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

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&

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University of Cape Town

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

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Editorial Abstract

This monograph deals with freedom of association and trade unionism in South Africa from apartheid to the democratic constitutional order. It reflects on the concept and contents of the right to freedom of association. It traces the legal protection of freedom of association and trade union rights in South Africa's history. It investigates South African statutory and case law on the protection of freedom of association in the work place and stresses the contribution made by foreign and international law to the development of freedom of association in South Africa. Finally, it examines the prospects for the better protection of freedom of association, which is instrumental for the consolidation of democracy in South Africa.

This monograph therefore seeks to make a meaningful contribution to the development of knowledge on freedom of association and trade union rights in South Africa where despite the role played by workers and their trade unions in the struggle for democracy, relatively little has been written on these rights entrenched in the Bill of Rights which is the cornerstone of democracy.

Key words

Freedom of association, trade unionism, South Africa, democratic constitutional order, Bill of Rights

* This monograph is in part based on the PhD thesis by the first author under the supervision of the second and third authors submitted to the University of Cape Town.

INTRODUCTION

The right to freedom of association is regarded as one of the cornerstones of liberal democracy.¹ It gives rise to the establishment of institutions such as trade unions, which promote democracy both in the workplace and in society at large.² The right to freedom of association is the bedrock upon which all other labour and workers' rights rest. In De Tocqueville's words, "No legislator can attack freedom of association without impairing the very foundations of society."³ According to Woolman,⁴ associations and freedom of association are essential components of a well-ordered society. Associational freedom makes participatory politics meaningful and genuinely representative politics possible.

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."⁵ These principles were reinforced in the 1998 Declaration.⁶ However, the most important ILO conventions on freedom of association 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

We ignore freedom of association at our own peril, at the peril of free and democratic society and at the peril of sustained progress.¹⁰ 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.

South Africa adhered to the ILO when it was created in 1919. However, due to criticism of its internal policies, it withdrew in 1964¹¹ before rejoining the ILO on 26 June 1994 after the demise of apartheid.¹²

In 1993 South Africa adopted the interim Constitution, which was later superseded by the 1996 Constitution. The aim of the 1996 Constitution,¹³ as certified by the Constitutional Court,¹⁴ 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 this monograph investigates workers’ right to freedom of association and trade unionism in South Africa from the period of apartheid to the current democratic order.

OBJECTIVES

This monograph enquires into workers’ right to freedom of association and trade unionism under South African law from the period of apartheid to the democratic constitutional order. Arguably, freedom of association in the South African

workplace still needs to be examined, given its importance and the role played by South African workers during the struggle for a free and democratic South Africa. The same applies to trade unionism. South Africa has the largest workforce on the continent. There are many unions of employees and several federations of employers in the country. The Congress of South African Trade Unions (COSATU) is one of the leading trade union federations on the continent due to its membership, which amounts to almost 2 million. COSATU was instrumental in the demise of apartheid as a key ally of the African National Congress (ANC) and it is worth highlighting the history of its struggle for South Africans.

Outside South Africa, there are many people who can learn from the history of freedom of association and trade unionism in South Africa in order to understand where the country has come from, what the challenges to freedom of association are, and where the country is heading. Finally, despite the constraints of the workplace, everyone aspires to work and everyone is a potential worker interested in freedom of association, including the right to join a trade union and participate in its activities. This research on freedom of association and trade unionism in South African law is important as we strive to promote and consolidate democracy, to foster a culture of human rights, to uplift the living conditions of our people and to lay the foundations for sustainable development and social justice in South Africa.

METHODOLOGY

In dealing with the subject matter of this research, attention is given to the legal instruments on freedom of association in the workplace and trade unionism in South Africa. Freedom of association and trade unionism cannot be studied without giving due consideration to the Constitution and to the relevant legislation passed by Parliament. On the other hand, South Africa has ratified 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 enactment of national legislation. Accordingly, the two

Constitutions of the Republic of South Africa, various labour statutes and international and regional human rights instruments will be considered.

Moreover, the nature of the research will require that history be considered, as freedom of association and trade unionism may be traced back to the beginning of the 19th century. Therefore, the methodological approach of this research is legal and theoretical, but also empirical, historical and comparative.

STRUCTURE OF THE MONOGRAPH

This monograph is divided into four parts preceded by an introduction. The introduction outlines the objectives, methodology and structure of the monograph.

Part I provides for a theoretical background to the right to freedom of association and trade unionism in South Africa. Part II deals with workers' right to freedom of association and trade unionism under the South African colonial and apartheid legal orders. It revisits the particular history of labour relations and trade unionism in South Africa, and their protection under the apartheid regime. Part III deals with freedom of association and trade unionism in foreign and international law, as well as international labour law. Part IV analyses freedom of association and trade unionism under the democratic and post-apartheid legal order. It refers to the development of labour relations and trade unionism, and their legal protection under the constitutional democratic legal order.

A brief conclusion summarises the findings of the study and reflects on the challenges and prospects for the protection of freedom of association and trade unionism in South Africa.

PART I: THEORETICAL BACKGROUND TO WORKERS' RIGHT TO FREEDOM OF ASSOCIATION AND TRADE UNIONISM IN SOUTH AFRICA

The concept of freedom of association

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.²¹

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 regard the right to freedom of association as a functional guarantee, which is protected in order to secure a clearly defined social purpose, namely, the attainment of some sort of equilibrium of bargaining power between employers and workers.²²

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.²³ It is not a static concept, and 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.²⁴ This right is determined and influenced by binding international law, government policy and regulations, and binding collective agreements.²⁵

According to Kirkland, freedom of association simply means 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.²⁶

The right to freedom to associate confers neither the right nor the licence 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 of any organisation that is not involved in criminal activity.²⁷

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.²⁸

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 to protect individual interests but rather to seek to secure a more equitable distribution of power within the working environment and society as a whole. But, as Lord Wedderburn notes, 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 become an individualistic, anti-collective concept.²⁹ 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".³⁰ Consequently, freedom of association 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.

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.”³¹

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.³² Freedom of association must therefore be seen as the foundation of the collective bargaining process.³³ 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.

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.³⁴ 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.³⁵

Madima points out that it is 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.³⁶ 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.³⁷ However, its positive dimension is generally underscored by the ILO Constitution, the ILO Conventions, and international and domestic Bills of Rights.³⁸

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.³⁹ 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 society.

The 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 good; the freedom to choose between organisations so as to enable the worker to join and work through the organisation which she or he believes speaks best for her or his needs and desires; and the freedom not to join trade unions at all, which entails the right of individual to refuse to participate in collective action and to insist on acting alone.⁴⁰

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.⁴¹

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.

The relationship between 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.⁴² Indisputably, trade union rights do, however, have a close relationship with the more general right of freedom of association.

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.⁴³

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, which rests on the knowledge that unity is strength.⁴⁴

Just as the bargaining strength of the individual is enhanced when he or she combines with fellow workers in a group at a place of employment, so too at a wider level, 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.

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 also because it enables and defends the exercise of all other human rights in the workplace. The

fundamental concern of the 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 employers. 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.⁴⁵ Thus, trade unions can only exist where individuals are free to combine in associations.

PART II: WORKERS' RIGHT TO FREEDOM OF ASSOCIATION AND TRADE UNIONISM UNDER THE SOUTH AFRICAN COLONIAL AND APARTHEID REGIMES

It is important to consider the historical underpinnings of the labour legislation on freedom of association, in order to understand where it comes from and to 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 South African workplace. As Bendix pointed out, "history plays an important role in the shaping of individual attitudes and societal norms and institutions".⁴⁶ According to Cardozo, "history in illuminating the past illuminates the present, and in illuminating the present, illuminates the future."⁴⁷

Accordingly, labour relations need to be placed within the context of the most important occurrences in the industrial revolution and economic history, and within the context of traditional attitudes to work.⁴⁸ It is the chequered political history of South Africa that has determined the nature and the scope of our present industrial relations system.⁴⁹ 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 organisations of workers in South Africa.⁵⁰ The development of labour in this country, as elsewhere, is a chronicle of responses to the exercise of power by those who possess it.

The history on freedom of association and trade unionism in South Africa 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 formal establishment of apartheid in 1948; and the period of apartheid (1948 to 1993). Due to space constraints, these periods will be examined briefly in this monograph.

