²⁷⁵ For a brief account of the historical underpinnings of the current legislation, see Du Toit *et al op cit* 4-13.

It provided for the registration of employers' organisations and trade unions excluding pass-bearing African workers. It introduced a framework for collective bargaining and a system for the settlement of disputes and regulated strikes and lock-outs.²⁷⁶

From the perspective of the legislature, the Act was a qualified success, as the membership of registered trade unions and the number of industrial councils grew steadily and industrial action declined to negligible proportions. However, it established a dual, racially-determined system of industrial relations and excluded African workers from the statute's definition of 'employee', and therefore from the membership of registered trade unions, from direct representation on industrial councils and from using conciliation boards.²⁷⁷

In the face of the problems emerging from the dual system, the ICA of 1924 was amended in 1930.²⁷⁸

The amendment Act authorised the Minister of Labour to specify, on the recommendation of an industrial council or conciliation board, the minimum wage rates and maximum working hours for "persons excluded from the definition of 'employee'".²⁷⁹ It unfortunately appeared that the aim of the amendment was to protect white workers from being undercut by cheaper African labour rather than to benefit pass-bearing African workers.²⁸⁰

In 1937, the ICA of 1924 was replaced by the consolidated ICA 36 of 1937 that made provision for an inspector of the Department of Labour to represent pass-bearing African workers at industrial council meetings. However, neither the 1930 amendment nor the new Act solved the problems of the dual industrial relations system.²⁸¹

²⁷⁶ Du Toit *op cit* 4.

²⁷⁷ *Idem* 4-5.

²⁷⁸ Industrial Conciliation (Amendment) Act 24 of 1930.

²⁷⁹ Du Toit *op cit* 6.

²⁸⁰ *Idem*.

²⁸¹ *Ibid* 6-7.

In 1950, the National Party government passed the Suppression of Communism Act that outlawed several political and labour movements. Consequently, trade union membership and the number of trade unions decreased. The Public Safety Act of 1953 was passed, enabling the government to govern through the state of emergency. Following the civil unrest, the government also appointed the Botha Commission of 1953 to investigate the existing labour relations. The Commission suggested that if black workers were granted the same representation under labour legislation as white workers, white political supremacy could well be challenged.

Nonetheless, it recommended separate bargaining bodies for white and black workers, subjecting recognition of black unions to stringent control. Strike action by black workers was prohibited. The Bantu Labour (Settlement of Disputes) Act was passed in 1953. This Act later to be known as the Black Labour Regulation Act 48 of 1953 sought to undermine the effectiveness of black trade unions. The Trade Union Council of South Africa (TUCSA) was formed in 1954, which excluded black trade unions from its membership.

The ICA 28 of 1956 was passed by the newly elected National Party Parliament in furtherance of its policy of apartheid. It completed the construction of the racially exclusive industrial system in South Africa by entrenching the racial division of workers, prohibiting the registration of new unions having both white and “coloured” members and reserving certain work exclusively to “persons of specified race”.²⁸²

Despite some kind of stability, the industrial relations system and the apartheid regime were to face new challenges from the mainly African working class who flocked to join newly unregistered unions that emerged in the wake of the strikes and grew rapidly. The dual system of industrial relations became unworkable and required reform to move from exclusion to inclusion.

²⁸² Du Toit *op cit* 8.

Following a spate of strikes in the mid and late 1970s, the government appointed the Wiehahn Commission of Inquiry in Labour Legislation in 1977. The 1979 report of the Commission proposed fundamental changes into the industrial relations system.²⁸³

The Wiehahn Commission recommended that freedom of association be granted to all employees regardless of sex, race or creed; that trade unions irrespective of their composition in terms of colour, race or sex, be allowed to register and unions be free to determine their rules and that the contractual exclusion of an employee's right to union membership or participation in union activities by an employer should be defined as an unfair labour practice.²⁸⁴ Most of the recommendations and findings of the Wiehahn Commission were accepted and implemented by the government.

Accordingly, the ICA 28 of 1956 was amended in 1979 and in 1980²⁸⁵ while by the 1981 Amendment,²⁸⁶ its name changed to the LRA as further amended in 1982, 1983, 1984, 1988 and 1991 respectively.²⁸⁷

The major impact of the Industrial Conciliation Amendment Act²⁸⁸ of 1979 and subsequent amendments was that it no longer excluded Black African workers from the definition of employee, thereby granting all South African employees equal rights in the industrial relations sphere.²⁸⁹

These amendments aimed at providing for more substantial protection of freedom of association to most employees.²⁹⁰ This led to a rapid growth in trade union membership among black employees.

²⁸³ See Roos J, "Labour Law in South Africa 1976-1986: The Birth of the Legal Discipline" (1997) *Acta Juridica* 96-98; Pienaar G, "Freedom of Association in the United States and South Africa – A Comparative Analysis" (1993) XXVI *CILSA* 167-169; Du Toit *op cit* 9.

²⁸⁴ Wiehahn Report (1979) parts 1-6. See also Pienaar *op cit* 168.

²⁸⁵ Industrial Conciliation Amendment Acts 94 of 1979 and 95 of 1980.

²⁸⁶ Labour Relations Amendment Act 57 of 1981.

²⁸⁷ Labour Relations Amendment Acts 51 of 1982; 2 of 1983; 81 of 1984; 83 of 1988; and 9 of 1991.

²⁸⁸ Hereinafter the "ICAA".

²⁸⁹ See Sonia Bendix *op cit* 285; Grosset M & Venter R, *Labour Relations in South Africa: A Comparative Guide for Managers and Practitioners* (1998) 31.

²⁹⁰ Pienaar *op cit* 169-171.

Black workers could now form and belong to trade unions in South Africa.²⁹¹ COSATU (Confederation of South African Trade Unions) and CUSA (Council of Unions of South Africa) were then founded in 1979 and 1980 respectively.²⁹²

As already pointed out, freedom of association is also related to democracy and constitutionalism which provide the best framework for its exercise. It is therefore important to also examine these twin concepts to understand their relationship with the concept and right of freedom of association.

2.6 Democracy and Constitutionalism

Constitutionalism and democracy seem to qualify as and fit into Gallie's definition of "essentially contested concepts".²⁹³ As Ihonvbere remarked, constitutionalism is a quite controversial concept.²⁹⁴ According to Mamdani, "The discourse on human rights and constitutionalism in contemporary Africa remains a contested terrain and should not be seen as a settled issue."²⁹⁵ The controversy is spirited in so far as the debate over constitutionalism and democracy has been ideologised. Notwithstanding volumes of essays, there is no common understanding of the concepts of democracy and constitutionalism.

²⁹¹ Grosset & Venter *op cit* 31.

²⁹² *Idem* 39.

²⁹³ Gallie quoted by Schochet G J, "Introduction: Constitutionalism, Liberalism, and the Study of Politics", in Pennock JR. & Chapman JW (eds) *Constitutionalism* (1979) 6.

²⁹⁴ Ihonvbere JO, *Towards a New Constitutionalism in Africa* (2000) 13.

²⁹⁵ Mamdani M, "Social Movements and Constitutionalism in the African Context", in Shivji IG, (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 239. Whilst agreeing with him, we should, however, make it clear that the "terrain" is not less contested in Africa than in other parts of the world.

Democracy and constitutionalism are not unitary, but “complex” concepts.²⁹⁶ Definitions are abundant, contentious, and very often vague. Finally, “What is constitutionalism”²⁹⁷ and “What is democracy”?

It is imperative that we be as precise as possible about the concepts we are using and how we understand them in the present study, the dialectic existing between, and their relationship with the right to freedom of association.

2.6.1 Democracy

Ronen pointed out that “[d]efining democracy is a challenge”.²⁹⁸ Many writers have spent their scholarly lifetimes teasing out the subtleties and nuances associated with democracy. The result of those endeavours remains the absence of universally accepted definitions and a concept that is still highly contested in analytical and ideological discourse.²⁹⁹ There is no universal definition of democracy. It might be said that “[e]veryone knows what democracy is, but nobody can define it to a general satisfaction.”

According to Venter, it is possible to identify its advantages. It has developed a heterogenous nature rendering a simplistic philological explanation in terms of the Greek words *demos* meaning town dwellers and *kratos* meaning authority wholly insufficient.³⁰⁰ Democracy entails that individuals should be free and equal in the determination of the conditions of their own lives; that is, they should enjoy equal rights and accordingly equal obligations. It is based on the belief that all people should have the same basic rights and freedoms and that people should be free to govern themselves.

²⁹⁶ See Sunstein CR, “Constitutions and Democracies: An Epilogue”, in Elster J & Slagstad R, (eds) *Constitutionalism and Democracy* (1988) 352.

²⁹⁷ Henkin L, “A New Birth of Constitutionalism: Genetic Influences and Genetic Defects”, in Rosenfeld M, (ed) *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives* (1994) 40-42.

²⁹⁸ Ronen D, “The Challenge of Democracy in Africa: Some Introductory Observations”, in Ronen D, (ed) *Democracy and Pluralism in Africa* (1986) 1.

²⁹⁹ Wiseman JA, *The New Struggle for Democracy in Africa* (1996) 7-8.

³⁰⁰ Venter F, *Constitutional Comparison* (2000) 193.

Democracy implies that the people should have the final say with regard to how they are to be governed. It hence implies not just the right to free and equal self-development, but also the constitutional limitation of powers. Concepts such as rule of law, separation of powers and limited government are all factors contributing to the achievement of democracy. The specific form that democracy takes in any country is largely determined by prevailing political, social and economic circumstances and it is greatly influenced by historical, traditional and cultural factors. Most definitions of democracy focus on qualities, procedure and institutions.

Democracy has come to be a catchall term, a fashionable buzzword. As in the case of constitutionalism, the first problem encountered is the definition of democracy. Democracy is undoubtedly the most discussed and contested notion of political theory.³⁰¹ Nwabueze pointed out that “[n]o word is more susceptible of a variety of tendentious interpretations than democracy”.³⁰²

According to Sono,

Throughout history the ideal of democracy has been the mother of all mischief. No concept has spawned such a multitude of devotees as democracy, however contradictorily conceived; nor has one, in the annals of political theory and conduct, been as disfigured, debased, and distorted as this one. Social scientists have twisted the meaning of the concept, while the other brotherhood, professional politicians and party hacks, misrepresented the concept in practice to the degree that its expression has been profoundly, wholly and permanently cast in a different hue all too foreign to its basic meaning.³⁰³

³⁰¹ Hoffman J, *State, Power, and Democracy: Contentious Concepts in Practical Political Theory* (1988) 31.

³⁰² Nwabueze BO, *Constitutionalism in the Emergent States* (1973) 1.

³⁰³ Sono T, *Comments on Democracy and Its Relevancy to Africa* (1992) 29.

As Wiseman held,

Many governments of quite different types wish to describe themselves as democratic. In some cases the term has even been incorporated into the official name of the state... although it is a noticeable paradox that in most cases where this happened (e.g. the German Democratic Republic, the People's Democratic Republic of Yemen, or in Africa, the Democratic Republic of Congo), the States concerned appear significantly undemocratic.³⁰⁴

Democracy has acquired different, even contradictory meanings. It has been suffering as much from its loyal partisans as from its opponents. Even its fierce enemies, dictators and authoritarian leaders, claim to be democrats and proclaim their faith in "democracy". Some people make democracy their God. Wars were waged in its name. The mere evocation of democracy created trouble and heart attacks to others. Democracy has walked throughout centuries and ages surrounded by these paradoxes.³⁰⁵

There is a widespread agreement that it is "a good thing". The term "democratic" almost inevitably connotes praise, while "undemocratic" implies censure.³⁰⁶

According to Sono, the use and abuse of democracy resulted in such a thorough and pervasive debasement and degrading of its meaning that the term has been rendered analytically useless.³⁰⁷

³⁰⁴ Wiseman JA, *Democracy in Black Africa. Survival and Revival* (1990) 4.

³⁰⁵ *Idem* 12.

³⁰⁶ Wiseman, *Democracy in Black Africa ...* 4.

³⁰⁷ Sono *op cit* 3.

Sono went further in denying the analytical value of democracy and launched a wholesale attack on the students of democracy among whom we should be counted:

Virtually all scribes and pundits together with an assortment of hacks and quacks glibly write and speak of 'democracy' and 'democratic' as if either term is the soul and blood of political practice today.³⁰⁸

Scholars have already spilled too much ink on the definition of democracy. We do not wish to enter this debate at any length, except to highlight the main conceptions of democracy. Depending on the scope of democracy, two of its major conceptions may be identified, namely the minimalist and maximalist conceptions. These conceptions have been informed by the two dominant ideologies in the contemporary world, liberalism/capitalism and socialism/communism respectively. Minimalist and maximalist conceptions of democracy are generally opposed in the scientific discourse.³⁰⁹

The latter relates to democratic values or principles while the former refers to the institutions in which those values are embodied. The clue to understanding democracy is based on this vital distinction.³¹⁰

³⁰⁸ Sono *op cit* 29.

³⁰⁹ See Wiseman *The New Struggle for Democracy*...7-14; Sklar RL, "African Politics: The Next Generation" in Joseph R, (ed) *State, Conflict, and Democracy in Africa* (1999) 166; Nyang'oro J E, "Discourses on Democracy in Africa: An Introduction", in Nyang'oro J E (ed) *Discourses on Democracy: Africa in Comparative Perspective* (1996) X; Beckman B, "Whose Democracy? Bourgeois versus Popular Democracy", *Review of African Political Economy* (1989) 84-98; Shivji I G, "State and Constitutionalism: A New Democratic Perspective", in Shivji *op cit* 27-65.

³¹⁰ Hinden R, *Africa and Democracy* (1963) 6-8.

2.6.1.1 Minimalist Conceptions and Liberalism

Minimalist conceptions are basically procedural, formal, and institutional. Procedural or institutional democracy may be linked to procedural or formal constitutionalism, as seen earlier. Democracy is defined as a specific political machinery of institutions, processes and roles.³¹¹

The notion of procedural or institutional democracy is of the sort found in Robert Dahl's concept of polyarchy.³¹² According to Dahl, polyarchy in a political order is characterised by seven institutions, all of which must be present. These are elected officials, free and fair elections, inclusive suffrage, the right to run for office, freedom of expression, alternative information and associational autonomy.³¹³

Polyarchy is distinguished by two broad characteristics, which are that "citizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in government".³¹⁴

According to Sorensen, Dahl's notion of polyarchy has three elements: competition for government power; political participation in the selection of leaders and policies; and civil and political rights.³¹⁵

³¹¹ Ronen D, "The State and Democracy..." 200.

³¹² See Dahl P, *Polyarchy: Participation and Opposition* (1971); Idem *Democracy and Its Critics* (1989) 220-224; Sorensen G, "Democracy and the Developmental State", in Nyang'oro *op cit* 42; Wiseman J A, *The New Struggle for Democracy in Africa...* 8.

³¹³ Idem.

³¹⁴ See Dahl *Democracy and Its Critics...* 220-224; Wiseman *The New Struggle for Democracy...* 8.

³¹⁵ Sorensen *op cit* 42.

The Schumpeterian definition of democracy was principally centred upon competition.³¹⁶ Again in minimalist views, democracy is synonymous with competitive and multiparty democracy. It is representative democracy, also labelled “Western” or “liberal” democracy”.

Especially Marxist and socialist scholars levelled criticism at the minimalist conceptions. Criticism against minimalist conceptions first of all concerned capitalism and liberalism. Liberalism was considered inimical to democracy. Amin recalled the rallying cry during the French Revolution: “Liberalism is the enemy of democracy.”³¹⁷

The Marxist argument is that liberal democracy is only a mask for bourgeois democracy.³¹⁸ For instance, Samir Amin holds that “Western democracy has no social dimension.”³¹⁹ According to him, the Western or liberal bourgeois democracy, which is confined to the political domain, ignores the masses of the people to serve the minority. It privileges individual and political rights over collective and socio-economic rights and the rights of the minority (bourgeois) over those of the people.³²⁰

It is a “formal democracy”³²¹ to which Shivji preferred a “substantive” or specifically a “popular democracy.”³²² Shivji regretted that democracy was frequently, if unconsciously, conflated with its liberal form, parliamentary or multi-party system and constitutionalism with individual rights and freedoms instead of being interrogated as a form of struggle and the mode of politics of the large majority of the working people.³²³

³¹⁶ Harbeson J W, “Constitutions and Constitutionalism in Africa: A Tentative Theoretical Exploration”, in Ronen *op cit* 7.

³¹⁷ Amin S, “The Issue of Democracy in the Contemporary Third World”, in Nyang’oro *op cit* 71.

³¹⁸ *Idem* 61.

³¹⁹ *Idem* 70.

³²⁰ *Idem* 64.

³²¹ Glaser D, “Discourses of Democracy in the South African Left: A Critical Commentary”, in Nyang’oro *op cit* 270.

³²² Shivji I G, “Contradictory Class Perspectives in the Debate on Democracy”, in Shivji *op cit* 254-255.

³²³ Shivji I G, *Fight My Beloved Continent: New Democracy in Africa* (1992) 2.

Ake regarded liberal democracy to be an “impoverished” democracy.³²⁴ Glaser revealed that for some socialists, a defence of civil liberties and political pluralism, or at any rate their elevation to a pride of place alongside other democratic principles, is irretrievably associated with individualism, formalism and reformism.³²⁵

Ronen regretted that definitions of democracy have tended to emphasize representation and the process of choice and accountability, which include political parties, elections, public opinion, and so forth.³²⁶

2.6.1.2 Maximalist Conceptions and Socialism, Populism or Communism

Whilst minimalist scholars define democracy as a process and a set of institutions and focus on political democracy, maximalist concepts concentrate on the substance and values of democracy, the most prominent among them being social equality, and socio-economic rights.

In maximalists’ view, democracy is essentially socio-economic and popular or socialist democracy. Theirs is a very broad definition of democracy that would include some or all of the desirable political, social, and economic characteristics of a “good society”.³²⁷

Compared with minimalist conceptions emphasising individual and political rights, maximalist views broadly define democracy as implying collective and socio-economic rights.

³²⁴ Ake C, *Democracy and Development in Africa* (1996) 132. See also Olukoshi A, “State, Conflict and Democracy in Africa: The Complex Process of Renewal”, in Joseph *op cit* 457.

³²⁵ Glaser *op cit* 270

³²⁶ Ronen *op cit* 192.

³²⁷ Wiseman *The New Struggle for Democracy...9*.

To liberal and bourgeois or elite-driven democracy, they oppose social and economic or popular democracy or what Amin once called “Jacobin democracy” or “people-driven democracy”,³²⁸ Unsurprisingly, most champions of maximalist conceptions recruit among scholars from socialist or Marxist persuasion or from the so-called “Left”. They are from all walks, economists, political scientists, historians and legal scholars who examine the issue of democracy in terms of class struggle.

Maximalist scholars, such as Ake, advocate a social democracy that places emphasis on concrete political, social, and economic rights, as opposed to a liberal democracy that emphasises abstract political rights; a democracy that puts as much emphasis on collective rights as it does on individual rights.³²⁹ This should be a popular, participative and social democracy.³³⁰

Maximalist definitions of democracy are in many ways very attractive and contain a far clearer notion of “good government” than the minimalist ones.³³¹ However, minimalist scholars also levelled criticism against them.

In Wiseman’s words,

To make democracy a usable concept, from an analytical point of view, in understanding events in the real world (in Africa or elsewhere) it is not useful to attach so much to it as a holdall of all desirable political, economic and social characteristics.³³²

Wiseman identified at least three sets of problems associated with maximalist conceptions. First, characteristics like economic equality, high participation levels, and gender equality should be seen as possible results of democracy rather than as part of its definition.

³²⁸ Nyang'oro “Discourses on Democracy...” X.

³²⁹ Ake *op cit* 132- 134.

³³⁰ *idem* 137, 139.

³³¹ Wiseman *The New Struggle for Democracy...* 9.

³³² *idem*.

Secondly, these conceptions are inherently imprecise on the extent to which these characteristics have to be realised. There is no agreement on how equality should be measured. Thirdly, and probably most importantly, whilst maximalist definitions of democracy may be useful in outlining future goals, they are less useful when analysing the political systems of the real world, which inevitably fall far short of the ideal.³³³

Wiseman concluded:

However sympathetic one may be towards some or all of the aspirations expressed within a maximalist conception of democracy it would be unrealistic to insist that all the maximalist characteristics have to be in place before a political system can be described as democratic.³³⁴

It is worth mentioning that like critics of minimalist conceptions, who found liberal democracy impossible in Africa, minimalists also think that maximalist conceptions only advocate an ideal type of democracy.

According to Wiseman, "There is no prospect whatsoever of any African state fulfilling the total range of aspirations contained within a maximalist conception of democracy in the foreseeable future."³³⁵

Glaser criticised the maximalist conceptions for their emphasis on social equality, substantive democracy and collective rights to the detriment of formal, legal equality, formal democracy and individual rights.³³⁶ According to Glaser, the central deficiency in the democratic discourses of the South African left is the low status accorded to political pluralism and civil liberties,³³⁷ a lack of resolute commitment to political pluralism and civil liberties.³³⁸

³³³ Wiseman *The New Struggle for Democracy...* 9.

³³⁴ *Idem*.

³³⁵ *Ibidem*.

³³⁶ Glaser *op cit* 251.

³³⁷ *Idem* 249.

³³⁸ *Idem* 248 & 249.

Yet, civil liberties and political pluralism are indispensable to any socialist order claiming to be democratic and should not be judged or jettisoned on the basis of instrumental criteria.³³⁹

Our position regarding democracy, like constitutionalism later, will distance ourselves from both radical minimalists and radical maximalists. Our conception of democracy is between minimalism/proceduralism, institutionalism or legalism and maximalism/populism although much closer to the former than the latter. It is both minimalist and maximalist. Our view of democracy is both formal and substantive, implying both formal and substantive equality and emphasising individual, civil, political and collective and socio-economic rights. Individual and civil rights are not simply “bourgeois” values and do matter in democracy, however defined.³⁴⁰ Yet, democracy should not stop there, at forms, institutions, individual and civil and political rights. Democracy is not only a set of principles or institutions, but also of values.

As Bangura aptly put it;

Although democracy is primarily concerned with the rules and institutions that allow for open competition and participation in government, it embodies also social and economic characteristics that are crucial in determining its capacity to survive.³⁴¹

Formal democracy must be linked to more substantive forms of popular rule.³⁴² There is not necessarily a conflict between formal democracy on the one hand and substantive democracy on the other. Nor do individual, political and civil rights oppose the collective and socio-economic ones.³⁴³

³³⁹ Glaser *op cit* 251.

³⁴⁰ See Glaser *op cit* 248-251; Sandbrook R, “Liberal Democracy in Africa: A Socialist-Revisionist Perspective”, in Nyang’oro *op cit* 145.

³⁴¹ Bangura Y, “Authoritarian Rule and Democracy in Africa: A Theoretical Discourse”, in Nyang’oro *op cit* 98.

³⁴² *Idem* 129.

³⁴³ Glaser *op cit* 251-252.

¹³ For a comprehensive and authoritative account of the history of constitutionalism, see, for instance, McIlwain C H, *Constitutionalism: Ancient and Modern* (1947); *Idem Constitutionalism in the Changing*

All things considered, the different conceptions of democracy revolve around democracy as defined by US President Abraham Lincoln in his famous speech on 19 November 1863 referring to “the government of the people, by the people and for the people”.

2.6.2 Constitutionalism

According to Chandler, Enslin and Renstrom,

The historical development of constitutionalism begins in a technical sense when the English term constitution was first used in its current political science context in the late seventeenth century. Constitutionalism was introduced in the mid-eighteenth century.³⁴⁴

Constitutionalism is part and parcel of constitutional and democratic theory.³⁴⁵ Schochet wrote that “The ‘veneration’ of constitutionalism is among the enduring and probably justified vanities of liberal democratic theory.”³⁴⁶

World (1939); Chandler, Enslin & Renstrom *op cit* 3-67; Wormuth F D, *The Origins of Modern Constitutionalism* (1945); Friedrich C, *Limited Government: A Comparison* (1974); Idem *Man and His Government* (1963); Idem *Constitutional Government and Politics* (1937), Idem *Constitutional Government and Democracy* (1968).

¹⁴Conac G, “Les processus de démocratisation en Afrique”, in Conac G. (ed) *L’Afrique en transition vers le pluralisme politique* (1993) 11.

²²Arato A, “Dilemmas Arising from the Power to Create Constitutions in Eastern Europe”, in Rosenfeld *op cit* 167-168.

²³Quoted by Nzombe S, *Democracy, Human Rights and Constitutionalism in Post-Colonial Africa* (1992) 1.

²⁴ Armour L, “John Locke and American Constitutionalism”, in Rosenbaum A S (ed), *Constitutionalism: The Philosophical Dimension* (1988) 10.

³⁴⁴ Chandler, Enslin & Renstrom *op cit* 16.

³⁴⁵ See Vile M J C, *Constitutionalism and The Separation of Powers* (1967) 8; Schochet *op cit* 1-15.

³⁴⁶ Schochet *op cit* 1.

Despite “veneration” or “worship”, the “god” largely remains unknown, as is illustrated by numerous and sometimes inconsistent and confusing definitions of constitutionalism. The definition of constitutionalism is quite controversial.³⁴⁷ Perspectives on constitutionalism are contradictory, competing and confusing.³⁴⁸

Thomas Grey was among the most critical of constitutionalism when he remarked:

Constitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse.³⁴⁹

Grey even seemed too sceptical in his expectations about the possibility of an intelligent and transparent debate about constitutionalism. Rosenbaum also observes that “constitutionalism is understood differently.”³⁵⁰

Gregor, for instance, holds:

In the context of political theory, ‘constitutionalism’ often signifies concern with the problem of how the institutions of a state are to be organized in order to secure the basic rights of men or citizens.³⁵¹

In the same vein, Zoethout and Boon contend that constitutionalism refers to a political ideal regarding the organisation of the State.³⁵²

³⁴⁷ Ihonvbere *op cit* 13.

³⁴⁸ Shivji “Contradictory Class Perspectives” 249, 255.

³⁴⁹ Grey T, “Constitutionalism: An Analytic Framework”, in Penrock & Chapman *op cit* 189.

³⁵⁰ Rosenbaum A S, “Introduction”, in Rosenbaum *op cit* 4.

³⁵¹ Gregor M J, “Kant’s Approach to Constitutionalism”, in Rosenbaum *op cit* 69.

³⁵² Zoethout C M & Boon PJ, “Defining Constitutionalism and democracy: An Introduction”, in Zoethout, C M *et al*, (eds) *Constitutionalism in Africa. A quest for autochthonous principles* (1996) 4.

As for Ihonvbere, constitutionalism is not an idea, a spirit or a principle, but rather a constitution-making process:

By constitutionalism, we refer to a process for developing, presenting, adopting and utilizing a political compact that defines not only the power relations between political communities and constituencies, but also defines the rights, duties, and obligations of citizens in any society. Essentially, the focus of what we mean by constitutionalism is on two issues: first the *process* of constitution-making and the extent to which it is popular and democratic; and second, the available openings, institutions, and processes of making the constitution a *living* document by taking it to the people so that they are in a position to not just have access to it, but that they understand it, claim ownership, and deploy it in defense of their individual and collective rights and the democratic enterprise.³⁵³

Arato defined constitutionalism as a political form in which a body of fundamental laws establishes the powers of government and institutionalises important limits for its operation.³⁵⁴

According to de Smith,

Constitutionalism is a genuinely accountable entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize and to campaign in between as well as immediately before elections with a view to presenting themselves as an alternative government, and where there are effective legal guarantees of basic civil liberties enforced by an independent judiciary.³⁵⁵

On the other hand, Armour contended that “It is ‘constitutionalism’ – the view that men may safely be left free provided they agree to conduct themselves within the limits of certain rules.”³⁵⁶

³⁵³ Ihonvbere *op cit* 15.

³⁵⁴ Arato *op cit* 167-168.

³⁵⁵ De Smith quoted by Nzombe *op cit* 1.

³⁵⁶ Armour *op cit* 10.

According to Henkin, there appears to be no accepted definition of constitutionalism.³⁵⁷ However, depending on whether constitutionalism is perceived as a legal principle, a set of rules aimed at achieving a specific end or a body of values underlying the government of a society, two main approaches to constitutionalism may be distinguished, the traditional and the modern approaches.³⁵⁸

2.6.2.1 Traditional Approaches: Procedural and Negative Constitutionalism

Traditional definitions of constitutionalism stress liberal, procedural, negative and formal constitutionalism. According to Ihonvbere and Shivji, the liberal concept of constitutionalism rests on two main pillars, namely limited government and individual rights.³⁵⁹

Schochet considered that “the hallmark of modern constitutionalism is its reliance upon formal limitations on political power that are directly tied to popular sovereignty.”³⁶⁰

Rosenfeld held that in the broadest terms, “Modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of human rights.”³⁶¹

³⁵⁷ Henkin “A New Birth of Constitutionalism...” 39-40.

³⁵⁸ See Schochet *op cit* 2-4; Pennock J R, “Epilogue”, in Pennock & Chapman *op cit* 378-379; Rosenfeld M, “Modern Constitutionalism as Interplay Between Identity and Diversity”, in Rosenfeld *op cit* 3; Chandler, Eisen & Renstrom *op cit* 16.

³⁵⁹ See Ihonvbere *op cit* 13; Shivji “State and Constitutionalism...” 28.

³⁶⁰ Schochet *op cit* 4.

³⁶¹ Rosenfeld *op cit* 3.

As McIlwain once put it,

The most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remain what it has been almost from the beginning, the limitation of government by law.³⁶²

In Andrews's view, "If one were to attempt a description of this complex concept in two words, we might call it 'limited government.'"³⁶³

Mojekwu also regarded constitutionalism as "a man-made device to limit the arbitrariness of governments."³⁶⁴

Zoethout and Boon took it for an expression of the conviction that no government should ever have unlimited power to do whatever it wants, since every political system is likely to relapse into arbitrary rule, unless precautions are being taken.³⁶⁵

As Rosenbaum also stressed, "Constitutionalism has evolved to mean the legal limitations placed upon the rightful power of government in its relationship to citizens".³⁶⁶ In all its successive phases, McIlwain and Schochet observed, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.³⁶⁷

According to Nwabueze, "[t]here is something logically incoherent about the modern doctrine of constitutionalism, for it places a limit on supreme political authority without denying its existence."³⁶⁸

³⁶² McIlwain CH, *Constitutionalism: Ancient and Modern*...22.

³⁶³ Andrews WG, *Constitutions and Constitutionalism* (1968) 11.

³⁶⁴ Mojekwu CC, "Nigerian Constitutionalism", in Pennock & Chapman *op cit* 184

³⁶⁵ Zoethout & Boon *op cit* 1, 11.

³⁶⁶ Rosenbaum *op cit* 4.

³⁶⁷ See McIlwain *op cit* 21-22; Schochet *op cit* 5.

³⁶⁸ Nwabueze *op cit* 1.

Henkin echoed the same view:

In sum, American constitutionalism – which is not novel – implies a government subject to the Constitution; it implies limited government, government with agreed powers for agreed purposes, subject to the rule of law; it implies fractionalized authority to prevent concentration of power and the danger of tyranny. Constitutionalism implies also the reservation of a large private domain and retained rights for every individual.³⁶⁹

The problem has always been how to limit the arbitrariness of political power which man can manipulate in government. It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism.³⁷⁰

Traditional definitions of constitutionalism are therefore grounded on the notion of limitation of State power by means of law.³⁷¹

The focus here is on the extent to which the Constitution is meant to limit the damage a State can do.³⁷² Constitutionalism as defined is a negative one.

According to Ivison,

Negative constitutionalism... focuses on the limiting functions of the constitution. It coordinates to a definition of what the state cannot or should not do. So constitutionalism is a means of opposing, in fact it does not oppose things already opposed, state power, where constitutions are primarily inhibiting and preventing mechanisms meant to protect individuals and society against arbitrary exercises of power.³⁷³

³⁶⁹ Henkin L, *Constitutionalism, Democracy and Foreign Affairs* (1990) 6, 7.

³⁷⁰ See Zoethout & Boon *op cit* 1; Mojekwu *op cit* 164.

³⁷¹ See Mojekwu *op cit* 164; Rosenbaum *op cit* 4; Arato *op cit* 167-168; Armour *op cit* 10; Vile *op cit* 1; Grey *op cit* 1; Chandler, Enselin & Renstrom *op cit* 35.

³⁷² Ivison D, "Pluralism and the Hobbésian Logic of Negative Constitutionalism", *Political Studies* (1999) 83.

³⁷³ *Idem* 85.

That is the logic of what Ivison called “Hobbesian Constitutionalism”.³⁷⁴ Negative constitutionalism is procedural, formal and relates to the “normative *Verfassung*”, “normal politics”, or politics made in terms of the norms and based on the rules of law. Power is proscribed and procedures prescribed.³⁷⁵

According to some scholars, constitutionalism is a doctrine that is prescriptive rather than descriptive, an ideal of how the authority should be exercised not how it is being exercised in practice.³⁷⁶ However, in a system such as the South African one where “constitutionalism has become central to the ...jurisprudence”³⁷⁷ and courts of law, especially the Constitutional Court have to ensure that it is actually practised. Constitutionalism acquires prescriptive, normative and descriptive dimensions.

Insofar as it restricts the State to what it can do, constitutionalism tends to create a “minimal State”, that is a State which leaves greater space to individual freedom and activities.

The concept of “minimal state” is itself problematic since what is being limited is not in fact the State, as understood in constitutional and international law, but the government which is but a component of statehood according to article 33 of the Montevideo Convention referred to earlier.

Born in the golden age of liberalism in the West, negative constitutionalism shares its ideology and is closely associated with it. Accordingly, it is generally labelled as “liberal constitutionalism” by both its protagonists and its opponents and criticism against liberalism generally follows constitutionalism.

³⁷⁴ Ivison *op cit* 83-89.

³⁷⁵ Andrews *op cit* 13, 26.

³⁷⁶ Henkin L, “A New Birth of Constitutionalism...” 41.

³⁷⁷ Statement by Justice Mokgoro in *S v Makwanyane and Another* 1995 (3) SA 391; (CC) par 301.

Constitutionalism was and still is perceived as a “bourgeois concept” to serve the dominant class, “an imperialist design imposed by the imperialist state with the power of its monopolies”.³⁷⁸

Constitutionalism was said to focus more on limitation of power, individual and negative rights and on a minimal State at the expense of collective rights rather requiring positive action by the government and more than a minimal state for their enforcement.

Iverson argues that negative constitutionalism seems “an incomplete formulation of what constitutionalism means. Constitutions are about preventing abuses of powers, but are also about more positive things too.”³⁷⁹

On the other hand, scholars such as Zoethout and Boon hold that because of its main procedural nature, traditional constitutionalism is unable to respond adequately to contemporary problems of the welfare State, since it is primarily aimed at protecting (negative) individual rights and freedoms. Therefore, so the argument goes, we should re-define or reconceptualise the term.³⁸⁰

Constitutionalism ought to transcend this negativism; not only should it provide for individual rights and freedoms, but it should also include (some) social and economic, and collective rights (in other words the second and third-generation rights).³⁸¹ Hence the tendency to move away from traditional approaches to constitutionalism, from legal, procedural, formal and negative constitutionalism to modern approaches favouring political, substantive and positive constitutionalism.

³⁷⁸ For a brief account of criticism against liberal constitutionalism, see Nzombe *op cit* 3; Shivji, “State and Constitutionalism...” 27-28; Slagstad R, “Liberal constitutionalism and its critics”, in Elster & Slagstad *op cit* 103-129.

³⁷⁹ Iverson *op cit* 83.

³⁸⁰ Zoethout & Boon *op cit* 1, 15.

³⁸¹ *Idem* 2.

2.6.2.2 Modern Approaches: Substantive and Positive Constitutionalism

Unlike traditional constitutionalism with its overemphasis on procedure and restraint, modern constitutionalism is said to be more concerned with values. It is value-laden, teleological or purposive constitutionalism. Modern constitutions are value-based. The 1996 Constitution of South Africa, for instance, provides that the Republic is based on a number of core “values”³⁸² and these democratic values “must” be promoted in the interpretation of the Constitution in general and of the Bill of Rights in particular.³⁸³

Modern approaches champion substantive and positive constitutionalism. To give effect to democratic values, the state should be more effective and more active and be given more powers than under negative constitutionalism.

A powerful version of this kind of constitutionalism is what Ivison called “rights-based constitutionalism.”³⁸⁴

Rights promoted by such constitutionalism are not only individual and first-generation rights, but also collective, second, and third-generation rights.

³⁸² Section 1 of the 1996 Constitution.

³⁸³ Section 39 (1) (a).

³⁸⁴ Ivison *op cit* 85.

Zoethout and Boon pointed out that “Whatever the merits of the social and economic objectives, we believe they should not be given constitutional status.”³⁸⁵ They warned against the erosion of constitutionalism that could result from the insertion of substantive values or positive rights.

According to them,

Including positive rights into the notion of constitutionalism entails the problem of how to unite the idea of state action (as needed for realising second and third-generation rights) with the constitutional premise of limiting state power.³⁸⁶

In line with the holistic or integrated methodological approach embraced in the study, our approach to constitutionalism inserts in the “great tradition” as enriched by recent developments occurred in both constitutional and international law.

Traditional and modern approaches as well as rules and values are not mutually exclusive, but reinforcing. According to Carpenter, “In short, constitutionalism is a doctrine which is concerned with values.”³⁸⁷

Formal, procedural, and negative constitutionalism should not be stressed at the expense of substantive and positive constitutionalism and *vice versa*.

We take the view that constitutionalism is a legal and political idea, principle or doctrine; it is based on both rules and values. The distinction between procedural, formal and negative constitutionalism on the one hand and substantive and positive constitutionalism on the other hand has become blurred or insignificant.

³⁸⁵ Zoethout & Boon *op cit* 15.

³⁸⁶ *Idem* 2.

³⁸⁷ Carpenter G, “Public Law: Constitutional Law”, in Hosten W.J *et al* (eds) *Introduction to South African Law and Legal Theory* (1997) 949.

That is the result of the constitutionalisation of individual and collective, first, second and third-generation rights through enforceable Bills of Rights as well as important developments in universal and regional human rights-law with several conventions that were adopted, ratified and are now nearly binding on every State. Today's constitutionalism includes procedure and substance, rules and values.

2.6.3 Relationship between Democracy and Constitutionalism

The relationship between constitutionalism and democracy has been the subject of hot debate in legal and political sciences. Sometimes, constitutionalism and democracy are considered mutually dependent and reinforcing, at other times antagonist.³⁸⁸

Democracy may not be the essence of constitutionalism and a system may be constitutional without being democratic, as Nwabueze³⁸⁹ pointed out, constitutionalism is nevertheless considered a step towards democratisation and an issue that inserts itself into the large debate on democracy, as Shivji and Mamdani stressed.³⁹⁰

According to Chandler, Enslin and Renstrom, "The final phase of modern constitutionalism was its democratization."³⁹¹

True and sustainable democracy is impossible without constitutionalism. Furthermore, without constitutional restraints, democracy becomes weaker and is doomed to collapse.³⁹²

³⁸⁸ See Rosenfeld *op cit* 27; Olukoshi *op cit* 456.

³⁸⁹ Nwabueze, quoted by Mojekwu *op cit* 164.

³⁹⁰ See Mamdani *op cit* 243; Shivji "Contradictory Class Perspectives..." 255.

³⁹¹ Chandler, Enslin & Renstrom *op cit* 18.

³⁹² Elster J, "Introduction", in Elster & Slagstad *op cit* 9.

Constitutionalism is a prerequisite for democratic survival.³⁹³
As Holmes put it,

It is meaningless to speak about popular government apart from some sort of legal framework which enables the electorate to have a coherent will...Without tying their own hands, the people will have no hands.³⁹⁴

On the other hand, constitutionalism as broadly understood requires democracy. Sejersted contended that “the common experience is likely to be stronger that democracy has after all been the best guarantee for limited government and the rule of law.”³⁹⁵ Constitutionalism and democracy are therefore held to be interrelated and interdependent. Accepting that constitutionalism and democracy are not fundamentally antagonistic and that they may and should coexist implies the recognition of a possible tension that cannot be ruled out altogether.

2.6.4 Democracy, Constitutionalism and Freedom of Association

Without promotion of, respect for and a culture of human rights, there is no possibility for democracy. According to Henkin, democracy itself is a human right.³⁹⁶ Human rights and constitutionalism are closely related.³⁹⁷ Constitutionalism is basically about the limitation of governmental power and perhaps the most important reason why the power should be limited is the protection of human rights.

³⁹³ Conac G, “Etat de droit et démocratie”, in Conac *op cit* 485.

³⁹⁴ Holmes S, “Precommitment and the Paradox of Democracy”, in Elster & Slagstad *op cit* 231.

³⁹⁵ Sejersted F, “Democracy and the Rule of Law: Some historical experiences of contradictions in the striving for good government”, in Elster & Slagstad *op cit* 139

³⁹⁶ Henkin quoted by Olivier PJJ, “Constitutionalism in the New South Africa”, in Licht RA & De Villiers B, (eds) *South Africa's Crisis of Constitutional Democracy. Can the U.S. Constitution help?* (1994) 19.

³⁹⁷ See in the South African perspective Chapters 1 and 2 of the 1996 Constitution.

Democratic deliberation, respect for individual rights and adherence to the rule of law are, according to Nino,³⁹⁸ three crucial facets of constitutionalism. On the other hand, Rosenfeld considered constitutionalism “a three-faceted concept”,³⁹⁹ consisting of three general features, namely limited government, adherence to the rule of law and protection of human rights.⁴⁰⁰ These three constitutive elements of constitutionalism are intertwined and not a single one would suffice to define constitutionalism.

Human rights are both a means and an end to constitutionalism. According to Rosenfeld, “Protection of human rights is considered the third general feature of modern constitutionalism.”⁴⁰¹

In Sigmund’s words, “The guarantee of the protection of individual freedom ...is the overall purpose of constitutionalism.”⁴⁰²

Carl Friedrich saw “the protection of individual rights against the tyranny of government” as “central to genuine constitutionalism.”⁴⁰³

As for Nwabueze, “individual civil liberties ...are the very essence of constitutional government.”⁴⁰⁴

³⁹⁸ Nino quoted by Rosenfeld *op cit* 27-28.

³⁹⁹ Rosenfeld *op cit* 28.

⁴⁰⁰ *Idem* 4-5.

⁴⁰¹ *Idem* 3-4, 13.

⁴⁰² Sigmund P, “Carl Friedrich’s Contribution to the Theory of Constitutionalism- Comparative Government”, in Pennock & Chapman *op cit* 39.

⁴⁰³ Chandler, Ensehn & Renstrom *op cit* 35.

⁴⁰⁴ Nwabueze *op cit* 10.

There is a close relationship between human rights and another element of constitutionalism, namely the constitution.⁴⁰⁵ Article 16 of the French Declaration of 1789 even went as far as stating that “any society where the guarantee of rights is not secured nor the separation of powers determined has no constitution.”