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 which was shaped by the statutory and customary law of Holland and was termed Roman-Dutch law.⁵¹ With regard to 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.⁵² 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 that of their forerunners in the Roman Empire.⁵³

The situation of the indigenous Khoikhoi on the Dutch farms was scarcely better. The only offence of these unfortunate people was that wished to graze their cattle on the land that was now demanded by the colonists. As the Dutch settlement expanded, their position became ever more perilous and, by the end of the 18th century, when their dispossession was complete, most of them were entirely dependent on their masters for a livelihood. Their 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 their master's conduct, all that indigenous servants could do was to desert their master, which they frequently did, and often recompensed themselves by stealing from the master's herd.⁵⁴ During this period, the law of employment applied to the few wage labourers who plied their trade within the urban settlement.⁵⁵

The Cape Colony was eventually taken over by the British colonists. South Africa was suddenly divided into the Boer Republics in the Free State and Transvaal, and the British colonies in the Cape and Natal.⁵⁶

In 1856, white farmers pushed for the enactment of a piece of legislation aimed at addressing their complaints of labour shortages.⁵⁷ The legislation set 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.⁵⁸

Up to the latter part of the 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 diamonds in the early 1870s and gold in 1886, industrialisation and economic development began.⁵⁹

Arguably, the South African labour relations system had its origin in the discovery of diamonds and gold and the subsequent development of the mining industry.⁶⁰ The discovery of gold and diamonds led to an 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 the skilled category. These workers brought with them the European and especially the British brand of trade unionism, at that time based on the ideal of the universal workers' movement.⁶¹

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.⁶² In the mines, black workers from the tribal areas provided the muscle for the arduous work, generally on short-term contracts for low wages.⁶³

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.⁶⁴ However, white workers were free to move from one

job to another without any restrictions. 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 that role.⁶⁵

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.⁶⁶ At that time labour laws, as we know them today, were non-existent.⁶⁷

According to Finnemore 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.⁶⁸ However, Van Jaarsveld and Van Eck argue that the first trade union in South Africa was founded in Johannesburg in 1892.⁶⁹

Attempts were made in 1894 to establish a trade council in Johannesburg to coordinate some of the trade unions.⁷⁰ 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.⁷¹ 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.⁷² 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 Anglo-Boer war.⁷³ Consequently, a large number of Chinese workers were imported in 1904. Many problems arose and the Chinese workers were repatriated in 1907 because of pressure from the British government.⁷⁴

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.⁷⁵

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.⁷⁶ The strike continued until the early part of 1908 when the government passed the Railway Regulations Act⁷⁷ 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.⁷⁸

The Transvaal legislature enacted the Industrial Disputes Prevention Act⁷⁹ in 1909. 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.⁸⁰ This Act was modelled on the Canadian Industrial Dispute Investigation Act of 1907, which the then State President Smuts regarded as a compromise.⁸¹ If an employee objected to any change, he could apply for the establishment of a conciliation and investigation board,⁸² and the employer could then wait for a month until the board had reported.⁸³ Unless the parties to a dispute agreed otherwise, the board's findings were not binding but merely advisory.⁸⁴ No industrial action was permissible unless the board reported on the dispute and until the moratorium on unilateral action had expired.⁸⁵ The Act excluded from its application employers who employed less than ten employees and public servants.⁸⁶

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.⁸⁷

The Mines and Works Act was promulgated in 1911.⁸⁸ 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 blacks employed mainly in unskilled and menial work.⁸⁹ This Act excluded blacks from all skilled jobs requiring certificates of competency and from certain semi-skilled jobs in the mines.

Again in 1911, the Native Labour Regulations Act was passed.⁹⁰ This Act prohibited strikes by blacks. It won the support of employers and mine owners by placing tight controls on employees and also reinforcing the criminal sanction for breaches of employment contracts by workers.⁹¹

In order to retain a cheap labour supply, blacks were compelled to look for jobs in specific districts where labour was most needed.⁹² They were forced to take up jobs only during the time and in the areas determined by the pass laws. 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 the mining industry, which confined blacks to low-paid unskilled work and reserved responsible posts for whites, was repeated in all other South African industries by means of legislation.⁹³

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.⁹⁴ It also protested against the reservation of jobs for whites and coloureds 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.

In 1913, the Native Land Act was passed.⁹⁵ In terms of this Act, approximately 10 per cent 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.⁹⁶

The Regulation of Wages, Apprentices and Improvers Act was passed in 1918.⁹⁷ This Act provided for the appointment of boards to fix minimum wages for apprentices, women and young people in certain trades and industries.⁹⁸

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,⁹⁹ 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 blacks 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.¹⁰⁰

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.¹⁰¹

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 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 1930s.¹⁰²

Despite the exploitation of black workers, the position of white workers was not entirely secure, as the mine owners pushed 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.¹⁰³

When some white workers faced retrenchment in 1922, large-scale 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.¹⁰⁴ This labour unrest became known as the Rand Rebellion.¹⁰⁵ During this unrest, a large number of workers were killed or seriously wounded. Nevertheless, the Rand Rebellion made the government realise that labour relations needed urgent attention. 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 a change in labour legislation. Accordingly, the Industrial Conciliation Act (ICA)¹⁰⁶ was passed in 1924, shortly before the defeat of the Smuts government.

The promulgation of this Act came after more than a decade of spiralling labour unrest within an inadequate statutory framework. This labour unrest had escalated steadily since 1913 and had culminated in the revolt of white mineworkers on the Rand in 1922 and their bloody confrontation with the military forces of the South African government.¹⁰⁷

The ICA became South Africa's first comprehensive labour legislation. This Act accorded legal recognition to the 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.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ The agreements of the industrial councils were, if the minister saw fit, given the force of law, and if the council was representative, the agreements could be extended to cover non-parties as well.¹¹¹

Where there was no industrial council, the minister was given the powers to establish conciliation boards to resolve disputes.¹¹² While 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.¹¹³ Under this Act, trade unions and employers' organisations were obliged to register.¹¹⁴ However, the Act expressly excluded black employees from the definition of an employee, and black employees could not benefit from its provisions.¹¹⁵

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.¹¹⁶

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 unions.¹¹⁷

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, the ICA 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.¹¹⁸

The divisions in the socio-political system in South Africa were reflected 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 the 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.¹¹⁹

The government that succeeded the Smuts government furthered racial exclusions. It favoured white workers and made policies to protect jobs and increase wages for white workers.¹²⁰ Black workers remained excluded from political and economic power. To increase its control over industrial relations, the government passed the Wage Act in 1925.¹²¹ 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.¹²² Unlike the ICA, the Wage Act also applied to black workers, and a 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 justification for racial discrimination, wage determinations had to be equal among the races, but, by manipulating the jurisdiction of the wage boards, the authorities ensured 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.”¹²³ The employees who received these benefits were overwhelmingly whites, and if blacks received any benefits as well, it was only for fear that they would otherwise undercut their white counterparts.¹²⁴

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.¹²⁵ 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.¹²⁶

In the face of the problems emerging from the dual system, the ICA of 1924 was amended in 1930.¹²⁷ 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’”.¹²⁸ Unfortunately, it appeared that the aim of the amendment was to protect white workers from being undercut by cheaper black labour rather than to benefit pass-bearing black workers.¹²⁹

In 1937, the ICA of 1924 was replaced by the consolidated ICA of 1937, which made provision for an inspector of the Department of Labour to represent pass-bearing black workers at industrial council meetings. However, neither the 1930 amendment nor the new Act solved the problems of the dual industrial relations system.¹³⁰

In 1941, the Lansdowne 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.¹³¹

By 1946, almost a quarter of the black population were residents in the urban areas. Trade union membership increased considerably.¹³² 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.¹³³ The strike was crushed and the black trade union movement was shattered on the eve of the establishment of apartheid.

Freedom of association and trade unionism in apartheid South Africa

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.¹³⁴ The NP entered history as the party that institutionalised apartheid. Accordingly, white workers continued to prosper under the NP government.¹³⁵ In apartheid South Africa, the history of labour relations was divided into two eras. During the first era the policy of exclusion was consolidated, and during the second era labour law was integrated.

Consolidation of the policy of exclusion (1948-1976)

Soon after taking office, the NP government established the Botha Commission of inquiry¹³⁶ 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.¹³⁷

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.¹³⁸ The South African government had no interest in the pursuit of human rights, particularly equality, given 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.

The Botha Commission's report was issued in 1951.¹³⁹ Though the Commission felt that "blacks lacked the skills to participate in modern industrial relations system", it recommended that they be given some role in the industrial relations system.¹⁴⁰ It proposed that black trade unions be recognised but kept separate on a tight rein.¹⁴¹

The Commission recommended that black unions should be able to negotiate within the statutory system, but only if the state approved the establishment of a conciliation board which should be chaired by a state official.¹⁴² It further recommended that strikes by black workers be permissible, but only when they were primary in nature and only in the most exceptional circumstances.¹⁴³ It also proposed that registered trade unions should be prohibited from engaging in political activities.¹⁴⁴ The government feared that black unions might be used as a political platform for change. Therefore, the government was determined to keep them out of the institutional collective bargaining structures.

Following the Commission's recommendations, the government passed the Suppression of Communism Act.¹⁴⁵ 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 union 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.¹⁴⁶

The real divisions between the various elements of the registered trade unions and the lack of any real organisation among blacks were some of the factors that

were undoubtedly responsible for the government's decision to introduce the Native Labour (Settlement of Disputes) Act in 1953.¹⁴⁷ This Act provided for the election of internal committees in industrial establishments that employed 20 or more black workers.¹⁴⁸ Their powers were minimal, consisting of no more than the right to be consulted if a dispute arose in the plant.¹⁴⁹

Regional Native Labour Committees, chaired by white officials, but comprising blacks, were to be appointed by the minister to regulate labour within communities.¹⁵⁰ 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.¹⁵¹

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).¹⁵² 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.¹⁵³ SACTU also maintained a close political link with the ANC and was active in promoting a political role for trade unions.¹⁵⁴

To give effect to the recommendations of the Botha Commission, the ICA of 1924 was repealed in 1956, and a new Act was passed.¹⁵⁵ The ICA 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”.¹⁵⁶

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, not to be or not to become a member of a trade union or other similar association of employees.¹⁵⁷ Any such term or condition in any contract of employment was void.

Before the enactment of the ICA of 1956, an employer could discourage union membership by victimising an employee on account of his or her trade union affiliations or activities. However, the legislature saw fit, in light of international labour standards,¹⁵⁸ to make it an offence for an employer to prohibit such activities.¹⁵⁹

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.¹⁶⁰

The ICA of 1956 mainly consolidated and restructured the 1924 ICA. In terms of the 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 carrying on, or conducting of the business of the employer.¹⁶¹

The main difference between the new Act and the old Act was the prohibition the former placed on multi-racial trade unions. The new Act prohibited the registration of multi-racial unions and obliged those that were already formed to subdivide into segregated unions. In many areas job reservations were made to protect white workers from competition by their black counterparts.¹⁶² As a result, only white and coloured workers could establish and join registered trade unions, and they existed in both the bi-racial and uni-racial forms.

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.¹⁶³ They could negotiate with individual companies and conclude collective agreements with them, but these agreements had only civil jurisdiction. They could not be enforced under the provisions of the ICA.¹⁶⁴

In 1957, the South African Confederation of Labour (SACOL) was formed, which was allied with the apartheid government. After the Sharpeville massacre in March 1960, banning orders were served to some political parties¹⁶⁵ and all SACTU leaders, who were forced to go into exile. As a result, black trade union activities virtually disappeared during the 1960s.¹⁶⁶

The Union of South Africa became the Republic of South Africa under the NP government in 1961 and adopted a new Constitution. Read with the Electoral Laws Consolidation Act,¹⁶⁷ the Republic of South Africa Constitution of 1961¹⁶⁸ made provisions for social and political participation in the highest affairs of the state by “whites” only.¹⁶⁹ The black population was set on a course of separate development through a complex system that was enforced by numerous statutes.¹⁷⁰

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.¹⁷¹ 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, due to pressure from the government, the federation was compelled to expel black trade unions. TUCSA's change of attitude left black unions with no option but to form their own organisations.¹⁷²

In 1973, black workers embarked on a strike over wages. Industry was brought to a near standstill.¹⁷³ For the first time, black workers demonstrated their real power. It became clear that even without the backing of any formal workers' organisation, black workers could pressurise the government on labour issues.¹⁷⁴ After the strike, black workers started to organise 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.¹⁷⁵

The Bantu Labour Regulations Act¹⁷⁶ 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 employer-initiated committees, with little if any bargaining power. In addition, not all black workers were covered by the provisions of this Act. Those in agriculture, gold and coal mining, and government services were excluded from its provisions.¹⁷⁷

Furthermore, blacks had little choice when it came to deciding which form of representation was better for them in the case of disputes. The Act allowed for the settlement of disputes involving black employees only by internal committees.¹⁷⁸ In nearly all instances, the system was foisted upon employees by their employers and the fact that the vast majority of committees were liaison committees, because the employers preferred them, speaks for itself.¹⁷⁹ Despite

some stability, the industrial relations system and the apartheid regime were to face new challenges from the mainly black 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 reform was needed to move from exclusion to inclusion.

Integration of labour law (1976-1990)

As 1976 approached, calls for disinvestment in South Africa increased, as did the shortage of skilled workers. As a result of 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 to the industrial relations system.¹⁸⁰

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, 1979 proved to be a turning point, as it witnessed the genesis of an integrated system of labour law.

The Wiehahn Commission, recommended in its 1979 Report that freedom of association be granted to all employees, regardless of sex, race or creed, and that trade unions be allowed to register irrespective of their composition in terms of colour, race or sex.¹⁸¹

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 reservation and the establishment of an Industrial Court.¹⁸²

Most of the recommendations and findings of the Wiehahn Commission were accepted. Accordingly, the ICA of 1956 was amended in 1979 and in 1980.¹⁸³ In terms of the 1981 amendment,¹⁸⁴ its name was changed to the Labour Relations Act 28 of 1956 (LRA), which was further amended in 1982, 1983, 1984, 1988 and 1991.¹⁸⁵

These amendments aimed to provide for more substantial protection of freedom of association to all employees, regardless of their origin or race.¹⁸⁶ 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.¹⁸⁷ 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 1980,¹⁸⁸ while Part 5 was published in 1981.¹⁸⁹ 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 that statutory requirements and procedures for registration of trade unions should be revised.¹⁹⁰ This created a general fear among 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 indeed played a vital role in the development of South African labour law as demonstrated by its case law.¹⁹¹ The court was mostly presided over by white conservative judges and yet proceeded to respond to the 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.¹⁹² The court held that the duty to bargain in good faith was implied in the legal definition of an unfair labour practice.¹⁹³ An inexorable process of modernisation of industrial relations had commenced with significant economic and political consequences for South Africa.

During the early 1980s, all outdoor trade union meetings were prohibited in South Africa.¹⁹⁴ 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.¹⁹⁵ Permission for these gatherings was 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 first had to be submitted to the authorities for approval. However, indoor gatherings were permitted without official authorisation, but with some legislative limitation.¹⁹⁶ All these prohibitions were intended to discourage black trade unionism.

In 1983, a new Constitution was introduced in South Africa.¹⁹⁷ 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 the black majority from state politics as they were denied any political rights and the Cabinet had only one non-white (coloured) member.¹⁹⁸

The BCEA¹⁹⁹ was also adopted in 1983, laying down a limited range of employment rights and duties. Due to the jurisprudence of the Industrial Court, the content and ethos of many ILO instruments were integrated into our labour law regime.

In 1984, the government created a tricameral parliament, extending political rights in central government to coloureds and Indians, but excluding blacks. The black labour movement used various strategies to fight the entrenched apartheid government.²⁰⁰ One of these strategies was the formation of the Congress of South African Trade Unions (COSATU) in 1985.

COSATU strongly supported the ANC, which was banned at that time, as it was furthering the struggle against apartheid. COSATU 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.²⁰¹ Its formation led to immediate rivalry and confrontation with COSATU affiliates. It later became known that in order for the government to counter the growing power of COSATU and its supporters, it had secretly sponsored UWUSA.²⁰²

Another significant new federation of workers was formed when the Azanian Council of Trade Unions (AZACTU)²⁰³ and the Council of Unions of South Africa (CUSA)²⁰⁴ joined forces to establish the National Council of Trade Unions (NACTU), which later developed strong links with the Pan African Congress (PAC).²⁰⁵

Prior to 1 September 1988,²⁰⁶ protection for freedom of association and trade union rights was to be found in sections 66(1)²⁰⁷ and 78²⁰⁸ of the 1956 Act.²⁰⁹ This Act also contained an absolute prohibition on the dismissal of employees merely because of their membership of a trade union or similar association.²¹⁰

The 1988 Amendment Act²¹¹ 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.²¹² Workers enjoyed rights and the Act applied only when those workers had been employed and their trade unions registered, not before. Public sector employees,²¹³ 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.²¹⁴ 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, in that employers were quick to seek interdicts against unlawful strikes and other forms of industrial action were held to be *prima facie* unfair.