Iverson shares the same view when he notes that “[c]onstitutionalism is essentially about protecting individual legal rights”.⁴⁰⁶ This Western liberal conception of rights, which is founded on individual and civil rights, should be broadened to encompass collective rights, socio-economic rights, and environment and development rights.

Human rights protection at the domestic level requires not only an enforceable Bill of Rights, but also enforcement mechanisms or institutions to sanction violations and provide appropriate relief. Accordingly, there is a close relationship between democracy, constitutionalism and human rights, including the right to freedom of association. Workers rights are important in the development of democratic institutions and democracy also implies the right of association, including the right to form and join trade unions. This is well captured in South Africa. The 1996 Constitution aimed at establishing a constitutional and democratic rule and comprises a comprehensible Bill of Rights as the cornerstone of democracy. The right to freedom of association in general and at the workplace in particular are protected under this Bill of Rights.

⁴⁰⁵ Human rights are enshrined in the Constitution.

⁴⁰⁶ Iverson *op cit* 85.

2.7 Conclusion

The right to freedom of association is one of the fundamental rights and freedoms entrenched in the South African Constitution as well as in a number of international instruments. At the workplace, this right entitles both employees and employers to organise in order to champion their interests. Employees are *inter alia* entitled to form and join trade unions. Understandably, they could not enjoy this and many other rights under the colonial and apartheid regimes.

Nevertheless, these rights were given a primordial place in South Africa after the dismantling of apartheid and the establishment of new democratic and constitutional order given the close relationship between democracy, constitutionalism and human rights, including the right to freedom of association in the workplace.

The rights of workers must be seen as essential to the issue of social justice, human rights and democracy and must be promoted as such. Against this background, an attempt at revisiting the concepts of employees, employers, freedom of association, trade unions, apartheid, democracy and constitutionalism was required before embarking on this study on the right to freedom of association and trade unionism in South Africa.

As demonstrated by the next chapter of the study, the history of freedom of association and trade unionism under colonialism and apartheid has been the history of a struggle closely associated with the struggle against apartheid itself.

CHAPTER 3 LABOUR RELATIONS, FREEDOM OF ASSOCIATION AND TRADE UNIONISM UNDER SOUTH AFRICAN COLONIAL AND APARTHEID LEGAL ORDERS

3.1. Introduction

The history of labour relations, freedom of association and trade unionism under the South African colonial and apartheid legal orders has its rightful place in our investigation on freedom of association and trade unionism in South Africa since it is connected to the objectives of the study.

This chapter complements the previous ones. From both a legal and an historical perspective, it deals with the protection of labour relations, freedom of association and trade union rights under South Africa's colonial and apartheid orders. Such protection would be meaningless without the legal and judicial protection of freedom of association and trade unions. Accordingly, this chapter will not only examine the protection of freedom of association and trade unions in terms of the different Constitutions and legislation but also their judicial protection (by South African courts) before the coming into operation of the current constitutional order. As stressed earlier, such a legal and historical account is critical to any study of freedom of association and trade unionism in South Africa.

It is worth considering the historical underpinnings of the labour legislation to understand where it comes from and highlight the scope and importance of the developments that have taken place as well as the current state of freedom of association and trade unionism in the workplace in South Africa.

As Bendix pointed out, “history plays an important role in the shaping of individual attitudes and societal norms and institutions”.⁴⁰⁷ According to Cardozo, “history in illuminating the past illuminates the present, and in illuminating the present, illuminates the future.”⁴⁰⁸ In Elias’s words, “worthwhile study of the problem of government and politics of Africa must necessarily take account of its past forms of political, social and cultural organisations.”⁴⁰⁹

Labour relations need to be placed within the context of the most important occurrence in the industrial revolution, economic history and within the context of traditional attitudes to work.⁴¹⁰ It is the chequered political history of South Africa that has determined the nature and the scope of our present industrial relations system through the laws, which have developed as result.⁴¹¹ Despite the fact that trade unions originated towards the beginning of the 19th century, their lack of political and industrial legitimacy and their interest in political objectives for a long time prevented the formation of effective organizations of workers.⁴¹² The development of labour in this country, as elsewhere, is a chronicle of responses to the exercise of power by those who possess it.

Over the years, the law has been used to protect the general public from the consequences of strike actions that are generally perceived as wasteful and can sometimes turn violent. It has been exploited by farmers to secure cheap labour on the farms, then by mine-owners and industrialists for the same purpose. It has also been used to provide a barrier of protectionism first for skilled white workers and then for unskilled white workers, behind which for almost a century, they have been able to shelter from the competition of their black counterparts.⁴¹³

⁴⁰⁷ Bendix S, *Industrial Relations in South Africa* (1992) 6.

⁴⁰⁸ Cardozo BN, *The Nature of the Judicial Process* (1921) 53.

⁴⁰⁹ Elias TO, *Government and Politics in African Context* (1963) 1.

⁴¹⁰ *Idem*.

⁴¹¹ Grobbelaar JA, “An Overview of Industrial Relations in South Africa” in Coetzee JAG, (eds) *Industrial Relations in South Africa* (1976) 178.

⁴¹² Bendix S, *Industrial Relations in South Africa* (1989) 284.

⁴¹³ Brassey *op cit* AII.

In South Africa freedom of association is derived from the common law and consolidated through legislation. On the other hand, South African courts more particularly the Industrial Court have contributed to promoting freedom of association.

South Africa's history prior to the establishment of the democratic legal order can be divided into two periods, namely the period of colonisation and the period under apartheid.

Colonisation started during the 16th century, when the Dutch East India Company established a provisioning station at the Cape around 1652.⁴¹⁴ In subsequent decades, French Huguenot refugees, the Dutch, and Germans also began to settle in the Cape. Collectively, they formed the Afrikaner segment of the population.

By 1779, European settlements extended throughout the Southern part of the Cape. The British gained control of the Cape of Good Hope at the end of the 18th century. Subsequent British settlement and rule marked the beginning of a long conflict between the Afrikaners and the English.⁴¹⁵

At the beginning of 1836, partly to escape British rule and cultural hegemony and partly out of resentment at the recent abolition of slavery, many Afrikaner farmers (Boers) undertook a northern migration that became known as the "Great Trek". This movement brought them into contact and conflict with African groups in the area, the most formidable of which were the Zulus.

⁴¹⁴ On the colonial history of South Africa, see Du Toit MA, *South African Trade Union* (1976) 10-11; Finnemore & Van der Merwe, *Introduction to Labour Relations in South Africa* (1996) 21-22; Roux E., *Time Longer than Rope : A History of the Black Man's Struggle for Freedom in South Africa* (1948); Simos RE and SA., *Class and Colour in South Africa 1850-1950* (1969); Lewis J, "South African Labour History : A Historiographical Assessment" (1990) 46/7 *Radical History Review* 213; Maree J, *The Independent Trade Unions 1974-1984* (1987); Walker IL & Weinbren BJ, *2000 Casualties : A History of Trade Unions and Labour Movements in the Union of South Africa* (1967) 2-3; Stahl CW, "Migrant Labour Supplies, Past, Present and Future with Special Reference to the Gold-Mining Industry " in Bohning WR, (eds) *Black Migration to South Africa* (1981) 7-8.

⁴¹⁵ Brassey *op cit* A1: 10-11.

Under their powerful leader, Shaka (1787-1828), the Zulus conquered most of the territory between the Drakensberg Mountains and the sea (now KwaZulu-Natal).⁴¹⁶

In 1852 and 1854, the independent Boer Republics of the Transvaal and Orange Free State were created. Relations between these Republics and the British were strained.⁴¹⁷ British forces prevailed during the Anglo-Boer wars of 1880-81 and 1899-1902 and the Boer Republics were incorporated into the British Empire.

In May 1910, the two Republics and the British colonies of the Cape and Natal formed the Union of South Africa, a self-governing dominion of the British Empire. The Union's Constitution kept all political power in the hands of whites.⁴¹⁸

In 1912, the South African Native National Congress was founded in Bloemfontein and eventually became known as the African National Congress (ANC). Its goals were the elimination of restrictions based on colour and the enfranchisement of and parliamentary representation for blacks. Despite these efforts the government continued to pass laws limiting the rights and freedoms of blacks.⁴¹⁹

South Africa's apartheid era began in 1948, when the National party (NP) won the all-white elections and began passing legislation codifying and enforcing an even stricter policy of white domination and racial separation known as "apartheid".⁴²⁰ However, from the beginning, the apartheid regime had to face challenges coming from the international community especially after the UN adopted the UDHR.

⁴¹⁶ See Brassey *op cit* A1 : 14; Webster E. *Work and Industrialisation in South Africa: An Introductory Reader* (1994) 52-53.

⁴¹⁷ Ringrose HG, *The Law and Practice of Employment* (1983)5, Walker IL & Weinbren *op cit* 2;

⁴¹⁸ Walker & Weinbren *op cit* 2; Finnemore & Van der Merwe *op cit* 23-24.

⁴¹⁹ Finnemore & Van der Merwe *op cit* 24.

⁴²⁰ *Idem* 29.

Despite support from some of the most powerful UN members with the veto right in the Security Council, the international challenges against apartheid intensified as more and more states in Asia, South America and the rest of Africa gained their independence and became members of the UN.

In 1961, the Republic of South Africa was proclaimed. The apartheid regime continued unabated but had now to face opposition from the black people organised to combat it in a number of political and social associations, prominently the African National Congress (ANC). Thanks to its domestic machinery and its Western support, the apartheid regime survived until the early 1990s. It was finally brought to an end when a new constitution was adopted in 1993 after lengthy and difficult negotiations between the representatives of the apartheid regime and those of the anti-apartheid movement. This Constitution provided for a transition to a constitutional and democratic regime that was consolidated by the 1996 Constitution. It contained an enforceable and justiciable Bill of Rights that entrenched the rights of all people in the country, including the right to freedom of association authorising workers to form and join trade unions.

3.2. History of Labour Relations, Freedom of Association, and Trade

Unionism under the Colonial and Apartheid Legal Order in South Africa

The history of labour relations, freedom of association and trade unionism before the new post-apartheid legal order may be divided into three periods, namely the period from the Dutch settlement during the 17th century to the formation of the Union of South Africa in 1910, the period from 1910 to the establishment of apartheid in 1948, and the period of apartheid (1948-1993).

3.2.1. Labour Relations, Freedom of Association and Trade Unionism from Dutch Settlement to the formation of the Union of South Africa

A small group of employees of the Dutch East Indian Company that landed at the Cape in 1652 brought with them a system of law that was rooted in Justinian's *Corpus Iuris Civilis* but shaped by the statutory and customary law of Holland and was termed Roman-Dutch law.⁴²¹ Within the field of employment, its structure and content was essentially Roman.

Since the arrival of the first Dutch settlers at the Cape Colony, the need for labour has been a pressing issue in South Africa.⁴²² At the Cape during this time, slavery was the mode of service. Certain statutes of the Council of India, the governing body of the Dutch East Indian Company, addressed the plight of slaves but they brought little change to their condition, which was not better than their forerunners in the Roman Empire.⁴²³

The situation of the indigenous Khoikhoi on the Dutch farms was scarcely better. The only offence of these unfortunate people was that they were to graze their cattle on the land now demanded by the colonists.

As the Dutch settlement expanded, their position became ever more perilous and, by the end of the eighteenth century, when their dispossession was complete, most of them were entirely dependent on their masters for a livelihood.

⁴²¹ Hahlo HR & Kahn E, *The South African History and its Background* (1973) 151.

⁴²² Finnemore & Van der Merwe *op cit* 21.

⁴²³ See Wilson M & Thompson L., *A History of South Africa to 1870* (1982)293 & Brassey *op cit* at A1: 10.

The relationship with their masters was largely beyond the reach of the law. The whip was the master's corrective and its use went almost unchallenged. In response to the master's conduct, all what indigenous servants could do was to desert the masters, which they frequently did, and often recompensed themselves by stealing from the master's herd.⁴²⁴ During this period, the law of employment applied to the few wage labourers who plied their trade within the urban settlement.⁴²⁵

The Cape Colony was eventually taken over by the British colonists. South Africa was suddenly divided into Boer Republics in the Free State and Transvaal and the British had colonies in the Cape and Natal.⁴²⁶

In 1856, white farmers pushed for the enactment of a piece of legislation aimed at addressing their complaints of labour shortage.⁴²⁷ It sets out the respective rights and duties of master and servant in a non-racial way. During this period, the issue of trade unionism was of little interest.⁴²⁸

Up to the latter part of 1850s few industries had been established in South Africa and there was little interest in the formation of trade unions. However, with the discovery of diamond in the early 1870s and gold in 1886, industrialization and economic development began.⁴²⁹

⁴²⁴ Robertson HM, "150 Years of Economic Contact Between Black and White" (1934) 2 *SA Journal of Economics* 403 at 406.

⁴²⁵ Typically shoemakers, tailors, builders and wagon makers.

⁴²⁶ Ringrose HG, *The Law and Practice of Employment* (1983)5; Walker & Weinbren *op cit* 2; Webster *op cit* 52-53.

⁴²⁷ Cape Master and Servant and Apprentices Ordinance of 1856.

⁴²⁸ Finnemore & Van der Merwe *op cit* 22.

⁴²⁹ Du Toit *op cit* 10.

Arguably, South African labour relations system had its origin in the discovery of diamonds and gold and the subsequent development of the mining industry.⁴³⁰ The discovery of gold and diamonds led to the influx of labour in the Witwatersrand and to the establishment of other industries to support the mining community. As South Africa did not have a sufficiently skilled labour force, European immigrants, mostly from Britain, were employed to do much of the work in this category. These workers brought with them the European and especially the British brand of trade unionism, at that time based on the ideal of universal workers movement.⁴³¹

By the end of the 18th century, slavery had become an integral part of the Cape Colony and Blacks were expected to do the manual labour. They rendered services to the white farmers in return for squatting rights.⁴³² In the mines, black workers from the tribal areas provided the muscles for what was arduous work generally on short-term contracts for low wages and a gun.⁴³³

Black mine workers needed a pass to leave the diamond fields, which was issued only if the employer certified that the employee had completed his term of work under the contract.⁴³⁴ However, white workers on the other hand, were free to move from one employment to another without any restriction. These divisions in the ranks of workers were exploited by employers, who needed the whites to act as supervisors and were willing to pay them disproportionately higher wages if they would perform the role.⁴³⁵

⁴³⁰ Neal AC, *Fundamental Social Rights at Work in the European Community* (1999) 32-33, Bendix S., *Industrial Relations in South Africa* (1989) 286.

⁴³¹ See Ringrose *op cit* 5; Bendix *op cit* 287.

⁴³² Finnemore & Van der Merwe *op cit* 21.

⁴³³ Robertson *op cit* 3 at 9. See also Brassey *op cit* at A1:15.

⁴³⁴ Brassey *op cit* at A1:16.

⁴³⁵ See Denoon D, *South Africa Since 1800* (1972) 136 & Brassey *op cit* at A1:16.

There is no absolute certainty about the formation of the first workers movement in South Africa. According to Scheepers, the first unions were established in the late 1870s in South Africa.⁴³⁶ At that time labour laws, as we know them today, were non-existent.⁴³⁷

According to Finnmore and Van der Merwe, one of the first documented trade unions in South Africa was the Carpenters and Joiners Union that was founded in 1881. This trade union represented skilled white workers mainly composed of employees recruited from Australia and Europe.⁴³⁸ On the other hand, Van Jaarsveld and Van Eck argued that the first trade union in South Africa was founded in Johannesburg in 1892.⁴³⁹

Attempts were made in 1894 to establish a trade council in Johannesburg to co-ordinate some of the trade unions.⁴⁴⁰ Those attempts failed because some of the workers refused to participate. A trade council did come into existence in the latter part of 1895, but soon became defunct. The skilled mineworkers and artisans who poured into South Africa from overseas, mainly Britain, during the latter half of the 19th century brought with them their peculiar style of unionism.⁴⁴¹ Their unions excluded black workers, who they regarded as cheap unskilled labour that could be used by employers to undermine their job security and high standard of living.⁴⁴² Blacks thus came to be excluded from trade unions by custom and tradition.

Between 1889 and 1902, attempts were made to secure cheap labour. These attempts were relatively unsuccessful because many blacks did not return to the mines after the Boer war.⁴⁴³

⁴³⁶ Scheepers A, "The Challenges Facing Trade Unions", in Coetzee J.A.G., *Industrial Relations in South Africa* (1976) 149-150.

⁴³⁷ For instance, when there was a strike in the 1880's, workers were not charged with striking but were charged for being absent from work or desertion.

⁴³⁸ Finnmore & Van der Merwe *op cit* 22.

⁴³⁹ Van Jaarsved & Van Eck, *op cit* 254.

⁴⁴⁰ Walker TL & Weinbren B, *The History of trade Unions and the Labour Movement in the Union of South Africa* (1961) 2, Coetzee *op cit* 150 & Finnmore *op cit* 22.

⁴⁴¹ Jones *op cit* 26.

⁴⁴² *Idem*.

⁴⁴³ The war took place between 1889 and 1902. See also Brassey *op cit* A1: 20.

Consequently, a large number of Chinese workers were imported in 1904. Many problems arose and the Chinese workers were repatriated in 1907 because of the pressure from the British government.⁴⁴⁴

After the Anglo Boer War, the mine owners resumed the search for ways to reduce their labour costs. Most of the unskilled labourers were deployed to do the work previously done by skilled miners. Threatened white miners who feared competition began to organise themselves and went on strike over wage-cutting in one of the mines after the strike miners decided to form a Transvaal Miners' Association, which was composed of whites only.⁴⁴⁵

In 1907, black and white miners went on strike over the attempt by mine owners to reduce wages by exploiting prevailing white unemployment and employing black cheap labour.⁴⁴⁶ The strike continued until the early part of 1908 when the government passed the Railway Regulations Act⁴⁴⁷ to regulate conditions of employment in the sector. The provisions of this Act placed the first ban on striking in the history of this country.⁴⁴⁸

The Transvaal legislature, in 1909, enacted the Industrial Disputes Prevention Act.⁴⁴⁹ This was the first South African statute designed to regulate labour relations in general. Under this Act, employers were obliged to give one month's notice of any changes they proposed to make to the terms and conditions of employment applicable in the enterprise.⁴⁵⁰ This Act was modeled around the Canadian Industrial Dispute Investigation Act of 1907, which the then president Smuts regarded as a compromise.⁴⁵¹

⁴⁴⁴ See Brassey *op cit*; Finnemore & Van Rensburg *op cit* 27; Stahl *op cit* 13.

⁴⁴⁵ Brassey *op cit* A1:20.

⁴⁴⁶ *Idem*.

⁴⁴⁷ Act 13 Of 1908.

⁴⁴⁸ Sections 38 read with 40 of the Act.

⁴⁴⁹ Act 20 of 1909.

⁴⁵⁰ Section 5(1) of the Act.

⁴⁵¹ Brassey *op cit* A1: 2; see also Lever "Capital and Labour in South Africa: The Passage of the Industrial Conciliation Act of 1924" in Webster *op cit* 82.

If an employee objected to the change, he could apply for the establishment of conciliation and investigation board⁴⁵² and the employer could then wait for a month until the board had reported.⁴⁵³

Unless the parties to a dispute agreed otherwise, the board's findings were not binding but merely advisory.⁴⁵⁴ No industrial action was permissible unless the board reported on the dispute and until the moratorium on unilateral action had expired.⁴⁵⁵ The Act excluded from its application employers who employed less than ten employees and so were public servants.⁴⁵⁶

3.2.2 Labour Relations, Freedom of Association and Trade Unionism from the establishment of the Union of South Africa to the institutionalisation of Apartheid

As stated earlier, the British colonies of the Cape and Natal together with the Boer Republics of the Transvaal and Orange Free State formed the Union of South Africa in May 1910. A constitution was adopted. This constitution ignored the rights and liberties of black South Africans and dealt mainly with the conflicts inherent in white politics.⁴⁵⁷

The Mines and Works Act was promulgated in 1911.⁴⁵⁸ It came into being at the demand of the skilled white miners who were at the time immigrants from overseas countries and insisted that they should not face any competition from the large number of non-whites employed mainly in unskilled and menial work.⁴⁵⁹ This Act excluded blacks from all skilled jobs requiring certificate of competency and from certain semi-skilled jobs in the mines.

⁴⁵² The board to investigate could only be appointed if the dispute affected ten or more employees.

⁴⁵³ Section 5(2).

⁴⁵⁴ Section 25.

⁴⁵⁵ Section 6(1).

⁴⁵⁶ Sections 1 & 2.

⁴⁵⁷ Togni LS, *The Struggle for Human Rights. An International and South African Perspective* (1994) 131.

⁴⁵⁸ Act 12 of 1911.

⁴⁵⁹ Coetzee *op cit* 179.

Again in 1911, the Native Labour Regulations Act was passed.⁴⁶⁰ This Act prohibited strikes by blacks. It won the support of employers and mine owners by placing tight control on employees and also reinforcing the criminal sanction for breach of employment contract by workers.⁴⁶¹

In order to retain a cheap labour supply, blacks were compelled to look for jobs in specific districts where labour was most needed.⁴⁶² They were forced to take up jobs only during the time and in the areas determined by the pass law. If the allocated time expired, and they had not found a job, they could be arrested.

On the other hand, the Chamber of Mines decided upon a low maximum wage to be paid to black workers. Any company paying black workers more than the stipulated amount could be fined. The pattern of industrial relations which developed in mining industry which confined blacks to low paid unskilled work and reserved responsible posts to whites was repeated in the rest of South African industries by means of legislation.⁴⁶³

As a result of the exclusions, the South African Native National Congress was created in 1912. It was the forerunner of the ANC and earlier embarked on a violent campaign against the 1910 Constitution that denied black people political rights.⁴⁶⁴ They further protested against the reservation of jobs to whites and colored only. However, black workers were isolated and their attempts to organise were not supported by white workers. Despite the ANC's efforts to eliminate restrictions based on colour, the government continued to pass laws limiting the rights and freedoms of blacks.

⁴⁶⁰ Act 15 of 1911. See also Finnemore & Van der Merwe *op cit* 223.

⁴⁶¹ See Brassey *op cit* at A1: 23 & Finnemore & Van der Merwe *op cit* 223.

⁴⁶² Brassey *op cit* at A1: 23.

⁴⁶³ For example, Section 77 of the Industrial Conciliation Act of 1924 empowered the Minister of Labour to reserve certain occupation on the ground of race and to compel employers to observe fixed ratios in the racial make-up of their workforce. The Wage Act of 1925 was originally presented as a means of giving statutory protection of wages of workers. It gave unions and representative groups of workers the right to have their members' wages and conditions investigated by the wage board and this was particularly done to white workers. Furthermore, the Bantu Building Workers Act of 1951 prohibited black workers from taking skilled jobs in the construction industries outside the black townships and homelands.

⁴⁶⁴ Finnemore & Van der Merwe *op cit* 24.

In 1913, the Native Land Act was passed.⁴⁶⁵ In terms of this Act, approximately 10 percent of the land was reserved for Blacks who were also prohibited from renting farms from white farmers. Shortage of land for farming and overcrowding forced many black farmers to move to towns to look for work and the migratory labour system was consequently established.⁴⁶⁶

The Regulation of Wages, Apprentices and Improvers Act was passed in 1918.⁴⁶⁷ This Act provided for the appointment of boards to fix minimum wages for apprentices, women and young people in certain trades and industries.⁴⁶⁸

In the later part of 1918 and early 1919, black mineworkers embarked on a strike for higher pay and the abolition of the colour bar. To restore order, the government passed the Natives (Urban Areas) Act,⁴⁶⁹ which tightened the control on black labour. Provisions were made for the proclamation of urban areas as zones in which the movements of blacks were restricted. Black males entering proclaimed areas had to report their presence to the authorities. When they managed to find employment, the employer had to register the employment contract with the police; and when the employment ceased, they had to leave the area unless they found another job within the prescribed period.⁴⁷⁰ During these early days of segregation, there were no legal measures to control the activities of trade unions. Trade unions mostly tried to enforce better conditions of employment and other workers demands by means of strikes. Some of these strikes were successful, while others were not.⁴⁷¹

⁴⁶⁵ Act 27 of 1913.

⁴⁶⁶ Finnemore *op cit* 22.

⁴⁶⁷ Act 29 of 1918.

⁴⁶⁸ Brassey *op cit* at A1 : 24.

⁴⁶⁹ Act 21 of 1923.

⁴⁷⁰ Brassey *op cit* at A1 : 25.

⁴⁷¹ See Du Toit *op cit* 10; Horrel M, *South African Trade Unionism* (1961)1; Finnemore & Van der Merwe *op cit* 25-26.

In 1919, the Industrial and Commercial Workers' Union (ICU) was established. It became the first black workers' union. Although it was not registered, the ICU did take up many issues to court and fought for the rights of black workers. However, due to factors such as external pressure, internal inefficiencies, division in the leadership and lack of democratic structure, the union collapsed and did not survive the depression of the early thirties.⁴⁷²

Despite the exploitation of black workers, the position of white workers was not entirely secured as the mine owners were pushing them to accept ruthless working conditions and lower wages. Accordingly, the period between 1917 and 1924 was marked by incidents of industrial unrest caused by white workers in reaction to what they saw as attempts by employers to introduce cheap black labour and hence downgrade wages in certain occupations.⁴⁷³

When some white workers were to be retrenched in 1922, a large scale of labour unrest and violent strikes took place on the Witwatersrand. The primary cause of the conflict was white/black competition for jobs and differential scales of pay.⁴⁷⁴ This labour unrest was called the Rand Rebellion.⁴⁷⁵ During this unrest, a large number of workers were killed and seriously wounded. Nevertheless, the Rand Rebellion made the government realise that urgent attention had to be given to labour relations. The strikes first resulted in the institution of conciliation machinery so that employers and employees could negotiate conditions of employment in an orderly fashion. The Rand Rebellion also precipitated the change of labour legislation. Accordingly, the Industrial Conciliation Act (ICA) was passed in 1924, shortly before the defeat of the Smuts government.⁴⁷⁶ The promulgation of this Act came after more than a decade of spiraling labour unrest within an inadequate statutory framework.

⁴⁷² Van Jaarsveld & Van Eck *op cit* 254.

⁴⁷³ Jones *op cit* 26.

⁴⁷⁴ Coetzee *op cit* 179.

⁴⁷⁵ Van Jaarsveld & Van Eck *op cit* 254.

⁴⁷⁶ Act 11 of 1924.

This labour unrest steadily escalated since 1913 and culminated in revolt of white mineworkers in the Rand in 1922 and their bloody confrontation with the military forces of South African government.⁴⁷⁷

The ICA became South Africa's first comprehensive labour legislation. This Act accorded legal recognition for trade union movement in South Africa for the first time. Not only was statutory recognition given to trade unions, but trade unions and their members were protected against employers and they were allowed to function in an organised manner.⁴⁷⁸ This Act remained loyal to the basic principles underlying the 1909 Industrial Dispute Prevention Act and favoured a process of voluntary collective bargaining backed by curbs on industrial action.⁴⁷⁹ It introduced a framework for collective bargaining and a system for the settlement of disputes and regulated strikes and lock-outs.

Provisions were made for standing industrial councils with wide powers to conclude collective bargaining agreements.⁴⁸⁰ The agreements of the industrial councils were, if the minister saw it fit, given the force of law, and if the council was representative, be extended to cover non-parties as well.⁴⁸¹ Where there was no industrial council, the minister was given the powers to establish conciliation boards to resolve disputes.⁴⁸²

As the conciliation machinery was operating, no strike or lock-out was permissible. Municipal workers and those working for essential services were wholly prohibited from striking.⁴⁸³

⁴⁷⁷ See Lever *op cit* 84; Brassey *op cit* A1:26-27.

⁴⁷⁸ See Van Jaarsveld & Van Eck *op cit* 254; Jones *op cit* 24, Coetzee *op cit* 179.

⁴⁷⁹ See Lever *op cit* 88; Brassey *op cit* A1:26-27.

⁴⁸⁰ Section 2.

⁴⁸¹ Section 9.

⁴⁸² Section 4.

⁴⁸³ Section 7 read with section 12.

Under this Act, trade unions and employers' organisations were obliged to register.⁴⁸⁴ However, the Act expressly excluded black employees from the definition of an employee and they could not benefit from its provisions.⁴⁸⁵

Only white and coloured workers were permitted to form and join registered trade unions. Some unions were bi-racial, with membership open to white and coloured workers, while some others were uni-racial, consisting of white or coloured workers only.⁴⁸⁶

White leadership and workers who perceived a community of interest with coloureds and considered them fellow workers supported the bi-racial unions. The exclusively white trade unions tended to have "conservative" leadership that shunned an affinity with coloured workers, thus forcing them to form their own separate racial unions.⁴⁸⁷

From the perspective of the legislature, the ICA of 1924 was a success, as the membership of registered trade unions and the number of industrial councils grew steadily, industrial action declined to negligible proportions. However, it established a dual, racially-determined system of industrial relations and excluded African and Black workers from the statute's definition of "employee" and therefore from the membership of registered trade unions, from direct representation on industrial councils and from using conciliation boards.⁴⁸⁸

⁴⁸⁴ Section 12 of the ICA.

⁴⁸⁵ See Webster E, *Essays in South African Labour History* (1978) 68; Lever *op cit* 82; Du Toit *et al Labour Relations Law* (2000) 4-5; Finnemore & Van der Merwe *op cit* 27; Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2001) 5; Sewerynski M, (ed) *Collective Agreements and individual Contracts of Employment* (2003) 207; Brassey M, *Employment and Labour Law Vol I* (1998) A1:28-29; Jones R A, *Collective Bargaining in South Africa* (1982) 26; Coetzee JAG, *Industrial Relations in South Africa* (1976) 179, Maree *op cit* 117-118, Bendix *op cit* 286-287; Dekker *op cit* 140-144; Ringrose *op cit* 3-5; Kittner M *et al, Labour Law Under the Apartheid Regime* (1989) 3-5; Grosset & Venter *op cit* 30.

⁴⁸⁶ Jones *op cit* (1982) 27.

⁴⁸⁷ *Idem* 27.

⁴⁸⁸ Brassey *op cit* A1:26-27.

The divisions in the socio-political system in South Africa found their reflection in the industrial relations system. Although black and white employees in South Africa initially worked side by side and shared common interests, particularly in the manufacturing industry, the need for protection of whites from competition by cheaper black labour and the rise of Afrikaner nationalism gradually led to ever-strengthening divisions in the sphere of labour law.⁴⁸⁹

The government that succeeded the Smuts government furthered the racial exclusion. It favored white workers and made policies to protect jobs and increase wages for white workers.⁴⁹⁰ Black workers remained excluded from political and economic powers. In furthering its control over industrial relations, the government passed the Wage Act in 1925.⁴⁹¹ This Act provided for the unilateral determination of wages and working conditions where there was no agreement under the ICA and in industries falling outside the industrial council system.⁴⁹² Unlike the ICA, the Wage Act applied to black workers and few trade unions were able to gain some benefits for black members by using the provisions of this Act to their advantage. Since the Act provided no warrant for racial discrimination, wage determinations had to be equal amongst races, but, by manipulating the jurisdiction of the wage boards, the authorities made sure that the system operated for the benefit of white workers only.

As one judge vigorously remarked, "the whole idea of this wage legislation was to secure to an employee a proper minimum wage, commensurate with his qualification and services."⁴⁹³ The employees who were to receive this benefit were emphatically whites and if blacks received any benefit as well, it was only for fear that they would otherwise undercut their white counterparts.⁴⁹⁴

⁴⁸⁹ Bendix *op cit* 284.

⁴⁹⁰ Finnemore & Van der Merwe *op cit* 27.

⁴⁹¹ Act 27 of 1925.

⁴⁹² Section 1.

⁴⁹³ In *Ex parte Minister of Justice: In re R v Gersnera* 1930 AD 420 at 423. See also Brassey *op cit* at A1: 30.

⁴⁹⁴ Brassey *op cit* A1: 30.

Encouraged or propelled by law, the trade union movement in South Africa has always been divided and lacked unity and solidarity. Outside the system, however, industrial unions emerged. A high point in the history of freedom of association and trade unionism in South Africa was reached in 1926, when the South African Trade and Labour Council (SATLC) was formed.

The SATLC pursued a policy of open membership for all trade unions in its efforts to achieve national unity. It promoted the establishment of parallel black unions.⁴⁹⁵ However, its hold on its members was tenuous, for they were randomly distributed and organised. Despite its non-racial policy, many unions remained divided on racial grounds. It ceased to be significant when, under the influence of white liberals, it expelled its communist office bearers.⁴⁹⁶

In the face of the problems emerging from the dual system, the ICA of 1924 was amended in 1930.⁴⁹⁷ The Amendment Act authorised the Minister of Labour to specify, on the recommendation of an industrial council or conciliation board, the minimum wage rates and maximum working hours for “persons excluded from the definition of ‘employee’”.⁴⁹⁸ It unfortunately appeared that the aim of the amendment was to protect white workers from being undercut by cheaper African labour rather than to benefit pass-bearing African workers.⁴⁹⁹

In 1937, the ICA of 1924 was replaced by the consolidated ICA 36 of 1937 that made provision for an inspector of the Department of Labour to represent pass-bearing African workers at industrial council meetings. However, neither the 1930 amendment nor the new Act solved the problems of the dual industrial relations system.⁵⁰⁰

⁴⁹⁵ Brassey *op cit* A1. 31.

⁴⁹⁶ Lewis J, “The New Unionism: Industrialization and Industrial Unions in South Africa 1925-1930” (1977) 3 *SA Labour Bulletin* 25 at 27, Finnemore M, *Introduction to Labour Relations in South Africa* (2002)22.

⁴⁹⁷ Industrial Conciliation (Amendment) Act 24 of 1930.

⁴⁹⁸ Du Toit *op cit* 6.

⁴⁹⁹ *Idem* 6.

⁵⁰⁰ *Idem* 6-7.

In 1941, the Landsdown Commission was appointed to investigate pay and other working conditions. In its recommendations, the Commission advised against the recognition of black trade unions. Its argument was that these black trade unions were not coming from workers themselves, but were manipulated by the communists in the ANC.⁵⁰¹

By 1946, almost a quarter of the African populations were residents in the urban areas. Trade union membership increased considerably.⁵⁰² Towards the end of 1946, a strike broke out and as a result many people were injured. The government's response to the strike was to table amendments to the ICA to prohibit strikes by blacks.⁵⁰³ The strike was crushed and the black trade union movement was shattered on the eve of the establishment of apartheid.

3.2.3. Labour Relations, Freedom of Association and Trade Unionism under Apartheid

In 1948, the National Party (NP) government was elected largely due to conservative white workers' fears of the perceived growth of the power of black labour and the growing support of the blacks for socialism.⁵⁰⁴ The NP entered history as the party that institutionalised Apartheid. Accordingly, white workers continued to prosper under the NP government.⁵⁰⁵

⁵⁰¹ Finnemore *op cit* 22.

⁵⁰² Meara O, "The 1946 African Mine Workers' Strike and the Political Economy of South Africa" (1975) 13 *Journal of Commercial and Comparative Politics* 146 at 150. See also Brassey *op cit* A1: 34.

⁵⁰³ Brassey *op cit* A1: 36.

⁵⁰⁴ Finnemore & Van der Merwe *op cit* 29, Brassey *op cit* at A1: 36, Finnemore *op cit* 22.

⁵⁰⁵ Labour legislation of this time followed the ideology of apartheid, lessening the fears of white workers by intensifying racial divisions in labour relations and causing divisions in those unions where non-racialism was beginning to take root.

3.2.3. 1. Consolidating the Policy of Exclusion

Shortly after taking office, the NP government established the Botha Commission of inquiry⁵⁰⁶ to investigate the whole spectrum of labour relations matters in South Africa. The commission was appointed with the hope that it would provide a blueprint for the introduction of apartheid in the workplace and the suppression of black trade unions.⁵⁰⁷

When the UN General Assembly adopted the UDHR in 1948, South Africa persisted in its policy of racial separation. Although South Africa was a UN member State, attempts by the international community to have South Africa adhere to the human rights requirements contained in the UDHR failed.⁵⁰⁸ The South African government had no interest in the pursuit of human rights such as equality in particular, since it was in contradiction with its policy of apartheid. The post-1948 period was a time during which the NP government enacted much of its repressive legislation aimed at giving legal force to its ideology of racial separation.

In 1950 the findings of the Botha Commission were released. In terms of its recommendations, the government passed the Suppression of Communism Act.⁵⁰⁹ This Act was intended to suppress any collective organisation or movement by blacks. The government policy in passing this Act was to divide black trade unionism. Many black trade unions leaders were arrested and banned. Political parties such as the ANC, which supported the vision of many black trade unions, were also targeted by this legislation.⁵¹⁰

⁵⁰⁶ The Commission was established on the 1st of October 1948. (It was called the Industrial Relations Commission of Enquiry. The Commission was headed by Botha and is hereinafter referred to as the "Botha Commission.")

⁵⁰⁷ Brassey *op cit* at A1: 36.

⁵⁰⁸ Togni *op cit* 132.

⁵⁰⁹ Act of 1950.

⁵¹⁰ Finnemore & Van der Merwe *op cit* 29.

Regional Native Labour Committees chaired by white officials but comprising blacks, were to be appointed by the minister to regulate labour within communities.⁵²⁰ Strikes of whatever nature were absolutely prohibited but black trade unions were permitted to operate. This brought some hope for black trade unionism.

In 1954, the South African Trade Union Council, which later became the Trade Union Council of South Africa (TUCSA), was formed. Black unions were excluded from this federation initially, but their members were encouraged to form parallel unions with which they could liaise and maintain a close working relationship.⁵²¹

In 1955, some erstwhile affiliates of TUCSA came together with some members of the Council of Non-European Trade Unions to form a new body called the South African Congress of Trade Unions (SACTU).⁵²² SACTU was to a large extent, a federation of black trade unions formed on a non-racial basis. The federation rejected the system of parallel unionism and was determined to mobilise the black working class in order to secure political liberation.⁵²³ SACTU also maintained a close political link with the ANC and was active in promoting a political role for trade unions.⁵²⁴

To give effect to the recommendations of the Botha Commission, the ICA of 1924 was repealed in 1956, and a new Act passed.⁵²⁵ The ICA 28 of 1956 was passed by the newly elected NP Parliament in furtherance of its policy of apartheid. It completed the construction of the racially exclusive industrial system in South Africa by entrenching the racial division of workers, prohibiting the registration of new unions having both white and "coloured" members and reserving certain work exclusively to "persons of specified race".⁵²⁶

⁵²⁰ Section 4 of Act 48 of 1953.

⁵²¹ Finnemore *op cit* 24.

⁵²² Brassey *op cit* at A1:39 & Finnemore & Van der Merwe *op cit* 30.

⁵²³ De Clercq "The Organised Labour Movement and State Registration: Unity or Fragmentation?" (1980) 5 *SA Labour Bulletin* 18 at 30-31.

⁵²⁴ Due to SACTU's neglect of shop floor issues it became weak and, by 1965, it had all but disintegrated under the weight of state repression.

⁵²⁵ Act 28 of 1956.

⁵²⁶ *Idem* 8.

The ICA of 1956 was the first statutory enactment, which extensively dealt with freedom of association and trade union rights for workers. It provided that no employer could require an employee, whether by a term or condition of employment or otherwise that he should not be or become a member of a trade union or other similar association of employees.⁵²⁷ Any such term and condition in any contract of employment was void.

Before the enactment of Act 28 of 1956, an employer could discourage union membership by victimising an employee on account of his trade union affiliations or activities. However, the legislature saw it fit, in light of the international labour standards,⁵²⁸ to make it a crime for an employer to stop such deeds.⁵²⁹

An employer who dismissed any employee or reduced the rate of his remuneration or altered the terms and conditions of employment to terms and conditions less favourable to him because he suspected or believed, whether the belief or suspicion was justified or correct, that the employee belonged or had belonged to any trade union or other similar association of employees or took part or had taken part outside working hours, or with the consent of the employer, within working hours, in the formation of or in the lawful activities of any such trade union or association, committed a criminal offence.⁵³⁰

The ICA of 1956 mainly consolidated and restructured the 1924 ICA. In terms of this new ICA, an “employee” was defined as:

Any person (other than a black) employed by or working for, any employer, and receiving or being entitled to receive, any remuneration and any other person whatsoever (other than a black) who in any manner assists in the caring on, or conducting of the business of the employer.⁵³¹

⁵²⁷ Section 78 (1) of Act 28 of 1956.

⁵²⁸ Section 66 (1) of Act 28 of 1956 is closely modeled around Article 1 of Convention 98 of 1949.

⁵²⁹ Landman *op cit* 92.

⁵³⁰ Section 66(1) of Act 28 of 1956.

⁵³¹ Brassey *op cit* A1:38 & Finnemore & Van der Merwe *op cit* 29.

Where it principally differed was in the curbs it placed on multi-racial trade unions. The Act prohibited the registration of multi-racial unions and obliged those who were already formed to subdivide into segregated unions and in many areas job reservations were made to protect white workers from competition by their black counterparts.⁵³² As a result, only white and colored workers could establish and join registered trade unions, and they existed in both the bi-racial and uni-racial form.

The exclusion of blacks from the definition of 'employee' did not prevent them from forming and joining unregistered trade unions of their own. In fact such black trade unions were formed on a fairly large scale, enjoying substantial membership encompassing urban blacks, migrants, frontier commuters, and foreign blacks. However, because they could not be registered, they were not recognised by law. They operated outside the provisions of the Act.⁵³³ They could negotiate with individual companies and conclude collective agreements with them. These agreements were only having civil jurisdiction. They could not be enforced under the provisions of the ICA.⁵³⁴

In 1957, the South African Confederation of Labour (SACOL) was formed, which was allied with the apartheid government. After the Sharpsville massacre in March 1960, banning orders were served to some political parties⁵³⁵ and all SACTU leaders, who were forced to go into exile. As a result, black trade union activities virtually disappeared during the 1960s.⁵³⁶

⁵³² Section 77 of the Act. See also Brassey *op cit* at A1:38 & Finnemore & Van der Merwe *op cit* 29.

⁵³³ Jones *op cit* 28.

⁵³⁴ Due to the fact that they could not register, black trade unions were faced with a number of problems. For example, they tended to be extremely unstable, they often depended upon the initiatives of a handful of individuals often left wing white organizations and intellectuals to keep them going, employers were generally suspicious of them since they were not recognized by law and there was no compulsion to negotiate with them, employers could invariably refuse to have anything to do with them. Only few companies were prepared to co-operate with them. And lastly, despite the fact that such unions were not illegal, the state frowned upon their existence and growth regarding them as "slumbering giants" capable of causing industrial unrest and pressing for social and political changes.

⁵³⁵ Particularly the ANC and PAC, which were the most popular, black political organizations at that time.

⁵³⁶ Finnemore & Van der Merwe *op cit* 30.