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 undermining unions.²¹⁵ They used strategies to alienate workers from the unions, including the focus on free riders²¹⁶ by giving them special considerations. For example, if a deadlock in wage negotiations led to a strike, workers who were not on strike were granted the wage increase last offered, while the strikers were told that they could only receive the increase from the date of the settlement.²¹⁷

The leadership of the unions was forced to respond to the challenge caused by overt and covert attempts by management to separate them from their members.²¹⁸ The maintenance of apartheid in South Africa led to the further harassment of trade unions and labour leaders.²¹⁹

The 1990s were characterised by the consolidation and incorporation of the 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 a sharp rise in the number of strikes.²²⁰

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, the PAC and the United Democratic Front (UDF). 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 statutes²²¹ 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 14 September 1990 came to be known as the “Latoria Minutes”.²²² The Labour Relations Amendment Act²²³ translated them into law. Labour relations and trade unionism entered a new era in South Africa.

PART III: FREEDOM OF ASSOCIATION AND TRADE UNIONISM IN FOREIGN AND INTERNATIONAL LAW

Freedom of association is one of the most fundamental of workers' rights. It is particularly relevant for employees and employers in regard to labour relations and it is enshrined in most international and regional human rights instruments. The consensus of the world community reflected in those international, regional and national instruments is that freedom of association is a right that must not be derogated from, for any ulterior motive, including economic development.²²⁴

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 organise, to engage in collective bargaining and to take direct action in support of workers' economic interests, particularly by exercising the right to strike.²²⁵

Consequently, organisations of workers and employers have sprung up in different countries in widely differing circumstances. This diversity is due in part to material factors, such as different degrees of economic development and 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.²²⁶ The result is that the trade union movement and therefore the law dealing with trade unionism have developed in different ways in different countries. Nevertheless, despite a time-lag in their emergence, these organisations and the law affecting them have everywhere been the products of the same forces.

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.²²⁷ 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.²²⁸

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.

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.²²⁹

Freedom of association and trade unionism under the European human rights system

The protection of human 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.

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.²³⁰ The Convention essentially deals with civil and political rights.

Article 11 of the Convention 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 Convention does not expressly refer to collective bargaining and the right to strike. It provides for the establishment of the European Commission²³¹ and a Court of Human Rights to protect and promote the rights in the Convention.²³² 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.²³³

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 *National Union of Belgian Police*,²³⁴ 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 Convention: while article 11(1) presents trade union freedom as one form of freedom of association, the article does not guarantee any particular treatment by a state of trade unions, or their members, 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*,²³⁵ a closed shop agreement was successfully challenged. In 1975, the British Railway Board (the 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 employed by the British Railway Board when the agreement was concluded, 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, alleging that their dismissal constituted a violation of the right to freedom of association provided for in article 11 of the European Convention.

The European Court first stressed that a closed shop system held considerable advantages for both employees and employers, such as the fostering of orderly collective bargaining and the avoidance of a proliferation of trade unions.²³⁶ However, the European Court ruled that although article 11 of the European Convention neither prohibited nor allowed the closed shop system in general, the challenged closed shop system was nevertheless inconsistent with the provisions of article 11.²³⁷ 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.²³⁸

In *Gustafsson v Sweden*,²³⁹ 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 include a right to refuse to enter into collective agreements. Again, in *Sigurour A Sigurjonsson v Iceland*,²⁴⁰ the European Court of Human Rights confirmed that article 11 of the European Convention included the right not to join a trade union, although this right was not on equal footing with the right to join.

The European Social Charter

The European Social Charter, a regional instrument protecting social and economic rights, was adopted in 1961 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.²⁴¹

Like other instruments protecting freedom of association and the right to organise, the Charter contains 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 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.²⁴²

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,²⁴³ 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 “[e]veryone 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.²⁴⁴ It has two specialised supervisory institutions, namely, the American Commission of Human Rights²⁴⁵ and the American Court of Human Rights.²⁴⁶

In 1988, an Additional Protocol to the American Convention on Human Rights to protect Economic, Social and Cultural Rights²⁴⁷ was signed. The Protocol contains specific provisions concerning freedom of association and workers’ rights in the region. 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.²⁴⁸

Freedom of association and trade unionism under the African human rights system

The right to freedom of association is protected in the African Charter for Human and Peoples' Rights (ACHPR or African Charter) and in the NEPAD instruments.

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 systems. 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.²⁴⁹ When the Organisation of African Unity (OAU), now the African Union (AU),²⁵⁰ 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.²⁵¹

The ACHPR was adopted by the assembly of heads of states and governments of the OAU in 1981.²⁵² 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 that "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: article 10 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 purposes.

Associations may be of social, cultural and political nature; all are covered by the provisions of article 10. The right to freedom of association is articulated as an individual right, and the state is first and foremost under a duty 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.

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.²⁵³ It also endorses the right to freedom of association in universal instruments such as the UDHR, the ICCPR and the 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.²⁵⁴

The ACHPR also endorsed the right to freedom of association in those instruments adopted within the UN specialised agencies, including the International Labour Organisation (ILO), of which African countries are members.²⁵⁵

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.”²⁵⁶

One of the important features of the ACHPR is that it includes economic, social and cultural rights.²⁵⁷ 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.

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.²⁵⁸

Member states of the AU undertook to adopt legislative or other measures to give effect to the provisions of the Charter.²⁵⁹ 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 1992.²⁶⁰

Since its establishment,²⁶¹ the African Commission has dealt with a number of cases dealing with the violation of human rights, including the right to freedom of association.²⁶² 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 must guarantee pluralism and allow individuals to associate, assemble and express opinions

which may compete or conflict with existing opinions or views, including those of the government.²⁶³

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*.²⁶⁴ 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 Civil Liberties Organisation argued that the new governing body for the Nigerian Bar Association, established by governmental decree, among other things violated the rights of Nigerian lawyers to freedom of association as guaranteed by article 10 of the ACHPR.

The African Commission held that the decree violated the provisions of article 10 of the ACHPR because the Body of Benchers was dominated by representatives of the government and had wide discretionary power. It 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 the UN Basic Principles on the Independence of the Judiciary,²⁶⁵ and thereby constituted a violation of article 10 of the African Charter.²⁶⁶ 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.²⁶⁷

Unfortunately, the Commission is not a judicial organ and its function is to try to reach amicable solutions. It only makes recommendations to the assembly of heads of states and governments, which are not binding on the states. 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.²⁶⁸

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”.²⁶⁹ Its twin objectives are the eradication of poverty and the fostering of socio-economic development, in particular, through democracy and good governance.²⁷⁰

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, which adopted the Strategic Policy Framework and a new vision for the revival and development of Africa.²⁷¹

The AU inaugural summit held in July 2002 in Durban, South Africa adopted a Declaration on the Implementation of NEPAD, formerly NAI,²⁷² endorsing the NEPAD Progress Report and Initial Action Plan,²⁷³ and encouraging AU member states to adopt the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG)²⁷⁴ and to accede to the African Peer-Review Mechanism (APRM).²⁷⁵

The APRM was established as a mechanism to implement NEPAD’s objectives. It is provided for in the DDPECG²⁷⁶ and annexed to this Declaration.²⁷⁷ The APRM is pivotal to NEPAD and constitutes the most essential test of its credibility. It was officially launched during the 9th summit of the HSGIC held in Kigali, Rwanda, from 13 to 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 pride of place in the NEPAD and APRM instruments.²⁷⁸

Human and peoples' rights in the NEPAD base document

The DDPECG is NEPAD's main instrument dealing with human and peoples' rights.²⁷⁹ 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.²⁸⁰

The Heads of State and Government then recalled those OAU decisions that stressed the importance of the protection of human rights in the development of the continent. These decisions included 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;²⁸¹ and the AU Constitutive Act (2000).²⁸²

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.²⁸³

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'.²⁸⁴ 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.²⁸⁵

Unlike the past, which was marked by lofty and empty declarations which were never implemented, the African Heads of State and Government considered concrete actions in terms of which their commitments could be assessed and themselves established a mechanism to guide and monitor their actions. In order to achieve NEPAD's objectives, which all revolve around the protection and promotion of human and peoples' rights in Africa, they agreed to establish an APRM on the basis of voluntary accession to promote adherence to and fulfilment of the commitments contained in the DDPECG.²⁸⁶

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 and 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'.²⁸⁷

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 to be guided by agreed parameters for good political, economic and corporate

governance.²⁸⁸ The DDPECG is therefore the document on which the work of the APRM is based.