The Union of South Africa became Republic of South Africa under the NP government in 1961 and adopted a new Constitution. Read with the Electoral Laws Consolidation Act,⁵³⁷ the Republic of South Africa Constitution of 1961⁵³⁸ made provisions for social and political participation in the highest affairs of the state by “whites” only.⁵³⁹ The black population was set on a course of separate development through a complex system that extended through a number of pieces of legislation.⁵⁴⁰

In 1962, the UN General Assembly passed a resolution condemning South Africa's apartheid policies and requesting all UN member states to cease military and economic relations with South Africa.⁵⁴¹ As a result, South Africa became increasingly isolated internationally. At the same time, TUCSA reversed its decision by opening its doors to black trade unions. But later in 1967, on pressure from the government, the federation was compelled to expel black trade unions. This change in attitude of TUCSA left black unions with no option but to form their own organisations.⁵⁴²

In 1973, black workers embarked on strike over wages. Industry was brought to a near standstill.⁵⁴³ For the first time, black workers demonstrated their real power. It became clear that even without the backing of any formal workers' organization, black workers could pressurize the government on labour issues.⁵⁴⁴ After the strike, Black workers started to organize themselves into trade unions. These unions were referred to as “independent trade unions”, since they were seen as separate from existing unions dominated by white workers.⁵⁴⁵

⁵³⁷ Act 46 of 1946.

⁵³⁸ Act 32 of 1961.

⁵³⁹ Burdzik J & Van Wyk D, “Apartheid Legislation 1976-1986” (1987) *Acta Juridica* 123.

⁵⁴⁰ Legislation such as the Black Authorities Act 68 of 1951, the Black Labour Act 67 of 1964 and Promotion of Black Self-Government Act 46 of 1959 played a vital role in oppressing the black South Africans.

⁵⁴¹ Resolution 1761 of 1962.

⁵⁴² Finnemore *op cit* 24.

⁵⁴³ *Idem*.

⁵⁴⁴ Finnemore & Van der Merwe *op cit* 30.

⁵⁴⁵ Maree *op cit* 1-2.

The Bantu Labour Regulations Act⁵⁴⁶ was passed in 1973 to regulate the conditions of employment for Black employees, the prevention and settlements of disputes between them and their employers as well as the procedure for setting up labour committees. This Act undermined the development of black trade unionism in that, because of their lack of power, Blacks were confined to mainly employers-initiated committees, with little if any bargaining power. In addition, not all Blacks workers were covered by the provisions of this Act. Those in agriculture, gold and coal mining, and government services were excluded from its provisions.⁵⁴⁷

Furthermore, there was very little choice on the part of Blacks in deciding which form of representation was better for them in case of disputes. The Act only allowed for the settlement of disputes involving Black employees by internal committees.⁵⁴⁸ In nearly all instances, the system was foisted by their employers and the fact that the vast majority of committees were liaison committees, because the employers preferred them, speaks for itself.⁵⁴⁹ Despite some stability, the industrial relations system and the apartheid regime were to face new challenges from the mainly African working class who flocked to join new unregistered unions that emerged in the wake of the strikes. The dual system of industrial relations became unworkable and required reform to move from exclusion to inclusion.

⁵⁴⁶ Act 70 of 1973, which was amending the Black Labour (Settlement of Disputes) Act 48 of 1953.

⁵⁴⁷ Section 1.

⁵⁴⁸ Coetzee *op cit* 185.

⁵⁴⁹ See Finnemore & Van der Merwe *op cit* 31; Coetzee *op cit* 184- 185.

3.2.3.2. Era of Integrated Labour Law

Towards 1976, calls for disinvestments in South Africa increased, as did the shortage of skilled workers. As a result of the pressure from the international community, the government appointed the Wiehahn Commission of Inquiry into Labour Legislation in 1977. The Commission reported back to the government in 1979 and issued its first report. The Commission's 1979 report proposed fundamental changes into the industrial relations system.⁵⁵⁰

South African labour law was relatively primitive for a fairly sophisticated industrial state with the most advanced and prosperous economy on the African continent. At this time, in our labour history, individual employment law was regulated essentially in terms of the common law contract of employment, subject to minimal statutory regulations.

Collective bargaining occurred within a statutory framework but, in accordance with the letter of the policy of apartheid, it excluded the vast majority of employees, the blacks, who were denied membership of registered trade unions. Therefore, the year 1979 proved to be a turning point, as it witnessed the genesis of an integrated system of labour law.

The Wiehahn Commission, in its report in 1979, recommended that freedom of association be granted to all employees regardless of sex, race or creed and trade unions be allowed to register irrespective of their composition in terms of colour, race or sex.⁵⁵¹

The Commission also recommended that trade unions be free to determine their rules and that the contractual exclusion of an employee's right to union membership or participation in union activities by an employer should be defined as an unfair labour practice. Finally, the Commission called for the abolition of jobs reservations and the establishment of an Industrial Court.⁵⁵²

⁵⁵⁰ See Roos J, "Labour Law in South Africa 1976-1986: The Birth of the Legal Discipline" 1997 *Acta Juridica* 96-98; Pienaar *op cit* 167-169; *The Law Society of South Africa Practice Manual Labour Disputes Resolution* 7-12; Du Toit *op cit* 9.

⁵⁵¹ Report for the Commission of Enquiry into Labour Legislation Part I RP 47/1979.

⁵⁵² Wiehahn Report (1979) parts 1-6. See also Pienaar *op cit* 168, Finnemore *op cit* 31, Van Jaarsveld & Van Eck *op cit* 255, Jones *op cit* 30; Pienaar *op cit* 147 at 169; Rycroft A, "Labour" in Ronald L *et al* *South African Human Rights and Labour Law Yearbook* Vol 7 (1996) 139-140; Olivier M *et al*, "Collective

Most of the recommendations and findings of the Wiehahn Commission were accepted. Accordingly, the ICA 28 of 1956 was amended in 1979 and in 1980⁵⁵³ while by the 1981 amendment,⁵⁵⁴ its name had changed to the LRA 28 of 1956 that was further amended in 1982, 1983, 1984, 1988 and 1991 respectively.⁵⁵⁵

These amendments aimed at providing for more substantial protection of freedom of association to all employees regardless of their origin or race.⁵⁵⁶ Trade unions were granted full autonomy in respect of their membership and all racial restrictions were removed while the Bantu Labour Regulations Act was repealed.⁵⁵⁷ To facilitate the admission of blacks into registered trade unions, the definition of “employee” was changed to avoid any reference to race or any other ground of discrimination. As a result, there was a rapid growth in the number of trade unions representing black workers. A number of trade unions were formed in the 1980s on the principles of non-racialism and industrial unionism. Accordingly, some black and mixed trade unions were formed and registered. In effect, this constituted a virtual revolution in industrial relations in South Africa.

Parts 2, 3, 4 and 6 of the Wiehahn report were published in 1980,⁵⁵⁸ while Part 5 was published in 1981.⁵⁵⁹ This part contained a number of recommendations concerning freedom of association and trade unionism. It recommended that labour law and practices should correspond with international conventions and codes and statutory requirements and procedures for registration of trade unions be revised.⁵⁶⁰

Agreements and Individual Contracts of Employment in Labour Law-South African Report” in Sewerynski M. (ed) *Collective Agreements and Individual Contracts of Employment* (2003) 207-208; Friedman S., *Building Tomorrow Today : African Workers in Trade Union 1970-1984* (1987) 14-15.

⁵⁵³ Industrial Conciliation Amendment Acts 94 of 1979 and 95 of 1980.

⁵⁵⁴ Labour Relations Amendment Act 57 of 1981.

⁵⁵⁵ Labour Relations Amendment Acts 51 of 1982, 2 of 1983, 81 of 1984, Act 83 of 1988 and 9 of 1991.

⁵⁵⁶ Pienaar *op cit* 169-171.

⁵⁵⁷ Finnemore *op cit* 31.

⁵⁵⁸ They were published as Report 38 of 1980.

⁵⁵⁹ It was published as Report 27/1981. See also Van Jaarsveld & Van Eck *op cit* 255.

⁵⁶⁰ Van Jaarsveld & Van Eck *op cit* 255.

This created a general fear amongst the whites that as trade unions became larger and powerful; they would bring about social and political changes in the country still under apartheid.

As recommended by the Wiehahn Commission, the Industrial Court was established with comprehensive jurisdiction to resolve unfair labour practices. The Industrial Court played indeed a vital role in the development of South African labour law as demonstrated by its case law.⁵⁶¹ The Court was presided over by mostly and consisted of white conservative judges and yet proceeded to respond to progressive ideals in the ILO instruments.

The Court introduced notions of fairness and international labour standards into the melting pot of South African labour law, which grew into a formidable body of jurisprudence, supporting workers protection and bargaining power for unions.⁵⁶² The Court held that the duty to bargain in good faith was implied in the legal definition of unfair labour practice.⁵⁶³ An inexorable process of modernisation of industrial relations had commenced with significant economic and political consequences for South Africa.

⁵⁶¹ See for instances some of the jurisprudence of the Industrial Court in the following cases decided since its establishment: *Mazibuko v Mooi River Textile Ltd* 1989 (10) ILJ 875 (IC), *Black Allied Workers Union and Others v Initial Laundries (Pty) Ltd and Another* 1988 (9) ILJ 272 (IC), *National Automobile & Allied Workers Union (NAAWU) v Atlantis Electric Diesel Engines (pty) Ltd* 1989 (10) 948 (IC), *Keshwar v SANCA* 1991 (12) ILJ 816 (IC), *Gana & Others v Building Materials Manufacturers Ltd t/a Doorcor* 1990 (11) ILJ 565 (IC), *NUM v Amcoal Colliery & Industrial Operations Ltd* 1990 (11) 1295 (IC), *Radio Television Electronics & Allied Workers Union v Tedalex (pty) Ltd* 1990 (11) ILJ 1272 (IC), *Ppwawu v SA printing and Allied Industries Federation* 1990 (11) ILJ 345 (IC), *Bawu & Others v Umgeni Iron Works* 1990 (11) ILJ 589 (IC), *National Union of Steel & Allied Workers v Basaans Du Plessis* 1990 (11) ILJ 359 (IC), *NUMSA v Metkor Industries (pty) Ltd* 1990 (11) ILJ 1116 (IC), *FAWU v Willoton Oil & Cake Mills* 1990 (11) ILJ 131 (IC).

⁵⁶² Olivier M *et al*, "Collective Agreements and Individual Contracts of Employment in Labour Law-South African Report" in Sewerynski M, (ed) *Collective Agreements and Individual Contracts of Employment* (2003) 207-208.

⁵⁶³ See for instance the decision of the Industrial court in *MAWU v Transvaal Pressed Nuts bolts & Rivets* (1986) 7 ILJ 703 (IC); *Natal Banking and Allied workers Union v BB Cereals Ltd & FAWU* 1989 (10) ILJ 870 (IC).

During the early 1980s, all outdoor trade union meetings were prohibited in South Africa.⁵⁶⁴ Outdoor union meetings were only allowed with the permission of the minister of law and order or the magistrate having jurisdiction in that particular area.⁵⁶⁵ Permission for these gatherings were granted subject to the assurance being given to the authorities that only certain named and specified people would address the meeting. A detailed agenda and the topics, which were to be addressed during the meeting, should first be submitted to the authorities for approval. However, indoor gatherings were permitted without official authorisation, but with some legislative limitation.⁵⁶⁶ All these prohibitions were intended to discourage black trade unionism.

In 1983, South Africa had a new Constitution.⁵⁶⁷ Like its predecessors, the 1983 Constitution entrenched and enforced racial discrimination and classification, which was at the heart of apartheid. It maintained the exclusion of black majority outside of State politics as they were denied any political rights and the Cabinet comprised one non-white (coloured) member only.⁵⁶⁸

The BCEA⁵⁶⁹ was also adopted in 1983, laying down a limited range of employment rights and duties. It was with the jurisprudence of the Industrial Court that the content and ethos of many ILO instruments were integrated into our labour law regime.

In 1984, the government created a tri-cameral parliament extending political rights in central government to coloreds and Indians but excluding blacks. The black labour movement to fight the entrenched apartheid government used various strategies.⁵⁷⁰ As a result, in 1985, the Congress of South African Trade Unions (COSATU) was formed.

⁵⁶⁴ The prohibition was in terms of section 46(3) of the Internal Security Act 74 of 1982.

⁵⁶⁵ See Robertson *et al.*, (eds) *South African Human Rights and Labour Law Yearbook* (1991) 303.

⁵⁶⁶ In terms of Section 25 of the Criminal Procedure Act 51 of 1977, the police may be present in any meeting on authorization from a magistrate who has reasonable grounds to believe that the internal security of the republic or the maintenance of public order may be endangered; or if he considers there to be a likelihood that an offence may be committed at the meeting.

⁵⁶⁷ Act 110 of 1983. Hereinafter "the 1983 Constitution".

⁵⁶⁸ Burdzik & Van Wyk *op cit* 119 at 126.

⁵⁶⁹ Act 3 of 1983.

⁵⁷⁰ Finnemore *op cit* 26.

COSATU has a strong support for the ANC, which was banned at that time, as it was furthering the struggle against apartheid. It supported the political struggle and calls for international sanctions and boycotts against the apartheid government.

In 1986, the United Workers Union of South Africa (UWUSA) was also formed under the umbrella of the Inkatha Freedom Party (IFP). Its members were mainly Zulu workers.⁵⁷¹ Its formation led to immediate rivalry and confrontation with COSATU affiliates. It appeared later that in order for the government to counter the growing power of COSATU and its supporters, it had secretly sponsored UWUSA.⁵⁷²

Another significant new federation of workers was formed when the Azanian Council of Trade Unions (AZACTU)⁵⁷³ and the Council of Unions of South Africa (CUSA)⁵⁷⁴ joined forces to establish the National Council of Trade Unions (NACTU), which later developed strong links with the Pan African Congress (PAC).⁵⁷⁵

Prior to 1 September 1988,⁵⁷⁶ protection for freedom of association and trade union rights was to be found in sections 66(1)⁵⁷⁷ and 78⁵⁷⁸ of the 1956 Act.⁵⁷⁹ This Act also contained an absolute prohibition on the dismissal of employees merely because of their membership of a trade union or similar association.⁵⁸⁰

⁵⁷¹ Finnemore *op cit* 27.

⁵⁷² Finnemore & Van der Merwe *op cit* 34.

⁵⁷³ AZACTU was formed in 1984 from an alliance of trade unions strongly supporting the philosophy of black consciousness. It had a strong link with AZAPO.

⁵⁷⁴ CUSA was formed in 1980 and, although accepting the principle of non-racial unionism, it insisted that the leadership be in the hands of Black members.

⁵⁷⁵ See Bendix *op cit* 211; 227-229; Finnemore & Van der Merwe *op cit* 34.

⁵⁷⁶ When the Labour Relations Amendment Act 83 of 1988 came into effect

⁵⁷⁷ It provides for the prohibition against victimization of employees by employers for belonging and participating in trade union activities

⁵⁷⁸ It particularly deals with the right relating to freedom of association of employees.

⁵⁷⁹ Sections 66(1) (c) & 78(1) and (2) of the LRA of 1956. See also Rycroft A & Jordan B, *A Guide to South African Labour Law* (1990) 103-104.

⁵⁸⁰ Section 66(1) (c).

The 1988 Amendment Act⁵⁸¹ extended the protection by categorising any direct or indirect interference with the right of employees to associate or not to associate as an unfair labour practice. However, this Act protected individual employees against any anti-union discrimination only and its protection was further limited to employees as defined in the Act.

Employees outside the scope of the Act were unprotected. Job applicants were thus open to discrimination on the grounds of their known or previous union involvement.⁵⁸² Workers enjoyed rights and the Act applied only when those workers had been employed and the trade unions registered, not before. Public sector employees,⁵⁸³ domestic servants and farm labourers were excluded from the scope of the Act. Critical to workers was the codification of the unfair labour practice definition to include non-procedural strikes and lockouts.

The Industrial Court could grant an urgent interdict prohibiting unfair labour practices. The Act also introduced a presumption of liability on the part of trade union members, office bearers and officials for damages caused by unlawful industrial action.⁵⁸⁴ The 1988 Amendment Act also introduced the establishment of the Labour Appeal Court. However, some amendments introduced by the Act had serious implications for workers and trade unions on that employers were quick to seek interdicts against unlawful strikes and other forms of industrial action were held to be *prima facie* unfair.

⁵⁸¹ Labour Relations Amendment Act 83 of 1988.

⁵⁸² See Rycroft & Jordan *op cit* 105, & Davies and Freedland *op cit* 213.

⁵⁸³ Public service employees were covered by the Public Services Act 111 of 1984. Section 351 of this Act provides for staff associations whose membership is restricted only to employees in the public sector. These associations have limited rights to negotiate with the state on terms and conditions of employment in the public sector.

⁵⁸⁴ Du Toit *op cit* 15.

Between 1988 and 1990, trade unions like any other organisations in South Africa were faced with the challenge of maintaining membership. Because employers at that time believed that they competed with unions, they were determined to divide workers with a view to undermine unions.⁵⁸⁵ They could advance some strategies to win workers against the unions. Those strategies included the focus on free riders by giving them special considerations. For example, if the deadlock in wage negotiations led to a strike, workers who were not on strike were granted the last offer wage increase, while the strikers were told that they could only receive the increase from the date of the settlement.⁵⁸⁶ The leadership of the union was forced to respond to the challenge caused by overt and covert attempts by management to separate them from their members.⁵⁸⁷ The maintenance of apartheid in South Africa led to further subjection and harassment of trade unions and labour leaders.⁵⁸⁸

The 1990s were characterised by the consolidation and incorporation of new labour dispensation. During this period, South Africa was faced with unprecedented socio-economic and political problems. Many of these problems overflowed into the area of labour relations resulting in consumer boycotts and sharp rise in the number of strikes.⁵⁸⁹

In 1990, President FW De Klerk announced the release of Nelson Mandela and other political prisoners. The government lifted the ban on various political organisations including the ANC, PAC and the United Democratic Front (UDF).

⁵⁸⁵ Dekker *op cit* 142.

⁵⁸⁶ *Idem*.

⁵⁸⁷ *Idem* 143.

⁵⁸⁸ Leary *op cit* 23.

⁵⁸⁹ Van Jaarsveld & Van Eck *op cit* 257.

In September 1990, the government entered into a broad-ranging agreement with the South African Consultative Committee on Labour Affairs (SACCOLA), COSATU and NACTU and committed itself to modifying those provisions of employment law statutes,⁵⁹⁰ which labour found most offensive. Talks took place between the State, capital and labour that produced an agreement to repeal the challenged provisions. The minutes of those negotiations of the 14th of September 1990 came to be known as "Laboria Minutes".⁵⁹¹ The Labour Relations Amendment Act⁵⁹² translated them into law. Labour relations and trade unionism were entering a new era in South Africa.

3.3. Protection of Freedom of Association and Trade Unionism prior to the new South African Democratic Order

Legislation provided for the protection of the right to freedom of association. South African courts also contributed to enforcing the relevant legal provisions and to promoting the right to freedom of association and trade unionism during the colonial and later the apartheid era.

3.3.1. Legal Protection of Freedom of Association and Trade Unionism

Before the establishment of the post-apartheid constitutional order, the protection of freedom of association and trade unions' rights could be deduced from the Constitution, labour legislation, common law and international law.

As pointed out earlier, South Africa was governed by three Constitutions before the establishment of the post-apartheid legal order. These Constitutions were enacted in 1910, 1961 and 1983 respectively. The 1910 Constitution established the Union of South Africa and did not make any reference to human rights.

⁵⁹⁰ More particularly the provisions of the Labour Relations Amendment Act of 1988.

⁵⁹¹ Brassey *op cit* at A1:52, Innes D, "Labour Relations in the De Klerk Era" (1992) 6 *SA Review* 338 at 339-40.

⁵⁹² Act 9 of 1991.

The 1961 Constitution established the Republic of South Africa and was enacted in the heyday of apartheid. Accordingly, it was only concerned with the rights of the whites while denying all human rights, including the right to freedom of association at the workplace, to the black majority. The 1983 Constitution governed the last decade of apartheid and still entrenched racial discrimination on which apartheid was based. In view of the above, the protection of the right to freedom of association and trade unions' rights was to be based on labour legislation, common law and international law.

As it has been observed, the main pieces of labour legislation protecting the right to freedom of association included the ICA of 1924, the consolidated ICA of 1937, and the ICA of 1956 that repealed the ICA of 1924. The ICA of 1956 was amended in 1979, 1980, 1981, 1982, 1983, 1984, 1988 and 1991 respectively.

According to Landman, freedom of association at the workplace, as many other rights, emanates from the common law that allowed employees to do anything permitted by law and did not interfere with the rights of others.⁵⁹³ At common law, individuals were free to form and join trade unions but common law did not grant the positive rights of association enforceable against others.

There was no protection against discriminatory action by an employer on the grounds of union membership, whether in the form of a refusal to hire, dismissal or some other actions aimed at discouraging union membership neither did the common law give any enforceable right not to associate to non-union members seeking employment.⁵⁹⁴

Employers could dismiss employees for joining and participating in trade union activities. However, employees and employers could also rely not only on common law but also on international law which they could not enforce in a court of law, especially the ILO instruments, for the protection of their right to freedom of association.

⁵⁹³ Landman *op cit* 90.

⁵⁹⁴ Smith IT *et al*, *Industrial Law* (1993) 450

3.3.2. Judicial Protection of Freedom of Association and Trade Unionism

Based on the ICA, South African courts used the unfair labour practice concept to uphold and protect the right to freedom of association by considering the victimisation of an employee on account of his trade union affiliations as an unfair labour practice.

3.3.2.1. The Right to Form and Join Trade Unions and Participate in their Activities

The extent of judicial protection of the right to freedom of association even under apartheid may be illustrated by the decisions that flow from a number of cases.

3.3.2.1.1. *Rooiberg Minerals Development Company Ltd v Du Toit*⁵⁹⁵

In this case decided in 1953, the respondent was engaged by the applicant, a mining company on 12th February, 1947, under a written contract of employment. As part of this employment he occupied one of the company's houses on the property. He was dismissed on 21st July, 1952, and was called upon to vacate the house, which he refused to do, claiming that he was still an employee of the company.⁵⁹⁶

The respondent alleged that his dismissal was null and void and of no effect in that the reason for the dismissal was that the plaintiff suspected or believed that the defendant belonged to a trade union and had taken part outside working hours in the lawful activities of the said trade union and such a dismissal was prohibited in terms of section 66 of the ICA, Act 36 of 1937.⁵⁹⁷

⁵⁹⁵ 1953 (2) SA 505 (T).

⁵⁹⁶ *Idem* at 506 A-C.

⁵⁹⁷ *Rooiberg op cit* at 506 D-E.

Mr Rathouse, for the applicant, took exception to the respondent's contention and argued that nowhere did section 66 of the ICA of 1937 in express terms forbid the dismissal or taking of other action to the prejudice of the employee but merely attached a penalty to the performing of such act (actual or alleged participation in trade unions activities).⁵⁹⁸

The Transvaal Provincial Division interpreted the anti-discrimination provisions favorably. It held that the effect of the provisions of section 66 of the ICA of 1937⁵⁹⁹ was not to permit the victimisation of an employee on the ground of his trade union activities but to forbid it.

Blackwell J remarked:

"Can it be said that similar considerations could apply in a case such as the present? That an employer could be allowed to victimize at will so long as he was prepared to pay the penalty? How could the cause of industrial peace, and in particular the protection of legitimate trade union activities on the part of employee be safeguarded if any employee were allowed to take up the attitude contended for in this case? Instead of industrial peace there would be industrial war. Instead of employees who enter upon trade union activities while in employment being protected, they would be open to victimization and dismissal, and the protection given by section 66(1) would virtually become a dead letter."⁶⁰⁰

After examining the legislation and case law referred to by the excipient, the Court came to the conclusion that the intention of section 66 was plain and to give it the interpretation sought for by the excipient would be to a frustration of that intention.⁶⁰¹ The Court opined that section 66, which imposed a penalty on the employer also forbade the dismissal or taking of other action to the prejudice of an employee victimised by reason of his actual or suspected trade union activities. Accordingly the exception was dismissed with costs.⁶⁰²

⁵⁹⁸ Rooiberg *op cit* at 507 E-H.

⁵⁹⁹ Industrial Conciliation Act 36 of 1937.

⁶⁰⁰ Rooiberg *op cit* at 509F-H.

⁶⁰¹ *Idem* at 509 H.

⁶⁰² *Idem*.

Rooiberg is evidence that even under apartheid, South Africa's courts contributed to the protection of the right to freedom of association in the workplace and to the promotion of trade unions rights.

3.3.2.1.2. *Mazibuko v Mooi River Textile Ltd*⁶⁰³

On request by the majority union, namely Amalgamated Clothing and Textile Workers Union (ACTWU), the employer dismissed employees who were members of the minority trade union, Textile & Allied Workers Union (TAWU).

The Industrial Court held that such dismissal constituted unfair labour practice and as such it was in contravention of the provisions of Section 66(1) (c) of the LRA 28 of 1956.⁶⁰⁴ The Court agreed that even though there was a commercial rationale for the employer's decision to dismiss (based on the continued threat to the productivity and industrial peace and also on the fact that the safety of TAWU members could not be guaranteed), such a dismissal was illegitimate. The employer's decision was found to be in violation of the provisions of the LRA which protected workers' rights to freedom of association. Accordingly, the court ordered the reinstatement of the dismissed employees.

⁶⁰³ (1989) 10 ILJ 875 (IC).

⁶⁰⁴ Section 66 considers guilty of unfair labour practice:

- "(1) Any employer who ... dismisses an employee employed by him or reduces the rate of his remuneration or alters the terms and conditions of his employment to terms or conditions less favourable to him or alters his position relatively to other employees employed by him to his disadvantage, by reason of the fact, or because he suspects or believes, whether or not the suspicion or belief is justified or correct, that-
- (c) that employee belongs or has belonged to any trade union or any other similar association of employees or takes or has taken part outside working hours, or, with the consent of the employer, within working hours, in the formation of or in the lawful activities of any such trade union or association."

3.3.2.1.3. *Black Allied Shops Offices and Distributive Trade Workers Union v Homegas*⁶⁰⁵

In this case, the applicant (employee) who was a shop steward of the Black Allied Shops Offices and Distributive Trade Workers Union was dismissed for his failure to report for work on a day on which violence was expected in the black township and for other unsatisfactory conduct. The applicant alleged that he had in fact been dismissed for his trade union affiliation and because he was a shop steward. During the disciplinary hearing, the applicant was denied the right to be assisted.

The Industrial Court held that the enquiry which led to the dismissal of the applicant was procedurally unfair on the ground that the applicant was not permitted to enlist the assistance of another person and, because of the sensitive nature of the dismissal of a shop steward, the company should have advised the union of the enquiry beforehand or insured that another shop steward or shop stewards were present.⁶⁰⁶ On the substantive fairness of the applicant's dismissal, the Court remarked:

The catalyst which led to the applicant's dismissal was his failure to report for work on the day of the unrest. None of the employees who had stayed away on that day were, however, dismissed. This would mean that the applicant was victimized on the account of his standing in the trade union. It is however, unnecessary to make any express finding in this regard because it is clear that whatever motive caused the respondent to single the applicant out on account of his failure to attend work was *prima facie* an improper one. It involved the selective dismissal of one of a group of employees who had all engaged in the same 'misdemeanor'.⁶⁰⁷

The Court consequently held that the applicant was unfairly dismissed in this circumstance and that the respondent was guilty of unfair labour practice.

⁶⁰⁵ (1986) 7 ILJ 411 (IC).

⁶⁰⁶ *Idem* at 416A-B.

⁶⁰⁷ *Idem* at 416-417.

3.3.2.1.4 *National Automobile & Allied Workers Union (NAAWU) v Atlantis Electric Diesel Engines (Pty) Ltd*⁶⁰⁸

During negotiations over increase in wages and improvements in working conditions, the employer offered a final package with retrospective effect to the date of the creation of the trade union, provided that the offer was accepted within a specified period. However, after the union's rejection of the offer, the employer informed all its members that the offer remained valid only for those workers who chose to resign from the union and retrospectively to the date of their resignation. The union then approached the court alleging that the conduct of the employer constituted a union bashing and an unfair labour practice inconsistent with the LRA 28 of 1956, as it was aimed at rewarding those members who decided to resign from the union.

The court ruled against the employer whose conduct was found to be a penalty for union membership amounting to union bashing and therefore an unfair labour practice in terms of Section 66 of the LRA. Accordingly, it ordered the employer to desist from rewarding members who resigned from the union. The facts of the *National Automobile Case* were similar to those in *Nkutha v Fuel Gas Installation*⁶⁰⁹ decided later under the LRA of 1995.

3.3.2.1.5. *Keshwar v SANCA*⁶¹⁰

The respondent employed the applicant as senior information officer at its Durban office. Estelle Frances Keshwar joined the SANCA Durban Society Staff Association, which was an association formed by the respondent's employees, and became the chairman of this association.

⁶⁰⁸ (1989) 10 ILJ 948 (IC).

⁶⁰⁹ (2000) 21 ILJ 218 (LC).

⁶¹⁰ (1991) 12 ILJ 816.

Therefore, although employees should be allowed to enjoy their right to freedom of association and trade unions rights, the enjoyment of these rights did not release them from their duties in terms of the contract and they could face disciplinary measures and even dismissal for not assuming their contractual duties.

According to De Kock J, the respondent had failed to put before the court facts alleging that the applicant did not perform her own duties as employee.⁶¹² Since the existence of a conflict of interest between the employer and the union and the detention of confidential information and its disclosure to the union was not proved as prejudicial to the employer, De Kock J made an order reinstating the applicant in her employment.⁶¹³

3.3.2.2. Closed Shop Agreements

South African courts under apartheid rule also decided cases of closed shops agreements.

3.3.2.2.1. *Black Allied Workers Union and Others v Initial Laundries (Pty) Ltd and Another*⁶¹⁴

The Industrial Court was called upon to determine whether the dismissal of several employees by their employer was an unfair labour practice when employees had voluntarily resigned from a union, which was a party to a closed shop agreement in terms of the industrial council agreement. After considering the provisions of Section 53 of the LRA 28 of 1956,⁶¹⁵ the Industrial Court concluded that the employer did not commit any unfair labour practice in dismissing the employees in compliance with the closed shop provisions.

⁶¹² *Keshwar* at 817 A – 821 G.

⁶¹³ *Idem* 821 H.

⁶¹⁴ (1988) 9 ILJ 272 (IC).

⁶¹⁵ Section 53 made retaining an employee by the employer in contravention with the closed shop provisions a criminal offence by the employer.

However, the employer could have committed a criminal offence in retaining them in contravention of this provision. It is clear that the Industrial Court took into account the criminal effect of the employer's retention in the services of employees in contravention of the closed shop provisions both in regard to the determination of an unfair labour practice and the Court's power to grant relief.

3.4. Conclusion

This chapter has examined labour relations, freedom of association and trade unionism in South Africa not only from a legal but also and even predominantly historical perspective from colonisation to apartheid to help understand South Africa's long march to freedom of association. It investigated the origins of trade unions in South Africa and to find out the extent to which the right to freedom of association was entrenched in the past Constitutions and other pieces of legislation and enforced by South African courts prior to the adoption of the post-apartheid Constitution in 1993.

As pointed out earlier, the British roots of South African unionism cannot be denied. Many British traditions were inherited directly and although unions in South Africa subsequently developed along their own unique path, they have been heavily influenced by the British style of union operation.⁶¹⁶

The settlers' technological culture was several hundreds of years ahead of that on the indigenous population, and this relatively higher degree of knowledge and technical ability almost immediately created a situation whereby the whites became the "haves" and the blacks became the "have nots".⁶¹⁷ The whites enjoyed a socio-political and economic security that ensured their support for a capitalist market system while the blacks were excluded. This early pattern of privilege was later entrenched by deliberate legislative policies. The practice continued up to the late 1980s.⁶¹⁸

⁶¹⁶ Jones *op cit* 8.

⁶¹⁷ Coetze *op cit* 178.

⁶¹⁸ In seeking to protect the white laborers from the encroaching threat of cheap black labour, together with

The industrial relations system that prevailed in South Africa before the establishment of the current constitutional and democratic order was fragmented in character. One system existed for white, and another for Indian, coloured, and black workers. White, coloured and Indian workers were granted trade union rights under legislation. They could form registered trade unions and had access to principal industrial relations machinery such as the industrial councils and conciliation boards.

African workers on the other hand, were denied these rights. It is clear from the historical background to labour relations, freedom of association and trade unionism in South Africa was a direct consequence of the inequitable political dispensation.

Policies of institutionalised discrimination in South Africa made inordinate inroads into freedom of association. The NP government devised a series of statutes that seriously impacted on the right to freedom of association and enforced discrimination at the workplace.⁶¹⁹

According to Mark Shope, it should never be forgotten that apartheid and racial discrimination in South Africa had an aim far more pervasive than discrimination itself. Its main aim was economic exploitation and profit and racial discrimination were its expected fruits.⁶²⁰

Labour organisations have a long and interesting history in South Africa. Migrant labour, pass laws, poverty wages, victimisation at the workplace, unemployment, repression, imprisonment, banning orders to mention but a few are the ingredients of exploitation that shaped the lives of millions of South African workers.⁶²¹

an attempt at fostering Afrikaner nationalism, a number of Acts such as the ICA of 1924, Wage Act of 1925 etc. were passed. These Acts were intended to oppress black South African from competing with their whites counterparts.

⁶¹⁹ These included the Group Areas Act of 1950, the Reservation of Separate Amenities Act of 1953, the Prohibition of Mixed Marriages Act of 1949, the Immorality Act of 1927, the Suppression of Communism Act of 1950 and the Affected Organization Act of 1974. All these Acts were intended to further racial discrimination in South Africa.

⁶²⁰ Statement by Mark Shope, SACTU Report to Solidarity Conference, Accra, Ghana in 1964 quoted by Luckhardt K & Wall B, *Organise or starve: The History of the south African Congress of Trade unions* (1980) 35.

⁶²¹ Luckhardt & Wall *op cit* 35.

Under apartheid black workers and their dependents were exploited both as workers and as disenfranchised citizens of South Africa.⁶²² The joint regulation of industries has always been a major union objective but it was distorted by racialism, which denied legal support for collective bargaining to trade unions of black workers and imprisoned and victimized their leaders.

The history of trade unionism in South Africa has shown that even when fundamental rights such as freedom of association, the right to assembly and trade union rights were denied to workers, they were able to establish their institutional forms to achieve these rights, despite any opposition towards granting them these rights.

However, it cannot be said that nothing was achieved for the protection and promotion of the right to freedom of association and trade union rights under apartheid. As back as 1924, the ICA was enacted and provided for some freedom of association despite that this right was to be enjoyed by white workers only. The subsequent amendments to this Act in 1937, 1956, and in the 1990s contributed to extending the protection of the right to freedom of association and trade unions rights to the majority of South Africans.

On the other hand, as evidenced by courts decisions in the *Rooiberg*, *Black Allied Workers Union*, *Mazibuko*, *Black Allied Shops Offices*, *National Automobile & Allied Workers Union*, and *Keshwar* cases, South African courts contributed to protecting and promoting the right to freedom of association and trade union rights even within the context of hostile legal framework which entrenched discrimination.

Foreign and international law played an important role in the promotion of freedom of association and trade union rights even under apartheid. Accordingly, the next chapter deals with freedom of association and trade unionism in foreign and international law.

⁶²² Luckhardt & Wall *op cit* 36.

CHAPTER 4 FREEDOM OF ASSOCIATION AND TRADE UNIONISM IN FOREIGN AND INTERNATIONAL LAW

4.1. Introduction

Freedom of association is one of the most fundamental workers' rights. It is particularly relevant for employees and employers in regard to labour relations and is recognized internationally. It gives rise to the establishment of institutions such as trade unions, which promote democracy both in the workplace and in society at large.⁶²³ As already stated, it is the bedrock on which all other labour and workers' rights rest. It is enshrined in most international and regional human rights instruments. The consensus of the world community reflected in those international as well as national instruments is that freedom of association is a right that must not be derogated from, for any ulterior motive, including economic development.⁶²⁴

Organisations of workers and employers have sprung up in different countries of the world in widely differing circumstances. This diversity is due in part to material factors such as the varying degree of economic development, the availability or lack of material and human resources and in part to a number of other equally important factors. Some of these factors are psychological, such as differences in religious beliefs and traditions, and some of them institutional such as differences in political and social organisation.⁶²⁵ The result is that the movement and therefore the law dealing with trade unionism developed in differing ways in different countries. Nevertheless, despite a time-lag in their emergence, these organisations and the law affecting them have everywhere been the product of the same forces.⁶²⁶

⁶²³ Landinan *op cit* 189.

⁶²⁴ Commission for Labour Cooperation., *Labour Relations in North America* (2000) 24.

⁶²⁵ *Freedom of Association and the Protection of the Right to Organize: A Workers education Manual* (1959) 2.

⁶²⁶ *Idem*.

Within any individual country, trade unions reflect the prevailing class and status divisions, as well as the wider social relationship that binds people together. Each country's trade union movement develops its own style, its own characteristics and its own approach.⁶²⁷ Trade unions are thus positioned differently in different countries. In some countries, trade unions are respected organisations, and are part and parcel of the political system. In other countries they are regarded as partners with the owners of capital in the management of organisations and perhaps the nation.⁶²⁸

Trade union rights include the rights of workers, without discrimination or prior authorisation to form and join trade unions of their own choosing, the right of trade unions to function autonomously and the right of workers to organize, to engage in collective bargaining and to take direct action in support of workers' economic interests, particularly by exercising the right to strike.⁶²⁹

A widely accepted body of international norms has set forth standards for workers freedom of association and trade union rights. They can be found in the UDHR and other UN instruments, in the ILO conventions, and in regional human rights instruments and in regional trade agreements. They are also grounded in the near-universality of national constitutions and legislation, protecting workers' freedom of association.

⁶²⁷ Sherman B, *The State of The Unions* (1986) 13.

⁶²⁸ Since the end of apartheid in South Africa, for instance, there exists an alliance between COSATU, the South African Communist Party (SACP) and the ANC, which remains the majority party. Through this alliance, South African trade unions and their members continue to play an important role in national politics.

⁶²⁹ See Rubin N, *Code of International Labour Law Vol.1 Essentials of International Labour Law* (2005) 204; Fenwick C, "The Minimum core Content of trade Union Rights in South African Context" in Brand D & Russell S, (eds) *Exploring the Core Content of Socio Economic Rights: South African and International Perspectives* (2002) 284; Shepston L, "Human Rights Law and Freedom of Association: Developments Through ILO Supervision" *International Labour Review* 1998 169 at 187; Committee on Freedom of Association (CFA): Second Report (1952) Case NO 28(Jamaica), in Sixth Report of the ILO to the UN (Geneva), 210, para 68; Digest, 1996 pars 474-75. See also the Articles 3, 8 &10 of the ILO Conventions no 87.

This chapter looks into the protection of freedom of association and trade union rights in foreign as well as in international law. It provides a comparison between the international instruments and regional instruments. It also analyses the fundamental principles which safeguard the freedom of workers to form and join trade unions of their choice, and to organise themselves against the infringement of their rights.

4.2. Protection of Freedom of Association and Trade Unionism in the Domestic Law of Some Foreign Countries

In most countries, the initial legal reaction to trade unionism, its aims and its methods, was hostile. Legislation was introduced to ban trade unions or to restrict their activities.⁶³⁰ After this initial period of hostility, the law in most countries gradually adopted a more accommodating approach to trade unionism. Legislation was enacted which permitted trade unions to exist and which to a greater or lesser extent, regulated their powers and activities.⁶³¹ Trade unionism, collective bargaining and even strikes and other forms of industrial action came to be accepted as important elements of a democratic society.

As pointed out in chapter 1 of this study, freedom of association and trade unionism in South African law cannot be examined without reference to the domestic law of some foreign countries, especially European and North American countries. The European and particularly British connection is a strong one. South Africa is a former British colony and part of its population consists of white people of British and Dutch origins. There is also an American connection that justifies reference to the Canadian law and to the law of the United States.

⁶³⁰ Pitt G, *Employment Law* (1992) 205.

⁶³¹ Basson *et al*, *Essential Labour Law* (2002) 3.

The Canadian and US law also inspired the South African law and, as will be demonstrated later, South African scholars and judges have very often referred to the Canadian and US law for guidance in matters related to freedom of association.

The legal recognition of the principle of the right to join and organise trade union occurred in Europe in two stages.⁶³² Initially, most European states removed statutory criminal prohibitions, recognising the right to freedom of association of workers and trade unions. This was followed by a second stage, the creation of positive rights against employers. The shift to positive rights required the legislature at an early stage to translate the principle of freedom of association into a set of legal limits upon employers in particular, limits upon their attempts to discourage trade unions by dismissals or by other means short of dismissal.⁶³³

The right to freedom of association and trade unionism in South Africa can be better understood and explained against the background of the European and North American connection and in the light of the law of some of those European and North American countries that inspired the labour law of this country, namely Britain, Germany, Canada and the US. It is therefore to the protection of freedom of association in the British, German, Canadian and US law that we will now turn.

4.2.1 Protection of Freedom of Association in British Law

The South African trade union movement originated and developed along the lines of its British colonial master.⁶³⁴ As a result of this, when dealing with trade unionism and its development in South Africa, it is important and necessary to first direct attention to the development of trade unionism in Britain.

⁶³² Anderman SD, *Labour Law: Management Decisions and Workers Rights* (2000) 306.

⁶³³ *Idem*

⁶³⁴ Finnemore & Van der Merwe *Introduction to Labour Relations in South African* (1996) 23-24.

There are many views regarding the establishment and formation of the trade union movement. According to Sidney and Beatrice Webb, trade unions existed in Britain for over two centuries and could not be supposed to have sprung at once fully developed into existence.⁶³⁵ For nearly two centuries, there have been trade unions of one kind or another in Britain.⁶³⁶

The traditional history of trade union movement represents the period prior to 1824 as one of unmitigated persecution and continuous repression. In Britain, workers' combines and combinations were prohibited by the Combination Acts of 1799 and 1800.⁶³⁷ The Master and Servants Act of 1823 was another powerful weapon in the hands of employers since an employee who was absent from work before his or her contract expired was punishable by up to three months of hard labour.⁶³⁸ The Combination Laws Repeal Act of 1824 removed 35 prohibitions on combinations on various sectors of the economy, and repealed most of the provisions of the 1800 Combination Act. Moreover, union combinations ceased to be *per se* criminal acts at common law.⁶³⁹ The immediate aftermath of the 1824 Act was a series of violent and damaging strikes. This caused the Parliament to think again and to pass the Combination Act of 1825. This Act revived the common law offences, save where the only object of the union collectivity was the determination of wage and working hours.⁶⁴⁰ Although limited by a number of restrictions, the right to combine, to bargain collectively and to strike was for the first time recognised in terms of this Act.

⁶³⁵ Sidney & Beatrice Webb, *The History of Trade Unionism* (1950) 1

⁶³⁶ *Idem*.

⁶³⁷ The Combination Act of 1800 enacted two further specific offences namely, the offence of entering into contracts for the purpose of improving conditions of employment or calling or attending a meeting for such a purpose; and the offence of attempting to persuade another person not to work or to refuse to work with another worker. Justices of peace were given jurisdiction to order up to three months' imprisonment for committing these offences.