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, and 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.²⁸⁹

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.²⁹⁰

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 the DDPECG.²⁹¹ 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.²⁹²

Algeria, Botswana, Burkina Faso, Cameroon, Comoros, Ethiopia, Kenya, Gabon, Ghana Mali, Mauritius, Mozambique, Nigeria, Republic of Congo, Rwanda, Senegal, South Africa, and Uganda have adhered to the APRM process and have adopted the rules, criteria, procedures and calendar for its evaluations. 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 will it 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.

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.²⁹³

The aim of the human rights revolution that led to the adoption of the UN Charter,²⁹⁴ 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.²⁹⁵

International human rights law exists principally as conventional international law. There are many 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 these are of general, universal²⁹⁶ or regional²⁹⁷ character. The next sections will examine freedom of association and trade unions' rights in the international bill of rights, the UDHR; the International Covenant on Civil and Political rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the ILO Conventions.

Right to freedom of association under the UDHR

The 30-article Universal Declaration of Human Rights,²⁹⁸ as a "common standard of achievement for all peoples and all nations",²⁹⁹ 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.”³⁰⁰ Key among the 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 that:

1. Everyone has the right to freedom and peaceful assembly and association.
2. No one may be compelled to belong to an association.

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 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,³⁰¹ the right to social security,³⁰² and the right to work and to equal pay for equal work,³⁰³ which includes the “right for everyone to form and join trade unions for the protection of his interests”.³⁰⁴ The UDHR expressly protects both the negative and the positive right to associate.³⁰⁵ 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 to be “a guiding light to all those who endeavoured to raise man’s material standard of living and spiritual condition” and “a moral obligation on the different countries to find ways and means of giving effect to the rights proclaimed therein.”³⁰⁶ 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.³⁰⁷ 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.³⁰⁸

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.³⁰⁹ After realising the problems which might be encountered by embodying in one document both civil and political rights and socio-economic rights, 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 containing economic, social and cultural rights.³¹⁰ Both covenants include provisions protecting freedom of association and trade union rights.

Right to freedom of association under the ICCPR and the 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 is accordingly included in both the ICCPR³¹¹ and the ICESCR.³¹² 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.” The right applies to a wide range of activities, which may be political, economic and social –the right to freedom of association covers the right to form and join a political party, a trade union or a football club.

Compared with the UDHR, the right to freedom of association in the ICCPR presents a number of distinctive features. First, unlike the UDHR, which enshrines 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.³¹³ 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, or the protection of the rights and freedoms of others.³¹⁴ Thirdly, the right to freedom of association in the ICCPR includes the

right for everyone “to form and join trade unions”,³¹⁵ which was 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 elaborate 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 right to work and the right to just and favourable conditions of work, and especially trade union rights.³¹⁶ Trade union rights occupy a prominent role in international legal instruments promoting economic, social and cultural rights. 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.³¹⁷

The ICESCR describes 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.”³¹⁸ 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.

The right to freedom of association and trade unionism in international labour law

International labour law is mainly developed within the context of the ILO and is based on freedom of association. According to the constitutive act of the ILO (the ILO Constitution), freedom of association must be protected as a means of improving conditions of labour and establishing peace.³¹⁹ Freedom of association is principally protected by two major instruments, which were adopted in 1948 and 1949 respectively.

The ILO Constitution

Freedom of association is considered a core labour standard by the ILO.³²⁰ 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 its *raison d'être*.³²¹ As such, freedom of association is one of the central provisions underpinning the work of the ILO.

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 organisation. Article 41(2) of the former 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 being fought, the International Labour Conference held its 26th session in Philadelphia, USA, and adopted the Declaration of Philadelphia 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 organisation is based.³²²

The Declaration stressed that “freedom of expression and association are essential to sustained progress.”³²³ This affirmation serves to emphasise 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 organisation.³²⁴ Meaningful tripartism necessarily depends upon the existence of a free and effective organisation of employers and workers,³²⁵ and such an organisation 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. Also advocated in the Declaration were 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.”³²⁶

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.³²⁷

The ILO has adopted a number of conventions concerned with the rights of workers to organise 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 No 87 and No 98.³²⁸

The ILO Convention No 87

The ILO Convention No 87 of 1948³²⁹ 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.³³⁰

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.³³¹ The kind of organisation referred to in article 2 is defined in article 10.³³² The right to organise is recognised in respect of workers and employers without any distinction.³³³

By using the expression “without distinction whatsoever”, the convention intended to give all employers and workers, including public officials, the right to organise without regard to sex, race, religion, social opinion, political opinion, etc.³³⁴ The ILO Committee of Experts on the Application of Conventions and Recommendations has decided 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.³³⁵ The only restriction which is allowed is in the case of members of the armed forces and the police.

Under this convention, states are authorised to decide to what extent members of the armed and police services³³⁶ may exercise this right.³³⁷ The provisions of article 9 of this convention permit either the total exclusion of these 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 member states of the ILO”.³³⁸

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.³³⁹

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 International Labour Conference intended to proclaim the fact that the right to organise is an absolute right to be respected by everybody, including the state.³⁴⁰ Article 2 implies that the authorities should not impose legal formalities which would be equivalent, in practice, to previous authorisation or which would constitute an obstacle amounting to a prohibition.³⁴¹ It expressly precludes governmental authorities from interfering in the organisation’s internal affairs, including suspension or dissolution by administrative authorities. Article 2 has been interpreted as guaranteeing the right to freedom of association for trade union purposes and not the right of association which falls within the competence of other international organisations.³⁴²

Workers’ and employers’ organisations are entitled to draw up their constitutions and rules to elect their representatives freely, to organise their administration and activities, and to formulate their programmes without any interference by the public authorities.³⁴³ 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 8.³⁴⁴

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.³⁴⁵

Each ILO member state must protect the right of workers and employers to freedom of association and to organise. At the same time, workers' and employers' organisations are free to develop their activities without interference by the public authorities.³⁴⁶

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, the ICESCR and the ICCPR, which provide:

Nothing in this article shall authorise States Parties to the International Labour Organization 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.³⁴⁷

Convention No 87 is silent on whether the right of workers to form and join organisations of their own choosing includes 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.³⁴⁸ This means that employees are free not to join such organisations.

Trade union security arrangements are acceptable only if they are concluded by free agreement between workers' organisations and employers. The law must not impose them.³⁴⁹

The ILO Convention No 98

The adoption of ILO Convention No 87 on the right to freedom of association and the protection of the right to organise 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. This convention supplemented the ILO Convention No 87 of 1948. It contains further safeguards concerning the right to organise 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' organisations 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 adopted 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.³⁵⁰

The convention protects workers against acts of discrimination and victimisation by their employers on account of their trade union membership or activities. 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. The latter acts 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.³⁵¹

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.³⁵²

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.³⁵³

The right to strike

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 a link, which has since been acknowledged by the Committee of Experts and other ILO supervisory organs.³⁵⁴ 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.³⁵⁵

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.³⁵⁶ The CFA has interpreted the two conventions on freedom of association as implying the right to strike.³⁵⁷ The provisions of Convention No 87 which give a legal basis to this principle are articles 3, 8 and 10.

According to the Committee of Experts, a general prohibition on the right to strike constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members,³⁵⁸ and of the right of members to organise³⁵⁹ their activities.³⁶⁰ It is also regarded as inconsistent with the obligation to accord proper respect to the principles of freedom of association 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 the freedom of association.³⁶¹ The ILO supervisory body has accepted that governments may legitimately impose certain pre-conditions on the right to strike.³⁶² However, pre-conditions on the right to strike must be reasonable and must not be such as to place substantial limitations on the means or action open to trade union organisations.³⁶³

The ILO accepts that strikes are regarded as acceptable only if they are embarked upon with the aim of furthering the 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 that the ILO partly and implicitly recognises a right not to associate.