⁶³⁸ Manchester AH, *Modern English Legal History* (1980) 328;

⁶³⁹ Bowers J & Honeyball S, *Textbook on Labour Law* (1998) 2.

⁶⁴⁰ This Act withdrew the immunities from prosecution granted in the 1824 Act. However, under this Act, trade unionism in Britain was able to develop substantially.

The reality in Britain during this period was that employers often did acquiesce to the existence of trade unions. However, where trade unionism appeared to be strong, employers were willing to break them when the opportunity arose.

The Master and Servants Act of 1823 was repealed and replaced by the Master and servants Act of 1867. In 1871, the Trade Union Act was passed, which fully recognised the right to freedom of association and freedom to strike.

According to Bottomley, the trade union movement began in Britain a long time ago as a means of settling differences between workers and employers. Since then, the unions have developed into a major force in the country recognised by, but independent of the government.⁶⁴¹

In Britain as well as in countries which have taken its system as a model, the greatest care is taken to preserve the independence of the unions from State interference.⁶⁴² However, recent developments in Britain and many other countries demonstrate that political parties and governments have always interfered with trade unions' activities and trade unions have been abused.⁶⁴³

In the first half of the 19th century, trade unions were illegal organisations in Britain, although they persisted, especially among craft workers, either secretly or with the tacit acquiescence of employers.⁶⁴⁴

Some writers, however, have suggested that trade unionism in the former British colonies was not a natural development but was rather created by the British colonial authorities. According to Tayo Fashoyin, this opinion is an over-simplification of the colonial experience and is not true of all the British former colonies.⁶⁴⁵

⁶⁴¹ Bottomley *op cit* 7.

⁶⁴² *Idem*.

⁶⁴³ *Idem*. Also see the decision of the European Court in *James and Webster v the United Kingdom* (1981) JLR 408; 1995 (4) LCD 208, where the British government was condemned for violation of the right to freedom of association.

⁶⁴⁴ Rosemary A, *Trade Unions and the Management of Industrial Conflict* (1998) 24.

⁶⁴⁵ Fashoyin T, *Industrial Relations in Nigeria* (1980) 1

Freedom of association was recognised in the British law in the same way as many other fundamental human rights or freedoms, in the sense that people were free to associate with others and to promote the interests of the association, provided that their action in doing so was not otherwise restricted by law.⁶⁴⁶

Another significant feature of British industrial relations was the enactment of the Trade Dispute and Trade Union Act of 1927. This Act made strikes which had any object other than the furtherance of a purely trade dispute illegal, especially if it was a sympathy strike by workers in a different industry, or designed to coerce the government by inflicting harm on the wider community. The Act also outlawed closed shop in local and public employment, and public employees were restricted on unions they could join.⁶⁴⁷

The Labour Government was elected in 1945, and it replaced the provisions of the Trade Disputes and Trade Union Act of 1927 with the Trade Disputes and Trade Union Act of 1946. This government radically transformed Britain's economy and social welfare system, creating managed economy and welfare state. Its purpose was to see that postwar Britain enjoyed a high standard of living. This idea was agreed on jointly by the Labour and the union movement during their years in the political wilderness.

The mid-19th century saw the first great expansion of trade unionism with the creation of federations of previously local organisations. At this time, British unions operated at the very center of the British government, negotiating with Conservative as well as Labour governments about the details and implementation of economic, social and employment policy.⁶⁴⁸

⁶⁴⁶ Ewing KD, "Freedom of association" in McCrudden & Chambers *op cit* 239-263.

⁶⁴⁷ Bowers & Honeyball *op cit* 5.

⁶⁴⁸ Dorfman AG, "Labour's Labor Problem" Hoover Digest (2005) No. 2 Spring Issue 1.

One of the explanations for the course which labour law took in Britain in contrast to the continent, where more workers' rights were guaranteed by statute, was that the industrial revolution and the birth of trade unionism preceded the advent of democracy for the industrial workers. The unions thus grew accustomed to look to industrial rather than parliamentary strength to achieve their ends.⁶⁴⁹

It was in the 1960s that for the first time employment protection legislation was passed on a large scale to improve a lot for illegal individual workers. The Contract of Employment Act of 1963 provided for a written statement of contractual terms between the employer and each employee. The Industrial Training Act of 1964 sought better training provisions and set up industrial tribunals and the Redundancy Payments Act of 1965 for the first time provided statutory compensation for dismissals.⁶⁵⁰

Again in 1965, the Government appointed the Royal Commission on Trade Unions and Employers' Associations under the chairmanship of Lord Donovan. Its instruction was to consider relations between management and employees and the role of trade unions and employers' associations in promoting the interests of their members and in accelerating the social and economic advance of the nation. The report of this Commission was published in 1968 and detected a major industrial shift from normal industry-wide collective bargaining to informal and often chaotic arrangements led by increasingly powerful shop stewards. It thus prescribed formal written agreement at plant level and called for unions' rules to indicate clearly the powers and duties of shop stewards. While it was not wholly opposed to legal enactment, it generally favoured machinery based on consensus.⁶⁵¹

⁶⁴⁹ Bowers & Honeyball *op cit* 3.

⁶⁵⁰ *Idem* 5.

⁶⁵¹ *Idem* 6.

In 1970, the Conservative government was elected. This government had no qualms about reform. The right to associate freely as well as the right not to associate enjoyed parallel protection under the Conservative government.⁶⁵² The first statute that noticeably provided for a right to freedom of association of workers in Britain was the Industrial Relations Act of 1971. This Act put law at the centre of collective bargaining and recognised both the right to associate and the right not to associate.⁶⁵³ It protected the principle of free association of workers in independent trade unions. It gave every worker the right to be a member of a registered trade union of his or her choice and to take part in its activities at an appropriate time.⁶⁵⁴ It further outlawed any obligation of trade union membership as a condition for job application (the so-called pre-entry closed shop) and allowed other forms of total unionisation only with the approval of the Commission of Industrial Relations and a ballot of affected workers. Employees were given rights not to be excluded or expelled from their union by arbitrary or unreasonable disciplinary action. Nor were members to be penalized for refusing to take part in unlawful industrial action.⁶⁵⁵ The Act also set up the National Industrial Relations Court (NIRC) as a special court to hear both individual and collective labour law cases.

In 1974, the Labour government returned to power. It repealed the Industrial Relations Act of 1971 and enacted legislation to give positive rights to workers and trade unions as part of an array of legislation to support collective bargaining.⁶⁵⁶ However, the Trade Unions and Labour Relations Act (TULRA) of 1974 did not provide for the right to dissociate as it aimed at setting a broad basis of legal support for the closed shop.⁶⁵⁷ Section 1 of the 1974 Act wholly repealed the 1971 Act.

⁶⁵² Hepple & Fredman *op cit* 207.

⁶⁵³ Section 5(1) b of the Industrial Relations Act of 1971.

⁶⁵⁴ Section 5(1) a of the Industrial Relations Act of 1971.

⁶⁵⁵ See Anderman *op cit* 311-312.

⁶⁵⁶ The Trade Union Labour Relations Act of 1974, as amended in 1976.

⁶⁵⁷ The decision of the European Court of Human Rights in Young, James and Webster case, confirmed the view that the legal regime provided by the TULRA of 1976 was a violation of the individual's basic human right not to join a trade union.

In terms of the social contract legislation adopted in the period 1974-1976, the right not to belong to a union was recognised only in two specific instances, namely where the union was an employer-dominated (non-independent) union and where the employee objected to join a union on the ground of religious belief.⁶⁵⁸

In 1976, the Trade Unions and Labour Relations Amendment Act (TULRAA) was passed and this Act proceeded to abolish the right to refuse to join a closed shop union on conscientious grounds, which was inserted by the Conservative opposition, and also broadened the protection for trade disputes.

The whole relationship between the unions and the Labour government collapsed towards the end of the 1970s, as the unions staged massive strikes during the winter of 1978-1979. The strikes gave the Conservatives a great political weapon for the union soon became "public enemy number one."⁶⁵⁹

In 1979, when Prime Minister M Thatcher and her Conservative Government came to power, unions were driven from the British policy process, laws were passed to restrict unions' right to strike and at the same time unions suffered a disastrous fall in their national membership.⁶⁶⁰ The Employment Act of 1980 was passed. This Act sought to restrict the powers of the unions and the ambit of individual rights. The Act also enabled the Secretary of State for Employment to give public funds to unions for the holding of secrets ballots, but unions viewed this with the gravest suspicion, preferring to finance ballots themselves.

⁶⁵⁸ See Hepple & Fredman *op cit* 210.

⁶⁵⁹ See Dorfman *op cit* 6.

⁶⁶⁰ Thatcher formed a government on 4 May 1979. She was the British Prime Minister until 1990. Thatcher was committed to reducing the power of trade unions but, unlike the Heath government, adopted a strategy of incremental change rather than a single Act. Several unions launched strikes that were wholly or partly intended to damage her politically. The most significant was the National Union of mineworkers strike carried out in 1984-1985. Thatcher had made preparations long in advance for this strike and the strike did not have massive impact on the economy. As a result union leaders had to concede without a deal. Thatcher was armed with a radical commitment to stop union power, to push them out of their negotiating position and to marginalize union power in all its manifestations. Moreover, Mrs. Thatcher not only succeeded in confronting union power head-on but greatly increased her own political stature, to the point that she became known as the "Iron Lady" and her policies as "Thatcherism."

The Act further limited the effectiveness of the closed shop by an extension of the remedies against unreasonable exclusion or expulsion.⁶⁶¹ Further restrictions were placed upon industrial action directed at employers not in dispute with the union. In December 1990, the Government announced its intention to introduce further measures of industrial law reform. Its stated aim was to “improve the operation of the labour market by providing a fairer and more balanced framework of industrial relations law and to curb a number of continuing abuses of trade union power”.

Another Employment Act was enacted in 1982 and its main features concerned the liability of unions for acts of their bodies and officials as well as a further tightening of the restrictions placed upon the operation of closed shops by subjecting them to periodic review, prohibiting union-membership-only clauses in contracts and tender documents, and increasing compensation for employees unfairly dismissed in consequence of a closed shop.⁶⁶²

The Trade Union Act of 1984 was intended to give unions back to their members. This Act provided for ballots for the election of the principal executive committee, before industrial action, and for unions’ political funds. Its effect was to take the courts further into the internal affairs of trade unions.

The Employment Act of 1988 placed further requirements on unions regarding a number of important union matters, including elections, ballots before striking and the day-to-day running of internal union affairs. Most notably, the Act created the Commissioner for the Rights of Trade Union members to help trade unionists bring actions against their unions. Then the Employment Act of 1990 followed. This Act introduced further reforms in collective labour law. It took away the remaining vestiges of legal support for the closed shop which, while not rendering the closed shop unlawful, made it impossible to operate.

⁶⁶¹ Bowers & Honeyball *op cit* 9.

⁶⁶² *Idem*.

It did this by making it unlawful for employers and training agencies to refuse to offer employment on the ground of trade union non-membership.

Refusal of employment on the ground of union membership was also made unlawful, but in practice this was of significantly lesser impact. The Act further outlawed secondary industrial action other than secondary picketing. The provisions relating to balloting of union members introduced by the Trade Union Act of 1984 and the Employment Act of 1988 were also extended to cover independent contractors. The liability of trade unions was also extended to cover the acts of their committees and officials, including shop stewards, unless disowned by the union, and employees lost the right to challenge unfair dismissal if at the time they were engaged in unofficial industrial action.⁶⁶³

A further item of legislation, which unusually received cross-party support, was the Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) of 1992 consolidating statutory collective labour law. This Act protected the positive right of association against dismissal,⁶⁶⁴ discriminatory action short of dismissal⁶⁶⁵ and a refusal to offer employment on grounds of union membership.⁶⁶⁶

The next piece of industrial legislation was clearly controversial and constituted a return by the government to the attack on trade unionism which characterized the Thatcher's years. The Trade Union Reform and Employment Rights Act was passed in 1993. It placed further restrictions on the rights of employees to strike and strictly regulated the financial affairs of trade unions.

⁶⁶³ Bowers & Honeyball *op cit* 10.

⁶⁶⁴ Section 152 (1) a of TULR(C) A.

⁶⁶⁵ Section 146(1)a.

⁶⁶⁶ Section 137.

The Labour government led by Tony Blair came back into power in 1997. Even at this period, British unions continued to lose membership and influence. Under the Conservative government, unions have always worked for and passionately hoped for, a Labour Party victory at the next election. In return for this effort and their financial contributions, unions expect that the Labour government will support and promote their interests, whether by legislation or policy action. However, the actual relationship has failed to meet unions' expectations.⁶⁶⁷

The fall in trade union membership stopped in 1999 when the economy was stronger and the government was less hostile to unions. The government then moved some way towards restoring some trade union rights.⁶⁶⁸

4.2.2 Protection of Freedom of Association in German Law

Article 9 of the German Constitution protects the right to freedom of association. It provides that the right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession.⁶⁶⁹ This guarantees the fundamental individual right of association, the individual employees' right to form and join trade unions and the individual employers' right to form and join employers' associations.⁶⁷⁰

⁶⁶⁷ Dorfman GA *op cit* 5. In fact, before Mrs. Thatcher appeared on the scene, unions often found that the so-called hated Conservative governments were easier to live with because they were afraid of union power, and lacking influence with unions they often gave in to union power.

⁶⁶⁸ *Idem* 6.

⁶⁶⁹ Article 9 of the German Constitution of 1949 as amended. Referred to as the Basic Law of the Federal Republic of Germany (Grundgesetz).

⁶⁷⁰ Weiss "Germany" in Blanpain R, (ed) *International Encyclopedia for Labour and Industrial Relations* (1984) 107, Weiss M & Schmidt M, *Labour and Industrial Relations in Germany* (2000) 137 and Weiss "Germany" in Blanpain R, (ed) *Labour Law, Human Rights and Social Justice* (2001) 188.

Employees are also protected against any kind of discrimination resulting from the use of their freedom of association. Although the right to freedom not to associate had in practice never been threatened in Germany, courts afforded the right to freedom of association a wide interpretation in order to include the “negative” right into the scope of article 9.⁶⁷¹ The freedom not to associate is simply regarded as the ‘mirror’ of the freedom to associate.⁶⁷²

Article 9 does not make any express reference to the right to strike. However, it is understood to protect the associations’ existence, their organisation and their activities.⁶⁷³

4.2.3 Protection of Freedom of Association in Canadian Law

Freedom of association is protected in Canadian constitutional law,⁶⁷⁴ but not necessarily the right to join or not to join trade unions. The Charter’s provisions for freedom of association are contained in Section 2(d). Canadian labour legislation has to comply with the Charter of Rights and Freedoms.

Canadian courts have narrowly interpreted freedom of association as protecting only entry into the association and not the right to strike and collective bargaining.⁶⁷⁵ In *Professional Institute of the Public Service of Canada v Northwest Territories*,⁶⁷⁶ the Supreme Court held that the right to associate in the Canadian Charter does not automatically guarantee and entrench the right to bargain collectively.

⁶⁷¹ See Olivier MP & Potgieter O, “The right to Associate Freely and the closed Shop” *TSAR* 1994 (3) 442 at 444 and also Weiss M & Schmidt *op cit* 137.

⁶⁷² *Idem*.

⁶⁷³ See Devenish GE, *A Commentary on the South African Bill of Rights* (1999) 249; Weiss & Schmidt *op cit* 138.

⁶⁷⁴ Canadian Charter of Rights and Freedoms (Constitution Act of 1982).

⁶⁷⁵ See *Re Alberta Public service Employee Relations Act* (1987) 38 DLR 4th 161, *Re Public Servants Alliance of Canada* (1987) 38 DLR 4th 249 and *Government of Saskatchewan v Retail, Whole Sale & Department Store union* (1987) 38 DLR 4th 544.

⁶⁷⁶ (1990) 72 DLR (4th) 1 (SCC).

In *Re: Public Service Employee Relations Act*,⁶⁷⁷ it was held that the right to bargain collectively and to strike were simply creatures of statute and not part of the sphere of activity protected by the Charter's right to freedom of association.

Union security arrangements and forms of agency shops are, however, allowed in Canada.⁶⁷⁸ Union security is regarded as a proper matter for collective bargaining and such arrangements in collective agreements are therefore enforceable.

A union security arrangement was challenged as being contrary to the Canadian Charter in *Lavigne v Ontario Public Service Employees Union*⁶⁷⁹. In this case a union member (applicant) argued that the compulsory deductions for union dues for the purpose of collective bargaining coerced him to associate with the union, thereby unjustifiably infringing his rights to freedom of association. Although the Canadian Supreme Court declined to strike down the agency shop agreement in this case, the plurality accepted that freedom not to associate goes with freedom to associate.

4.2.4 Protection of Freedom of Association in the United States

The US Constitution does not make any express reference to the right to freedom of association.⁶⁸⁰ This does not mean, however, that the Constitution does not protect this right. Despite the lack of textual support, US courts have gone a long way in protecting the right to freedom of association as implied in the Constitution.

⁶⁷⁷ 1987 (38) DLR (4th) 161 (SC).

⁶⁷⁸ Arthurs, *et al*, *Labour Law and Industrial Relations in Canada* (1988) 228-229.

⁶⁷⁹ 1986 (33) DLR (4th) 174 (SC).

⁶⁸⁰ See Van Wyk *et al*, *Rights and Constitutionalism* (1994) 342.

In *Railway Employees Union v Hanson*,⁶⁸¹ the Supreme Court held that the Railway Labour Act did not abridge the constitutionally protected right of association when it required employees to pay union dues as condition for employment.

It was held that legislation authorising union shops and agency shops whereby workers can be compelled to become members of a union or pay a fee for the services it extends to all workers does not violate the right to freedom of association. The Supreme Court declined to read into the right to freedom of association an absolute right of non association which correlated with the right to associate.

A constitutional right to associate was recognised for the first time in the case of *NAACP v Alabama*.⁶⁸² The State of Alabama attempted to stop the NAACP, a civil rights organisation from operating within the State on the ground that it had failed to comply with all the public disclosure and registration requirements of foreign corporations doing business in the State. NAACP argued that compelling them to make such a disclosure violated their organisational right to association. In considering the NAACP's appeal, the Supreme Court advanced several arguments in favour of the right to associate. First, the Supreme Court held that the right to associate was justified on the instrumental grounds that public and private debate on issues of political and social importance were "undeniably enhanced by the group association".⁶⁸³ The Court also asserted that the right to associate should be seen as an essential aspect of the liberty guaranteed by the Fourth Amendment and that without such liberty people would have their ability to express their beliefs on political, cultural, religious and economic matters significantly impeded, if not entirely denied.⁶⁸⁴

⁶⁸¹ 351 US 225 (1955).

⁶⁸² 357 US 449 (1958). Also summarized in Van Wyk *op cit* 343.

⁶⁸³ *NAACP v Alabama* at 460.

⁶⁸⁴ *Ibid.*

Since then, both the right to associate and the right to be free not to associate are recognised and protected in American labour law. The protection flows from the statutory provisions⁶⁸⁵ and extensive judicial interpretation and application of individual rights enshrined in the American constitution.⁶⁸⁶ Section 7 of the National Labor Relations Act of 1935 as amended provides:

Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

This section expressly provides for the employees' right to form and join trade union and not to join any union at all if he or she so wishes. The Act grants equal protection to both the positive and the negative right.

Section 8 of the same Act provides that "it is unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7."⁶⁸⁷

According to Cihon and Castagnera,

The intent of these sections is to insulate an employee's employment from conditions based on his or her union sympathies, or lack thereof. If an employee is to have the free choice, under section 7, to join or refrain from joining a union, then that employee must not be made to suffer economically for his or her choice.⁶⁸⁸

⁶⁸⁵ Notably the National Labor Relations Act of 1935, as amended.

⁶⁸⁶ See Olivier & Potgieter *op cit* 450.

⁶⁸⁷ Section 8(a) (1) of the National Labor Relations Act as amended.

⁶⁸⁸ Cihon and Castagnera Labor and Employment Law as quoted by Olivier & Potgieter *op cit* 451.

The courts, in particular the Supreme Court, have given an extensive interpretation to these provisions and outlawed practices aimed at undermining the individual's free choice.⁶⁸⁹ It can be concluded that the right to be free not to associate enjoys an extensive protection in the United States and generally equals the protection afforded to the right to be free to associate. In terms of the statutory regulations and judicial interpretation, these rights can only be infringed to the extent that collective bargaining and the position of the union as a sole bargaining representative necessitate curtailment.⁶⁹⁰

Following the decision in the *NAACP* case,⁶⁹¹ American courts have decided other cases dealing with the right to freedom of association. For instance in *Shelton v Tucker*,⁶⁹² the State of Arkansas passed a law that required teachers in State supported schools to file affidavits listing all the organizations to which they belonged. The law was aimed at exposing teachers who belonged to NAACP. Teachers who did not have their contracts renewed because they refused to comply with the requirement brought the suit claiming that the law violated their rights to personal, academic and associational rights. The High Court held that the State law went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers" and therefore violated their associational rights.

In *Abood v Detroit Board of Education*,⁶⁹³ the United States Supreme Court reasoned that freedom of association and its correlative, freedom not to associate, could not permit dissenting employees to withhold union dues intended for collective bargaining purposes as this would make such bargaining impossible.

⁶⁸⁹ See *NLRB v Exchange Parts Co* 375 US 405 (1964), *NLRB v Saviar Mfg* 414 US 220 (1973), *Finnegan v Leu* 456 US 431 (1982) 437.

⁶⁹⁰ Olivier & Potgieter *op cit* 454.

⁶⁹¹ 357 U.S. 449 1958.

⁶⁹² 364 U.S. 516 (1960).

⁶⁹³ 431 US 209 1977.

However, the Supreme Court held that the dissenting employees possessed a right to refuse to associate in relation to “ideological union expenditure not directly related to collective bargaining.”⁶⁹⁴

Dealing with the issue of non-association, the US Supreme Court has in many cases⁶⁹⁵ taken the approach that the right to freedom to associate does not in anyway imply the freedom not to associate.

Apart from its protection in municipal law, the right to freedom of association is also protected in regional human rights systems such as the European, the (inter) American and the African human rights systems.

4.3 Freedom of Association and Trade Unionism Under the European, the American, and the African Human Rights Systems

Regional human rights instruments were adopted to complement and reinforce the international conventions protecting human rights. It has been suggested that these conventions were likely to be more successful than their universal counterparts because the political and cultural homogeneity and shared judicial traditions and institutions within a region provide the confidence in the system necessary for effective implementation.⁶⁹⁶

⁶⁹⁴ 431 US 209 (1977).

⁶⁹⁵ See *Railway Employees Union v Hanson* 351 US 225 (1955), *Abood v Detroit School Board* 431 US 209 (1977); *Communication Workers of America v Beck* 487 US 735 (1988).

⁶⁹⁶ Maluwa T, “International Human Rights Norms and the South African Interim Constitution 1993” (1993-1994) 19 *SAYIL* 22-25.

4.3.1 Freedom of Association and Trade Unionism under the European Human Rights System

The protection of rights in Europe is mainly achieved through two human rights instruments, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter.

4.3.1.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms

The Council of Europe, after its establishment in 1949, adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 as a regional instrument for the protection of human rights.⁶⁹⁷ The Convention essentially deals with civil and political rights. Its Article 11 provides that “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”

The European Convention does not expressly refer to collective bargaining and the right to strike. It provides for the establishment of the European Commission⁶⁹⁸ and a Court of Human Rights to protect and promote the rights in the convention.⁶⁹⁹ Before its demise and substitution by the European Court, the European Commission had decided a number of cases dealing with workers rights to form and join trade unions of their own choice.⁷⁰⁰

⁶⁹⁷ The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 in Rome and it came into force in 1953.

⁶⁹⁸ In 1998, the European Union adopted an additional Protocol to the European Convention (Protocol No. 11) which came into force on November 1 1998. This protocol removes the Commission, creating a full-time Court of Human Rights in the region and the decisions of the Court are legally binding on the parties.

⁶⁹⁹ Article 19(1) & (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷⁰⁰ For example, the European Commission in the case of *Lavissee v France* application no 14223/88 at 218-239 has held that the refusal to register an organisation could in principle constitute an interference of the right to freedom of association.

And, since its inception, the European Court of Human Rights has decided a number of cases dealing with freedom of association and trade union rights and other related rights. In the *National Union of Belgian Police*,⁷⁰¹ the European Court of Human rights held that the Belgian government's refusal to consult with the applicant union, although it consulted with other police unions did not violate Article 11 of the ECHR because while Article 11(1) presents trade union freedom as one form of special aspect of freedom of association the article does not guarantee any particular treatment of trade unions, or their members by the State such as the right to be consulted.

The concept of union non-membership as an element of the right of association is not clearly expressed in the European Convention. Thus, the Convention does not make any reference to the freedom not to associate.

In *Young, James and Webster v United Kingdom*,⁷⁰² a closed shop agreement was successfully challenged. In 1975, the British Railway Board (employer) entered into a closed shop agreement with three trade unions providing that membership of one of them was a requirement for employment. The applicants who were already in the employment of the British Railway at the time of the conclusion of the agreement were dismissed on the ground that they failed to satisfy the condition of the closed shop.

They therefore referred the dispute to the European Court of Human Rights (ECHR) alleging that their dismissal constituted a violation of the right to freedom of association provided for in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.⁷⁰³

⁷⁰¹ (1975) 1 EHRR 578.

⁷⁰² (1981) JLR 408 (ECHR); (1995) 4 LCD 208 (Young et al).

⁷⁰³ Article 11 provides that-

- (1) "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests
- (2) No restrictions shall be placed on the exercise of these rights other than such as prescribed by law and are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of rights and freedoms of others..."

The European Court first stressed that a closed shop system held considerable advantages for both employees and employers such as the fostering of an orderly collective bargaining and the avoidance of the proliferation of trade unions.⁷⁰⁴ However, the European Court ruled that Article 11 of the European Convention neither prohibited nor allowed closed shop system in general, but the challenged closed shop system was nevertheless inconsistent with the provisions of Article 11.⁷⁰⁵

While the judges were in agreement that, on the facts, the agreement was in breach of Article 11(1) in such a situation and that the “negative aspect” of freedom of association is necessarily complementary to...its positive aspect, there was considerably less support for the proposition that an unqualified right to non-membership could be read into the Convention.⁷⁰⁶

In *Gustafsson v Sweden*,⁷⁰⁷ a case which was decided after the *Young case*, the European Court of Human rights held that while Article 11 of the European Convention contains an implicit right to refuse to join a trade union, it does not extend to a right to refuse to enter into collective agreements.

Again, in *Sigurour A Sigurjonsson v Iceland*,⁷⁰⁸ the European Court of Human Rights confirmed that Article 11 of the European convention on Human Rights included the right not to join a trade union, although not on equal footing with the right to join.

⁷⁰⁴ *Young et al op cit* 210.

⁷⁰⁵ *Idem* 209.

⁷⁰⁶ *Idem*.

⁷⁰⁷ (1996) 22 ECHR 409.

⁷⁰⁸ (1993) 16 EHRR 462.

4.3.1.2 The European Social Charter

The European Social Charter,⁷⁰⁹ a regional instrument protecting social and economic rights, was adopted as an adjunct to the European Convention on Human Rights. Article 5 of the Charter guarantees the right to organise and freedom of association for employers and workers. It provides:

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.⁷¹⁰

Like other instruments protecting freedom of association and the right to organize, the Charter contained an internal limitation on the extent to which the provisions of Article 5 are to apply to the police and members of the defence force. This is to be regulated by national legislation.

Unlike the European Convention on Human Rights, which does not specifically refer to the right to strike, the European Social Charter expressly includes the right to strike among the fundamental social rights of workers in case of conflicts of interests in the workplace.⁷¹¹

⁷⁰⁹ The European Social Charter was adopted in 1961.

⁷¹⁰ Article 5 of the European Social Charter.

⁷¹¹ Article 6(4) of the Charter.

4.3.2 Freedom of Association and Trade Unionism under the Inter American Human Rights System

The Organisation of American States (OAS), which is the world's oldest regional organisation,⁷¹² adopted an American Convention of Human Rights as an instrument protecting human rights in the Americas in 1969. This Convention entered into force on July 1978 and it is the principal instrument for both North and Latin America. It is largely concerned with political and civil rights and broadly follows the European Convention of Human Rights. The Convention contains particular provisions concerning freedom of association and forced labour. Article 16 of this Convention provides that "Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, and sport or other purpose."

Unlike the European Convention, which provides for the freedom to associate for trade union purposes, this Convention provides for a general right to associate.

Like other instruments protecting freedom of association, the American Convention contains an internal limitation.⁷¹³ It has two specialised supervisory institutions, namely, the American Commission of Human Rights⁷¹⁴ and the American Court of Human Rights.⁷¹⁵

⁷¹² The International conference of American states approved the establishment of the International Union of American Republics in 1889-1890. The Charter of the OAS was signed in Bogota in 1948 and entered into force in 1951.

⁷¹³ Article 16(2) & (3) which provide that "the Exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order to protect public health or morals or the rights and freedoms of others. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed force and the police".

⁷¹⁴ Established in terms of article 33(a) of the American Convention on Human Rights.

⁷¹⁵ Established in terms of article 33(b) idem.

In 1988, an Additional protocol to the American Convention on Human Rights to protect Economic, Social and Cultural Rights⁷¹⁶ was signed. The Protocol contains specific provisions concerning freedom of association and workers rights in the region. Its Article 8(1) provides:

The states parties shall ensure the right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension to the right, the states parties shall permit trade unions to establish national federation or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with those of their choice. The states parties shall also permit trade unions, federations and confederations to function freely.

Article 8 closely resembles the provisions of the ICESCR, but it contains one provision not provided for in the ICESCR, affirming that no one may be compelled to join a trade union. Thus, the Protocol contains both the negative and the positive right to associate. The Protocol also provides for related rights such as the right to work, the right to just, equitable and satisfactory conditions of work and the right to social security.⁷¹⁷

4.4 Freedom of association and Trade Unionism in Africa and under the African Human Rights System

Freedom of association and trade unionism in Africa will first be examined in the domestic law of some African countries and then under the African human rights system.

⁷¹⁶ Protocol of San Jose 1988.

⁷¹⁷ Articles 6, 7 & 8.

4.4.1 Brief Overview of Freedom of Association and Trade Unionism Under the Domestic Law of Some African Countries

In Africa, trade unions came for two principal reasons namely the availability of paid employment in urban areas; and as a means to fight against colonialism and imperialism. Hence they are relatively of recent origin. In most African countries there have been unions for less than thirty years.⁷¹⁸

Freedom of association and trade unionism in Africa may be examined in the light of Africa's history, in pre-colonial Africa, during colonialism and after independence.

Davies considered that fundamental rights and freedoms including trade union rights were ignored in pre-colonial Africa.⁷¹⁹ However, Sanders argues that the view that pre-colonial Africa was an unorganised and undeveloped part of the world with no respect for human rights "is a parochial European notion" arising from European feeling of cultural superiority which reached the peak of its development during the latter portion of the nineteenth and the beginning of the twentieth centuries.⁷²⁰ Mbaye also held that the right to life, freedom of expression, freedom of religion, freedom of movement, freedom of association, the right to work and the right to education and other human rights existed and were protected in pre-colonial Africa.⁷²¹ The debate on the protection of human rights in pre-colonial Africa is a contested terrain. Accordingly, it will not be taken any further.

⁷¹⁸ Davies I, *African Trade Unions* (1966) 10. See also Meynaud J & Bay AS, *Trade Unionism in Africa* (1967) 158.

⁷¹⁹ Idem.

⁷²⁰ Sanders AJGM, *International Jurisprudence in African Context* (1979) 49 also quoted by Dlamini CRM., *Human rights in Africa: Which Way South Africa* (1995) 21.

⁷²¹ Keba Mbaye quoted by Eze OC, *Human Rights in Africa: Some Selected Problems* (1984)13.

Colonial rule was authoritarian. Africans were excluded from the government of their own country. African trade unionism represented serious danger for the colonial administration, especially in that it could and actually led African workers to confuse economic exploitation with political domination and thereby encouraged nationalists' demands.⁷²²

Different policies were adopted throughout Africa to counteract this danger. The first was an attitude of uncompromising resistance to the formation of unions; and the second was to work for the growth of trade unionism, the better to control it.⁷²³

The fight against colonialism and the demand for independence, both being the expression of nationalism was pursued with greater or less vigour in various African countries. Well-established and virulent nationalist campaigns were extremely useful to trade unionism and *vice versa*.⁷²⁴

Attempts to free themselves from the ideological commitments of the communist and the Western pressure groups inevitably brought African trade unions into an even closer relationship with their own governments.⁷²⁵ The promulgation of the UDHR gave the colonized people an idea of the human rights that should be aspired to and enjoyed by all human beings. The human rights ideology during colonialism was advantageously used as a basis for the struggle for independence. Africans were therefore able to secure certain rights, such as the right to self-determination, the right to freedom of association and expression.

⁷²² Hodgkin T, *Nationalism in Colonial Africa* (1956) 122.

⁷²³ Meynaud & Bey *op cit* 19.

⁷²⁴ *idem* 74.

⁷²⁵ Davies *op cit* 12.

Trade unions played an important role in the liberation of many African countries. The important growth of African trade unionism coincides with the growth of nationalism. Political factors exerted considerable influence on the development of trade unionism in Africa before and after national independence.⁷²⁶ This explains the particular characteristics of African trade unionism which make it unique and especially its close ties with political parties. In Africa, trade unions have been actively involved in protesting against what they claim are anti-democratic practices by governments.⁷²⁷

After independence, many African leaders had no experience of democracy.⁷²⁸ Although most African countries incorporated into their Constitutions a justiciable Bill of Rights modeled on the UDHR, official recognition and practice of human rights left a lot to be desired. According to Kibwana, many governments in Africa, while professing to champion human rights issues on the international level, ignored them in their internal and bilateral relations and while professing being inspired by 'African practices' on human rights, they put in place regimes whose human rights practices did not dispose them to the external scrutiny.⁷²⁹

As Esimokhai observed:

One would have thought that when African states gained their independence the unpleasant experience of the repressive colonial regimes would have made their leaders abhor violations of human rights. Instead, some African leaders showed traits of intolerance, high-handedness and callousness in dealing with political opponents and non conformists.⁷³⁰

⁷²⁶ Meynued & Bey *op cit* 47.

⁷²⁷ See for example 'Union Chief Held as Fuel Rise Fires Up Nigerians', *Guardian* 17 January 2002, 'Unions Warn of Zimbabwe Unrest' *Guardian*, 15 March 2002, 'ICFTU Calls for Solidarity Over Harassment of Zimbabwean Union Leader', ICFTU Press Release, 27 March 2002.

⁷²⁸ Dlamini *op cit* 31.

⁷²⁹ Kibwana *et al*, "Human Rights in Africa: A Critical Perspective", <http://www.kent.ac.uk> accessed on 2 August 2005.

⁷³⁰ Esimokhai EO, "Towards an adequate Defence of Human Rights in Africa" 21 *Indian Journal of International Law* (1981) 141, at 142.

The human rights situation in many African countries uncannily resembled the one under colonial rule.⁷³¹ However, this state of affairs did not mean that the human rights provisions served no useful purpose. African regimes were not willing to remove Bills of Rights from their Constitutions, for fear of confirming that their rule was authoritarian and undemocratic. During the period of repression and misrule, affected citizens relied on the human rights provisions enshrined in those Bills of Rights to challenge unconstitutional and undemocratic rule and to vindicate their rights.⁷³²

Constitutions of many African states included provisions protecting the right to freedom of association for workers. The extent to which Constitutions of some selected African countries protect the right to freedom of association and trade union rights may be examined briefly before looking at the developments under the OAU/AU instruments.

4.4.1.1 Freedom of Association and Trade Unionism in Some African Individual Countries

African countries' domestic position around freedom of association and trade unions would require several studies and goes far beyond the scope of this dissertation. Accordingly, we have selected a few countries which are close to South Africa, namely Ghana, Kenya, Nigeria, Malawi, Namibia, Lesotho, and Zimbabwe.

The present section focuses on the Constitutions of these countries to find out whether and the extent to which the right to freedom of association is protected in other parts of the African continent.

⁷³¹ Kibwana *op cit.*

⁷³² *Idem.*

Legislation on the right to freedom of association and trade unionism were introduced in 1941 before Ghana's independence. The Ghana Trade Union federation was formed in 1945 with the support of the colonial administration.⁷³³

Ghana was the first African state to become independent in 1957. It was followed by a number of other African states in the 1960s. The right to freedom of association in Ghana is guaranteed in chapter 5 of the current Constitution, which deals with fundamental human rights.⁷³⁴ It provides that "all persons shall have the right to freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interests".⁷³⁵

In Kenya, workers have a constitutional right as well as a statutory right to form, join and take part in trade union affairs. It is a fundamental freedom under the Bill of Rights entrenched in chapter V of the Kenyan Constitution.⁷³⁶ Section 80(1) of the Constitution of Kenya provides that "except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say his right to assemble freely and to associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests." Section 80(2) lays down instances under which the freedom to form or belong to trade unions may be derogated from.

In Nigeria, trade unionism can be traced back to the beginning of the 19th century. The Nigerian Congress of Trade Unions (NTUC), which was the first federation of workers, was set up directly after the Second World War.⁷³⁷ Like many African countries, the Nigerian Constitution protects the right to freedom of association.

⁷³³ Meynued & Bey *op cit* 169.

⁷³⁴ Article 21 of the Constitution of the Republic of Ghana of 1992.

⁷³⁵ Article 21(1)(e).

⁷³⁶ The Constitution of the Republic of Kenya of 1963 amended as a republic 1964; reissued with amendments 1979, 1983, 1986, 1988, 1991, 1992, 1997, and 2001.

⁷³⁷ Meynued & Bey *op cit* 34, 53 and 172.

Section 40 of the Constitution of the Federal Republic of Nigeria, expressly guarantees to the citizens the right to associate with other persons, in particular to form or belong to trade unions.⁷³⁸

Workers' rights are included in the constitution of Malawi.⁷³⁹ The Constitution devoted two of its sections to freedom of association and workers rights.⁷⁴⁰ Section 31(2) provides that "every person shall have the right to form and join trade unions or not to form or join trade unions." The state shall take measures to ensure the right to withdraw labour.⁷⁴¹ The constitution of Malawi protects both the right to form and not to form trade unions as well as the right to strike.

Like the Constitutions of many other African countries, the Constitution of Namibia⁷⁴² includes provisions on freedom of association. Article 21 protects fundamental freedoms and it provides that all people shall have the right to "freedom of association which shall include freedom to form and join associations or unions including trade unions and political parties."⁷⁴³ It also provides for workers' right to withhold labour without being exposed to criminal penalties.⁷⁴⁴

Section 16 of the constitution of Lesotho protects the right to freedom of association.⁷⁴⁵ It provides that "every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, cultural, recreational and similar purposes."⁷⁴⁶

⁷³⁸ Section 40 of the Constitution of the Federal Republic of Nigeria of 1999.

⁷³⁹ Constitution of the Republic of Malawi of 2000.

⁷⁴⁰ Section 31 deals with labour rights whereas Sec 32 with freedom of association in general.

⁷⁴¹ Sec 31(4).

⁷⁴² Constitution of Namibia of 1998 (Act No. 34 of 1998).

⁷⁴³ Article 21(1) e of the Constitution of Namibia.

⁷⁴⁴ Article 21(1) f.

⁷⁴⁵ The Constitution of Lesotho of 1993 (order No. 16 of 1993).

⁷⁴⁶ Article 16 (1) of the Lesotho Constitution.

Zimbabwe's constitution was adopted at independence in 1980.⁷⁴⁷ Section 21 of this constitution explicitly guarantees the right to freedom of association and assembly. It provides that "except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form and or belong to political parties or trade unions or other associations for the protection of his interests."

4.4.2 Freedom of Association and Trade Unionism under the African Human Rights System and NEPAD

The right to freedom of association is protected in the African Charter for Human and Peoples' Rights (ACHPR) and in the NEPAD instruments.

4.4.2.1 Freedom of Association and Trade Unionism in the ACHPR

The normative and institutional evolution of human rights and fundamental freedoms at the global level played a prominent role in encouraging the creation of regional human rights system. Africa became the third region in the world after Europe and the Americas, to establish its own intergovernmental system for the protection of human rights.⁷⁴⁸ When the Organisation of African Unity (OAU) now the African Union (AU),⁷⁴⁹ was established in 1963 in Addis Ababa, Ethiopia, its founding Charter did not explicitly include human rights as part of its mandate. The OAU member states were only required to have "due regard" for the human rights set out in the UDHR.⁷⁵⁰

⁷⁴⁷ Lancaster House Constitution of 1980 as amended.

⁷⁴⁸ Viljoen F, "African Commission on Human and Peoples' Rights" in Heyns C, (ed) *Human Rights in Africa* (1996) 386.

⁷⁴⁹ The OAU is composed of 53 Independent African states and is the largest regional organization. Recently, African states created the African Union (hereinafter the AU) to replace the OAU. The Constitutive Act of the AU was adopted by the OAU Assembly of Heads of States and Governments in Lomé in 2000 and it came into force 2001.

⁷⁵⁰ Article 2 (1) of the OAU Charter.

The ACHPR was adopted by the assembly of heads of states and governments of the Organisation of African Union (OAU) in 1981.⁷⁵¹ The ACHPR, which is the major regional human rights instrument on the African continent, came into force in 1986. It draws from other human rights instruments, and recognises basic civil, political, economic and social rights. Unlike other regional instruments, the ACHPR recognises the so-called third generation (or collective) rights such as the rights to development, and self-determination.

The preamble to the African charter stipulates “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.” The right to freedom of association is entrenched in the ACHPR.⁷⁵²

Article 10 of the Charter provides that “every individual shall have the right to free association provided that he abides by the law. Subject to the obligation of solidarity provided for in article 29, no one may be compelled to join an association.”

The ACHPR provides for a general right to freedom of association. Unlike the American and the European conventions, the African Charter does not specify the types of associations that individuals may form or join. Thus, the ACHPR does not specifically refer to freedom of association for trade union purposes. It provides for a general right to associate whether for political, trade union or any other purpose.

Associations may be of social, cultural and political nature. All are covered under the provisions of article 10. The right to freedom of association is articulated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join associations in order to attain various ends without interference by the State.

⁷⁵¹ The African Charter on Human and Peoples' Rights (21 ILM 58 (1982), hereinafter “the African Charter”) was adopted on the 17th of June 1981 in Banjul.

⁷⁵² ACHPR, Article 10.1.

In regulating the use of the right to associate freely, the competent authorities should not enact provisions, which would limit the exercise of this freedom. The right to associate freely in this Charter is made conditional to the requirement that one abides by the law.

The ACHPR provides for related rights and freedoms.⁷⁵³ It also endorses the right to freedom of association in universal instruments such as the UDHR, ICCPR and ICESCR, as it refers to the UDHR and other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights.⁷⁵⁴

The same goes for those instruments adopted within the UN Specialised Agencies, including the International Labour Organisation (ILO), of which African countries are members.⁷⁵⁵

The adoption of the ACHPR, which clearly and explicitly refers to the UDHR and other international human rights instruments, is evidence of Africa's participation in the global human rights revolution. The ACHPR internationalises human rights on the African continent and "no longer can gross breaches of human rights be swept under the carpet as matters of domestic jurisdiction. It is a Charter of struggle for people, coming a long way after centuries of the slave trade, colonialism and in some areas, despotic governments."⁷⁵⁶

One of the important features of the ACHPR is that it includes economic, social and cultural rights.⁷⁵⁷ In this respect, it resembles the American Convention on Human Rights, but differs drastically from the European Convention on Human Rights, which for political reasons does not incorporate these rights.

⁷⁵³ These include the right to work under equitable and satisfactory conditions, the right to equal pay for equal work, non-discrimination, equality before the law and equal protection of the law, life, dignity, liberty and security of the person, religion and conscience, expression and information, and freedom of assembly (Articles 2, 3, 4, 5, 6, 8, 9 & 11 of the African Charter).

⁷⁵⁴ See Preamble & Article 60 of the African Charter.

⁷⁵⁵ Articles 60 and 61 of the African Charter.

⁷⁵⁶ Umzurike UO., as quoted by Mugwanya *op cit* 31.

⁷⁵⁷ Articles 21 & 22 of the African Charter.

The inclusion of these economic, social and cultural rights in the African Charter was inspired by the UDHR and the ICCPR. The latter states in its preamble:

The ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as social and cultural rights.⁷⁵⁸

Member states of the AU undertook to adopt legislative or other measures to give effect to the provisions of the Charter.⁷⁵⁹

Article 30 of the ACHPR establishes an African Commission on Human and peoples' Rights. The primary function of the African Commission is to promote and protect human and peoples' rights in Africa. The Commission has been actively involved in the promotion of rights' consciousness on the continent. In recognising the importance of the freedom of association and assembly for a democratic society, the African Commission adopted a resolution on freedom of association in 1992.⁷⁶⁰

Since its establishment⁷⁶¹, the African Commission has dealt with a number of cases dealing with the violation of human rights, including the right to freedom of association.⁷⁶² The Commission's jurisprudence recognises that freedom of association and assembly coupled with freedom of expression are designed to promote pluralism. The Commission has held that States are to guarantee pluralism, allow individuals to associate, assemble and express opinions which may compete or conflict with existing opinions or views, including those of the government.⁷⁶³

⁷⁵⁸ See the Preamble to the ICCPR.

⁷⁵⁹ Article 1 of the African Charter.

⁷⁶⁰ For the text of the resolution, see the ICJ Compilation of the Basic Documents October 1991-April 1994 at 40.

⁷⁶¹ The African Commission on Human and peoples' Rights was inaugurated on November 2 1987 and its headquarters was located in Banjul, Gambia.

⁷⁶² See *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* case 102/93, *Constitutional Rights Project and Civil Liberties Organisation and Media Rights Agenda v Nigeria* case 140/94, *Amnesty International v Sudan* case 48/90 and so forth.

⁷⁶³ See for example Communications 25/89, 56/91, and 100/93 also referred to by Mugwanya *op cit* 291.

One of the leading cases decided by the African Commission on freedom of association and trade union rights is *Civil Liberties Organisation in respect of Nigerian Bar Association v Nigeria*.⁷⁶⁴ In this case, the Civil Liberties Organisation, a non-governmental organisation in Nigeria protested against the Legal Practitioners' Decree. This decree established a new governing body of the Nigerian Bar Association, namely the Body of Benchers. Of the 128 members of this body, only 31 were nominees of the Bar Association and the rest were nominees of the government.

The Organisation argued that the new governing body for the Nigerian Bar Association, established by the governmental decree, amongst other things violated the rights of Nigerian lawyers to freedom of association as guaranteed by Article 10 of the ACHPR. The African Commission in this case held that the decree violated the provisions of Article 10 of the ACHPR on that the Body of Benchers was dominated by representatives of the government and had wide discretionary power.

It was further held that this interference with the free association of the Nigerian Bar Association was inconsistent with the preamble of the African Charter in conjunction with UN Basic Principles on the Independence of the Judiciary⁷⁶⁵ and thereby constituted a violation of Article 10 of the African Charter.⁷⁶⁶ The Commission pointed out that states were not to enact provisions which would arbitrarily limit the right to freedom of association and the exercise of this right must be consistent with the state's obligations under the Charter.⁷⁶⁷

Unfortunately, the Commission is not a judicial organ and its function is to try and reach amicable solutions. It only makes recommendations to the Assembly of Heads of States and Governments. Those recommendations are not binding on the States.

⁷⁶⁴ *Civil Liberties Organisation in respect of Nigerian Bar Association v Nigeria* 101/93 (1995).

⁷⁶⁵ UN General Assembly Resolution no.40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁷⁶⁶ *Civil Liberties Organisation in respect of Nigerian Bar Association v Nigeria* at par 24.

⁷⁶⁷ *Idem* par 25.

As a result of this shortcoming, in 1998, the Conference of the Heads of States and Governments of the OAU adopted a Protocol to the ACHPR on the establishment of an African Court of Human rights.⁷⁶⁸

4.4.2.2 Freedom of Association and Trade Unionism under NEPAD

NEPAD is an African initiative designed to 'eradicate poverty and to place African countries, individually and collectively, on the path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic on equal footing'.⁷⁶⁹ Its twin objectives are the eradication of poverty and the fostering of socio-economic development, in particular, through democracy and good governance.⁷⁷⁰

NEPAD was established by the NEPAD Heads of State and Government Implementation Committee (HSGIC) during the 37th session of the OAU Assembly of Heads of State and Government held in July 2001 in Lusaka, Zambia, that adopted the Strategic Policy Framework and a new vision for the revival and development of Africa.⁷⁷¹

The AU inaugural summit held in July 2002 in Durban, South Africa, adopted a Declaration on the Implementation of NEPAD, formerly NAI,⁷⁷² endorsing the NEPAD Progress Report and Initial Action Plan,⁷⁷³ and encouraging AU Member States to adopt the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG)⁷⁷⁴ and to accede to the African Peer-Review Mechanism (APRM).⁷⁷⁵

⁷⁶⁸ The protocol was adopted by the 34th Ordinary Session of the Assembly of Heads of States and Governments, which meet on 10 July 1998 in Ouagadougou, Burkina Faso. It came into force on the 25th January 2004.

⁷⁶⁹ Doc. AHG/235 (XXXVIII), Annex I, par 2.

⁷⁷⁰ *Idem*, par 5.

⁷⁷¹ Doc. AHG/ Decl. I (XXXVII).

⁷⁷² Assembly/AU Doc AHG/Decl. I (1).

⁷⁷³ Doc. AHG/ 235 (XXXVIII).

⁷⁷⁴ *Idem*, Annex I.

⁷⁷⁵ *Idem*, Annex II (APRM Base Document).

The APRM was established as a mechanism to implement NEPAD. It is provided for in the DDPECG⁷⁷⁶ and annexed to this Declaration.⁷⁷⁷ The APRM is pivotal to NEPAD and constitutes the most essential test of its credibility, was officially launched during the 9th summit of the HSGIC held in Kigali, Rwanda, from Friday 13 to Saturday 14 February 2004.

A resolution of the HSGIC during its Kigali meeting recommended that NEPAD, which had so far functioned independently, should be incorporated into the AU structures. The Assembly of Heads of State and Government of the AU Member States later endorsed this resolution during their 2004 summit in Addis-Ababa, Ethiopia.

Human and peoples' rights, including the right to freedom of association, are given a pride of place in the NEPAD and APRM instruments.⁷⁷⁸

4.4.2.2.1 Human and Peoples' Rights in the NEPAD Base Document

The DDPECG is NEPAD's major instrument dealing with human and peoples' rights.⁷⁷⁹ In reviewing the report of the NEPAD HSGIC and considering the way forward, the participating Heads of State and Government of the AU Member States reiterated that they were mindful of the fact that

Over the years, successive OAU Summits have taken decisions aimed at ensuring stability, peace, security, promoting closer economic integration, ending unconstitutional changes of government, supporting human rights and upholding the rule of law and good governance.⁷⁸⁰

⁷⁷⁶ Doc. AHG/235 (XXXVIII), Annex I.

⁷⁷⁷ *Idem*, Annex II.

⁷⁷⁸ On human and peoples' rights under NEPAD and APRM, see Mangu AMB, "What future for human and peoples' rights in Africa under the African Union, the New Partnership for Africa's Development, African Peer-Review Mechanism and the African Court?" (2004) 29 *SAYIL* 136-163; *Idem* "The Changing Human Rights Landscape in Africa: Organisation of African Unity, African Union, the New Partnership for Africa's Development and the African Court" (2005) 23 *Netherlands Quarterly of Human Rights* 379-408.

⁷⁷⁹ Doc. AHG/235 (XXXVIII) Annex I.

⁷⁸⁰ *Idem*, par 3.

The Heads of State and Government then recalled these OAU decisions that stress the importance of the protection of human rights in the development of the continent. These decisions include the African (Banjul) Charter on Human and Peoples' Rights (1981); the African Charter for Popular Participation in Development (1990); the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (1990); the Protocol on the Establishment of an African Court on Human and Peoples' Rights (1998); the 1999 Grand Bay (Mauritius) Declaration and Plan of Action for Promotion and Protection of Human Rights;⁷⁸¹ and the AU Constitutive Act (2000).⁷⁸²

They reaffirmed further their

full and continuing commitment to these and other decisions of our continental organization, as well as the other international obligations and undertakings into which we have entered in the context of the United Nations. Of particular significance in this context are the Charter of the United Nations and the United Nations Universal Declaration on Human Rights and all conventions relating thereto, especially the Convention on the Elimination of All Forms of Discrimination against Women and the Beijing Declaration.⁷⁸³

Human and peoples' rights are therefore central to the NEPAD project. As the Heads of State and Government acknowledged themselves, much more was required from them to advance the cause of human rights in Africa and in the light of Africa's recent history, 'respect for human rights has to be accorded an importance and urgency all of its own'.⁷⁸⁴ As pointed out earlier, these rights include the right to freedom of association, which is among the rights enshrined in the international and regional instruments referred to in the AU and NEPAD documents.⁷⁸⁵

⁷⁸¹ Adopted at the 2000 AU Summit in Lomé, Togo. It was based on an earlier decision of the 1999 Algiers OAU Summit.

⁷⁸² Doc. AHG/235 (XXXVIII), par 3 (a)-(I).

⁷⁸³ *Idem*, par.4.

⁷⁸⁴ *Idem*, par.10.

⁷⁸⁵ See, for instance, the UDHR and all conventions relating thereto, including the ICCPR and the ICESCR, which are referred to in the NEPAD Declaration on Democracy, Political, Economic and Corporate

Contrary to the past marked by lofty and empty declarations which were never implemented, African Heads of State and Government considered concrete actions in terms of which their commitments could be assessed and established themselves a mechanism to guide and monitor their actions.

Accordingly, in order to achieve NEPAD's objectives which all revolved around the protection and promotion of human and peoples' rights in Africa, they separately agreed to establish an APRM on the basis of voluntary accession to promote adherence to and fulfilment of the commitments contained in the Declaration.⁷⁸⁶

4.4.2.2 Human and Peoples' Rights under the APRM

The APRM spells out the institutions and processes that could guide future peer reviews, based on mutually agreed codes and standards of democracy, political, economic and corporate governance.

The APRM is defined in the base document as '[a]n instrument voluntarily acceded to by Member States of the African Union as an African self-monitoring mechanism'.⁷⁸⁷ Participation in the APRM is open to all AU Member States on a voluntary basis. After the adoption of the DDPECG, countries wishing to participate in the APRM will notify the Chairman of the NEPAD HSGIC. This will entail an undertaking to submit to periodic peer reviews, as well as to facilitate such reviews, and be guided by agreed parameters for good political, economic and corporate governance.⁷⁸⁸ The DDPECG is therefore the document on which the work of the APRM is based.

Governance of 2002. See Heyns C & Kilander M (eds) *Compendium of Key Human Rights Documents of the African Union* (2006) 294.

⁷⁸⁶ Doc. AHG/235 (XXXVIII), par 28.

⁷⁸⁷ *Idem*, Annex II, par 1.

⁷⁸⁸ *Idem*, par 5.

The overarching goal of the APRM is for all participating countries to accelerate their progress towards adopting and implementing the priorities and programmes of NEPAD, achieving the mutually agreed objectives in compliance with the best practice in respect of each of the areas of governance and development. Every review exercise carried out under APRM authority must be technically competent, credible and free of political manipulation.⁷⁸⁹

The primary purpose of the APRM is

To foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and accessing the needs of capacity building.⁷⁹⁰

The mandate of the APRM is to ensure that the policies and practices of the participating States conform to the agreed political, economic and corporate governance values, codes and standards contained in this Declaration.⁷⁹¹ These values, codes and standards include the protection of human and peoples' rights, as provided for in international and regional instruments ratified by African states. The protection of the right to freedom of association is one of those values, codes and standards to be considered during the peer-review process.⁷⁹²

Algeria, Botswana, Burkina Faso, Cameroon, Comoros, Ethiopia, Kenya, Gabon, Ghana, Mali, Mauritius, Mozambique, Nigeria, Republic of Congo, Rwanda, Senegal, South Africa, and Uganda adhered to APRM and adopted the rules, criteria, procedures and calendar for its evaluations.

⁷⁸⁹ Doc. AHG/235 (XXXVIII), Annex II, par 4.

⁷⁹⁰ Doc. AHG/235 (XXXVIII), Annex II, par 3.

⁷⁹¹ *Idem*, par 2.

⁷⁹² The questionnaire for Country self-assessment for the APRM as prepared by the Panel of Eminent Persons, lists standards and codes for self-assessment. These standards and codes consist of international and regional instruments such as the UDHR, the ICCPR, the ICESCR, and the ACHPR which also protect freedom of association. See Heyns & Kilander *op cit* 304-305.

It is only after all AU Member States participating in the NEPAD and the APRM process have been subjected to impartial peer review and the Heads of State and Government of other participating member countries have responded to the final reports of the review teams that it will be possible to make a more conclusive assessment on the extent to which these countries have adhered to the values, codes and standards set up in the NEPAD and APRM instruments and in international instruments such as those protecting the right to freedom of association.

4.5 Protection of Freedom of Association and Trade Unionism in International Law

The right to freedom to form and belong to associations, whether trade unions, religious or political parties is regarded today as an important aspect of international human rights. On the importance of international human rights law and standards, Keightly remarked:

In many respects, international standards have been at the forefront of developments in human rights. It seems devious therefore that if human rights are to be afforded full recognition and protection in future...it will be crucial for the governing authorities to adopt appropriate existing international instruments as the international standards will serve to buttress whatever domestic human rights standards are included in domestic constitution.⁷⁹³

In the workplace, freedom of association takes shape in the right of workers to organize to defend their interests. Most often, workers organise by forming and joining trade unions.

Although trade unions are essentially national institutions functioning within nationally determined rules, they have for about a century maintained international associations for co-operation and mutual support.

⁷⁹³ Keightly R, "International Human Rights Norms in a New South Africa" (1992) 8 *SAJHR* 171-172.

Of course, until World War I the international dimension of trade unionism was, in effect, confined to Europe where the trade unions shared, by and large, common ideological outlook, similar problems of organisation and more or less the same difficulties in dealing with employers and the State.⁷⁹⁴ Awareness of these common elements led to the creation of modest international associations for limited practical objectives within a democratic socialist perspective.⁷⁹⁵

Freedom of association is generally protected by international human rights law that is embodied in conventions, rules and principles aimed at promoting and defending human rights. It is particularly protected in international labour law, which is based on the Conventions negotiated within the framework of the ILO.

4.5.1 Freedom of Association, Trade Unionism and International Human Rights Law

Workers' rights are human rights. The first sign of a deteriorating situation in a country is often the violation of the right to freedom of association, the most fundamental of workers' rights.⁷⁹⁶

The aim of the human rights revolution that led to the adoption of the UN Charter⁷⁹⁷ followed by the UDHR and other international and regional human rights instruments was to ensure the global respect and promotion of human rights and fundamental freedoms.⁷⁹⁸

⁷⁹⁴ Windmuller JP, *The International Trade Union Movement* (1980) 3.

⁷⁹⁵ *Idem*.

⁷⁹⁶ Leary VA, "The Paradox of workers' rights as human Rights" in Lance A *et al*, (eds) *Human Rights, Labor Rights and International Trade* (1996) 22.

⁷⁹⁷ U.N.T.S xvi, (hereinafter the UN Charter).

⁷⁹⁸ Mugwanya *op cit* I.

International human rights law exists principally as conventional international law. There are a whole host of international human rights instruments namely, treaties, conventions or agreements and declarations of various types which together provide the main source of international law. These create direct obligations for States, whether of general, universal⁷⁹⁹ or regional⁸⁰⁰ character.

Freedom of association and trade unions' rights will first be examined under the international bill of rights, namely the UDHR, the International Covenant Civil and Political rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and under those of international labour law, the ILO Conventions.

4.5.1.1 UDHR

The 30-article Universal Declaration of Human Rights,⁸⁰¹ as a “common standard of achievement for all peoples and all nations”,⁸⁰² proclaims: “the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace of the world.”⁸⁰³

Key among rights and freedoms considered essential to human dignity and social progress are the rights to freedom of assembly and association.

Article 20 of the UDHR provides:

1. Everyone has the right to freedom and peaceful assembly and association.
2. No one may be compelled to belong to an association.

⁷⁹⁹ For example, the United Nations Charter, the Universal Declarations of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights.

⁸⁰⁰ For Example the African Charter on Human and Peoples Rights, the American Convention on Human Rights and the European Convention on Human Rights.

⁸⁰¹ Universal Declaration of Human Rights GA Res 217 (III) 1948 adopted by the United Nations General Assembly on 10 December 1948.

⁸⁰² Preamble to the UDHR.

⁸⁰³ Idem.

An interesting feature of the right to freedom of association in the UDHR is its broadness. The right to freedom of association is not restricted to any specific area and may be claimed whether in the political, economic or any other social domain.

As pointed out earlier and as is evident from the UDHR, the right to freedom of association cannot be isolated from other freedoms and fundamental rights, particularly the right to peacefully assemble,⁸⁰⁴ the right to social security,⁸⁰⁵ and the right to work and to equal pay for equal work,⁸⁰⁶ which includes the “right for everyone to form and join trade unions for the protection of his interests”.⁸⁰⁷ The UDHR expressly protects both the negative and the positive right to associate.⁸⁰⁸ However, it does not make any specific reference to the right to strike.

The UDHR is not a treaty as such, and is therefore not legally enforceable against States. It was initially not intended to be legally binding, but rather “a guiding light to all those who endeavoured to raise man’s material standard of living and spiritual condition ... a moral obligation on the different countries to find ways and means of giving effect to the rights proclaimed therein.”⁸⁰⁹

However, as an “inspirational” declaration intended to serve as a common standard for all peoples and nations it enjoys an unquestionable moral force and persuasive character within the international community.⁸¹⁰

⁸⁰⁴ Article 20 (1) of the UDHR.

⁸⁰⁵ Article 22.

⁸⁰⁶ Article 23.

⁸⁰⁷ Article 23.4.

⁸⁰⁸ Articles 20(1) & (2).

⁸⁰⁹ United Nations Plenary Meeting, Official Records of Third Session, Part I (1948) 873, Netherlands Delegate. Also quoted by Umzurike *op cit* 11.

⁸¹⁰ Maluwa *op cit* 24.

With its constant repetition and reaffirmation in subsequent universal and regional instruments, and in national constitutions, it is argued that at least some of its provisions have achieved the status of customary international law.⁸¹¹

In an attempt to transpose the UDHR into an enforceable instrument, in 1951, the UN General Assembly mandated the Economic and Social Council (ECOSOC) to task the Commission on Human Rights to prepare a draft Covenant on human rights.⁸¹²

After realising the problems which might be encountered by embodying in one document civil and political rights together with socio-economic rights, the ECOSOC invited the General Assembly to reconsider its decision. After a long debate, the General assembly requested the Commission on Human Rights to draft two covenants on human rights: one containing civil and political rights and the other economic, social and cultural rights.⁸¹³ Both Covenants include provisions protecting freedom of association and trade union rights.

4.5.1.2 ICCPR and ICESCR

The right to freedom of association including the right of employees to form and join trade unions of their choice is considered both a civil right and an economic right and accordingly included in both the ICCPR⁸¹⁴ and the ICESCR.⁸¹⁵

⁸¹¹See Waldock CH, *Human Rights in Contemporary International Law and the Significance of the European Convention* quoted by Umozurike *op cit* 11; Dugard J, *International Law: A South African Perspective* (2000) 34, 241.

⁸¹² See United Nation Action in the Field of Human Rights (New York 1980) 9. See also Ben-Israel R., *International Labour Standard: The Case of the Freedom to Strike* (1988) 71-72.

⁸¹³ See United Nation Action in the Field of Human Rights *op cit* 10.

⁸¹⁴International Covenant on Civil and Political Rights 1966 999 UNTS 171; 6 ILM 368 (1967). Hereinafter "the ICCPR".

⁸¹⁵ International Covenant on Economic, Social and Cultural Rights UNTS 3 (1967) 6 ILM 360 (1960). Hereinafter "the ICESCR".

Article 22 of the ICCPR provides that “everyone shall have the right to freedom of association with others including the right to form and join trade unions for the protection of his interests.”

It applies to a wide range of activities, which may be political, economic and social in the sense that the right to freedom of association would cover the right to form and join a political party, a trade union or a football club.

As compared with the UDHR, the right to freedom of association in the ICCPR presents a number of distinctive features. First, unlike the UDHR, which enshrined the right to “peacefully assembly and association” as a single freedom, the rights to freedom of assembly and association although related are protected separately in the ICCPR.⁸¹⁶

Secondly, the right to freedom of association in the ICCPR is subject to restrictions. However, to be valid, these restrictions must be prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals, the protection of the rights and freedoms of others.⁸¹⁷ Thirdly, the right to freedom of association in the ICCPR includes the right for everyone “to form and join trade unions”,⁸¹⁸ which was however dealt with under the right to work and to equal pay for equal work under the UDHR.

In the light of the above, the protection of freedom of association is more elaborated in the ICCPR than in the UDHR. However, like the UDHR, the ICCPR does not refer to the right to strike. Freedom of association is not as such protected in the ICESCR. Related to freedom of association in the ICESCR are, however, the rights to work and the right to just and favourable conditions of work, and especially trade union rights.⁸¹⁹ Trade union rights occupy a prominent role in international legal instruments promoting economic, social and cultural rights.

⁸¹⁶ Articles 21 and 22(1).

⁸¹⁷ Article 22 (2) of the ICCPR.

⁸¹⁸ Article 22 (1).

⁸¹⁹ Articles 6, 7 & 8 of the ICESCR.

Under the ICESCR, trade union rights include the following:

- (a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- b) the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade unions organizations;
- c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- d) the right to strike, provided that it is exercised in conformity with the laws of the particular country.⁸²⁰

The ICESCR discusses trade union rights in more detail. Unlike the ICCPR which does not refer to the right to strike, the ICESCR proclaims “the right to strike, provided that it is exercised in conformity with the laws of the particular country.”⁸²¹ The rights protected in Article 8 of the ICESCR, are to be implemented immediately, rather than progressively. Neither of the two UN covenants makes specific reference to the right to bargain collectively.

4.5.2 Freedom of Association and Trade Unionism in International Labour Law

This section examines first freedom of association and trade unions in international labour law and then proceeds to consider the enforcement of the ILO instruments and the jurisprudence of the ILO Committee on Freedom of Association.

⁸²⁰ Article 8 of the ICESCR.

⁸²¹ Article 8(d).

4.5.2.1 Freedom of Association and Trade Unionism in International Labour Law Instruments

International labour instruments adopted within the ILO include the ILO Constitution itself, Conventions 87 and 98, Workers Representative Convention, Labour Relations Public Service Convention, and the 1998 Declaration of Fundamental Principles and Rights at Work.

4.5.2.1.1 Sources of International Labour Law and Genesis of the ILO

From the origin of labour law, it was felt that national legislation on labour matters could not be more firmly established in individual countries if it was not supported by parallel standards adopted internationally.⁸²²

According to Valticos and Von Potobsky, the first move towards international labour conventions dates back to the beginning of the 19th century. Robert Owen, in England, Blanqui and Villerme in France and Dupétiaux in Belgium are considered to be the forerunners of the idea of the international regulation of labour matters, but this idea has been put forward most systematically by David Legrand, an industrialist from Alsace who defended it and developed it in repeated appeals addressed from 1840 to 1855, to the governments of the European countries.⁸²³ In 1905 and 1906 the Swiss government convened an international conference which adopted the first two International Labour Conventions.

⁸²² Valticos R & Von Potobsky G, *International Labour Law* (1995) 17.

⁸²³ *Idem*.

At the end of the First World War, in 1919, the League of Nations and the ILO were established.⁸²⁴ The ILO is a UN specialised agency, which deals with workers rights in general. It is the first international organisation which emphasised the fundamental value of freedom of association. It consists of three organs, namely the International Labour Conference,⁸²⁵ the Governing Body⁸²⁶ and the International Labour Office.⁸²⁷

The ILO set about adopting International Conventions on Conditions of Work. After the World War I, the only instruments that really protected human rights were the Slavery Convention adopted by the League of Nations in 1926 and the Forced Labour Convention⁸²⁸ adopted by the ILO in 1930 to develop the coverage of labour aspects of slavery. International labour law mainly developed within the ILO is based on the right to freedom of association.⁸²⁹

⁸²⁴ Sweepston *op cit* 171; Betten L, *International Labour Law* (1993) 12-13.

⁸²⁵ The International Labour Office is the permanent secretariat of the ILO because it is part of the structure, which services all the others. The office is controlled by the tripartite governing body, which appoints the members of the staff, subject to the regulations approved by the Governing body. It functions as an administrative agency, a research and documentation center and an action center for the documentation. The office prepares the essential background material for the ILO conferences and other meetings. The Office also recruits and guides the ILO's technical co-operation experts throughout the world.

⁸²⁶ The Governing body is the executive council of the ILO and its members are elected every three years at the Conference. It meets three times in a year. It establishes the agenda for the International Labour Conference and for other meetings. It also directs the activities of the International Labour Office. It is thus the hub around which all ILO activities revolve.

⁸²⁷ The International Labour Conference is often called the International Parliament of Labour. It has several measure tasks such as working out and adoption of international labour standards, approving the work programme and the budget for the International Labour Office every 2 years, providing guidelines for the organization's policies and future activities, etc. During the International Labour Conference, each member state is entitled to send a four member delegation composed of two government delegates, one employer's delegate and one workers' delegate.

⁸²⁸ Convention No 29 of 1930.

⁸²⁹ The first Convention regulating freedom of association adopted by the ILO Conference was the Right of Association (Agriculture) Convention No 11 of 1921. This Convention dealt with the Right of Association in Agriculture, where the need for some regulation of this kind was particularly urgent. It confined itself by saying that any member of the ILO covered by its terms must undertake to grant all persons employed in agriculture the same rights of association and combination as workers in industries and must repeal any legislative or other provisions having the effect of restricting the rights of agricultural workers in this respect.

The ILO is firmly committed to the principle that all workers should enjoy the right to belong to trade unions, and these unions in order to serve the interest of their members should not only be free and independent of external pressures, but must also be well organised, well informed and well led.⁸³⁰ Since 1948, the ILO and the UN have developed parallel lines issues on freedom of association. According to the Constitutive Act of the ILO or the ILO Constitution, freedom of association must be protected as a means of improving conditions of labour and establishing peace.⁸³¹ Within the ILO, freedom of association is principally protected by two major instruments, which were adopted in 1948 and 1949 respectively, namely Conventions 87 and 98.

One of the most important functions of the ILO is the development of international labour standards. The ILO is not only charged with developing international conventions and recommendations, it also has a system of supervision that monitors efforts by member States to implement the conventions. It also examines their laws and practices in terms of their conformity to ILO standards. The system includes a committee of experts, which examines compliance with a list of conventions each year, and a committee at the annual international labour conference which discusses the report of experts and in turn report to the full conference. There is also the ILO Governing body, which guides the work of the ILO along with the Annual International Labour Conference, has a committee on freedom of association, which deals with complaints from trade unions and employers' organisations concerning the violation of the right to associate and to organise.

⁸³⁰ *Trade Unions and The ILO: A Workers Education Manual* (1988) V.

⁸³¹ Preamble to the ILO Constitution read with Preamble to the Convention No 87 of 1948.

As the ILO Committee of Experts on the Application of Conventions and Recommendations stated in its report:

The Universal Declaration ...is generally accepted as a point of reference for human rights throughout the world, and as the basis for most of the standard setting that has been carried out in the United Nations and in many other organisations since then....The ILO standards and practical activities of human rights are closely related to the universal values laid down in the Declaration... The ILO's standards on human rights along with the instruments adopted in the UN and in other international organisations give practical application to the general expression of human aspirations made in the Universal Declaration of Human Rights, and have translated into binding terms and principles of that noble document.⁸³²

All ILO member states, even if they have not ratified the ILO conventions, have an obligation to respect, to promote and to realise, in good faith and in accordance with the Constitution of the ILO, the principles concerning the fundamental rights which are the subject of those Conventions, namely freedom of association and the effective recognition of the right to collective bargaining.⁸³³

Workers' freedom of association in human rights instruments has been complemented by legal guidelines on international labour norms developed in detail by the ILO. These norms set forth the right to organise, the right to bargain collectively and the right to strike as fundamental rights. They are inextricably tied to the exercise of the right to freedom of association and must be protected by national governments.⁸³⁴

⁸³² ILO Report of the Committee of Experts on the Application of Conventions and Recommendations: General Report and Observations concerning particular Countries, Report III (Part IA), International Labour Conference, 86th Session, 1998, Geneva, 16-17 pars 56-58.

⁸³³ See the ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 7.

⁸³⁴ Nearly every country is a member of the ILO. Each country is bound by the ILO Conventions 87 and 98 dealing with freedom of association whether or not they have ratified those conventions, since freedom of association is taken to be a constitutional norm binding on countries by virtue of their membership in the organization. See the Fact Finding and Conciliation Commission on Chile, (ILO, 1975), par 446.

For the ILO, its principles concerning freedom of association have universal value, and form an element of fundamental human rights. According to Jenks, the organisation's principles in this area do not presuppose any single pattern of the formation of unions; each movement must necessarily adapt to the political, social and economic system in which it operates. Nevertheless, these principles define the essence of freedom of association, and are the benchmark against which the freedom of the trade union movement must be judged.⁸³⁵ As a reward for its hard work, the ILO was awarded the Noble Peace Prize in 1969 for its achievements in the area of the international protection of fundamental rights.⁸³⁶

The ILO itself has no right to seek to organise workers or in anyway to interfere with trade union activities. It offers its assistance and co-operation to the trade union movement, in areas relevant to its terms of reference, only when requested to do so by the unions themselves.⁸³⁷

4.5.2.1.2 ILO Constitution

Freedom of association is considered a core labour standard by the ILO.⁸³⁸ The original Constitution of the ILO, which was adopted in 1919, bears clear witness to the importance of the respect for the principles of freedom of association not only for the functioning of the organisation but also as *raison d'être*.⁸³⁹ As such, freedom of association is one of the central provisions underpinning the work of the ILO.

⁸³⁵ Speech by Jenks CW, then ILO Deputy Director-General, to the Instituto de Estudios Políticos (Madrid), 9 March 1965, as quoted by Hector Bartolomé de la Cruz et al, *The International Labour Organisation: the International Standard System and Basic Human Rights* (1996) 167.

⁸³⁶ Betten *op cit* 65.

⁸³⁷ Trade Unions and The ILO *op cit* V.

⁸³⁸ This is recognized and given effect through several instruments adopted by the ILO, including the ILO Constitution, ILO conventions such as Convention 87 and 97, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the ILO Convention 135 concerning the Protection of the Right to Organize and Procedure for determining Conditions of Employment in Public Service and the Declaration of Fundamental Principles and rights at Work of 1998.

⁸³⁹ Betten *op cit* (1994) 1.

The preamble to the original Constitution of the ILO underlines “the recognition of the principle of freedom of association” as one of the means of improving the conditions of workers and ensuring peace at the workplace and as such the principal object of the organization. Whilst former Article 41(2) of the ILO Constitution stressed that the “right of association for all lawful purposes by the employed as well as by employers” is the principle of outmost importance and urgency.

In 1944, while the Second World War was still going on, the International Labour Conference held its 26th session in Philadelphia, USA, and adopted a declaration in which it sought to redefine the aims and the purposes of the ILO together with the principles that should inspire the policy of its members. The Conference reaffirmed the special status of the notion of freedom of association. It listed freedom of association as one of the fundamental principles on which the organization is based.⁸⁴⁰

The Declaration stressed that “freedom of expression and association are essential to sustained progress.”⁸⁴¹ This affirmation serves to emphasize not only that the right to associate is an important value in itself, but also that respect for the principle of freedom of association is an essential precondition of the effectiveness of the ILO as a tripartite organization.⁸⁴² Meaningful tripartism necessarily depends upon the existence of free and effective organisation of employers and workers.⁸⁴³ Similarly, such organization can develop and function only in an environment where there is proper respect for the right of workers and employers to associate freely and to organise their activities.

⁸⁴⁰ Article 1 of the Declaration of Philadelphia of 1944.

⁸⁴¹ Articles I (b) and III (e).

⁸⁴² Hepple B *et al*, (eds) *Human Rights and Labour Law: Essay for Paul O' Higgins* (1994) 1-2.

⁸⁴³ Novitz T, *International and European Protection of the Right to Strike* (2003) 109.

Also advocated in the Declaration was the “effective recognition of the right to collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency and the collaboration of workers and employers in the preparation and application of social and economic measures.”⁸⁴⁴

In 1946, the Declaration was incorporated in the Constitution of the ILO, and a new preamble was adopted which also endorsed the ‘recognition of the principle of freedom of association’ as one of the main methods by which social justice, and therefore ‘universal and lasting peace’ could be attained.⁸⁴⁵

The ILO has adopted a number of conventions concerned with the rights of workers to organize and bargain through trade unions. Special supervisory mechanisms were set up to monitor compliance with these conventions.

Even though the principle of freedom of association was recognised in the 1919 Constitution of the ILO, which was reaffirmed by the Declaration of Philadelphia, the general conventions regarding this principle were adopted from 1948 onwards.

The most relevant international agreements on the right to freedom of association and the protection of trade union rights are ILO Conventions 87 and 98.⁸⁴⁶

⁸⁴⁴ Swepston *op cit* 169.

⁸⁴⁵ Creighton WB, “Freedom of Association” in Blanpain R *et al*, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (1990) 23, Yaraslau Kryvoi, “The Relationship Between the State and Trade Unions on the Labour market: The Belarusian Case” in Blanpain R, (ed) *Collective Bargaining, Discrimination, Social Security and European integration* (2003) 223-230, Byre A, *Human Rights at the Workplace: A Handbook for Industrial Relation Practitioners* (1988) 6-11, Simpson B, *Human Rights and The End of the Empire* (2001) 149-190.

⁸⁴⁶ Convention 87 of 1948 “Freedom of Association and the Right to Organise Convention” and Convention 98 of 1949 “The Right to Organise and Collective Bargaining Convention”.

4.5.2.1.3 ILO Convention No 87

The ILO Convention 87 of 1948⁸⁴⁷ establishes general standards for freedom of association and the right to organise. It confines itself to defining very clearly certain fundamental principles, which in the view of the International Labour Conference should enable both employers and workers to exercise their right to organise freely. It is the first major ILO instrument protecting freedom of association.

The Convention guarantees to all employers and workers, including supervisors the right to freely establish and join organisations of their own choosing subject only to the rules of the organisation. According to the Convention:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.⁸⁴⁸

The purpose of Article 2 of the Convention is not only to protect workers against attempts by employers to prevent them from organising but also to ensure that there is freedom for all to exercise the right to organise in relation to public authorities.⁸⁴⁹ The kind of organisation referred to in article 2 is defined in Article 10.⁸⁵⁰ The right to organise is recognised to workers and employers without any distinction.⁸⁵¹

⁸⁴⁷ Part I of the Convention deals with Freedom of Association (Article 1-10). Part II concerns the Right to Organise (Article 11), Part III (Article 12) with Miscellaneous, and Part IV contains the Final provisions.

⁸⁴⁸ Article 2 of the Convention No 87 of 1948.

⁸⁴⁹ International Labour Office, *Freedom of Association: An international Survey* (1975) 3.

⁸⁵⁰ Article 10 defined an organization as "any organization of workers or employers for furthering and defending the interests of workers and employers."

⁸⁵¹ Article 9.

By using the expression “without distinction whatsoever”, the Convention intended to give all employers and workers including public officials the right to organise without distinction of sex, race, religion, social opinion, political opinion, etc.⁸⁵² The ILO Committee of Experts on the Application of Conventions and Recommendations has considered that the provisions requiring that a different organisation be set up for each category of public employees are incompatible with the right of workers to establish and join organisations of their own choosing.⁸⁵³ The only restriction which is allowed is in the case of members of the armed force and police.

Under this Convention, States are authorised to decide to what extent members of the armed and police services⁸⁵⁴ may exercise this right.⁸⁵⁵ The provisions of Article 9 of this Convention, permits either the total exclusion of this categories of workers from the coverage of the Convention, or the recognition of some limitation of their rights to freedom of association. The Committee on Freedom of Association made it clear that “this is a matter which has been left to the discretion of the States members of the ILO”.⁸⁵⁶

The Committee of Experts emphasised that employers, including managerial staff and executive staff in state run enterprises, are covered by Convention No 87 and that their right to organise should be protected fully.⁸⁵⁷

⁸⁵² General Survey of the Reports on the Freedom of Association and the Right to Organise Convention Nos 87 of 1948 and The Right to Organise and Collective Bargaining Convention No 98 of 1949 in 1994. (hereinafter called the “General Survey” 1994) Paras 48-49.

⁸⁵³ ILO Report of Experts on the Application of conventions and Recommendations, Report III (Part IV), International Labour Conference 48th Session, Geneva, 1964, 130.

⁸⁵⁴ Most countries deny the armed services the right to organize, although in some cases, they may have the right to group together, with or without restriction, to defend their occupational interests. In some countries their rights are confined to establishing and joining their own organizations only.

⁸⁵⁵ See Article 9 of Convention 87 of 1948 and Article 5 of Convention 98 of 1949.

⁸⁵⁶ General Survey, 1994, par 55.

⁸⁵⁷ Idem pars 66 & 67.

Article 2 also makes reference to “previous authorisation”, this means in effect that workers and employers should not have to seek permission from public authorities before setting up an industrial organisation or association.

Thus the Conference intended to proclaim the fact that the right to organise was an absolute right to be respected by everybody including the State itself.⁸⁵⁸ This article implies that the authorities should not impose legal formalities which would be equivalent, in practice to previous authorisation nor constitute an obstacle amounting to a prohibition.⁸⁵⁹ It expressly precludes governmental authorities from interfering in the organisation’s internal affairs including suspension or dissolution by administrative authorities. Article 2 of this convention has been interpreted as guaranteeing the right to freedom of association for trade union purposes and not the right of association which falls into the competence of other international organisations.⁸⁶⁰

Workers’ and employers’ organisations are entitled to draw up their constitutions and rules to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes without any interference by the public authorities.⁸⁶¹ Article 3 provides that the public authorities shall refrain from any interference that would restrict them or impede their lawful exercise. These provisions may be read in conjunction with the provisions of article 8.⁸⁶²

⁸⁵⁸ International Labour Office, *Freedom of Association: An international Survey* ...37.

⁸⁵⁹ *Idem* 3.

⁸⁶⁰ Potter EE, *Freedom of Association, The Right to Organise and Bargain Collectively: The Impact on the US Law and Practice of Ratification of ILO Conventions Nos 87 and 98* (1984) 8.

⁸⁶¹ Article 3, which deals with collective rights of the organizations themselves.

⁸⁶² Article 8 is in two parts. First, in exercising the rights provided for in the convention, workers and employers and their respective organizations, like other persons or organized groups, shall respect the law of the land; and secondly, the law of the land shall not be such as to impair, nor shall it be so implied as to impair the guarantees provided for in the convention.

Workers and employers also enjoy the right to establish and join federations and confederations and any such organisation, federation or confederation has the right to affiliate with international organisations of workers and employers.⁸⁶³

Each ILO member state must protect the right of workers and employers to freedom of association and to organise. On the other hand, workers and employers' organisations are free to develop their activities without interference by the public authorities.⁸⁶⁴

The importance of Convention No 87 of 1948 in protecting the right to freedom of association is such as it is specifically referred to in the two United Nations Covenants, namely the ICESCR and ICCPR, which provide:

Nothing in this article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning freedom of association and protection of the right to organize, to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.⁸⁶⁵

This Convention is silent on whether the right of workers to form and join organisations of their own choosing include the right not to form and join those organisations. But according to the ILO, it is essential that all workers and employers enjoy the right and the freedom to establish and join organisations that they consider will best further their occupational interests.

In interpreting Convention No 87, the ILO Committee on Freedom of Association held that though the Convention did not explicitly refer to the right to dissociate, the general right to dissociate is included in the right to associate.⁸⁶⁶ This means that the employees are free to join and form such organisations.

⁸⁶³ Article 5 ILO Convention No 87.

⁸⁶⁴ Articles I & II.

⁸⁶⁵ Article 22.3 of the ICCPR (Freedom of Association) read with Article 8.3 of the ICESCR (Trade unions rights).

⁸⁶⁶ Report of the Committee of experts on the Application of Conventions and Recommendations 1959 Report III (Part IV) 109.

Trade union security arrangements are only acceptable if they are concluded by free agreement between workers' organisation and employers. The law must not impose them.⁸⁶⁷

4.5.2.1.4 ILO Convention No 98

The adoption of Convention No 98 on the right to the freedom of association and protection of the right to organize, marked the first step in the process of international regulation. A year later, the International Labour Conference took the second step by adopting the Right to Organise and Collective Bargaining Convention No 98 of 1949.⁸⁶⁸ This Convention supplemented the ILO Convention No 87 of 1948. It contains further safeguards concerning the right to organize and makes provision for the development of the machinery of collective bargaining.

It particularly deals with the right to organise and bargain collectively and also provides for adequate protection for workers, employers and trade unions or workers' organizations from acts of interference by other parties. Although the convention refers also to the rights of employers, it is more particularly concerned with those of workers. It was set out to protect trade unionists and their organisations against possible threats by employers or their organisations. Workers are protected against acts of anti-union discrimination in respect of their employment.⁸⁶⁹

The Convention intended protecting workers against acts of discrimination and victimization by their employers on account of their trade union membership or activity. Acts envisaged are those calculated to make the employment of a worker subject to the condition that he or she shall not join a union or shall relinquish union membership.

⁸⁶⁷ General Survey, pars 102-103.

⁸⁶⁸ Hereinafter "Convention 98 of 1949".

⁸⁶⁹ Article 1.1 of the Convention.