Conventions No 87 and No 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 two of the most respected international instruments in the field of human rights.³⁶⁴

There is no remedy for individuals under these conventions. The conventions are enforced by workers’ organisations who can lay complaints with a special ILO Committee (the governing body’s committee on freedom of association) that the conventions are not observed by the state and employers. The committee then decides whether the complaint is justified or not.³⁶⁵

The ILO mentions both freedom of association and the right to bargain collectively in its constitution, to which all member countries are bound.³⁶⁶ The ILO Conventions No 87 and No 98 are not exhaustive in respect 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.

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 the landmark Declaration of Fundamental Principles and Rights at Work.³⁶⁷ 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 organise, and the right to bargain collectively are proclaimed by this declaration as 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."³⁶⁸ 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 realise 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.³⁶⁹

PART IV: FREEDOM OF ASSOCIATION AND TRADE UNIONISM UNDER THE DEMOCRATIC AND POST-APARTHEID SOUTH AFRICAN LEGAL ORDER

Prior to the first democratic elections 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 adopted a more accommodating approach to trade unionism relatively quickly. 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 Labour Relations Act 66 of 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.³⁷⁰ Unlike under the previous dispensation, there is no distinction between public and private sector employees, except that certain categories of employees are excluded from the provisions of the LRA.³⁷¹

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 realisation of years of struggle by the majority of South Africans.³⁷²

The key fundamental rights of workers are those rights that enable the working people to fight for and defend their rights. These rights are the first group of workers' rights and they consist of the workers' right to establish trade unions, the right to bargain collectively, and the right to strike. These are the three pillars of autonomy of the working people, giving them the capacity to defend all their other rights.³⁷³ South Africa's democratic transition was marked by a change from a pariah state to a model democracy, an example to all and especially the divided societies of this world.

The development of labour relations, freedom of association and trade unionism after 1993

As pointed out earlier, the labour relations arena 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, the 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 the equal protection and benefit of the law, including the law governing labour relations, as fundamental rights.³⁷⁴ 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.³⁷⁵ The enactment of labour rights in the interim Constitution created a need for labour legislation that would give effect to labour rights entrenched in the Constitution.

Accordingly, the Minister of Labour appointed the Ministerial Legal Task Team on 8 August 1994. This Team was headed by Halton Cheadle and came to be known as the Cheadle Task Team. 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 the Draft Labour Relations Bill.³⁷⁶ 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.³⁷⁷

The Task Team released its recommendations in February 1995.³⁷⁸ One of the recommendations of the Task Team was that the registration process of trade unions should be simplified. Several trade union rights were recognised in the labour legislation as a result of the recommendations of the Task Team. After the collation of the comments from the public and negotiations in NEDLAC, the Labour Relations Act of 1995³⁷⁹ was passed, to give effect to the stated goals and principles of the Reconstruction and Development Programme of the government, to ensure that labour legislation complied with the provisions of the 1993 Constitution, and to bring 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 the industrial relations system.³⁸⁰ It provides for the framework within which the constitutional right to form and join trade unions and employers' organizations and to participate in their activities can be protected and fulfilled.³⁸¹ Procedures to be followed in resolving disputes relating to the alleged violation of these rights are also outlined in the Act.³⁸² It also provides for organisational rights³⁸³ for unions in the workplace. It encourages parties to resolve disputes through conciliation and arbitration.³⁸⁴ It also makes provision for joint decision-making and consultation

between management and labour and it also entrenches the right to strike.³⁸⁵ 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 a transitional constitution, the Constitutional Assembly, a democratically elected body, adopted a draft of a new Constitution on 8 May 1996.³⁸⁶ 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 the final draft.³⁸⁷ On certification, the Constitutional Court found that the new text met the constitutional principles in most respects, but not in all.³⁸⁸

The draft was therefore amended and re-submitted to the Constitutional Court, which finally certified it, before it was signed into law by President Mandela at Sharpeville on 10 December 1996.³⁸⁹ This Constitution contains a Bill of Rights and it is no surprise that, like its predecessor, it extensively entrenches labour rights.³⁹⁰

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)³⁹¹ was passed to regulate conditions of work. It was followed by the Skills Development Act (SDA)³⁹² and the Skills Development Levies Act (SDLA).³⁹³ Later the Employment Equity Act (EEA)³⁹⁴ was promulgated. The main purpose of this Act is 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, the EEA, the BCEA, 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, the BCEA, the EEA and the SDE in order to improve the lives of workers 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 newly created tripartite forum (NEDLAC) to involve the social partners in socio-economic policy making.³⁹⁵

COSATU is the biggest trade union federation in South Africa, with a combined membership of just over 1.8 million. There are currently 21 trade unions affiliated to COSATU. It played an important role in the transformation of South African labour relations.

Before 1994, COSATU was an economic and political movement. Since the 1994 elections, COSATU and its members have been developing a type of trade unionism called social movement unionism. This differs qualitatively from the economic and political types of trade unionism. However, by sending a number of senior COSATU leaders to parliament, COSATU weakened its base. Its participation in the tripartite alliance³⁹⁶ started to take strain as the government's economic policy and its implementation started to be seen to be contrary to workers' interests.

In 2004, COSATU was prepared to stand against its key ally, the ANC, for the latter's decision to push ahead with the Anti-Terror Bill, which could have the effect of criminalising transgressions during protest action.³⁹⁷ COSATU contended that the Protection of Constitutional Democracy Bill against Terrorist and Related Activities Bill "constitutes a massive attack on workers' constitutional rights especially the right to strike."³⁹⁸

COSATU argued that if this Bill were passed, it would effectively render strikes in essential services and unprotected strikes as terrorist activities, which 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 the Constitutional Court and to notify the ILO.³⁹⁹ It even threatened to embark on a national strike against the government decision to go ahead with the Bill.

The challenge that COSATU and its members is faced with today is to decide whether to turn the organisation into an independent working organisation of the working class, or to be reduced to a “silent partner” which cannot challenge anti-worker policies and which must try to resolve all worker-related problems through discussions within the alliance.

It is time for COSATU to start addressing poverty in the rural areas of South Africa, actual job losses because of structural changes in industries, and international exposure to the challenges of globalisation; otherwise, it will face a serious loss of membership.

CONCLUSION

The industrial relations system that prevailed in South Africa before the establishment of the current constitutional and democratic order was fragmented. One system existed for white, Indian, and coloured workers, and another for 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.

The policies of institutionalised discrimination in South Africa made inordinate inroads into freedom of association. The apartheid government devised a series of statutes that seriously impacted on the right to freedom of association and enforced discrimination in the workplace.⁴⁰⁰

Under apartheid black workers and their dependants were exploited both as workers and as disenfranchised citizens of South Africa.⁴⁰¹ The joint regulation of industries has always been a major union objective, but it was distorted by apartheid policies, which denied legal support for collective bargaining to black trade unions, and imprisoned and victimised union 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, regardless of any opposition towards granting them these rights.

Trade unionism contributed to the extension of the frontiers of freedom and the struggle for democracy in South Africa. Enacted in terms of the 1993 Constitution and following the first democratic general elections held in 1994, the LRA of 1995 sought to normalise 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.

Freedom of association in the Constitution and the labour law 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 No 87 of 1948 and No 98 of 1949 on the right to freedom of association.

Recent developments in international law and particularly in Africa under NEPAD and the APRM are likely to promote the right to freedom of association and trade unionism on the African continent. There are, however, a number of challenges, both internal and external, to the protection of freedom of association and trade unionism in Africa, including South Africa. Internal challenges include underdevelopment, internal politics, lack of a trade unionist culture and the collusion between trade unionism and politics, as demonstrated in South Africa during the 2007 ANC Polokwane national conference. Difficult economic conditions and the increased politicisation of workers may impact negatively on freedom of association and trade unionism.

External challenges to the protection and promotion of freedom of association and trade unionism mainly derive from the imperialism of capitalism or the global market, characterised by immense pressure on the governments of Third World countries to deregulate and to increasingly renounce any meaningful role in

economic activities. Capitalism and the market are generally hostile to the promotion of freedom of association and trade unionism. 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.

Endnotes

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² Landman A A “Freedom of Association in South African Labour Law” (1990) *Acta Juridica* 89.

³ Alexis de Tocqueville, quoted by Woolman S “Freedom of Association” in Chaskalson M et al (eds) *Constitutional Law of South Africa* (1996) 22-1.