The latter include acts of dismissal and other acts designed to cause prejudice to a worker by reason of union membership or because of his or her participation in union activities outside working hours, or with the consent of the employer, within working hours.⁸⁷⁰

Workers and employers' organisations also enjoy protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.⁸⁷¹

According to the Convention, the State is bound to establish, where necessary, machinery appropriate to national conditions for the purpose of ensuring respect for the right to organise as defined in the Convention.⁸⁷²

One of the fundamental principles on which the ILO is based is the right of employees to form and join trade unions and the right of unions to operate freely and to pursue the interests of their members. Neither the Constitution of the ILO nor any of its conventions on freedom of association made any explicit reference to the right to strike. No express link is made between freedom of association and the right to strike. However, the creation of the ILO Committee on Freedom of Association (CFA) led to the recognition of such connection, which has since been acknowledged by the Committee of Experts and other ILO supervisory organs.⁸⁷³ The CFA has indicated on numerous occasions that the right of employees to strike is an essential element of the right to freedom of association and one of the essential elements of trade union rights.⁸⁷⁴

⁸⁷⁰ Article 1.2. of the ILO Convention No 98.

⁸⁷¹ Article 2.1.

⁸⁷² Article 3.

⁸⁷³ Novitz *op cit* 185.

⁸⁷⁴ Committee on Freedom of Association, Second Report (1952), Case No 28 (Jamaica), in Sixth Report of the International Labour Organisation to the United Nations (Geneva), Appendix 5, 181, para 27.

The Committee of Experts considers the right to strike as one of the essential means available to all workers and their organisations for the promotion and protection of their economic and social interests.⁸⁷⁵ The CFA has interpreted the two Conventions on freedom of association as implying the right to strike.⁸⁷⁶ The provisions of Convention 87 which give a legal basis to this principle are Articles 3, 8 and 10.

According to the Committee of Experts, a general prohibition of the right to strike constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members,⁸⁷⁷ and of the right of members to organise⁸⁷⁸ their activities.⁸⁷⁹ It is also considered to be inconsistent with the obligation to accord proper respect to the principles of freedom of association as resulting from their adherence to the ILO Constitution.

The ILO has maintained that the right to strike is an essential element of the right to freedom of association, but recognises that strikes may be restricted by law where public safety is concerned, as long as adequate alternatives such as mediation, conciliation, and arbitration provide a solution for workers who are affected.

Any domestic law of a member State which prohibits in general or restricts in particular the right to strike must comply with the two ILO Conventions on freedom of association.⁸⁸⁰ The Supervisory body has accepted that governments may legitimately impose certain pre-conditions on the right to strike.⁸⁸¹ However, all that pre-conditions on the right to strike must be reasonable and must not be such as to place substantial limitation on the means or action open to trade union organisations.⁸⁸²

⁸⁷⁵ 1983 Report of the Committee of experts, par 2000.

⁸⁷⁶ General Survey, 1994 par 179.

⁸⁷⁷ 1983 Report of the Committee of experts, par 205.

⁸⁷⁸ Provided in Article 3 of Convention 87 of 1948.

⁸⁷⁹ General Survey, 1973, par 107.

⁸⁸⁰ Birk R, "Derogations and Restrictions on the Right to Strike Under International Law" in Blanpain R, (ed) *Labour Law, Human Rights and Social Justice* (2001) 99.

⁸⁸¹ These may include the giving of strike notice, the holding of ballots, the recourse to compulsory conciliation and arbitration.

⁸⁸² General Survey 1994 pars 170-172.

The ILO accepts that strikes are regarded as acceptable only if they are embarked upon with the aim of furthering economic, social and occupational interests of workers. The use of the term “worker” in these two conventions is clearly broader and it includes the self-employed and those looking for a job. Although the emphasis of the ILO in both conventions is placed on the positive right to associate freely, it seems as the ILO partly and implicitly recognises a right not to associate.

Conventions 87 and 98 and their associated supervisory mechanisms have acquired a degree of acceptance amongst the international community, which not only renders them uniquely authoritative in relation to freedom of association, but which makes them some of the most respected international instruments in the field of human rights.⁸⁸³

There is no remedy for individuals under these conventions. The conventions are enforced by workers’ organisations making complaints to a special ILO Committee (the governing body’s committee on freedom of association), that they are not observed by the State and employers. The committee then decides whether the complaint is justified or not.⁸⁸⁴

The ILO mentions both freedom of association and the right to bargain collectively in its constitution to which all member countries are bound.⁸⁸⁵ The ILO Conventions 87 and 97 are not exhaustive of the concept of freedom of association. They are entirely silent about issues such as the protection of trade union funds and the confidentiality of communications.

⁸⁸³ Creighton *op cit* 19-20. See also Novitz *op cit* 110.

⁸⁸⁴ Morris G, *Law at the Workplace: Union Members* (1980) 11.

⁸⁸⁵ In 1944, the Constitution of the ILO was supplemented by the inclusion of the Declaration of Philadelphia, which reaffirmed “the fundamental principles on which the organization is based and, in particular that freedom of expression and freedom of association are essential to sustained progress. At the same time the Declaration recognized the ILO’s “solemn” obligation to further “the effective recognition of the right of collective bargaining....” These constitutional principles are not dependant on ratification of standards. Instead they are applicable to all the member states of the ILO.

4.5.2.1.5 Workers Representative Convention⁸⁸⁶

This Convention protects trade union rights of workers representatives so long as they conform to existing laws or collective agreements in their respective countries. Article 1 provides that “workers representatives in this undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal based on their status or activities as a worker representative or on union membership or participation in union activities in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.” Article 3 defines what a worker representative is.⁸⁸⁷ The provisions of this Convention are binding only on the countries that have signed and ratified it.

4.5.2.1.6 The Labour Relations Public Service Convention⁸⁸⁸

This Convention applies to all persons employed by the public authorities to the extent that more favorable provisions in other international labour conventions are not applicable to them. It protects the right to freedom of association of employees employed in public sector. Article 9 provides that “public employees shall have as other workers the civil and political rights which are essential for the normal exercise of freedom of association subject only to the obligations arising from their status and the nature of their functions.”

⁸⁸⁶ Herein after called the Workers Representative Convention No 135 of 1971. The ILO adopted this convention on the 23rd of June 1971.

⁸⁸⁷ It provides that for the purpose of this convention, the term “workers representatives” means persons who are recognized as such under national law or practice, whether they are :

- (a) trade union representatives, namely representatives designated or elected by trade unions or by members of such union; or
- (b) elected representatives namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognized as the exclusive prerogative of trade unions in the country concerned.

⁸⁸⁸ Convention No 151 of 1978. This convention was adopted on the 27th of June 1978.

4.5.2.1.7 The 1998 Declaration of Fundamental Principles and Rights at Work

In 1998, trade unions, employers' organisations and governments joined together at the ILO, to issue a landmark Declaration of Fundamental Principles and Rights at Work.⁸⁸⁹

The ILO adopted this declaration in order to stress the importance of social progress and workers rights during a time when globalisation and economic growth were touted as the solution to social and economic problems.

Freedom of association, the right to organize and to bargain collectively is proclaimed by this Declaration as one of the fundamental principles of the ILO. Article 2 of this declaration provides that "ILO members must, by virtue of membership, promote and realize ... the principles concerning freedom of association and the right to collective bargaining."⁸⁹⁰

The Declaration is not a binding instrument in international law, but under this declaration, all ILO member states even if they have not ratified the Convention in question, have an obligation to respect, to promote and to realize in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental human rights set out in seven core human rights instruments.⁸⁹¹

4.5.2.2 Enforcement and Supervisory Bodies under ILO Instruments

International human rights law prohibits the use of state power to repress workers' exercise of their right to freedom of association. Moreover, governments must take affirmative measures to protect workers freedom of association. Governments have a responsibility under international law to provide effective recourse and remedies for workers whose rights have been violated by employers.

⁸⁸⁹ (1998) 37 ILM 1237.

⁸⁹⁰ Article 2(a) of the 1998 Declaration of Fundamental Principles and Rights at Work.

⁸⁹¹ Those instruments are Conventions 87 and 98, Forced Labour Convention No.29 (1930), Abolition of Forced Labour Convention No. 105 (1957), Equal Remuneration Convention No.100 (1951), Discrimination Convention No. 111 (1958), and the Minimum Wage Convention No. 138 (1970).

At the international level, international human rights law consists of the body of international rules, procedures and institutions developed to implement human rights and to promote their respect all over the world.⁸⁹²

In labour law in particular, the ILO, a UN agency responsible for the promotion and protection of workers' rights, has established a number of different methods for supervising the enforcement of international labour standards.

The significance of respect for the principle of freedom of association for the effective functioning of the ILO is also reflected in the special procedures that have been developed to deal with alleged contravention of this principle at the workplace. The ILO has established special machinery to ensure that the principle of freedom of association is complied with in practice.

A widely accepted body of international norms has established standards for workers' freedom of association covering the right to organise, the right to bargain collectively and the right to strike.

The ILO supervision of labour standards has different groups of supervisory procedure, which are the reporting and complaint procedure. The reporting procedure is based on the Constitution of the ILO.⁸⁹³

The Constitution obliges the states to report regularly on measures that have been taken by them to give effect to the conventions that the State has ratified. The obligation to report is not only limited to those conventions that have been ratified by the State concerned. A State is also under an obligation to report at certain intervals on conventions that the State in question has not ratified.⁸⁹⁴

⁸⁹² Maluwa *op cit* 20.

⁸⁹³ Article 22 of the ILO Constitution.

⁸⁹⁴ Article 19 par 5(c).

The Second procedure is the complaint procedure. This has different forms. The first one is based on Article 24 of the ILO Constitution. This is the case where organisation of workers or employers made representation to the ILO that a member State had failed to comply with the provisions of a given convention that has been ratified by the violating State. The representation in terms of Article 24 is only possible if the State concerned has ratified the convention in question. The second form is regulated by the provisions of Article 26 of the ILO Constitution.

This is where a complaint is instituted by a member state against another member state. In this case both States must have ratified the convention upon which the complaint is based.⁸⁹⁵

The third complaint procedure is the Freedom of Association procedure which imposes another type of obligation on member states. This procedure is not based on the Constitution of the ILO, but on the agreement between the UN Economic and Social Council (UNESCO) on the one hand and the Governing Body of the ILO on the other hand.⁸⁹⁶ Following the negotiations between these parties, the Governing body, decided to set up a Fact Finding and Conciliation Committee on Freedom of association. The Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) was established in 1950. The function of the Commission was to examine the alleged violation or infringement of trade unions and employers' organisations rights referred to it.⁸⁹⁷

⁸⁹⁵ Article 19 par. 5(c) of the ILO Constitution.

⁸⁹⁶ Rood M., "New Development within the ILO Supervisory Body" in Blanpain R, (ed) *Labour Law, Human Rights ...* 89. See also Novitz T, *International and European Protection of the Right to Strike* (2003) 188-189.

⁸⁹⁷ See ILO, Minutes of the Governing Body, 11th session (1992) 62-90.

The Commission may examine cases only if the government against which the complaint was filed agreed to the examination where a country involved was not a member of the ILO, or a party to a particular convention.⁸⁹⁸

As a result of the consent requirement, the FFCC encountered some serious difficulties as it could only operate with the consent of the defendant state and that consent hardly came about. Pursuant to these difficulties, the Governing body in 1951 set up a new committee, the Governing Body Committee on Freedom of Association (CFA).⁸⁹⁹ However, the establishment of the Committee on Freedom of Association did not diminish the status of the FFCC.⁹⁰⁰ It was retained and cases were still referred to it.

The Committee on Freedom of Association systematically examines complaints containing allegations of violations of the Conventions on freedom of association, regardless of whether or not the countries concerned have ratified those instruments.

Whether or not a country has ratified Conventions 87 and 98, the ILO has determined that ILO member countries are “bound to respect a certain number of general rules which has been established for the common good...among these principles, freedom of association has become a customary rule above the conventions.”⁹⁰¹ The Committee meets three times a year and has, since its establishment, examined nearly 2000 cases, which are often of a very serious nature.⁹⁰² It has also established a series of principles which constitutes a veritable international law on freedom of association.⁹⁰³

⁸⁹⁸ Consent is not required if the government concerned has ratified one of the ILO Conventions dealing with freedom of association.

⁸⁹⁹ Hereinafter called the “Committee on Freedom of Association (CFA).”

⁹⁰⁰ Novitz *op cit* 189.

⁹⁰¹ See the Fact Finding and Conciliation Commission on Chile, International Labour Organization, Geneva, Switzerland (1975), par 466.

⁹⁰² See Rood M & Rubin N, (ed) *Codes of International Labour Law: Law, Practice and Jurisprudence* (2005) 30.

⁹⁰³ One of the principles established by the ILO committees is that: “the right to bargain freely with employers with respect to conditions of work constitutes an essential element of freedom of association.”

The distinctiveness of this procedure resides in the fact that it can be invoked even in relation to governments which have not ratified any or all of the freedom of association conventions.⁹⁰⁴ This is possible because it is assumed that the very fact of membership of the ILO carries with it a constitutional obligation to respect the principles that govern that organization. It is also argued that this obligation is derived from customary international law.⁹⁰⁵

In respect of each complaint or case referred to the entertained to the CFA, it reaches conclusion and where relevant, makes recommendations to the government concerned on matters that require attention or rectification.⁹⁰⁶

The reports of the CFA are presented to the Governing Body for adoption. The decisions of the CFA, as adopted by the Governing Body are considered binding on the member governments in respect of which any case is determined.⁹⁰⁷

An individual worker or employer cannot bring matters to the attention of the CFA without the assistance from a trade union or employers' organization. These must be either a national organization directly interested in the matter or an international organisation with ILO consultative status or another international organization whose affiliates are directly affected by the matters raised by the complaint.⁹⁰⁸

⁹⁰⁴ See Article 2 of the 1998 Declaration of Fundamental Principles and Rights at Work. See also Ewing KD & Hepple BA, (eds) *Human Rights and Labour Law*... 2.

⁹⁰⁵ *Idem*.

⁹⁰⁶ See Rubin *op cit* 30.

⁹⁰⁷ *Idem* 31.

⁹⁰⁸ Handbook of Procedures Relating to International Labour Conventions And Recommendations (Geneva, ILO, 2002) par 80; also the Procedure for the Fact-Finding and Conciliation Commission and the Committee on Freedom of Association for the Examination of Complaints Alleging Violation of Freedom of Association (Geneva, ILO, 2002) par 34.

Also as a supervisory mechanism, the ILO has drawn up a procedure designed to find out how far the conventions adopted by the International Labour Conference are applied in practice by member states. All ratified ILO Conventions are dealt with by the ILO's Committee of Experts on the application of Conventions and Recommendations. Once a Convention has been ratified by a state, which thus assumes an international obligation to carry it out, its government is required to submit an annual report to the International Labour Office on the action it has taken to put it in practice and the Committee of Experts makes any comments that may be called for.

In more difficult cases, the situation is referred to the tripartite Conference Committee on Application of Standards in annual session of the International Labour Conference, where the government concerned may be invited to come and discuss its situation in a public forum.⁹⁰⁹ Copies of the reports are sent to the workers and employers' organizations in that particular country to enable them to make any comments on their own if they so wish. Those copies are also examined by a committee of independent experts, who points out any discrepancies if any between national legislation and the provisions of the Convention in question under consideration to the government and to the conference. Then the conference appoints a tripartite committee, made up of government, employers and workers to discuss these discrepancies with the representatives of the government concerned. After the discussion the conclusion is published although they are not binding.⁹¹⁰

In addition to the above procedures, disputes relating to the interpretation of the ILO Constitution or of ILO instruments can be referred to the International Court of Justice.⁹¹¹ No case concerning freedom of association or the right to strike has been brought to the International Court of Justice.⁹¹²

⁹⁰⁹ Sweepston *op cit* 174.

⁹¹⁰ They are published as the ILO Committee of Experts on the application of Conventions and Recommendations, General Survey (Geneva ILO).

⁹¹¹ See Art. 37 of the ILO Constitution.

⁹¹² Novitz *op cit* 187.

There is a fundamental and general shared view that the ILO supervisory system is one of the most developed systems of standards supervision in the multilateral system.⁹¹³

4.5.2.3 ILO Committee Jurisprudence on Freedom of Association

In at least two cases or complaints brought before it, the ILO Committee dealt with workers' rights to freedom of association. It considered the right to strike and embark on secondary or sympathy strikes as well as the workers' protection against unfair dismissal based on their enjoyment of their rights as enshrined in the ILO Conventions 87 and 98.

The ILO standards on freedom of association and trade union matters have been supplemented and developed by the principles enunciated by the supervisory bodies, in particular the Governing Body Committee on Freedom of Association and Fact-Finding and Conciliation Commission on Freedom of Association set up to examine complaints of violations of trade unions' rights. These decisions, which are not limited to the basic rules laid down by the Conventions on freedom of association have progressively become a set of principles which, together with the observations formulated by the Committee of Experts concerning those same instruments, constitutes a veritable international law of freedom of association.

4.5.2.3.1 *British National Union of Mineworkers and International Mineworkers Organisation v British Government*⁹¹⁴

In 1988, the British National Union of Mineworkers and International Mineworkers Organisation lodged a complaint with the ILO Committee against the British Government. The complaint was based on four statutes introduced by the British Government in 1980, 1982, 1984 and 1988 respectively.⁹¹⁵

⁹¹³ See Committee on Legal Issues and International Labour Standards, GB 280, LILS/3, 2001 par 3.

⁹¹⁴ See Seady & Benjamin *op cit* 441-445.

⁹¹⁵ Employment Act of 1980, Employment Act of 1982, Trade Union Act of 1984 and Employment Act of 1988.

The applicant argued that the challenged legislation intended to prevent trade union activities and industrial actions in particular and was therefore contrary to the principles entrenched in the ILO Conventions on freedom of association. Furthermore, the ILO Committee was called upon to examine the British law regulating the right to strike.

The United Kingdom (UK) legislation during the late 1980s was based on common law and did not provide employees with a positive right to strike. Employees who participated in a strike or any industrial action in furtherance of a strike that was not protected by a legislative immunity were criminally and civilly liable in tort to compensate the employer or the third party for any loss suffered as a result of such strike. The same went for those who participated in secondary strikes or industrial actions, except where the secondary employer was the customer or supplier of the first employer.

The workers further complained about the urgent interim relief in the form of an interdict that could be obtained by employers who were faced with industrial actions to prevent them from striking. They also blamed the British labour legislation for non-protection of employees against strike-related dismissals and complained that strikers dismissed for participating in industrial actions were not allowed to apply to the industrial tribunal for reinstatement or for any other relief, except in the case of selective dismissal. They finally argued that this vulnerability to dismissal was further erosion of the employees' right to engage in lawful industrial action, as guaranteed by Convention 87 of 1948.

The ILO Committee pointed out that the right to strike was one of the essential means for workers and their organizations to promote and defend their socio-economic interests.⁹¹⁶ These interest not only have to do with obtaining better working conditions and pursuing collective demand of an occupational nature, but also with seeking solutions labour problems of any kind which are of different concern to workers.

⁹¹⁶ See General Survey by the Committee of Experts on the Application of the Conventions and Recommendations, in International Labour Conference 69th Session, 1983 (General Survey) par 226 and also pars 218-20.

It held that any restriction in the objectives and methods of industrial actions should be sufficiently reasonable and should not result in excessive limitation of the right to strike.⁹¹⁷

The Committee found that the British legislation curtailed the right to strike in an unacceptable manner and therefore contravened the provisions of the ILO Convention 87 of 1948. On the issue of secondary or sympathy strikes, the ILO Committee found that the British legislation made it impossible for workers and trade unions to engage in any form of sympathy actions or boycotts against a party not directly involved in a dispute.

The Committee stressed that this was an unlawful constraint on the freedom to participate in lawful industrial actions. It held that boycotts were a legitimate exercise of the right to strike and should be permitted when they directly related to the workers' social and economic interests. The Committee urged the British government to introduce legislation to protect sympathy actions and boycotts in support of a lawful strike.

Finally, the ILO Committee held that the denial to employees of their right to challenge the fairness of their strike-related dismissal before an independent court or tribunal was inconsistent with the right to strike as entrenched in Convention 87 of 1948. The Committee expressed the view that the British government should introduce legislation to protect strikers from dismissal and other prejudicial treatment.⁹¹⁸ The views of the ILO Committee on the complaint of British workers were identical to the ones on the complaint filed later by their South African counterparts of the Congress of South African Trade Unions against the South African government under apartheid.

⁹¹⁷ Seady & Benjamin *op cit* 447.

⁹¹⁸ *Idem* 449.

4.5.2.3.2 *Congress of South African Trade Unions (COSATU) v South African Government*⁹¹⁹

Prior to 1994, in South Africa, most of the workers' rights were infringed not only by the apartheid government but also by private sector employers. Accordingly, the Congress of South African Trade Unions (COSATU) lodged a complaint with the ILO Committee against the South African government. On behalf of its members, COSATU argued that the provisions of the 1987 Labour Relations Amendment Bill, especially those concerning the registration of racial trade unions and the right to strike,⁹²⁰ infringed the employees' right to associate freely with each other.

The ILO Committee found that the registration of trade unions whose constitutions limited membership to a single racial group was incompatible with the fundamental principles of the ILO Conventions regulating the right to freedom of association. The ILO Committee further pointed out that international labour law recognised the right to strike and to engage in secondary or sympathy strikes provided that the initial strike was lawful. This right was also recognised by the South African ICA 28 of 1956 whose Section 79(1) protected workers from civil liability. However, sympathy or secondary strikes were considered unfair labour practice and withdrawn by the Labour Relations Amendment Act (Section 1(1)), which also provided for an urgent relief under the form of interdict that could be obtained by employers to prevent industrial actions.

The ILO Committee held that any Act restricting this right or providing for an urgent relief to be granted to the employers in order to restrain a strike was in contravention with international labour conventions in general and the ILO Conventions on freedom of association in particular. Moreover, the Committee expressed the view that boycott was a legitimate form of industrial action when it was directly related to workers' social and economic interests and its prohibition was incompatible with international labour law.

⁹¹⁹ Seady & Benjamin *op cit* 448-458.

⁹²⁰ *Idem* 449.

In the same vein, it held that protest actions were legitimate and should be protected particularly when their aim was to criticise the social and economic policy of the government. Due to the fact that South Africa was not a member of the ILO when COSATU lodged its complaint, the findings and recommendations by the ILO Committee could not bind the Republic. However, the ILO Committee's jurisprudence was later to impact on the protection of freedom of association in the 1993 and 1996 Constitutions and it somehow corroborated the South African jurisprudence on freedom of association.

4.6 Conclusion

This chapter examined the right to freedom of association and trade unionism in foreign and international law. As stressed earlier, the 1996 Constitution of the Republic of South Africa provides that in interpreting the Bill of Rights, which enshrines the rights of all people in the country, including the right to freedom of association, any court, tribunal or forum must promote the values embedded in the Constitution. It must consider international law, including international labour law, and may consider foreign law.⁹²¹ This puts it quite clear that there is a close relationship between international law and South African domestic law on the one hand and between foreign law or at least the law of some foreign countries and South African law on the other hand.

South African law in general and South African labour law in particular has been very much influenced by the foreign law of some countries and by international labour law. Accordingly, given the European and North American connection of our South African municipal law, the chapter dealt with the protection of the right to freedom of association in British, German, Canadian and the US law respectively.

⁹²¹ See Section 39 (1) read with section 7 of the 1996 Constitution.

It then dealt with the protection of the right to freedom of association under the European, the (inter) American and the African human rights systems before considering the protection of the right to freedom of association and trade unionism under NEPAD and the APRM.

Finally, the chapter examined the protection of the right to freedom of association and trade unions in international (human rights and labour) law in the light of the main sources of international labour law, focusing on the main instruments protecting this right, the enforcement of this right, and the jurisprudence of the ILO Committee on freedom of association.

To recap, fundamental workers' rights include the right to freedom of association, which includes the right to join and to form a trade union. As workers and employers organisations have come into being and developed under conditions which are basically the same everywhere, it was possible, despite national disparities to work out an international system to safeguard the right to freedom of association.

The International Labour Conference has been able to adopt a series of universally valid principles in the shape of conventions and declarations dealing with the protection of the right to associate and trade union rights.

An international institution was created in 1919 to further their aims and aspirations. International conventions were entered in and on the regional level human rights instruments were adopted to protect the right to freedom of association. Regional human rights systems are essential intermediaries between abusive State institutions and the global system that is incapable of redressing all human rights violations.⁹²² Universal and regional human rights instruments influenced the drafting of some national Bills of Rights that enshrine the right to freedom of association and other workers' rights.

⁹²² Mugwanya *op cit* 51.

The history shows that progress in the recognition and the promotion of the right to freedom of association and in the development of the trade union movement depended on workers' own determination and action both internationally, regionally and nationally. The protection and the realisation of human rights and fundamental freedoms is the responsibility of individual States, but international instruments and regional institutions and structures are indispensable to ensure the fulfilment of this duty.⁹²³

The ILO, a UN specialised agency with nearly universal membership and tripartite representation by governments, workers and employers recognise freedom of association and the protection of the right to organise and trade union rights as core workers rights.

Over decades of painstaking treatment of allegations of violations of workers' rights, the ILO's Committee on Freedom of Association has elaborated authoritative guidelines for implementation of the right to organise, the right to bargain collectively and the right to strike.

International law has contributed to better protection of the right to freedom of association and workers' rights to organise, form or join a trade union in a number of countries. This is particularly true for the protection of freedom of association and trade unionism under the democratic and post-apartheid legal order. which is examined in the next chapter of the study.

⁹²³ Mugwanya *op cit* 7.

CHAPTER 5 FREEDOM OF ASSOCIATION AND TRADE
UNIONISM UNDER THE DEMOCRATIC AND POST-
APARTHEID LEGAL ORDER

5.1. Introduction

Prior to the first democratic election in 1994, South Africa was a society deeply divided along racial lines, with discrepancies that were economically, politically and socially entrenched for a long period of time.

After 1990, the law in South Africa not relatively quickly adopted a more accommodating approach to trade unionism. The democratic transition in South Africa brought with it the emergence of a sophisticated labour law system with significant employees' rights. The democratic post-apartheid order started with the 1993 Constitution, which was later replaced by the 1996 Constitution.

The right to freedom of association is now guaranteed under the Constitution of the Republic as well as under the 1995 LRA as amended. Employees are entitled to establish trade unions, to bargain collectively, and to strike. Trade unionism, collective bargaining, strikes and other forms of industrial action came to be accepted as important elements of a democratic society. More generally, trade unions and collective bargaining are seen to enhance the dignity of workers and their control over their working lives.⁹²⁴ Unlike under the previous dispensation, there is no distinction between public and private sectors' employees, except that certain categories of employees are excluded from the provisions of the LRA.⁹²⁵

⁹²⁴ Basson A *et al Essential Labour...* 3.

⁹²⁵ Section 2 of the LRA. It provides that "this Act does not apply to members of-
(a) the National Defence Force
(b) the National Intelligence Agency; and
(c) the South African Secret Service."

The adoption of the 1993 Constitution was a major turning point in South Africa's history. It has been called the "birth certificate" of a new South Africa, a country that is profoundly different from the one that existed before April 1994. Of course, the Constitution did not arrive suddenly, mechanically or magically; it was the product of protracted negotiations and a long and troubled history. Many of the ideas it contains are the realization of years of struggle by the majority of South Africans.⁹²⁶

The key fundamental rights of workers are those rights that enable the working people to fight and defend their rights. These rights comprise the first group of workers' rights and they consist of the workers' right to establish trade unions, the right to bargain collectively and to strike. These are the three pillars of autonomy of the working people, their capacity to defend all their other rights.⁹²⁷ South Africa's transitional democratic role had been marked by a change of a pariah State to that of a model democracy to all and especially the divided societies of this world.

This chapter deals with the promotion and protection of the right to freedom of association and trade unionism under the post-apartheid democratic legal order in South Africa. It starts by revisiting the development of labour relations under the 1993 and the 1996 Constitutions. Then it examines their legal protection under the post-apartheid legal order and assesses the contribution of the judiciary to the protection and promotion of freedom of association and trade unionism through a brief review of the jurisprudence.

⁹²⁶ <http://www.constitutionalcourt.org.za> accessed 2/28/2006.

⁹²⁷ Sachs A, "The Bill of Rights and Workers Rights: An ANC Perspective" in Patel E, (ed) *Workers Rights: From Apartheid to democracy- What role for organized Labour* (1994) 47.

5.2. Development of Labour Relations, Freedom of Association and Trade Unionism since 1993

As pointed out earlier, labour relations developed tremendously as the apartheid regime was drawing to an end. The development of trade unionism is closely related to the anti-apartheid struggle. Accordingly, while political negotiations were underway for the peaceful dismantling of the apartheid system, other negotiations were taking place between unions, State and employers' organisations. These negotiations resulted in the formation of the National Economic Development and Labour Council (NEDLAC). Unions, employers' organisations and the state within NEDLAC agreed that the post-apartheid Constitution under discussion by the political parties should contain a Bill of Rights enshrining the rights of all the people in the country, including the right to freedom of association, the right to form or join a trade union and participate in its activities, the right to bargain collectively and the right to strike. This was later endorsed by the parties to the political negotiations that led to the adoption of the interim Constitution of 1993.

The 1993 Constitution recognised the rights of all citizens to equal protection and benefit of the law, including the law governing labour relations as fundamental rights.⁹²⁸ It expressly enshrined the right to form and join trade unions, to participate in their activities, to strike and to engage in collective bargaining as fundamental rights.⁹²⁹ The enactment of labour rights in the Interim Constitution created a need for a labour legislation to give effect to labour rights entrenched in the Constitution.

Accordingly, the Minister of Labour appointed the Ministerial Legal Task Team on the 8th of August 1994.

⁹²⁸ Chapter III of the Interim Constitution.

⁹²⁹ Section 27 of the Constitution.

This Team was headed by Cheadle and came to be known as the Cheadle Task. The Task Team was set up to review legislation regulating labour relations as well as to produce a new draft labour Act which was first circulated as a Draft Labour Relations Bill.⁹³⁰ Assisted by the ILO and some specialist practitioners, the Task Team produced a draft-negotiating document in the form of a Bill, accompanied by a detailed explanatory memorandum.⁹³¹ The Ministerial team released its recommendations in February 1995.⁹³² One of the recommendations of the Ministerial Task Team was that the registration process of trade unions should be simplified. Several trade union rights were recognized in the Labour legislation as a result of the recommendations of the Task Team. After collation of the comments from the public and negotiations in NEDLAC, the Labour Relations Act of 1995⁹³³ was passed to give effect to the stated goals and principles of the Reconstruction and Development Programme of the government and to ensure that labour legislation comply with the provisions of the 1993 Constitution and to bring the South African labour law in line with the Conventions and Recommendations of the ILO.

The enactment of the LRA was one of the first steps in the process of reforming South African labour laws and it brought many changes to her industrial relations system.⁹³⁴ It provided for the framework within which the constitutional right to form and join trade unions and employers' organizations and to participate in their activities could be protected and fulfilled.⁹³⁵ Procedures to be followed in resolving disputes relating to the alleged violation of these rights were also outlined in the Act.⁹³⁶

⁹³⁰ Van Jaarsveld & Van Eck *op cit* 258; Basson *et al*, *Essential Labour...* 10.

⁹³¹ See Fouche M, (ed) *A Practical Guide to Labour Law* (1998) 211.

⁹³² Government Gazette 1692, 10 February 1995.

⁹³³ It was passed by Parliament as Act 66 of 1995 in October 1995 and it came into operation on 11 November 1996.

⁹³⁴ The LRA has been amended several times since it was passed. See for instance the Labour Relations Amendment Act 42 of 1996, the Labour Relations Amendment Act 127 of 1998 and the Labour Relations Amendment Act 12 of 2002.

⁹³⁵ Sections 4-8 of the LRA.

⁹³⁶ Section 10

It also provided for organizational rights⁹³⁷ for unions in the workplace. It encourages parties to resolve disputes through conciliation and arbitration.⁹³⁸ It also made provisions for joint decision-making and consultation between management and labour and it also entrenched the right to strike.⁹³⁹ For the first time in South African labour history all employees were brought under the ambit of one industrial relations system.

Since the 1993 Constitution was transitional, the Constitutional Assembly, a democratically elected body, adopted a draft of a new Constitution on 8 May 1996.⁹⁴⁰ In order to ensure that the final Constitution conformed to the principles laid down in the 1993 Constitution, the Constitutional Court was required to certify its final draft.⁹⁴¹ On certification, the Constitutional Court found that the new text met the constitutional principles in most respects but not in others.⁹⁴² The draft was therefore amended and re-submitted to the Constitutional Court, which finally certified it prior to its signing into law at Sharpeville by President Mandela on 10 December 1996.⁹⁴³ This Constitution contains a Bill of Rights and it is no surprise that like its predecessor it extensively entrenched labour rights.⁹⁴⁴

⁹³⁷ Sections 12-16 of the LRA.

⁹³⁸ The parts of this Act which related to individual labour law were largely a codification of the body of jurisprudence which has been built by the Industrial and the Labour Appeal Court. The Act included an entirely new dispute resolution system which involved the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA) as well as a completely revised structure of the Labour Court.

⁹³⁹ Section 64 of the LRA.

⁹⁴⁰ De Waal et al op cit 5.

⁹⁴¹ Section 72(1) of the Interim Constitution.

⁹⁴² Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (1996) 17 ILJ 841 (CC).

⁹⁴³ The judgment of the Constitutional court of South Africa on the certification of the new constitution is dated 6 September 1996 under case Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (1996) 17 ILJ 841 (CC).

⁹⁴⁴ Labour rights are entrenched in Section 23 of the final Constitution. All leading texts on constitutional law contain chapters on labour rights. See for instance Cheadle H et al, (eds) *Fundamental Rights in the Constitution* (1997); Woolman S, "Freedom of Association" in Chaskalson M et al, (eds) *Constitutional Law of South Africa* (1996); Davis et al (eds) *Fundamental Rights in the Constitution* (1997); De Waal et al, (eds) *Bill of Rights Handbook* (1999); Idem (2001); Devenish GE, *A Commentary on South African Bill of Rights* (1999), Louw R et al, (eds) *South African Human Rights and Labour Law Yearbook* (1996); Robertson M et al, (eds) *South African Human Rights and Labour Law Yearbook* (1990); Idem (1991); Togni LS, *The Struggle for Human Rights: An International and South African Perspective* (1994), Davis D, "Constitutionalisation of Labour Rights" in Wyk et al op cit and so forth.

Labour legislation was further amended to comply with the 1996 Constitution and South Africa's international obligations. By the end of a decade a new Basic Conditions of Employment Act (BCEA)⁹⁴⁵ was passed to regulate the conditions of work. It was followed by the Skills Development Act (SDA)⁹⁴⁶ and by the Skills Development Levies Act (SDLA).⁹⁴⁷ Later the Employment Equity Act (EEA)⁹⁴⁸ was promulgated. The main purpose of this Act was to redress the unequal distribution of jobs, income and occupation, a legacy of the apartheid regime in South Africa. The Act therefore, seeks to eliminate discrimination in employment and to provide for affirmative action to redress the imbalances of the past and to create equality in the workplace. The combination of the LRA, EEA, BCEA and the SDE and other labour legislation is seen as an engine of social economic policy espoused by the ANC government. Since 2000, significant amendments have been made to the LRA, BCEA, EEA and SDE in order to improve the lives of the working people in South Africa.

Trade unions flourished under the new democratic order and consolidated their positions at a national level. Their status and powers increased as they used their elevated position in the tripartite forum (NEDLAC) created to involve the social partners in socio-economic policy making.⁹⁴⁹

COSATU is the biggest trade union federation in South Africa. There are currently 21 trade unions affiliated to COSATU with a combined membership just over 1.8 million. It played an important role in the transformation of South African labour relations. Before 1994, COSATU was an economic and political movement. After the 1994 elections, COSATU and its members have been developing a type of trade unionism called the social movement unionism. This differs qualitatively with the economic and political types of trade unionism.

⁹⁴⁵ Act 75 of 1997.

⁹⁴⁶ Act 97 of 1997.

⁹⁴⁷ Act 9 of 1999.

⁹⁴⁸ Act 55 of 1999.

⁹⁴⁹ See Finne more & Van Rensburg *op cit* 46.

However, by sending a number of senior COSATU leaders to parliament, COSATU weakened its base. Its participation in the tripartite alliance⁹⁵⁰ started to take strain as the government economic policy and the direction of its implementation started to be seen to be contrary to worker's interests.

In 2004, COSATU was prepared to stand against its key ally, the ANC for its decision to push ahead with its Anti-Terror Bill, which could have the effect of politicizing criminal transgression during protest action.⁹⁵¹ COSATU contended that the Protection of Constitutional Democracy Bill against Terrorist and Related Activities Bill⁹⁵² "constitutes a massive attack on workers constitutional rights especially the right to strike." It argued that if this Bill is pushed through the parliament, and is passed as an Act of Parliament, it would effectively render strikes in essential services and unprotected strikes as terrorist activities and that harks back to the apartheid era where strikes at key government installations such as hospitals and power stations were outlawed and considered anti-state activities. COSATU threatened for the first time to take the post-apartheid government to Constitutional court and to notify the ILO.⁹⁵³ It even threatened to embark on national strike against the government decision to push the Bill ahead.

The challenge that COSATU and its members is faced with today is to choose whether to turn the organization into an independent working organization of the working class, or to be reduced to a "silent partner" which cannot challenge anti-workers policies and which tries to resolve all work related problems through discussions within the Alliance.

⁹⁵⁰ Composed of ANC, COSATU and SACP.

⁹⁵¹ Louw I, "Labour Federation Threaten to Strike over The Anti-Terror Bill" *Sowetan* Friday 27 February. 2004.

⁹⁵² In defining acts of terrorism, the Bill identifies amongst the following as acts of terrorism-

- (a) Strikes in essential services
- (b) Unprotected strikes
- (c) Vandalisation during both legal and illegal strikes and any industrial action that has an impact on the economy of the country.

⁹⁵³ *Idem*.

It is about time that it started focusing its attention on addressing poverty in rural areas in South Africa, actual job losses because of structural changes in industries and international exposure to the challenges of globalization or face serious loss of membership.

5.3. Legal Protection of Freedom of Association and Trade Unions in Post-Apartheid South Africa

The sources of legal protection of freedom of association and labour relations' rights in post-apartheid South Africa have mainly been both domestic and international.

5.3.1. Domestic Sources

Employees' rights to form or join trade unions and participate in their activities was firstly acknowledged by the 1993 Constitution, which was later superseded by the 1996 Constitution, and by the LRA. Domestic sources of the protection of freedom of association therefore comprise the Constitutions and the LRA.

5.3.1.1. The 1993 Constitution and the LRA of 1995

It is worth examining the protection of the right to freedom of association in the Interim Constitution and then under the LRA enacted under this Constitution.

5.3.1.1.1 The 1993 Constitution

The introduction of the new political dispensation during the early 1990s brought about fundamental changes in the way in which South Africa was governed. The 1993 Constitution⁹⁵⁴ was passed on the 22 December 1993.⁹⁵⁵

⁹⁵⁴ The 1993 Constitution ringed the death-knell of a large number of constitutional institutions which were the product of our apartheid past and which together and individually made that notorious system possible.

⁹⁵⁵ Hereinafter called the "interim Constitution".

It initiated a constitutional revolution in South Africa and was passed as a transitional arrangement. It came into operation on the 27th April 1994.⁹⁵⁶

One of the most important features of the interim Constitution was that it created a constitutional State in which the Constitution was to be the supreme law of the country.⁹⁵⁷ This was a very important departure from the past constitutions in which parliament was sovereign⁹⁵⁸.

According to Mureinik, the interim Constitution replaced the old culture of authority with a new culture of justification—"a culture in which every exercise of power is expected to be justified; in which the leadership given by the government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command."⁹⁵⁹

The other important feature of the 1993 Constitution was its uniqueness in the sense that it was a product of long-standing negotiations involving representatives of different political groups with opposing interests and aspirations. As such it established a democratic dispensation that is totally representative of the country's population. It provides for a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and development of opportunities for all South Africans.

⁹⁵⁶ The day on which the first democratic elections for a parliament constituted by a Constitution took place in South Africa.

⁹⁵⁷ The supremacy of the Constitution was echoed in section 4(1) of the interim Constitution, which provided that "this Constitution is the supreme law of the Republic and any law or Act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

⁹⁵⁸ See the 1910, 1960 and 1983 Constitutions of the Republic of South Africa.

⁹⁵⁹ Mureinik E, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) *SAJHR* 31.

For the first time in the history of South Africa, a chapter on fundamental rights (Bill of Rights) was included in the Constitution.⁹⁶⁰ The Bill of Rights included civil and political rights, social, economic and cultural rights as well as environmental and development rights.⁹⁶¹

Labour relation rights are some of the fundamental rights entrenched in the Bill of Rights. Thus, under the post-apartheid legal order, freedom of association and labour rights of workers and employers were first entrenched in Section 27 of the 1993 Constitution. Section 27 of the interim Constitution provided:

- (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions and employers shall have the right to form and join employers organizations;
- (3) Workers and employers shall have the right to organize and to bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).

The Constitution protects the right to freedom of association for every worker. This is different under the LRA.

⁹⁶⁰ Chapter 3 of the Interim Constitution.

⁹⁶¹ The inclusion of these fundamental rights in the Interim Constitution marked an important break with the past in which some individual rights had been enjoyed by a minority of the population.

5.3.1.1.2. The LRA in the Light of the 1993 Constitution

According to Solomon, what prevailed before our constitutional democracy was largely a lack of social justice and democracy in the workplace.⁹⁶² Despite criticism by some scholars, including Solomon,⁹⁶³ the constitutionalisation of organizational or labour rights under the 1993 Constitution and thereafter the 1996 Constitution positively impacted on South African labour law.⁹⁶⁴

The LRA was enacted in 1995. It came into existence after considerable negotiations between the interested parties namely, the State, management and labour. This Act dedicated a whole chapter to trade union rights.⁹⁶⁵ It can precisely be described as the first real democratic labour law in South Africa reflecting the wishes and interests of all the relevant parties.

The LRA, which is the cornerstone of South African labour law, was enacted to, among other things, give effect to rights entrenched in Section 27 of the Interim Constitution, to give effect to the obligations incurred by South Africa as a consequence of its membership of the ILO, to promote social justice, labour peace and workplace democracy, and to promote orderly collective bargaining.⁹⁶⁶ Furthermore, the LRA must be interpreted amongst other things to give effect to its primary purpose, in compliance with the Constitution and in compliance with public international law obligations of the Republic.⁹⁶⁷

⁹⁶² Solomon *op cit* 4-5.

⁹⁶³ Solomon echoed such a criticism, as he held:

"It has, however, been argued that the constitutionalisation of labour rights could have dire consequences for employment and labour relations. Rather than improving the quality of employees' lives, courts can just as easily interpret constitutional guarantees as aggravating their lives. Furthermore, the recognition by the courts of labour rights has not been consistent."

⁹⁶⁴ See Brassey "Labour Relations Under the New Constitution" *op cit* 179-207; Solomon *op cit* 4-12. On the impact of constitutions on labour law, also see Kahn-Freund O "The Impact of Constitutions on Labour Law" (1976) 35 *CLJ* 240-271.