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⁵ See Seady HM & Benjamin PS “The Right to Strike and Freedom of Association: An International Perspective” (1990) 11 *ILJ* 440.

⁶ The Declaration of Fundamental Principles and Rights at Work (1998) 37 *ILM* 1237.

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 Woolman *op cit* 22-1 – 22-2.

¹¹ South Africa’s withdrawal became effective in 1966.

¹² Rubin N *International Labour Law and the Law of the New South Africa* (1998) 1.

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) and 195(1).

¹⁷ Section 1.

¹⁸ Chapter 2.

¹⁹ Section 7(1).

²⁰ Section 18.

²¹ Ferdinand von Prondzynski *Freedom of Association and Industrial Relations: A Comparative Study* (1987) 225.

²² *Idem*.

²³ *Idem* 14.

²⁴ Olivier MP “Statutory Employment Relations in South Africa” in Slabbert et al (eds) *Managing Employment Relations in South Africa* (1999) 5-60.

²⁵ *Idem*.

²⁶ Kirkland L “Promoting Democracy: Labor’s Enduring Commitment” at <http://www.iri.org/common4.asp> accessed on 2 July 2006.

²⁷ Per Wooding CJ in *Collymore v Attorney General of Trinidad and Tobago* (1970) A.C. 538.

²⁸ Woolman & De Waal “Freedom of Association: The Right to be We” in Van Wyk et al *op cit* 340.

²⁹ Wedderburn, quoted by Ferdinand von Prondzynski *op cit* 232.

³⁰ Ferdinand von Prondzynski *op cit* 233.

³¹ *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545 at 623.

³² Ewing *op cit* 240.

³³ Bassom D et al (eds) *Essential Labour Law* (2001) 26.

³⁴ Madima T “Freedom of Association and the Bill of Rights” in Kalula E (ed) *Labour Relations in Southern Africa* (1993) 116.

³⁵ Madima T “Freedom of Association and the Concept of Compulsory Trade Union Membership” (1994) 3 *TSAR* 545.

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- ³⁷ See Albertyn C “Closed shop, closed mind” (1994) 10 *Employment Law* 101-102; Madima “Freedom of Association” *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 : the Closed Shop] (continued)” (1994) *TSAR* 289; Weiss M “Trade Union Democracy in Germany” in Blanpain *op cit* 30.
- ³⁸ Madima “Freedom of Association” *op cit* 553.
- ³⁹ Gutmann A *Freedom of Association* (1998) 64.
- ⁴⁰ Summers CW “Freedom of Association and Compulsory Union Membership in Sweden and the United States” (1964) *Pennsylvania Law Review* 647.
- ⁴¹ 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.
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- ⁴⁵ Hughes & Pollins *op cit* 165.
- ⁴⁶ Bendix S *Industrial Relations in South Africa* (1992) 6.
- ⁴⁷ Cardozo BN *The Nature of the Judicial Process* (1921) 53.
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- ⁵³ See Wilson M & Thompson L *A History of South Africa to 1870* (1982) 293 and Brassey *op cit* at A1: 10.
- ⁵⁴ Robertson HM “150 Years of Economic Contact Between Black and White” (1934) 2 *SA Journal of Economics* 403 at 406.
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- ⁵⁷ Cape Master and Servant and Apprentices Ordinance of 1856.
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- ⁵⁹ Du Toit D et al (eds) *Labour Relations Law* (2000) 10.
- ⁶⁰ See Neal AC *Fundamental Social Rights at Work in the European Community* (1999) 32-33; Bendix S *Industrial Relations in South Africa* (1989) 286.
- ⁶¹ See Ringrose *op cit* 5; Bendix *op cit* 287.
- ⁶² Finnemore & Van der Merwe *op cit* 21.
- ⁶³ Robertson *op cit* at 9. See Brassey M *Employment and Labour Law* Vol 1 (1998) A1:15.
- ⁶⁴ Brassey *op cit* at A1:16.
- ⁶⁵ See Denoon D *South Africa since 1800* (1972) 136 and Brassey *op cit* at A1:16.
- ⁶⁶ Scheepers A “The Challenges Facing Trade Unions” in Coetzee JAG *Industrial Relations in South Africa* (1976) 149-150.
- ⁶⁷ For instance, when there was a strike in the 1880s, workers were not charged with striking but were charged for being absent from work or desertion.
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- ⁶⁹ Van Jaarsveld SR & Van Eck BPS *Principles of Labour Law* (2002) 254.
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- ⁷³ The war took place between 1889 and 1902. See also Brassey *op cit* A1: 20.
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- ⁷⁶ *Idem.*
- ⁷⁷ Act 13 of 1908.
- ⁷⁸ Section 38 read with section 40 of the Act.
- ⁷⁹ Act 20 of 1909.
- ⁸⁰ Section 5(1) of the Act.
- ⁸¹ Brassey *op cit* A1: 2; also see Lever “Capital and Labour in South Africa: The Passage of the Industrial Conciliation Act of 1924” in Webster *op cit* 82.
- ⁸² The board could be appointed only if the dispute affected ten or more employees.
- ⁸³ Section 5(2).
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- ⁸⁶ Sections 1 and 2.
- ⁸⁷ Togni LS *The Struggle for Human Rights: An International and South African Perspective* (1994) 131.
- ⁸⁸ Act 12 of 1911.
- ⁸⁹ Coetzee *op cit* 179.
- ⁹⁰ Act 15 of 1911. See Finnemore & Van der Merwe *op cit* 223.
- ⁹¹ See Brassey *op cit* at A1: 23; Finnemore & Van der Merwe *op cit* 223.
- ⁹² Brassey *op cit* at A1: 23.
- ⁹³ For example, section 77 of the Industrial Conciliation Act of 1924 empowered the Minister of Labour to reserve certain occupations on the grounds of race and to compel employers to observe fixed ratios in the racial composition of their workforces. The Wage Act of 1925 was originally presented as a means of giving statutory protection to the 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 for 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.
- ⁹⁴ Finnemore & Van der Merwe *op cit* 24.
- ⁹⁵ Act 27 of 1913.
- ⁹⁶ Finnemore *op cit* 22.
- ⁹⁷ Act 29 of 1918.
- ⁹⁸ Brassey *op cit* at A1 : 24.
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- ¹⁰⁰ Brassey *op cit* at A1: 25.
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- ¹⁰⁵ Van Jaarsveld & Van Eck *op cit* 254.
- ¹⁰⁶ Act 11 of 1924.
- ¹⁰⁷ See Lever *op cit* 84; Brassey *op cit* A1:26-27.
- ¹⁰⁸ See Van Jaarsveld & Van Eck *op cit* 254; Jones *op cit* 24; Coetzee *op cit* 179.
- ¹⁰⁹ See Lever *op cit* 88; Brassey *op cit* A1:26-27.
- ¹¹⁰ Section 2.
- ¹¹¹ Section 9.
- ¹¹² Section 4 of the ICA.
- ¹¹³ Section 7 read with section 12.
- ¹¹⁴ Section 12.
- ¹¹⁵ 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 1* (1998) A1:28-29; Jones RA *Collective Bargaining in South Africa* (1982) 26; Coetzee JAG *op cit* 179, 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.
- ¹¹⁶ Jones *op cit* 27.