⁹⁶⁵ Chapter II of the LRA.

⁹⁶⁶ Section 1.

⁹⁶⁷ Section 3(a) (b) and (C).

The LRA heralded a new era in labour relations in South Africa. It effectively confined the ambit of the unfair labour practices to unfair discrimination against individual employees and codified most of the labour rights upheld by the Industrial Court in the past as well as those set out in the interim Bill of Rights and in international law.⁹⁶⁸ The philosophy behind the LRA is to create a spirit of industrial democracy and to encourage production and labour peace by means of greater understanding and joint decision-making.

Prior to the enactment of the LRA of 1995, there was a multiplicity of labour laws with different provisions covering different groupings of employees⁹⁶⁹ leading to a potential constitutional challenge that the State was not treating all employees equally. Some employees such as domestic workers and university employees fell outside the ambit of the labour relations legislation.⁹⁷⁰

The position was therefore remedied by the LRA that applies to all employees, except those in the South African Defence Force, the National Intelligence Agency and the South African Secret Service.⁹⁷¹ For all practical purposes, there is now a uniform labour law which does not differentiate between employees. For the first time in South African labour history all workers are brought under the ambit of one industrial relations system irrespective of whether they are in a private or public sector.

Freedom of association is one of the avenues employed by the LRA to ensure comprehensive protection of the existence, support, power and functioning of trade unions.⁹⁷² Chapter II of this Act provides for employees' right to freedom of association including their right to form or join a trade union or a federation of trade unions and participate in its activities.

⁹⁶⁸ Devenish *op cit* 313.

⁹⁶⁹ For example, before the 1995 LRA, teachers, police, agricultural workers and public servants had their own legislation.

⁹⁷⁰ Rycroft A, "Labour" *op cit* 141.

⁹⁷¹ Section 2 of the LRA of 1995.

⁹⁷² Olivier "Statutory Employment Relations in South Africa" *op cit* 5-59.

According to the LRA,

- (1) Every employee has the right -
 - to participate in forming a trade union or federation of trade unions; and
 - to join a trade union subject to its constitution.
- (2) Every member of a trade union has a right, subject to the constitution of that trade union -
 - to participate in its lawful activities;
 - (b) to participate in the election of its office bearers, officials or trade union representatives; to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office; and
 - to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.
- (3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation-
 - (a) to participate in its lawful activities;
 - (b) to participate in the election of its office bearers or officials; and
 - (c) to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office.⁹⁷³

In terms of the LRA, every employee has the right to participate in forming a trade union or trade union federation and to join a trade union or federation of trade unions subject to its constitution.⁹⁷⁴ Similarly, employers are entitled to form employers' organisations or federations of employers' organisations, to join and participate in the lawful activities of those organisations.⁹⁷⁵

The right of workers to form and join trade unions and that of employers to form and join employers' organisations is one of the rights that span both individual and collective rights.⁹⁷⁶ It not only protects the individual employee, it also provides the legal basis for ensuring the existence and functioning of trade unions.

⁹⁷³ Section 4 of the LRA.

⁹⁷⁴ Section 4 (1).

⁹⁷⁵ Sections 6 & 7.

⁹⁷⁶ Davis op cit 217.

In keeping with international precedents,⁹⁷⁷ the LRA protects not only the individual right to join and belong to a trade union, but also the right of the union itself to exist and function effectively. Thus the protection of the individual's right to freedom of association in itself amounts to the protection of the union's right to freedom of association.⁹⁷⁸ Otherwise, the employer would have been able to destroy a union by dismissing union members in a way which would have been lawful had it not been for the prohibition of dismissal on account of union membership.⁹⁷⁹

Trade unions may also form and join federations. They may also determine their own Constitution and rules. They may also plan and organise their administrative and lawful activities.⁹⁸⁰ The LRA of 1995 extensively covers freedom of association issues other than the previous ones in terms of the categories of beneficiaries of the rights as well as the types of activities included in the ambit of the protection.

It protects the rights of members of trade unions as well as those of the persons seeking employment and persons who were, are, or intending to become union members against victimisation for union membership and activities. According to the Act, an employer may not require a person seeking employment not to become a member of a trade union or workplace forum or to give up membership of workers' associations. The employer may also not prejudice a job applicant because of the person's past, present or anticipated exercise of his or her right to freedom of association.⁹⁸¹

⁹⁷⁷ Particularly ILO Conventions 87 and 98 on Freedom of Association and the Right to Organise.

⁹⁷⁸ Section 8 of LRA.

⁹⁷⁹ Section 5(2) (c) of the LRA. See also Olivier "Statutory Employment Relations in South Africa" *op cit* 5-67-8.

⁹⁸⁰ Section 8.

⁹⁸¹ Section 5.

No one may infringe the right to freedom of association granted in terms of the LRA. This means that neither the State nor an employer, nor trade union may infringe any of these rights.⁹⁸² This also means that an ex-employer may not refuse to re-employ an ex-employee because of that employee's past or present membership of a union.⁹⁸³ The prohibition also confers protection on trade union members and officials against their own trade union.⁹⁸⁴

Any discriminatory acts or conduct against an employee or job seeker as a result of his or her union activities is prohibited⁹⁸⁵ as well as any act or conduct prejudicing an employee or work-seeker as a result of certain freedom of association rights exercised by the person concerned.⁹⁸⁶

The Act also categorises giving or promising an advantage to an employee or a work-seeker in exchange for that person not exercising the rights provided for in chapter II as the violation of the right to freedom of association.⁹⁸⁷

The LRA provides redress for actions short of dismissals taken against an employee or a job seeker for the purpose of preventing or deterring him or her from being or seeking to become a member of a trade union or taking part in the activities of a trade union during the appropriate time.

⁹⁸² Olivier "Statutory Employment Relations in South Africa" *op cit* 5-17.

⁹⁸³ See *NAAWU v Borg-Warner SA Pty Ltd* (1994) 1LJ 509 (A).

⁹⁸⁴ See *Theron v Food and Allied Workers Union (FAWU)* (1997) 1LJ 1046 (LC) 1050B-D. In this case, certain union officials who were removed from their position by the union claimed that their removal by their union violated their rights to participate in the activities of the union and further argued that their removals were unfair in that they had not been given the opportunity to state their case, that the rule of natural justice had not been followed. However, the union argued that the removal had taken place by way of majority decision during the meeting and that there was no need to let the aggrieved members state their positions individually in addition to what transpired at the meeting. In this case the LC held that the LRA protect trade union members against acts of victimisation not only by employers but also by the trade union itself. It was pointed out that the rights in Sections 4 and 5 of the LRA should not be given a restrictive interpretation to exclude violation by the member's union. As a point of departure in this issue the Court held that the infringement of the rights in section 4 and 5 operates against "anyone" who might infringe them.

⁹⁸⁵ Section 5(1) of the LRA.

⁹⁸⁶ Section 5(2) (c).

⁹⁸⁷ Section 5(3).

As far as dismissal is concerned, a dismissal where the reason for it was that the employee was or proposed to become a member of a trade union or had taken part or proposed to take part in union activities is automatically unfair.⁹⁸⁸

This principle is extended to selection for redundancy by the employer in terms of section 189 of the LRA. However, the LRA provisions on freedom of association do not cover all workers. Thus, unlike the Constitution that protects freedom of association of workers, the LRA protects freedom of association for employees as defined by the Act.⁹⁸⁹

Although the Act does not apply to members of the South African Defence Force, Secret service and the Intelligence Service,⁹⁹⁰ yet these categories of workers can claim their right to form and join trade unions under section 23 of the Constitution.⁹⁹¹

The LRA should not be read as protecting unions or employers' organisations whose purpose is illegal.⁹⁹² Any union or employer's organisation whose purpose is illegal cannot claim any protection under the LRA.

Related to freedom of association are also the trade unions' rights to organise and bargain collectively.⁹⁹³ Collective bargaining can only succeed if trade unions and their officials have the right to access the employer's premises and are able to operate and recruit members freely without any fear of intimidation.⁹⁹⁴

⁹⁸⁸ Section 187(1) of the LRA.

⁹⁸⁹ Section 213 of the LRA defined an employee as:

- (a) "any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying or conducting the business of an employer."

⁹⁹⁰ Section 2 of the LRA.

⁹⁹¹ See the judgment of the Constitutional Court of South Africa in the case of *South African National Defence Union v Minister of Defence and Another* (1999) 20 ILJ 2265 (CC).

⁹⁹² Woolman & De Waal, "Freedom of Association: The Right to Be We" *op cit* 379.

⁹⁹³ Davies *et al*, *op cit* 217.

⁹⁹⁴ It is clear that apart from giving effect to the constitutional law rights, the LRA was also intended to provide a framework within which employees and their trade unions, employers and employers' organizations could collectively bargain. Accordingly, chapter III of the LRA deals with collective bargaining.

Accordingly, organisational rights are necessary to secure the stability, proper functioning and solidarity of the association. These rights include access to workplace, stop order facilities, and leave for trade union activities and disclosure of information for the purpose of collective bargaining and consultations.⁹⁹⁵ While the basic right not to be unfairly discriminated for trade union reasons apply irrespective of trade union recognition by the employer, organisational rights are exercisable only where the employer accords a union recognition and a union must also meet some specific requirements to be able to exercise these rights.⁹⁹⁶

In terms of the LRA, membership of trade union is subject to the constitution of the trade union concerned.⁹⁹⁷ This means that a union may determine, in its constitution, the type of employees that may become its members and those who are disqualified from joining that particular union.

By virtue of being union members, employees are subject to the payment of a contribution to the union. On occasions, they must also provide support to actions such as strikes decided by the union especially through a fair and democratic procedure.⁹⁹⁸ The LRA comprehensively acknowledged the right to strike, but subjected it to a number of limitations. The right to strike is only protected where workers embark on a legal strike.

⁹⁹⁹ This is a reasonable and justifiable limitation.

⁹⁹⁵ Chapter III, Sections 12-16 of LRA.

⁹⁹⁶ For instance, in order for a trade union to be able to exercise the right to access the workplace; deduction of trade union subscription; and the right to leave for trade union activities, a union must be a sufficiently representative trade union. The act is not clear on what sufficiently representative entails. In order to exercise the right to elect trade union representatives and disclosure of information; a union must be a representing majority of employees employed in the workplace. The Act defined a majority trade union as a union which represents 51 percent of all employees at the workplace.

⁹⁹⁷ Section 4(1) (b) of the LRA.

⁹⁹⁸ Gutmann *op cit* 346.

⁹⁹⁹ Section 64 of the LRA provides for the requirements that must be met before the employees may embark on a legally protected strike. First, the issue on dispute must be referred either to a bargaining council or to the CCMA for conciliation; secondly, a certificate stating that the dispute remains unresolved must be issued or a period of 30 days from the date of referral of the dispute must have lapsed; thirdly, the other party to the dispute must be given at least 48 hours notice of the commencement of the strike and where the state is the employer, the required strike notice is 7 days.

The positive right to associate is protected in the Act by prohibiting any one from infringing the employee's or work-seeker's right to form and join a trade union of his or her choice. However, the LRA does not make any specific reference to the freedom not to associate.

The LRA recognises union security arrangements contained in collective agreements.¹⁰⁰⁰ "Collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and on the other hand one or more employers, registered employers' organisations or employers and registered employers' organisations.¹⁰⁰¹ A collective agreement binds all parties thereto.¹⁰⁰²

To give effect to unions' right to security arrangements, the LRA provides for two categories of collective agreements, namely agency shop agreements and closed shop agreements.

The agency shop agreement is a collective agreement concluded by a representative trade union and an employer or employers' organisation requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.¹⁰⁰³ On the other hand, the closed shop agreement only requires all employees covered by the agreement to be members of the trade union.¹⁰⁰⁴

¹⁰⁰⁰ Sections 25 and 26 of the LRA.

¹⁰⁰¹ Section 213.

¹⁰⁰² Section 23.

¹⁰⁰³ Section 25 (1). On the agency shop, see Landman A, "No Free Ride.. " *op cit* 1-7; Madima T, "The Agency Shop" (1993) 9 *Employment Law* (4) 88-91.

¹⁰⁰⁴ Section 26 (1). On closed shop agreements, see Albertyn, Note 67; Madima *op cit* 547; Le Roux PAK "The closed shop and the Industrial Conciliation Act" (1980) *MB* 69-77; Grogan J *Collective labour law* (1993) 7-8; Landman A "The closed shop" (1989) 2 *Labour Law Briefs* (12) 87-93.

Fourthly, unlike 1993 Constitution, the 1996 Constitution provides for national legislation to recognise union security arrangements contained in collective agreements.¹⁰¹³ Finally, the 1993 Constitution excluded state employers as well as employers in the private sector from the benefit of labour rights.

During the certification there were two objections to section 23 of the final Constitution. The first related to the exclusion of the employer's right to lock-out and the second objection was that the section should recognize and protect the right of an employer to bargain collectively with its employees.¹⁰¹⁴ The Constitutional Court found that the new text, which made no reference to the right to lock out but which provides workers with a right to strike, was in accordance with constitutional principles.¹⁰¹⁵ The position was therefore that the right to lock-out should not appear in the new Constitution. However this does not mean that the new Constitution does not recognize a lock-out.

According to the Constitutional Court, the possibility exists that an employer would be entitled to exercise the same economic power against an adversary but declined to define the nature and the extent of this right. It was pointed out that in theory, employers may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment and the exclusion of workers from the workplace.¹⁰¹⁶ The result is that lockout may be available.¹⁰¹⁷

¹⁰¹³ Section 23(6) of the 1996 Constitution.

¹⁰¹⁴ *In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC); *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (1996) 17 ILJ 821 (CC) at 841.

¹⁰¹⁵ *In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at 1284-5; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (1996) 17 ILJ 840 (CC) at 839-840.

¹⁰¹⁶ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (1996) 17 ILJ 841 (CC).

¹⁰¹⁷ The Constitutional Court in certification of section 23 pointed out that "It is correct that collective bargaining implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries. However constitutional principle 28 does not require that the new text expressly recognize any particular mechanism for the exercise of economic power on behalf of workers and employer's; it suffices that the right to bargain collectively is specifically protected. Once a right to bargain collectively is recognized, implicit within it will be the right to exercise some economic power against

The further objection raised was that the new text was defective because it did not deal with the right of employer to bargain collectively with its employees. The Constitutional Court noted that, as far as employers were concerned, this right was only given to employers' organizations and not to individual employers.¹⁰¹⁸ The Court upheld the objection. This aspect has subsequently been remedied and the right to engage in collective bargaining now applies to employers as individuals.¹⁰¹⁹

The relationship between freedom of association and trade unions' rights is a complex one. Freedom of association is fundamental to trade unions' activities. Similarly, the right to form and join trade unions constitutes the 'bedrock of social democracy.' It is a seminal right in a democratic body that straddles both individual and collective rights.¹⁰²⁰ It not only protects the individual employees' right, but also provides the legal basis for ensuring the existence and functioning of trade unions.¹⁰²¹

The constitution provides "every worker" with the right to form and join trade unions and to participate in their activities and programmes. The right of workers to form and join trade unions and to participate in their activities and programmes is balanced by and corresponds with the employers' right to form and join employers' organisations and to participate in their activities and programmes.¹⁰²² The employees' right to form and join trade unions and the employer's right to form and join employer's organisations are an integral part of the vitally important collective bargaining process required to ensure fairness and equality in labour matters and thereby facilitate an orderly and stable industrial relations.¹⁰²³

partners in collective bargaining. The nature and the extent of the right need not be determined now."

¹⁰¹⁸ In *Re Certification of the Constitution of the Republic of South Africa*, 1996 *op cit* at 1283E-F.

¹⁰¹⁹ Section 23 (5) of the Constitution.

¹⁰²⁰ Devenish *op cit* 315.

¹⁰²¹ Olivier M, "Freedom of Association and Closed Shop Agreements" (1994) *De Rebus* 352-354.

¹⁰²² Section 23(3) (a-b).

¹⁰²³ Basson A, *South Africa's Interim Constitution op cit* 40. See also Devenish *op cit* 315.

Furthermore, the Constitution protects the workers' right to strike.¹⁰²⁴ This is an important constitutional innovation that has its genesis in the interim constitution.¹⁰²⁵ The right to strike is a powerful instrument in the hands of employees. They can use it to voice their demands in the process of collective bargaining.¹⁰²⁶ Unlike in the interim Constitution where the right to strike is limited only to collective bargaining purpose, in the final Constitution, this right is no longer limited to any specific purpose. The effect of this is to broaden its scope. It now extends beyond its role in collective bargaining, to the right to strike over the social and economic policies that have a direct impact on the interest of workers. Thus, a purposive interpretation of this right and one in line with international law will include under its ambit strikes for social and economic purposes. Strikes which are purely political are excluded from the ambit of this section.

Before the coming into existence of the interim as well as the final Constitutions, since there was no entrenched right to strike, the protection of the strikers was left to the exclusive discretion of the Industrial Court¹⁰²⁷ in the exercise of its unfair labour practice jurisdiction.¹⁰²⁸

Like any other fundamental right, the right to strike is not absolute. The LRA provides an extensive legislative framework for the exercise of this right. Section 64 (1) of the LRA echoes the constitutional right to strike but subjects it to a number of limitations.¹⁰²⁹

¹⁰²⁴ Section 23 (2) of the Constitution.

¹⁰²⁵ Section 27 of the interim Constitution. See also Devenish GE, *A Commentary on the South African Bill of Rights* (1999) 318.

¹⁰²⁶ See Basson A, *South Africa's Interim Constitution op cit* 40 & Mubangizi JC, *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) 124.

¹⁰²⁷ For instance in *Black Allied Workers Union v Prestige Hotels CC v/a Blue Waters Hotel* (1993) 14 *ILJ* 963 (LAC), the Labour Appeal Court (LAC) accepted that workers who participate in a legal strike may not be dismissed. The argument by the Court was that if workers contemplating strike action face the possibility of dismissal, this would render strike action ineffective and thereby negatively impairing collective bargaining.

¹⁰²⁸ Section 23(5).

¹⁰²⁹ The first limitation is procedural. A strike is protected only if the procedures required by the LRA are complied with. This is regulated by the provisions of section 64. Second limitation is the prohibition of strike in respect of disputes that are subject of a peace clause or that are regulated by a collective agreement (regulated by section 65 (1)); and the third limitation is the restriction of strikes in respect of dispute that have been referred to arbitration by agreement (regulated by section 65 (3)).

Arguably, the right to strike should be read together with the right to engage in collective bargaining.¹⁰³⁰

The final constitution recognises the importance of collective bargaining by granting trade unions, employers and employer's organisations the right to engage in collective bargaining

Likewise, section 23(6) of the Bill of Rights recognizes union security arrangements contained in collective agreements. The Constitution does not define "union security arrangements". However, according to Barker and Holtzhausen, "union security arrangement" is a generic term for an agreement between an employer and a trade union in terms of which union membership or alternatively, payment of union subscription is a condition for employment for all employees.¹⁰³¹ Obviously this would include closed and agency shop agreements.

The rights guaranteed in section 23 of the final Constitution are primarily directed at the relationship between employers and employees. Unlike other socio-economic rights, labour rights are not directed at material state's performance such as the provision of facilities and delivery of services, but at a relationship between private parties.¹⁰³²

Under the 1996 Constitution, the different amendments brought little change to the protection of freedom of association as entrenched in the LRA of 1995.

¹⁰³⁰ Section 23(5) provides for the trade union, employers' organization and employer's right to engage in collective bargaining.

¹⁰³¹ Barker & Holtzhausen, *South African Labour Glossary* (1996) 160.

¹⁰³² Mubangizi *op cit* 124.

5.3.2. International Law: Impact on Current SA Law

As stressed earlier, international law is also law in South Africa.¹⁰³³ As far as the right to freedom of association at the workplace is concerned, it may also find its sources in international law, especially international human rights and international labour law.

5.3.2.1. International Human Rights Law

The relationship between international law and municipal law in South Africa must be examined in order to place international human rights law in its proper context. The major propositions regarding the relationship between international law and municipal law are reflected in the opposing theories commonly known as the monist and the dualist theory.

In terms of the monist theory as advocated by Grotius, Kelsen, Verdross and Scelle, international law and municipal law must be regarded as the manifestation of a single conception of law.¹⁰³⁴ Thus, the international legal order and the national or municipal legal order of various States all belong to a single universal system. The municipal legal order is said to be in a subordinate position. According to this theory, municipal courts are obliged to apply rules of international law directly, even in matters concerning individual citizens, without any act of incorporation or transformation by the legislature.¹⁰³⁵ Therefore when their rights have been infringed, natural or juristic persons may invoke international law to vindicate their rights and a court of law cannot rule out an argument on the pretext that it would be based on international and not national law. This theory lends support to the “doctrine of incorporation,” according to which international law is automatically incorporated in municipal law.

¹⁰³³ See Sections 39 (1) (b), 231-232.

¹⁰³⁴ Dugard *op cit* 43.

¹⁰³⁵ *Idem* 36.

The opposing theory, which is the dualist theory as developed by Van Bynkershoek, Triepel, Anziliotti and Lauterpacht, maintains that international and municipal law are entirely separate systems of law, originating from different sources and dealing with different subject matters. It is said that this theory of law is connected with the positivist theory of law and with the view that it is States, rather than individuals, who are the primary subjects of international law. Therefore, rules of international law become part of municipal law only to the extent that the latter has caused them to do so.

Accordingly municipal courts may apply international law only if it has been “transformed” into local law by Act of Parliament or municipal legislation.¹⁰³⁶ Thus, signing and ratification are not sufficient to bring international law applicable into municipal law. Domestic law prevails over international law.

The above theories indicate the place of international law in municipal courts. The position in South Africa prior democracy and post democracy should be assessed briefly. Historically, prior to the 1993 Constitution, some leading legal commentators agreed that customary international law did form part of South African law.¹⁰³⁷ Thus, South Africa followed the monist approach in respect of customary international law. However, as a species of common law, it was subordinate to legislation or Acts of Parliament.¹⁰³⁸

However, when coming to treaties, they generally did not become part of our law unless transformed by legislation. South African courts adopted the rule that the provisions of an international treaty or convention to which South Africa was a party did not become part of the municipal law of South Africa unless expressly transformed as such through the legislative process.¹⁰³⁹

¹⁰³⁶ Dugard *op cit* 36.

¹⁰³⁷ Maluwa *op cit* 30; see further the cases of *Ex parte Schumann* (1940) NPD 251; *South African Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C); *Nduli and another v Minister of Justice and Others* (1978) (1) SA 893 (A); *Inter-science Research and Development Services (pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T).

¹⁰³⁸ See the *Inter-science Research and Development Services (pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T); Sanders AJGM, “The Applicability of Customary International Law in South Africa: The Appeal Court has Spoken” (1978) XI *CILSA* 198.

¹⁰³⁹ The *Locus Classicus* in *Pan American World Airways Incorporation v SA Fire and Accident Insurance*

International treaties or conventions were not automatically incorporated into our law. Accordingly, for international treaties and conventions, South Africa followed the dualist approach.

The 1996 Constitution takes human rights and international law very seriously.¹⁰⁴⁰ It expressly recognizes international law and the role it plays in South African municipal law. The Republic is bound by international agreements signed and/or ratified and enacted into law by national legislation¹⁰⁴¹ as well as by customary international law as long as it is consistent with the Constitution or an Act of Parliament.¹⁰⁴² Thus also under the post apartheid, South Africa follows both the monism and dualism approaches. It follows monism in terms of customary international law and dualism in terms of international treaties or convention. South African courts have in a number of cases referred to the principles of international human rights law.¹⁰⁴³

The incorporation of a Bill of Rights in the 1993 as well as in the 1996 Constitution provides clear evidence of South Africa's commitment to the protection of human rights.

Co Ltd 1965 (3) SA 150 (A) at 161.

¹⁰⁴⁰ Section 39 of the 1996 Constitution which provides that "when interpreting the Bill of Rights, a court, tribunal or forum (b) must consider international law and (c) may consider foreign law."

¹⁰⁴¹ Section 231 of the Constitution. Section 231(4) provides that "any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by the Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." Section 233 also provides that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

¹⁰⁴² Sections 232 which provides that "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

¹⁰⁴³ *S v Makwanyane* 1995 (3) SA 391 (CC); *South African National Defence Union (SANDU) v Minister of Defence and Another* (1999) 1LJ 2265 (CC); *SANDU v Minister of Defence and Another* 2003 (9) BCLR 1055 (T); 2003 (24) ILJ 2083 (T); *National Union of Metal workers of South Africa (NUMSA) v Bader Bop Ltd* 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) and in *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* 2003 (2) BCLR 154 (CC).

5.3.2.2. International Labour Law

International labour law is mainly based on ILO Conventions. South Africa joined the ILO on its inception in 1919. It played an important role in the adoption of the ILO Constitution.

In 1966 South Africa was expelled from the ILO due to its apartheid policy.¹⁰⁴⁴ Accordingly, before 1994, South Africa was not a signatory to the ILO Conventions on freedom of association. It was also no longer a member of the ILO. It was not possible for an aggrieved trade union to pursue a complaint to the Freedom of Association Committee of the governing body of the ILO concerning any violation of workers' rights to freedom of association in South Africa. It is only after the 1994 general elections that the country was readmitted to the ILO and ratified many ILO Conventions, including Conventions 87 and 98.

International labour law played an important role in the transformation of South African labour law. Our labour law on freedom of association and trade unions' rights was inspired by the two core ILO conventions on freedom of association and the protection of the right to organize.¹⁰⁴⁵ South Africa ratified these conventions in 1996, immediately after its readmission and these conventions constitute binding obligation in international law.¹⁰⁴⁶ The South African LRA was consequently passed to amongst other things, give effect to the obligation incurred by South Africa as a member of the ILO.¹⁰⁴⁷

¹⁰⁴⁴ Du Toit *op cit* 65.

¹⁰⁴⁵ ILO Conventions 87 and 98. The provisions of the Constitution and LRA dealing with freedom of association are more or less the same with the provisions of these two Conventions.

¹⁰⁴⁶ South Africa signed and ratified the two ILO Convention on Freedom of Association on the 19th of February 1996.

¹⁰⁴⁷ Section 1(b) of the LRA.

In view of the above, the major sources of the South African international obligation in respect of labour law are the ILO Conventions and Recommendations. Accordingly, labour courts have to refer to the ILO conventions that have been signed and ratified and this will include those that were binding in South Africa prior to its withdrawal from the ILO in 1964.

The South African Labour Court and the Constitutional Court in particular pointed out in a number of cases that in interpreting the provisions of section 23 of the final constitution, the ILO Conventions are of great importance and must be considered.¹⁰⁴⁸

5.4. Judicial Protection of Freedom of Association and Trade Unionism under the Democratic Constitution: An Overview of the Jurisprudence

Since the coming into operation of the Interim Constitution and its replacement by the 1996 Constitution and the LRA of 1995 as amended, South African courts in general and the Labour Court in particular, have developed an interesting jurisprudence on employees' rights at the workplace, especially the right to join, form a trade union or participate in its activities, the right to strike and the right to engage in collective bargaining with the employers or employers' organisations.

The judiciary has played a crucial role in interpreting the Constitution and ensuring that the limitations on the right to freedom of association are constitutional and justified in view of the standards set out in the limitation clause. This may be illustrated through an overview of the jurisprudence of our courts in some selected cases.

¹⁰⁴⁸ *South African National Defence Union (SANDU) v Minister of Defence and Another* (1999) 11 LJ 2265 (CC); *Food and Allied Workers Union and others v Pets Products (pty) Ltd* (2000) 21 ILJ 1100 (LC) *SANDU v Minister of Defence and Another* 2003 (9) BCLR 1055 (T); 2003 (24) ILJ 2083 (T); *National Union of Metal workers of South Africa (NUMSA) v Bader Bop Ltd* 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC); *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* 2003 (2) BCLR 154 (CC) .

5.4.1. The Right to Join Trade Unions and Participate in their Activities

5.4.1.1. *South African National Defence Union v The Minister of Defence and Another (SANDU 1)*¹⁰⁴⁹

The Transvaal Provincial Division declared Section 126B (1),¹⁰⁵⁰(3)¹⁰⁵¹ and (4) of the Defence Act¹⁰⁵² to be unconstitutional. The ground for constitutional invalidity was that it prohibited members of the South African National Defence Force (SANDF) from forming and joining trade unions, participating in public protest actions or engaging in bargaining process, thereby violating their right to freedom of association.¹⁰⁵³ The order of unconstitutionality was then taken before the Constitutional Court for confirmation.

The Constitutional Court held that the term “worker” in Section 23(2) of the 1996 Constitution should be interpreted to include members of the SANDF even though the relationship with the Defence Force was not identical to an ordinary employment relationship. Like any other workers, members of the SANDF were entitled to the constitutional rights to form and join trade unions of their choice and to participate in their activities and programmes as entrenched in Section 23 of the Bill of Rights.

¹⁰⁴⁹ (1999) 20 ILJ 2265 (CC) (SANDU).

¹⁰⁵⁰ It provides that a member of the permanent force shall not be or become a member of any trade union as defined in Section 1 of the LRA of 1956 provided that the provisions should not preclude any member of such force from being or becoming a member of any professional or vocational institute, society, association or like-body approved by the minister.

¹⁰⁵¹ A member of the SANDF who contravened subsections 1 and 2 was guilty of an offence.

¹⁰⁵² Act 44 of 1957.

¹⁰⁵³ *SANDU v Minister of Defence & Another* 1999 (2) SA 735 (TPD).

The Minister of Defence invoked Section 199(7) of the 1996 Constitution¹⁰⁵⁴ as a justification for this limitation. He further argued that the Defence Force could not be a disciplined military force required by Section 200(1)¹⁰⁵⁵ of the 1996 Constitution if its members belonged to a trade union and wished to exercise all the rights conferred by Section 23 of the Constitution. He contended that the provisions of Section 126B (1), (3) and (4) constituted a justifiable limitation of the rights of the members of the armed forces in terms of Section 36 of the Constitution.

According to the Court, Section 199(7) of the 1996 Constitution required members of the Defence Force to perform their duties dispassionately and did not imply that they should lose their rights and obligations of citizenship in other aspects of their lives.¹⁰⁵⁶ The Court also held that the ILO Convention 87 on freedom of association did not prevent members of the Defence Force from joining, forming or participating in the activities of trade unions.¹⁰⁵⁷ Finally, the Constitutional Court confirmed the judgment of the Transvaal Provincial Division declaring the provisions of Section 126B (1), (3) and (4) of the Defence Act unconstitutional and invalid.¹⁰⁵⁸

¹⁰⁵⁴ It reads:

“Neither the security services nor any of their members may in the performance of their functions
 (a) prejudice a political party interest that is legitimate in terms of the Constitution; or
 (b) further in a partisan manner any interest of a political party.”

¹⁰⁵⁵ Section 200 (1) of the 1996 Constitution provides that “the defence force must be structured and managed as a disciplined military force.”

¹⁰⁵⁶ *SANDU* at 2273G-H.

¹⁰⁵⁷ *Idem* at 2278 D-F.

¹⁰⁵⁸ *Idem* at 2279-2280H.

The judgment of the Constitutional Court contrasts with that in *Lesotho Union of Public Employees v The Speaker of the National Assembly and Others*.¹⁰⁵⁹ The applicant contended that Sections 31(2)¹⁰⁶⁰ and 35¹⁰⁶¹ of the Lesotho Public Service Act of 1995 were unconstitutional on the ground that they conflicted with Section 16 of the Lesotho Constitution, which protected the right of workers to freedom of association.¹⁰⁶² The respondent argued that trade unions were confrontational and suited to a private sector and had no place in a public sector.

The Lesotho Court held that Sections 31(2) and 35 were not unconstitutional. It went as far as contending that trade unions were not only confrontational, but also unreasonable on the ground that they usually resorted to strike actions without conforming to the requirements of the law and without taking into account the economy of the country.¹⁰⁶³ The Court further pointed out that freedom of association of public officers had not been eliminated, since they were free to establish and join staff associations. The Court held that the impugned legislation pursued a legitimate aim listed in Section 16(2) (c) of the Lesotho Constitution.

¹⁰⁵⁹ 1997 BLLR 1485.

¹⁰⁶⁰ It provided that notwithstanding any other law, public officers should not become members of any trade union registered under the Labour Code Order of 1992.

¹⁰⁶¹ In terms of Section 35, the Labour Code Order of 1992 did not apply to public officers.

¹⁰⁶² Section 16 of the Lesotho Constitution read as follows-

- (1) "Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of peaceful assembly, without arms, that is to say, freedom to assemble with other persons.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions –
 - (a) in the interests of defence, public service, public order, public morality or public health;
 - (b) for the purpose of protecting the rights and freedoms of other persons; or
 - (c) for the purpose of imposing restrictions upon public officers.
- (3) A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as referred to in subsection (2) except to the extent to which he satisfies the court that provisions or, as the case may be, the thing done under the authority thereof does not abridge the rights and freedoms guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) or for any of the purposes specified in subsection (2)(b) or (c)."

¹⁰⁶³ *Lesotho Union*, at 1493G.

According to the Court, there was a proper balance between the applicant's interest in establishing staff associations in order to enjoy the fundamental human right to freedom of association and the general public interest in preserving a sound economy of the country.¹⁰⁶⁴

The difference between the South African Constitutional Court's judgment in *South African National Defence Union* and the Lesotho's judgment is that the former put more emphasis on the constitutional rights of the members of the SANDF while the latter emphasised the economy of the country.

5.4.1.2. *Nkutha & Others v Fuel Gas Installation Pty Ltd*¹⁰⁶⁵

The applicants were members of a trade union, the National Entitled Workers Union (NEWU). They alleged that the employer had unfairly discriminated against them on the ground of union membership and therefore contravened the provisions of Section 5(2) and (3) of LRA 66 of 1995.¹⁰⁶⁶

¹⁰⁶⁴ *Lesotho Union*, at 1495 I.

¹⁰⁶⁵ (2000) 21 ILJ 218 (LC).

¹⁰⁶⁶ Section 5 (2) & (3) reads as follows:

- "(2) Without limiting the general protection conferred by subsection (1), no person may do any of the following -
- (a) require any employee or a person seeking employment-
 - (i) not to be a member of a trade union or workplace forum;
 - (ii) not to become a member of a trade union or workplace forum; or
 - (iii) to give up membership of a trade union or workplace forum;
 - (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
 - (c) prejudice an employee or a person seeking employment because of past, present or anticipated -
 - (i) membership of a trade union or workplace forum;
 - (ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;
 - (iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;
 - (iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;
 - (v) disclosure of information that the employee is lawfully entitled or required to give to another person;
 - (vi) exercise of any right conferred by this Act; or
 - (vii) participation in any proceedings in terms of his Act.
- (3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in

The union first alleged that one of its members was dismissed for union membership and whenever a union member was involved in a dispute with a non-member, only the member was charged with assault. It also argued that during a conversation between the employees and the employer, the latter made some anti-union remarks. As a further violation the right to freedom of association under Section 5 (2) and (3) of the LRA, the union referred to the letter faxed by the employer to the union, informing the union of the resignation of some of its members and their subsequent promotion.

The Labour Court dismissed the first allegation of the union, holding that it had failed to prove that its members were compelled to give up their union membership or were discriminated against on the basis of their union membership. On the other hand, the employees were successful in proving that the conduct of the employer was in contravention with Section 5 (2) and (3) since only those employees who resigned from the union were promoted shortly after their resignation.

The employer failed to prove that its conduct was not intended to victimise union members. It also failed to explain why it played an active role in informing the union of the resignation of some of its members. The Labour Court therefore ruled that the employer had unfairly discriminated against the applicants on the basis of their union membership thereby infringing upon their right to freedom of association as protected by Sections 4 and 5 of the LRA.

5.4.1.3. *Independent Municipal & Allied Trade Union & Others v Rustenberg Transitional Council*¹⁰⁶⁷

On 27 January 1998, the respondent operating under the Local Government Transitional Act 1993 adopted a resolution, in terms of which senior executives and other managerial employees or “employees on job level 1-3” could “not be allowed to serve in executive positions of trade unions or be involved in trade union activities.” Following an objection by the first applicant, the final phrase “or be involved in trade union activities” was deleted from the resolution.

any proceedings in terms of his Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.”

¹⁰⁶⁷ (2000) 21 ILJ 377 (LC) (IMATU).

Still unsatisfied, the union launched an application for an order setting aside the resolution as a contravention of LRA 66 of 1995 and the Bill of Rights in the 1996 Constitution.

The respondent contended that senior officials could not simultaneously discharge their obligations as employees entrusted with functions traditionally assigned to top management in an organisation and still sit on the executive branch of the union as union office-bearers. First, they have access to confidential information. Secondly, they are required to initiate or conduct disciplinary hearings against employees. Thirdly, they may by reason of their membership of the union executive find themselves in a position where they are “unable or unwilling to fulfil essential tasks required of them.”¹⁰⁶⁸

The legal issue, reminding one of type in the *Keshwar* case, was whether a managerial employee could enjoy the right to join and hold office in a union and become a union leader. The conflict of interest between the employer and the union was also at issue. In its judgement, the Labour Court acknowledged that unions and employers were natural adversaries, but they were obliged to live together and to co-operate increasingly as commerce and industry become more complex.

The Court first referred to the common law position that allowed the dismissal of an employee for membership of an entity – the union – conflicting with the employer, as it was considered a betrayal of the master or employer. However, the Court quickly turned to the Constitution and held that Section 23 thereof conferred on all employees the right to join a trade union and to participate in its activities without exempting them from their contractual duties. The Court declared that the resolution adopted by the respondent conflicted with the 1996 Constitution¹⁰⁶⁹ and LRA 66 of 1995,¹⁰⁷⁰

¹⁰⁶⁸ *IMATU* at 378 H – 379 C.

¹⁰⁶⁹ Sections 18 and 23 of the 1996 Constitution.

¹⁰⁷⁰ Sections 4(1)(b), (2)(a), (2)(c), 5(1)(a) & (b), 5(2)(a)(i) & (ii), 5(2)(b), 5(2)(c)(i) & (iii), 5(3).

Brassey AJ made the point that the employee could not be punished for taking up a leadership position in a union, but his status in the union gave him no right to do less than his job required unless some specific provisions, such as Sections 14 and 15 allowed so. A senior employee who became a union leader should, in consequence, tread carefully, especially in his handling of confidential information.¹⁰⁷¹ The respondent's resolution of 27 January 1998 prohibiting employees on job level 1-3 from serving in executive positions on trade unions was declared to be unlawful and set aside to the extent of such prohibition.¹⁰⁷²

The common ground between the *Keshwar* and the *IMATU* is that both concerned the right to freedom of association of managerial employees, which is also recognised in South African law. The *IMATU* case is, however, close to another case, namely the *South African Defence Union* case, which was decided under the LRA of 1995 on that they all dealt with the right to freedom of association for public sector employees.

5.4.1.4. *Food and Allied Workers Union (FAWU) & Others v Pets Products (pty) Ltd*¹⁰⁷³

In this case, the employees members of the applicant trade union, FAWU, participated in a protected strike over wage increase. The strike ended in a wage increase which was extended to non-union members in the bargaining unit. The respondent employer gave an R 200 Pick 'n Pay voucher to those employees in its operation who did not participate in the strike.

¹⁰⁷¹ *IMATU* at 384 I – J.

¹⁰⁷² *Idem* at 385 G.

¹⁰⁷³ (2000) 21 *ILJ* 1100 (LC).

The legal question that the Labour Court had to deal with was whether the provision of shopping vouchers by the respondent to the non-striking employees violated the right of the striking employees provided for in section 5(1)¹⁰⁷⁴ and (3)¹⁰⁷⁵ of the LRA.

The applicants contended that the respondent contravened section 5(1) and/ or 5(3) in that the respondent paid non-strikers the R200 Pick 'n Pay voucher and that in this way the respondent discriminated against the strikers (all of whom were members of FAWU) for exercising their right to strike conferred by the Act. In the same way, the applicant argued that the respondent had advantaged the non-strikers in exchange for them not exercising their right to strike conferred by the Act.

The applicant pointed out that the mere fact that the respondent differentiated between strikers and non-strikers constituted discrimination as contemplated in section 5(1) of the Act. The effect of such payment was that those who did not strike were rewarded and those who did were penalised for doing so. This had the effect of deterring the strikers from striking in future; conversely, those who did not strike were also encouraged not to go on strike in future.¹⁰⁷⁶

The respondent argued that he had no ulterior motive in making the payment to non-strikers which was simply a payment to those who did not strike, who had worked during the strike, and who had "gone an extra mile." He contended that the payment was for the "extra hard work" done by the non-strikers during the strike in that they had ensured the continued viability of the operation department by keeping the production going.

¹⁰⁷⁴ Section 5(1) provides that "No person may discriminate against an employee for exercising any right conferred by this Act."

¹⁰⁷⁵ Section 5(3) provides that "No person may advantage, or promise to advantage an employee, or a person seeking employment in exchange for that person not exercising any right conferred by the Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute."

¹⁰⁷⁶ (2000) 21 *FLJ* 1100 (LC) at 1104D-F.

The respondent contended that there was no intention on its part to secure an unfair advantage over the union or for that matter for it to undermine the first applicant or its role as the collective bargaining agent on behalf of its members employed in the operation department.¹⁰⁷⁷

After taking into consideration the provisions of section 23 of the Constitution and the relevant ILO Conventions and Recommendations, the Labour Court held that the respondent discriminated against the strikers for exercising their right to strike conferred by the LRA and that by doing so, the respondent infringed section 5(1) and (3) of the LRA.

Arendse AJ pointed out that the right to strike was a right that could be waived unless of course there was an agreement between a trade union party and an employer party which regulated the issue. In the context of this case, however, there could be no justification for giving rewards to non-strikers because they refrained to exercise their statutory right to strike.¹⁰⁷⁸

5.4.2. Agency and Closed Shop Agreements

5.4.2.1. *National Manufactured Fibers Employers' Association (Pty) Ltd v Commissioner Bikwani South African Chemical Workers Union*¹⁰⁷⁹

The employer entered into a collective agreement on wages and conditions of service, which included agency shop provisions, with a representative trade union, namely South African Clothing Textile Workers Union (SACTWU). As a result thereof, double deductions were made from the wages of employees members of the minority union, which was South African Clothing Workers Union (SACWU). SACWU referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

¹⁰⁷⁷ *Idem* at 1104 H-J.

¹⁰⁷⁸ (2000) 21 ILJ 1100 (LC) *op cit* at 1113B-D

¹⁰⁷⁹ (1999) 10 BLLR 1076 (LC).

The Commissioner was required to determine whether the members of the rival trade union (SACWU) were bound by the agency shop agreement and whether such agreement complied with the provisions of LRA 66 of 1995, especially its Section 25.

The Commissioner held that the agreement did not apply to SACWU's members and ordered the employer to repay what it had collected from them. The applicant then requested the Labour Court to review the arbitration award issued by the CCMA Commissioner on the ground that the latter had erred in finding that only the employees who were not members of any trade union were obliged to pay agency shop fees.

The Court ruled that those employees who were members of the minority union were not covered by the said agreement because they contributed materially to a collective bargaining. Such employees remained "free riders" because they benefited from the efforts of the majority union without contributing to costs.

The Court's judgment was based on the view that agency shop agreement was directed at employees who were not members of the representative trade union, irrespective of whether they were members of another union or not. The commissioner's award was set aside. The judgment of the South African Court on the legality of an agency shop agreement may be compared to two other judgments handed down by foreign courts on the same legal issue, one in Canada and another in the USA as discussed below.

In *Lavigne v Ontario public Service Employees Union*,¹⁰⁸⁰ the Canadian Supreme Court declined to find unconstitutional an agency shop provision in a public sector collective bargaining agreement despite the fact that contributions were used for political purposes that went beyond the immediate concern of the collective bargaining unit. The Canadian court sought to balance the rights of the workers and the values in industrial relations context.

¹⁰⁸⁰ 1992 (4) CRR 2D 193.

The US Supreme Court in *Abood v Detroit board of Education*¹⁰⁸¹ also held that agency shop provisions were in principle justified notwithstanding their impact upon the constitutional rights of employees. It further ruled that the mere existence of an agency shop did not constitute an infringement on the right to freedom of association. However, like the South African but unlike the Canadian Court, the US Supreme Court held that the use of the collected money pursuant to an agency shop for political activities was inimical to freedom of association and as such prohibited in agency shop agreements.

5.4.2.2. *Greathead v SA Commercial Catering & Allied Workers Union*¹⁰⁸²

On 2 July 1997 SA Commercial Catering & Allied Workers Union (SACCAWU), a trade union duly registered under the LRA of 1995, concluded an agency shop agreement with Metcash Trading Ltd (Metcash), the employer. The agreement required Metcash to deduct an agreed monthly agency fee from the wages of those of its employees who were not members of the union and to remit the agency fees so deducted to the union.¹⁰⁸³

Greathead was employed by Metcash as a retail adviser but was opposed to the union and its policies and affiliations. He objected to the imposition upon him of the agreement on the grounds that it contravened his constitutional right to freedom of association and freedom of political choice in terms of sections 18 and 19(1) retrospectively.

He first launched an application in the Witwatersrand Local Division for an order against Metcash as first respondent and the union as second respondent, requesting the Court to declare the agency shop agreement invalid, unenforceable and of no application to him. The application was dismissed on the ground that it was limited to an attack on the agency shop agreement and not on the constitutionality of section 25 of the LRA providing for such an agreement.

¹⁰⁸¹ 52 Led 2d 61 summarised in 1995 4 LCD 183, in Du Toit *op cit* Note 21, 98.

¹⁰⁸² 2001 (3) SA 464 (SCA) (*Greathead*).

¹⁰⁸³ *Idem* 467 B-C.

However, the Court granted Greathead leave to appeal to the Supreme Court of Appeal. Following the withdrawal of Metcash, the union remained the only respondent.¹⁰⁸⁴

The central issue on appeal was whether the agreement complied with section 25(3) of the LRA.¹⁰⁸⁵ The respondent argued that the agreement complied substantially with section 25(3) and was capable of rectification. However, the Court held the view that the agreement did not expressly provide for the matters referred to in section 25(3)(a) and (c) and was also silent about the requirements stated in section 25(3) (d)(i) of the LRA.¹⁰⁸⁶ It finally made an order upholding the appeal and setting aside the order of the Witwatersrand Court and replacing it with a new one declaring the agency shop agreement unenforceable on that it failed to comply with the provisions of section 23(3) of the LRA.¹⁰⁸⁷

¹⁰⁸⁴ *Greathead* 467 D-J.

¹⁰⁸⁵ Section 25(3) of the LRA of 1995 provides as follows;

- "An agency shop agreement is binding only if it provides that-
- (a) employees who are not members of the representative union are not compelled to become members of that trade union;
 - (b) the agreed agency fee must be equivalent to, or less than-
 - (i) the amount of the subscription payable by the members of representative trade union;
 - (ii) if the subscription of the representative trade union is calculated as a percentage of an employee's salary, that percentage; or
 - (iii) if there are two or more registered trade unions party to the agreement, the highest amount of the subscription that would apply to an employee;
 - (c) the amount deducted must be paid to into a separate account administered by the representative trade union; and
 - (d) no agency fee deducted may be -
 - (i) paid for a political party as an affiliation fee;
 - (ii) contributed in cash or in kind to a political party or a person standing for election to any political office; or
 - (iii) used for any expenditure that does not advance or protect the socio-economic interests of employees."

¹⁰⁸⁶ *Greathead* 468 H-J.

¹⁰⁸⁷ *Idem* 469G-H.

5.4.2.3. *Great North Transport v TAWU*¹⁰⁸⁸

The Court held that a closed shop agreement that complied with the LRA of 1995 was not unconstitutional. This judgment may be compared with the one handed down by the European Court of Human Rights in *Young, James & Webster v United Kingdom*,¹⁰⁸⁹ where closed shop agreement provisions in UK were successfully challenged.

In 1975, the British Railway (employer) entered into a closed shop agreement with three trade unions providing that membership of one of them was a requirement for employment. The applicants who were no longer employees of British Railway on the conclusion of the closed shop agreement were dismissed on the ground that they failed to satisfy the conditions of the closed shop. They therefore referred the dispute to the European Court of Human Rights alleging that their dismissal constituted the violation of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.¹⁰⁹⁰

The European Court first stressed that a closed shop system held considerable advantages for both employees and employers such as the fostering of an orderly collective bargaining and the avoidance of the proliferation of trade unions.¹⁰⁹¹ However, the Court ruled that Article 11 of the European Convention neither prohibited nor allowed the system of closed shop in general, but the challenged closed shop agreement was nevertheless inconsistent with it.

¹⁰⁸⁸ (1998) 4 BALR 470 M.

¹⁰⁸⁹ (1995) 4 LCD 208.

¹⁰⁹⁰ Article 11 provides that-

- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
- (2) No restrictions shall be placed on the exercise of these rights other than such as prescribed by law and are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights and freedoms of others."

¹⁰⁹¹ *Young et al, op cit* Note 187, 210.

5.4.3. The Right to Engage in Collective Bargaining and to Strike

5.4.3.1. *SANDU v Minister of Defence and Another (SANDU 2)*¹⁰⁹²

It has already been observed that the Constitutional Court upheld the challenge by SANDU and declared the provisions of section 126 B (1) of the Defence Act which prohibited members of the Defence Force from joining trade unions and participating in their activities to be unconstitutional and invalid.¹⁰⁹³ The order of invalidity was, however, suspended for a period of three months in order to enable the Minister of Defence to devise an appropriate regulatory framework to regulate trade unions in the force.¹⁰⁹⁴

Following the judgment of the Constitutional Court in the first *SANDU* case, the Minister of Defence established a committee to draft regulations providing for military trade unions. SANDU was not, however, represented in the drafting committee. On 20 August 1999, the Minister published the regulations providing for military trade unions. Those regulations took the form of a new chapter to be included in the general regulations of the South African National Defence Force.

SANDU contended that it represented approximately 30% of the uniformed personnel in the SANDF and the only other registered military trade union, the South African Security Forces Union represented 18 % of the uniformed personnel.¹⁰⁹⁵ In October 2002, after the establishment of the military bargaining council, negotiations took place between the parties relating to possible amendments to the regulations.¹⁰⁹⁶

¹⁰⁹² 2003 (9) BCLR 1055 (T) & 2003 (24) ILJ 2083 (T).

¹⁰⁹³ See *SANDU v Minister of Defence and Another* (1) 1999 (4) SA 469 (CC), also reported at 1999 (6) BCLR 615 (CC).

¹⁰⁹⁴ See 2003 (9) BCLR 1055 at 1057E-F.

¹⁰⁹⁵ *SANDU* at 1057 H-I.

¹⁰⁹⁶ *Idem* at 1058 I.

SANDU was involved in the negotiations but no amendments to the regulations were effected. Then SANDU made two applications to the Transvaal Provincial Division of the High Court. SANDU's constitutional challenges that formed the subject matter of its applications to the High Court were based on the Minister's failure to amend the regulations in accordance with SANDU's recommendations.

SANDU requested the High Court to set aside the provisions of Regulations 41¹⁰⁹⁷ and 53¹⁰⁹⁸ on the basis that they were unconstitutional in that they infringed the provisions of Chapter 2 of the Constitution¹⁰⁹⁹ and some provisions of the Promotion of Administrative Justice Act.¹¹⁰⁰ SANDU and the second applicant also challenged the constitutionality of other provisions of the regulations. Finally, SANDU applied for a declaration and a mandamus regarding the Minister's duty to negotiate on matters of mutual interest.¹¹⁰¹

The legal issue in this case was whether or not the Minister of Defence in his official capacity as the employer had a duty to bargain with SANDU on all matters of mutual interest that might arise between them and whether the refusal by the Minister to bargain violated the provisions of section 23(5) of the Constitution.

SANDU argued that the Minister of Defence had the duty to bargain with it in all matters of mutual interest and this was a constitutional duty based on the provisions of section 23(5) of the Constitution. Therefore, failure by the Minister to negotiate with it constituted a serious violation of the Constitution.

¹⁰⁹⁷ Regulation 41 gives the Minister of Defence the power to appoint the registrar of the Military Trade Union.

¹⁰⁹⁸ Regulation 53 grants the Registrar of Military Unions the power to withdraw the registration of SANDU without prior notice and / or reasonable notice.

¹⁰⁹⁹ Hereinafter called the Bill of Rights.

¹¹⁰⁰ Act 3 of 2000.

¹¹⁰¹ See *SANDU* 2003 (9) BCLR 1055 at 1058E.

The Minister of Defence contended that he was not under any obligation to negotiate with SANDU and section 23(5) of the Constitution did not impose any duty upon him to bargain with the applicant union. The Minister argued further that the matter was *res judicata*. The Minister's argument was based on the earlier judgment of the High Court handed by Van der Westhuizen J in *SANDU v Minister of Defence and Others*.¹¹⁰²

Van der Westhuizen J had held that unlike section 27(3)¹¹⁰³ of the interim Constitution,¹¹⁰⁴ which provided for a legal duty on the employer to bargain with a trade union, section 23(5) of the 1996 Constitution did not provide for such duty. It only provided for a right to engage in collective bargaining which according to him was totally different from the duty to bargain collectively as provided in section 27(3) of the interim Constitution.¹¹⁰⁵ He concluded that section 23(5) did not impose any duty on the Minister of Defence to bargain with the applicant union.¹¹⁰⁶

In his judgment Smit J held that section 23(5) imposed an obligation on the Minister of Defence to bargain with SANDU. According to him, collective bargaining was central to a proper exercise of the rights conferred by the provisions of section 23 of the Constitution. He held that for the purpose of section 23(5) of the Constitution, "collective bargaining" meant negotiation in good faith between employers and employees or their respective representatives on all matters of mutual interest pertaining to the terms and conditions of employment.¹¹⁰⁷

¹¹⁰² 2003 (3) SA 239 (T).

¹¹⁰³ Section 27(3) of the interim Constitution provides that "Workers and employers shall have the right to organise and bargain collectively."

¹¹⁰⁴ Act 200 of 1993.

¹¹⁰⁵ 2003 (3) SA 239 at 251 D.

¹¹⁰⁶ *Ibid* at 255 D-E.

¹¹⁰⁷ See *SANDU* 2003 (9) BCLR 1055 at 1064 J.

Departing from the reasoning of Van der Westhuizen J in the earlier case of *SANDU v Minister of Defence & Others*¹¹⁰⁸ Smit J held that “in my view, there was no reason why one’s right to engage in collective bargaining could not impose a correlative obligation on another to engage in collective bargaining”. Since SANDU was entitled to the right to engage in collective bargaining in terms of the provisions of section 23(5) of the Constitution, the enjoyment of such right imposed a correlative duty on the Minister of Defence to negotiate with the union since the Bill of Rights bound the executive, the legislature, the judiciary and all State organs in terms of section 8(1) of the Constitution.

The Minister was therefore bound in his official capacity as the employer.¹¹⁰⁹ According to Smit J, the obligation to engage in collective bargaining is of particular importance in the present context since members of SANDF are unable to secure their rights to bargain collectively by strike action. If the Minister was not burdened with an obligation to negotiate in good faith, SANDU could be deprived of any method of enforcing their “right to engage in collective bargaining.” He pointed out that granting a right without a remedy when such right is violated is meaningless and in this case the remedy was indeed, part and parcel of the right.¹¹¹⁰ Constitutional rights should not be interpreted restrictively.¹¹¹¹ A generous interpretation should be adopted.¹¹¹² The Court came to the conclusion that the Constitution and the Regulations imposed a duty on the Minister to negotiate with SANDU on all matters of mutual interest that might arise between them. It issued a declaration that the Minister was under a duty to negotiate with the first applicant within the Military Bargaining Council and otherwise on all matters of mutual interest that might arise between the Minister in his official capacity as the employer on the one hand, and the first applicant or its members on the other hand. The Minister was ordered to negotiate with the applicant on all matters of mutual interest between them with immediate effect.¹¹¹³

¹¹⁰⁸ 2003 (3) SA 239(T).

¹¹⁰⁹ *SANDU* at 1065C.

¹¹¹⁰ *Idem* at 1066D-F.

¹¹¹¹ *Ibid.*

¹¹¹² *S v Zuma and Others* 1995 (2) SA 642 (CC) at 650H-651.

¹¹¹³ See *SANDU* 2003 (9) BCLR 1055 at 1082 I

The judgment of the High Court in this case should be applauded. It highlights the perfect application of the provisions of the Constitution and how South African courts protect and promote fundamental human rights. Collective bargaining in South Africa is entrenched in the Bill of Rights. The Court's findings in this case clearly indicate that although it is not possible to compel collective bargaining over terms and conditions of employment in terms of the Labour Relations Act, now it is possible for workers to seek a High Court order to enforce the provisions of section 23(5) of the Constitution. Such right is only limited in terms of section 36 of the Constitution. Furthermore, the workers' right to join and participate in trade union affairs and a union's freedom to engage in collective bargaining are the cornerstone of industrial relations. Collective bargaining is undermined where trade unions are unable to organize effectively and to negotiate on behalf of their members. Similarly, there is little point in workers belonging to a trade union unless that union has the power to negotiate on their behalf. The enforceability of the right of one party to labour or industrial relations (employer or employees) to engage in collective bargaining entails a duty on the other to negotiate or bargain in good faith.

5.4.3.2. *NUMSA and others v Bader Bop (pty) Ltd*¹¹⁴

In this case the applicant union, NUMSA, represented 26% of the respondent's workers. NUMSA gave the employer, Bader Bop notice in terms of section 21 of the LRA that it wished to be granted organisational rights contemplated by sections 12 to 15 of the LRA. Under the LRA, the rights bestowed by sections 12, 13 and 15 are conferred upon a trade union that is "sufficiently representative" or two or more trade unions acting jointly that are sufficiently representative of the employees.

¹¹⁴ See 2003 (3) SA 513 (CC) & (2003) 24 ILJ305 (CC) and (2003) 2 BLLR 103 (CC).

On the other hand, the rights in sections 14 and 16 are conferred on a majority trade union or on two or more unions acting jointly that have majority of the employees at the workplace as their members. The respondent employer was prepared to grant NUMSA organisational rights in terms of section 12 and 13, but was reluctant to recognise NUMSA's shop stewards and to bargain collectively with it. NUMSA declared a dispute.

The matter was referred to the CCMA for conciliation. At the CCMA, the matter remained unresolved and thereafter the union gave the employer notice of its intention to embark on a strike in support of its demand. The respondent sought an interdict to prohibiting the alleged strike on the ground that such a strike by a minority trade union was unprotected. NUMSA argued that the strike was protected as it followed the pre-strike procedures in terms of section 64 of the LRA.

The employer made an application for an interdict to the Labour Court in order to restrain NUMSA and its members from embarking on the strike. The Labour Court dismissed the application for the interdict and consequently the employer appealed to the Labour Appeal Court.¹¹¹⁵ The Labour Appeal Court was divided on this. The majority of the judges upheld the appeal and found that the strike would be unprotected. They were not of the view that a minority trade union could demand that its shop stewards be recognised and could lawfully strike in support of such demand.

The minority took a view that there was no express prohibition in the LRA against a strike by a minority trade union in support of its demand for organisational rights, including those in section 14, and therefore, a minority union could strike in support of a demand to be allowed to exercise rights analogous to those conferred by part A of Chapter III of the Act, including those in section 14.

¹¹¹⁵ Cited as *Bader Bop (pty) Ltd v National Union of Metal & Allied Workers of South Africa* (2002) 23 ILJ 104 (LAC).

Accordingly, the applicant union approached the Constitutional Court contending that its member's rights to strike as enshrined in section 23(2) of the Constitution, had been infringed.

The Constitutional Court had to decide the question whether it was possible for a trade union that did not represent the majority of employees in the workplace, to strike in order to compel the employer to grant it organisational rights.

The Constitutional Court noted that the LRA provides a clear procedure for the exercise of organisation rights by a representative union. However, it was silent as regards to the obtaining of organisational rights by a trade union that did not meet the requisite threshold of membership levels. The question that arose was whether the LRA could be interpreted to preclude non-representative unions from obtaining organisational rights either through agreement with the employer or through industrial action. When answering this question, the Constitutional Court focused on the purpose of the LRA as stated in section 1 of the LRA. In interpreting section 23 the Constitutional Court relied on the ILO Conventions on freedom of association and the protection of the right to organise and to bargain collectively.¹¹¹⁶

The court held that:

there is nothing in part A of Chapter III of the LRA...which expressly states that unions which admit that they do not meet the requisite threshold membership levels, are prevented from using ordinary process of collective bargaining and industrial action to persuade the employer to grant them organisational facilities such as access to the workplace, stop order facilities and recognition of shop stewards. These are matters which clearly of "mutual interest" to employers and unions and as such, matters capable of forming the subject-matter of collective agreements and capable of being referred to the CCMA for conciliation, the condition precedent to a protected strike action.¹¹¹⁷

¹¹¹⁶ Conventions 87 and 98.

¹¹¹⁷ 2003 (2) BCLR 182 (CC) at 199H-200A-B

The Constitutional Court pointed out that an interpretation of the LRA which permits minority unions the right to strike over the recognition of their shop steward would be consistent with the principle of freedom of association and should be preferred over the one that unjustifiably limited that right. The Constitutional Court therefore found that the constitutional right to freedom of association in section 18 and the right to form and join trade unions in section 23 of the final Constitution include the right of workers to be represented by a minority union of their choice.¹¹¹⁸ O'Regan J held that minority unions did have the right to strike in support of organisational rights.

The Constitutional Court pointed out that the interpretation by the majority of the Labour Appeal Court was one which the text could plausibly bear. However, it failed to have regard to the ILO Conventions on freedom of association and in particular did not avoid the limitation of constitutional rights.¹¹¹⁹

5.5. Conclusion

Enacted under the 1993 Constitution and following the first democratic general elections held in 1994, the LRA of 1995 sought to normalize the relationship between politics and industrial relations. It constituted a milestone in legislative history in that it was drawn up by the parties that it would directly affect namely, labour, the government and business. Emphasis was placed on this tripartite relationship in an attempt to play host to the government policy of reconciliation.¹¹²⁰

¹¹¹⁸ 2003 (3) SA 513 (CC) at 541A-D.

¹¹¹⁹ 2003 (2) BCLR 182 (CC) at 199E.

¹¹²⁰ Grossert & Venter *op cit* 31.

The Bill of Rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Key among these rights and democratic values are the right and value of freedom of association that is crucial for any democratic society. On the other hand, sustainable development and social peace are not possible without freedom of association in the workplace. Employees' and employers' rights are generally dealt with and studied under "labour relations" rights and not under "freedom of association" that is closely related to other rights and freedoms embedded in the Constitution.

South African courts should be commended for promoting freedom of association even long before the 1993 and 1996 Constitutions and the enactment of LRA 66 of 1995. In at least two cases decided under LRA 28 of 1956, namely the *National Automobile* and *Keshwar* cases, South African courts considered union bashing unfair labour practice. They also protected the rights of workers to belong to a union and not to be discriminated against on the ground of their membership.

The Courts upheld the rights of all employees whether managerial or subordinate ones, in the private or in the public sector, to join a trade union, participate in its activities and hold position on it. As could be expected, the Courts went on promoting these rights in cases decided under the 1993 and the 1996 Constitutions.

The South African jurisprudence on closed shop and agency shop agreements is also consistent with international and foreign jurisprudence such as that of the European Court of Human Rights. The conventional wisdom adopted by our courts is that closed shop and agency shop agreements are not necessarily unfair labour practices unless inconsistent with the Constitution or the ILO Conventions. Their existence alone does not deprive employees who are not members of a union or whose unions are not parties thereto of their rights to be protected against unfair dismissal.

The tension or dilemma of a closed shop or agency shop agreement *versus* freedom of association in the workplace unleashed a spirited debate and still remains a controversial issue.

In the long run, the protection and promotion of freedom of association will depend on the protection and promotion of other rights and freedoms in the Bill of Rights and the consolidation of constitutional democracy. Enhancing a culture of human rights and enlightening the people, the judiciary and other State's organs constitute a challenge that must be taken up by all legal scholars and human rights activists. However, international law and foreign law that inspired our Bill of Rights and labour legislation cannot be dismissed lest to undermine or misunderstand the Constitution itself.

The protection and fulfilment of the right to freedom of association and other workers' rights, however, requires a commitment by the State, trade unions and employers to act on the framework provided by the Constitution and by the LRA with a view towards securing a better South Africa. Human rights and labour law students and experts in South Africa should pay more attention to international law and jurisprudence as well as foreign law, as we strive to promote freedom of association in our country and develop both our own law and jurisprudence.

CHAPTER 6 GENERAL CONCLUSION

This chapter brings to an end the study on freedom of association and trade unionism in South Africa. It strives to summarise what was dealt with in the previous chapters and contains some recommendations for further research on the protection and promotion of freedom of association and trade union rights in South Africa and to a certain extent in the rest of the African continent.

6.1. Research Findings

Apart from the general conclusion, the thesis consists of five other chapters dealing respectively with the general introduction, the theoretical background, freedom of association in foreign and international law, labour relations, freedom of association and trade unionism under South Africa's colonial and apartheid legal orders, and freedom of association and trade unionism under the democratic and post-apartheid legal order.

The first chapter highlighted the research problem and the subject matter of the study, its aims, rationale, and importance. It explained why freedom of association and trade unionism in South Africa was chosen as the subject matter of the study. As pointed out, freedom of association is one of the fundamental rights and freedoms enshrined in the Bill of Rights, which is "the cornerstone of democracy in South Africa".¹¹²¹ No serious study of constitutionalism and democracy in post-apartheid South Africa would fail to examine the Bill of Rights. However, the Bill of Rights itself consists of many rights. Section 7 also provides that "it enshrines the rights of all people in our country". The choice of freedom of association had therefore also to be justified as a support to or a manifestation of many other rights and freedoms. The exercise of the right to freedom of association played a crucial role in the dismantling of apartheid in South Africa.

¹¹²¹ Section 7 of the 1996 Constitution.

Very little would have been achieved in the struggle against apartheid were the majority of the people incapable of associating in any field of life, including in politics and at the workplace. Much has already been written about the exercise of freedom of association in political affairs that led to the constitution of political parties.

The exercise of the right to freedom of association at the workplace in South Africa and the subsequent possibility given to employees and employers to form or join trade unions and employers' organisations still remains very much an unaltered terrain. Employers and their organisations were part and parcel of the leading class which benefited from apartheid. Employees and mainly black employees who were denied the quality of "employee" for a long time, continued to be exploited. Nevertheless, they also continued to struggle using the power given to them by the right to freedom of association. The literature on colonial, apartheid and democratic South Africa continued to be relatively inadequate on freedom of association at workplace and how it was used by the masses of the people to fight first against the colonial rule and later to win the long struggle against the ignominious system of apartheid prior to contributing to the consolidation of democracy during the post-apartheid era. On the other hand, trade unionism cannot exist and develop without the promotion of the right to freedom of association. Freedom of association at the workplace and the development of trade unionism contributed to the establishment of the current legal order and will continue to be critical to the consolidation of democracy in South Africa.

The first chapter also explained the importance of freedom of association among all other human rights and freedoms in foreign law and in international law that inspired South African law. On the international level, freedom of association at the workplace is taken very seriously. The promotion of this freedom is one of the main objectives of a leading international organisation, namely the ILO.

A number of international conventions adopted within the ILO, especially Conventions 87 and 98, and acceded to by the overwhelming majority of the UN member States, including South Africa, aim at promoting respect for the right to freedom of association. This also inspired the choice of freedom of association and trade unionism in South Africa as the title of this dissertation.

Any scientific research should be limited in its scope. Accordingly, the title of the thesis refers to its triple delimitation, namely *ratione materiae* (freedom of association and trade unionism), *ratione loci* (South Africa) and *ratione temporis* (from colonial and apartheid rule up to the democratic and post-apartheid legal order).

Part and parcel of the first chapter of the thesis is a literature review. The thesis critically revisited a number of research works undertaken in the field, and the findings arrived at in order to demonstrate how it intended filling the gap and contributing to the development of the law, particularly human rights and labour laws, on the critical issues of freedom of association and trade unionism that will continue to challenge legal scholars, lawyers and judges. Prior to providing an outline of the study and stressing the research problems encountered, the first chapter also referred to the methodological approaches used and which were implicit in the title, especially the legal, historical, and comparative approaches.

The second chapter provided the theoretical background and defined the key concepts of the study. These included employees, employers, industrial relations, freedom of association, trade unions and trade unionism, apartheid, constitutionalism and democracy. Industrial relations were meant to refer to those relations at the workplace involving two main parties bound by a contract of employment. These parties are employers on the one hand and employees on the other hand. In predetermined conditions acceptable by all parties, the first offer their services in exchange for a fair and equitable remuneration by the latter.

The relationship between employers and employees is subject to the law, especially the labour law. The State has to intervene through labour legislation to ensure that the employees are not exploited or left *à la merci* of their employers. Freedom of association, to which employers are also entitled, enables the employees to claim their rights and better conditions in which they can fulfil their obligations. Freedom of association was analysed as a broad concept including freedom to associate or not to associate, to form or join a trade union and participate in its activities, to engage in collective bargaining with the employer, and to strike.

Freedom of association at the workplace is itself related to the general freedom of association and to other fundamental rights such as freedom of expression, the rights to demonstrate, to assemble peacefully and unarmed, to present petitions and so on.

Without freedom of association, there is no freedom for employees to assemble and champion their rights within the framework of trade unions. The trade union movement – trade unionism – is therefore the most concrete manifestation of the exercise of the right to freedom of association at the workplace. As devised in South Africa, the apartheid system was an institutionalised system of separate development based on racial discrimination. The apartheid system denied some of the most fundamental rights to the overwhelming majority of the South African population, namely black people.

From the outset, the ruling white minority in government took the view that once organised within trade unions, as a consequence of the recognition of their right to freedom of association, the employees could constitute a very serious threat to the apartheid regime. Hence the negation of freedom of association to black employees whose number grew steadily and became the overwhelming majority of the employees in the country despite the fact that labour legislation excluded them from the very definition of “employee”.

Fortunately, as the colonial and apartheid governments later discovered to their disappointment, the colonial and apartheid rules were not eternal. It finally came to an end and was replaced by a democratic and constitutional order after the negotiations were completed in the early 1990s between the representatives of the apartheid government on the one hand and those of the majority of the population on the other hand.

Democracy and constitutionalism two closely interrelated norms of modern politics feature among the founding values of the post-apartheid era. The advent of democracy and constitutionalism, one of whose main facets is the protection and promotion of human rights, created a better environment in which freedom of association could thrive and trade unionism further developed in South Africa.

Chapter three of the thesis investigated labour relations, freedom of association and trade unionism in South Africa under the colonial and apartheid legal orders which complemented one another. The past is important since it helps us understand the present as it illuminates the future. South Africa's legal, political, economic and social history may be divided into three periods, the colonial, the apartheid and the post-apartheid and democratic ones.

Labour relations, freedom of association and trade unionism developed during the European industrial revolution in the 19th century. The first piece of labour legislation in South Africa dealing with the relationship between the labourers and the farmers was enacted during the Dutch settlement.

The South African labour relations system can be traced back to the discovery of diamonds and gold and the subsequent development of the mining industry in the late 1870s. The first trade unions were founded towards the end of the 19th century, but they represented white workers only and excluded black workers.

The first strikes were organised after the Anglo-Boer War during the first decade of the 20th century. The Railways Regulations Act of 1908 was the first piece of legislation to place a ban on strikes in South Africa's history. The Industrial Disputes Prevention Act of 1909 was the first South African statute designed to regulate labour relations in any shape or form.

After the formation of the Union of South Africa in 1910, a number of acts were passed to regulate labour relations but all ignored the rights and liberties of South African black workers, including their right to form or join a trade union, the right to strike and the right to a decent wage. The laws excluded them from some jobs which were reserved for the white people. These developments prompted the emergence of the South African Native National Congress, which finally transformed into ANC in 1912. This organization soon embarked on a violent campaign against the various exclusions of the black people.

When it was created in 1919, the Industrial and Commercial Workers' Union became the first black workers' union. However, it was not a registered or recognised trade union. After the Rand Rebellion and the subsequent labour unrest that took place in 1924, the Industrial Conciliation Act was passed to protect trade unions and their members and allow them to organise. It became South Africa's first comprehensive labour legislation. Unfortunately, it still excluded black employees from the definition of "employee" and denied them freedom of association which could only be enjoyed by white and coloured workers. This continued until the establishment of apartheid by the NP government in 1948.

The apartheid government enacted much of its repressive legislation to give legal force to its ideology of racial discrimination and separate development. In terms of the Suppression of Communism Act of 1950 passed according to a recommendation of the Botha Commission established in 1948 to investigate labour relations matters in South Africa, collective organisations or movements of blacks were outlawed and many black leaders, including trade union leaders were arrested as well as political leaders such as those in the ANC who supported black trade unionism.

Black unions were excluded from the South African Trade Union Council when it was formed in 1954. They later constituted SACTU, a federation of black trade unions, which nevertheless rejected the system of parallel unionism. It maintained close relations with the ANC.

In terms of the recommendations of the final report of the Botha Commission issued in 1951, the ICA of 1924 was repealed and replaced by the ICA of 1956 which completed the construction of the racially exclusive industrial relations system initiated since the establishment of the apartheid regime. It was the first Act which dealt extensively with freedom of association and trade union rights but continued to exclude black people from the definition of "employee". This however, did not prevent black workers from organising.

The situation started changing from 1962 following the UN General Assembly resolution condemning South Africa's apartheid policies. Freedom of association was to be promoted further following the recommendations made by the Wiehahn Commission appointed by the government in 1977. The Wiehahn Commission recommended a more substantial protection of freedom of association of all employees regardless of their origin and race. Parts of the Wiehahn report published in 1980 recommended that labour law and practices should correspond to international conventions.

The Industrial Court was established in 1980. It played a critical interpretive role that led to the integration of the content and ethos of many ILO instruments in our labour legislation. Black workers redoubled energy in their struggle against the apartheid regime such that COSATU was therefore established in 1985 and later formally allied with the ANC. It was followed by a number of other trade unions which later embarked on negotiations with the apartheid government over labour relations issues while political leaders had started negotiating the end of apartheid.

The fourth chapter of the study dealt with freedom of association and trade unionism in foreign and comparative law. The importance of foreign and international law as interpretive tools of the rights in our Bill of Rights, including the right to freedom of association, is recognised by the Constitution which provides that if the first “may be considered”, the latter must definitely be considered.¹¹²² The result is that South African labour law in general and freedom of association in particular has benefited immensely from these influences.

The chapter first examined the protection of freedom of association and trade unionism in the domestic law of some foreign countries selected for their connection with South Africa. These included Britain, Germany, Canada and the USA. The choice of Britain was the easiest one given the close connection between this country and South Africa which used to be a British colony. It was stressed that South African trade unionism originated and developed out of its British counterpart. The history and development of freedom of association and trade unionism in South Africa would hardly be understood without reference to their history and development in Britain.

Arguably, other foreign and Western law that comes closer to the South African law include the German, Canadian and American laws which have come to epitomize foreign and comparative law when one considers the number of references made to German, Canadian and American law and case law in South African jurisprudence.

While the British law is common-law based and Britain does not have a written and supreme Constitution with a Bill of Rights entrenching freedom of association, this is not the case of Germany, Canada and the USA. Freedom of association, including the right to associate and the right not to associate, to bargain collectively and to strike, is embedded in the German Basic Law, which like the South African Constitution, is the supreme law of the land.

¹¹²² Section 39 (1) (b) of the 1996 Constitution.

On the other hand, although it has been sometimes interpreted by the Canadian courts to exclude freedom not to associate, freedom of association, the right to strike and bargain collectively and union security arrangements are protected in the Canadian Charter of Rights and Freedoms which inspired the South African Bill of Rights. As far as the USA is concerned, freedom of association is not expressly embodied in the Constitution.

However, through an extensive interpretation, American courts have gone a long way in protecting this right as implied in the Constitution and as an aspect of the liberty guaranteed by the Fourth Amendment. The US National Labor Relations Act has been interpreted as protecting the right to associate as not necessarily implying freedom not to associate.

The fourth chapter also examined the protection of freedom of association in regional human rights systems such as the European, the American and the African human rights systems. It considered foreign law except where it has been enacted into domestic law as is the case of African human rights instruments. Freedom of association is protected by the two major European human rights instruments, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter.

The American Convention on Human Rights similarly provides for a more general right to associate unlike its European counterpart that provides for the right to freedom to associate for trade union purposes only, although this freedom is not absolute. As far as the African Charter for Human and Peoples' Rights is concerned, it protects the right to freedom of association which has been reinforced in a number of instruments adopted within the AU, such as the NEPAD and APRM instruments. On the municipal level, freedom of association is also entrenched in almost all African Constitutions despite that domestic courts seem to have so far done little in enforcing this right and many other rights.

The fourth chapter finally considered the protection of freedom of association and trade unionism in international law, including international human rights law and international labour law. Under international human rights law, freedom of association is protected in the UDHR, the ICCPR and the ICESCR, which are generally considered components of the international bill of rights.

The chapter expanded, however, on the protection of freedom of association under international labour law, especially under the ILO Constitution and Conventions 87 and 97 as well as on the jurisprudence of the ILO supervisory bodies, especially the ILO Committee on Freedom of Association. Of critical interest is the jurisprudence of the Committee in two cases in which the British Government and the then South African apartheid regime were respectively condemned for violations of freedom of association. The decision of the committee, finding South Africa in violation of the right to associate freely without any reference to race had little impact since South Africa was not a member of the ILO at the time. It is clear that it would have been taken seriously had it been decided after the end of apartheid and the readmission of the country to the ILO.

The fifth chapter examined the legal and judicial freedom of association and trade unionism that could only prosper under the democratic and post-apartheid legal order. An interim Constitution was adopted, which legally terminated the apartheid regime. South Africa divorced the past characterised by parliamentary sovereignty by adopting a Constitution that became the supreme law of the land and contained an enforceable and justiciable Bill of Rights enshrining the rights of all the people in South Africa, including the right to freedom of association in the workplace. This Constitution led to the enactment of the LRA of 1995 that protects and promotes freedom of association in a non-racialised and democratic environment.

The 1993 Constitution was later replaced with the 1996 Constitution and the LRA amended further to better protect labour relations. Under the post-apartheid dispensation, international law, both human rights and labour law became the source of protection of freedom of association. On the other hand, freedom of association was to be enforced by South African courts taking advantage of the post-apartheid and democratic order. In a number of cases, they promoted freedom of association of all employees whether in the public or in the private sector, whether subordinate or managerial employees.

Against this background, freedom of association and trade unionism in South Africa proved to be an interesting topic of study. The author submits that the aims set up at the beginning of the study have been attained, namely to trace the legal and judicial protection of freedom of association and trade unionism in South Africa's history, to stress the current state of freedom of association and trade unionism in contemporary South Africa, to assess the contribution of foreign and international law to the developments that have taken place in this country with regard to the protection of freedom of association and trade union rights and by so doing to contribute to the development of knowledge in a field that needs further exploration and investigation by South African and other African legal scholars, especially human rights and labour law experts.

The struggle for freedom of association, now entrenched in the Bill of Rights and protected in terms of labour legislation inspired by the relevant ILO instruments, has been a long and sometimes violent struggle in South Africa. Trade unionism largely contributed to the success of the struggle against apartheid. The struggle for freedom of association and trade union rights was part and parcel of the struggle against apartheid, which denied fundamental human rights to the majority of South African people.

The paradox is that under the influence of the ILO jurisprudence and the jurisprudence of some foreign courts, South African courts contributed to protecting and promoting freedom of association and trade union rights even under the apartheid constitutions which were not supreme and did not contain enforceable bills of rights. More was expected and has actually been achieved under the post-apartheid constitutional order.

The prospects for the protection and promotion of freedom of association and trade unionism in South Africa are good and even much better than in many African countries. However, like democracy, freedom cannot be won overnight and once for all. Democracy and constitutionalism would not consolidate without freedom of association. Working people should keep on fighting to ensure that there is no setback and freedom of association for which so much was sacrificed could no longer be denied. However, this should not be the struggle for the workers alone. As long as it is part of our common struggle for sustainable democracy and development, it should be fought by the entire nation, particularly by all those who care for democracy and constitutionalism in this country. The elected representatives of the people should be involved in this struggle as well as the judiciary. South African courts should build on their past achievement and continue to champion freedom of association. Legal scholars should contribute to such a struggle and play an important role in the protection and promotion of freedom of association. The study that has come to an end purported to be a personal contribution but more research work is still needed in the field.

6.2. Recommendations for Further Research

Naturally, this study cannot be expected to have dealt with all the issues related to the protection of freedom of association and to the development of trade unionism in South Africa. There are necessarily and inevitably some issues that have been deliberately overlooked or involuntarily neglected but that require further research.

Some of these issues are of a methodological nature. As pointed out in the first chapter of the study, the topic itself favoured legal, historical and comparative approaches. It is clear that more legal and historical investigations will be needed in any study of freedom of association and trade unionism in South Africa or elsewhere. However, freedom of association and trade unionism cannot be the preserve for legal scholars, be the labour law, human rights and constitutional law experts, or that of historians. Social scientists in general, and political scientists, economists, and sociologists in particular, should continue to pay more attention to issues related to labour, freedom of association and trade unionism. This is eminently an area of research suitable for interdisciplinary study. Moreover, South Africa being a former British colony, part and parcel of the world and a SADC and AU member state participating in the NEPAD and APRM processes, a comparative approach – whether legal, historical, or political – is needed to understand how freedom of association and trade unionism developed in other countries. It would also help understand how the law of these countries inspired and the extent to which it may be close to the South African law, and how South Africa has contributed to the development and the protection of freedom of association and trade unionism in the world in general and in Africa in particular. On the other hand, with regard to the objectives of both SADC and the AU, such comparative approach may be required to develop and harmonise African labour law for a better protection of freedom of association and trade unions' rights on the continent.

The study of freedom of association and trade unionism in South Africa also helps to understand the relationship between politics and trade unionism. Democratic politics will generally promote the protection of freedom of association and trade unions' rights as any other human right and fundamental freedom. Undemocratic dispensation would do the opposite and therefore be combated by workers and trade unions allied with political forces for democratic change.

Since the beginning, for instance, COSATU, the leading South African trade federation has been very much involved in politics as a close ally of the ANC. Together with the South African Communist Party (SACP), COSATU and the ANC embarked on a tripartite alliance to rule the country after the end of apartheid. COSATU managed to get its members elected into Parliament or appointed to the Cabinet on ANC's lists.

Recently, COSATU has been concerned with ANC's internal matters and asserted the right to be involved in the nomination of the future president of the ANC and of the Republic of South Africa to succeed President Thabo Mbeki. It is unlikely that the Alliance will survive for a long time. Nevertheless, this association of trade unions with political parties or this politicisation of trade unionism, which is frequent in other parts of Africa and the world but perhaps more pronounced in South Africa, poses a problem of demarcation between trade unions and political parties and should be investigated further by students of freedom of association and trade unionism in (South) Africa to assess whether it is a good development, or whether it should be discouraged.

Further studies should also be expected on the trade union movement itself, the composition, and organisation and functioning of the different trade unions, their respective ideologies, and their relationships with the government of the day, with other trade unions and with the different political, economic and social forces in and outside the country.

Furthermore, the judiciary plays a crucial role as the watchdog of the Constitution and the protector of the Bill of Rights and the rights therein entrenched, including freedom of association. No matter how important the contribution of South African labour courts has been, as long as the struggle continues, legal scholars should keep on monitoring and assessing the jurisprudence of our courts to find out how consistent they have been in the protection and promotion of freedom of association at the workplace.

Finally, we live in the era of globalisation. From the giant multinationals, there is an immense pressure on the governments of the Third World countries to deregulate and to increasingly renounce any meaningful role in economic activities.

An additional challenge for trade unions is the changing nature of the employer. In a country where capital is much more mobile than workers, different forms of business organisations and relationships have been created which can affect employment and threaten collective bargaining relationships.

A strong national and international movement is required to humanise the globalisation process, and to enable workers and their unions to participate effectively in the global economy and in democracy-building.

The critical challenge facing workers' organisations in the era of globalisation is to ensure that structural changes and adaptations are achieved without compromising the goals of full employment and social justice.

The success of capitalism requires the opening up of the national markets, particularly in the underdeveloped countries and seriously impacts on political, economic and social development.

It would be wrong for African scholars to remain indifferent to the pervasive effects of globalisation both positive and negative on the life conditions of their peoples. Claude Ake argued that the current evolution of global economic forces undermined the sovereignty of African governments over economic matters so as to make democracy essentially irrelevant.¹¹²³

Mkandawire also referred to “choiceless democracies”.¹¹²⁴ Cheru contended that globalisation would necessarily result in “more hardship and further marginalisation for the majority of poor African peasants and the Third World as a whole”.¹¹²⁵ Throughout the world, an anti-globalisation campaign is raging, supported by human rights organisations and trade unions leaders.

Arguably, globalisation has got both positive and negative consequences for the political and economic development of the African continent. However, without embarking at this final stage of the study on the debate on these consequences of globalisation and its impact on the protection of human and peoples’ rights, the point being made here is that there is also urgent need for research on the impact of globalisation on the protection of employees’ right to freedom of association and on the development of trade unionism in Africa.

Once again, as stated earlier, even when progress has been made for the protection of freedom of association and the promotion of trade unionism in countries such as South Africa, the struggle should continue and intellectual efforts should be sustained to ensure that we move towards a better protection and promotion of freedom of association and other rights entrenched in the Bill of Rights considered a cornerstone of democracy in South Africa.

¹¹²³ Ake *Democracy and Development op cit* 96.

¹¹²⁴ Mkandawire T, “Crisis Management and the making of “choiceless Democracies”, in Joseph *op cit* 119-133.

¹¹²⁵ Cheru F, “New Social Movements: Democratic Struggles and Human Rights in Africa”, in Mittelman JH, (ed) *Globalization: Critical Reflections* (1996) 145. See also Van de Walle *op cit* 96.

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