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- ¹¹⁷ *Idem*.
- ¹¹⁸ Brassey *op cit* A1:26-27.
- ¹¹⁹ Bendix *op cit* 284.
- ¹²⁰ Finnemore & Van der Merwe *op cit* 27.
- ¹²¹ Act 27 of 1925.
- ¹²² Section 1.
- ¹²³ In *Ex parte Minister of Justice: In re R v Gerstnera* 1930 AD 420 at 423. See also Brassey *op cit* at A1: 30.
- ¹²⁴ Brassey *op cit* A1: 30.
- ¹²⁵ Brassey *op cit* A1: 31.
- ¹²⁶ 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.
- ¹²⁷ Industrial Conciliation (Amendment) Act 24 of 1930.
- ¹²⁸ Du Toit *op cit* 6.
- ¹²⁹ *Idem* 6.
- ¹³⁰ *Idem* 6-7.
- ¹³¹ Finnemore M *Introduction to Labour Law in South Africa* (2002) 22.
- ¹³² 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.
- ¹³³ Brassey *op cit* A1: 36.
- ¹³⁴ Finnemore & Van der Merwe *op cit* 29; Brassey *op cit* at A1: 36; Finnemore *op cit* 22.
- ¹³⁵ 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.
- ¹³⁶ The Commission was established on 1 October 1948. It was called the Industrial Relations Commission of Enquiry. The Commission was headed by Botha and is hereafter referred to as the “Botha Commission”.
- ¹³⁷ Brassey *op cit* at A1: 36.
- ¹³⁸ Togni *op cit* 132.
- ¹³⁹ As a result of the recommendations of the Botha Commission, the Black Labour Regulations Act 48 of 1953, the Industrial Conciliation Act 28 of 1956 and the Wage Act 5 of 1957 were passed.
- ¹⁴⁰ Industrial Relations Commission of Enquiry UG 62 of 1951.
- ¹⁴¹ See para 1636 of the Report of the Industrial Relations Commission of Enquiry UG 62 of 1951; Van Jaaarsveld & Van Eck *op cit* (2002) 254-255; Brassey *op cit* at A1: 37.
- ¹⁴² Paras 1794-1796 of the Report.
- ¹⁴³ Paras 1820 and 1823 of the Report.
- ¹⁴⁴ Chapter VIII and para 1742 of the Report.
- ¹⁴⁵ Act 44 of 1950.
- ¹⁴⁶ Finnemore & Van der Merwe *op cit* 29.
- ¹⁴⁷ Act 48 of 1953.
- ¹⁴⁸ Section 7.
- ¹⁴⁹ Brassey *op cit* at A1:38.
- ¹⁵⁰ Section 4 of Act 48 of 1953.
- ¹⁵¹ Finnemore *op cit* 24.
- ¹⁵² Brassey *op cit* at A1:39; Finnemore & Van der Merwe *op cit* 30.
- ¹⁵³ De Clercq “The Organised Labour Movement and State Registration: Unity or Fragmentation?” (1980) 5 *SA Labour Bulletin* 18 at 30-31.
- ¹⁵⁴ 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.
- ¹⁵⁵ Act 28 of 1956.
- ¹⁵⁶ Du Toit *et al Labour relations law:A comprehensive guide* (2000) 8.
- ¹⁵⁷ Section 78(1) of Act 28 of 1956.
- ¹⁵⁸ Section 66(1) of Act 28 of 1956 is closely modelled around Article 1 of Convention 98 of 1949.
- ¹⁵⁹ Landman *op cit* 92.

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- ¹⁶⁰ Section 66(1) of Act 28 of 1956.
- ¹⁶¹ Brassey *op cit* A1:38; Finnemore & Van der Merwe *op cit* 29.
- ¹⁶² Section 77 of the Act. See also Brassey *op cit* at A1:38; Finnemore & Van der Merwe *op cit* 29.
- ¹⁶³ Jones *op cit* 28.
- ¹⁶⁴ Due to the fact that they could not register, black trade unions were faced with a number of problems. They tended to be extremely unstable, they often depended upon the initiatives of a handful of individuals (often left wing white organisations and intellectuals) to keep them going, employers were generally suspicious of them since they were not recognised by law and there was no compulsion to negotiate with them, and employers could invariably refuse to have anything to do with them. Only a 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.
- ¹⁶⁵ Particularly the ANC and the PAC, which were the most popular black political organisations at that time.
- ¹⁶⁶ Finnemore & Van der Merwe *op cit* 30.
- ¹⁶⁷ Act 46 of 1946.
- ¹⁶⁸ Act 32 of 1961.
- ¹⁶⁹ Burdzik J & Van Wyk D “Apartheid Legislation 1976-1986” (1987) *Acta Juridica* 123.
- ¹⁷⁰ Legislation such as the Black Authorities Act 68 of 1951, the Black Labour Act 67 of 1964 and the Promotion of Black Self-Government Act 46 of 1959 played a vital role in oppressing black South Africans.
- ¹⁷¹ Resolution 1761 of 1962.
- ¹⁷² Finnemore *op cit* 24.
- ¹⁷³ *Idem*.
- ¹⁷⁴ Finnemore & Van der Merwe *op cit* 30.
- ¹⁷⁵ Maree *op cit* 1-2.
- ¹⁷⁶ Act 70 of 1973, which amended the Black Labour (Settlement of Disputes) Act 48 of 1953.
- ¹⁷⁷ Section 1.
- ¹⁷⁸ Coetzee *op cit* 185.
- ¹⁷⁹ See Finnemore & Van der Merwe *op cit* 31; Coetzee *op cit* 184-185.
- ¹⁸⁰ 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.
- ¹⁸¹ Report for the Commission of Enquiry into Labour Legislation Part I RP 47/1979.
- ¹⁸² Wiehahn Report (1979) parts 1-6. See also Finnemore *op cit* 31; Van Jaarsveld & Van Eck *op cit* 255; Jones *op cit* 30; Pienaar G “Freedom of Association in the United States and South Africa – a comparative analysis” (1993) XXVI *CILSA* 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 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.
- ¹⁸³ Industrial Conciliation Amendment Acts 94 of 1979 and 95 of 1980.
- ¹⁸⁴ Labour Relations Amendment Act 57 of 1981.
- ¹⁸⁵ Labour Relations Amendment Acts 51 of 1982, 2 of 1983, 81 of 1984, 83 of 1988, and 9 of 1991.
- ¹⁸⁶ Pienaar *op cit* 169-171.
- ¹⁸⁷ Finnemore *op cit* 31.
- ¹⁸⁸ They were published as Report 38 of 1980.
- ¹⁸⁹ It was published as Report 27 of 1981. See also Van Jaarsveld & Van Eck *op cit* 255.
- ¹⁹⁰ Van Jaarsveld & Van Eck *op cit* 255.
- ¹⁹¹ For examples of the jurisprudence of the Industrial Court see: *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 Tedelex (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).

¹⁹² 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.

¹⁹³ 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).

¹⁹⁴ The prohibition was in terms of section 46(3) of the Internal Security Act 74 of 1982.

¹⁹⁵ See Robertson et al (eds) *South African Human Rights and Labour Law Yearbook* (1991) 303.

¹⁹⁶ In terms of section 25 of the Criminal Procedure Act 51 of 1977, the police may be present at any meeting on authorisation 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 or she considers it likely that an offence may be committed at the meeting.

¹⁹⁷ Act 110 of 1983.

¹⁹⁸ Burdzik & Van Wyk *op cit* 119 at 126.

¹⁹⁹ Act 3 of 1983.

²⁰⁰ Finnemore *op cit* 26.

²⁰¹ Finnemore *op cit* 27.

²⁰² Finnemore & Van der Merwe *op cit* 34.

²⁰³ 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.

²⁰⁴ 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.

²⁰⁵ See Bendix *op cit* 211, 227-229; Finnemore & Van der Merwe *op cit* 34.

²⁰⁶ When the Labour Relations Amendment Act 83 of 1988 came into effect.

²⁰⁷ It provides for the prohibition against victimisation of employees by employers for belonging to trade unions and participating in trade union activities.

²⁰⁸ It particularly deals with the right relating to freedom of association of employees.

²⁰⁹ Sections 66(1)(c) and 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.

²¹⁰ Section 66(1)(c).

²¹¹ Labour Relations Amendment Act 83 of 1988.

²¹² See Rycroft & Jordan *op cit* 105; Davies and Freedland *op cit* 213.

²¹³ 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 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.

²¹⁴ Du Toit *op cit* 15.

²¹⁵ Dekker D *Industrial Relations for a Changing South Africa* (1990) 142.

²¹⁶ “Free riders” are employees who benefit from the efforts of a trade union as a bargaining agent without contributing to it.

²¹⁷ Dekker D *Industrial Relations for a Changing South Africa* (1990) 142.

²¹⁸ Dekker *op cit* 143.

²¹⁹ Leary *op cit* 23.

²²⁰ Van Jaarsveld & Van Eck *op cit* 257.

²²¹ More particularly, the provisions of the Labour Relations Amendment Act of 1988.

²²² Brassey *op cit* at A1:52; Innes D “Labour Relations in the De Klerk Era” (1992) 6 *SA Review* 338 at 339-40.

²²³ Act 9 of 1991.

²²⁴ Commission for Labour Cooperation *Labour Relations in North America* (2000) 24.

²²⁵ See Rubin N *Code of International Labour Law Vol. I 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 paras 474-75. See also Articles 3, 8 and 10 of the ILO Convention No 87.

²²⁶ *Freedom of Association and the Protection of the Right to Organize: A Workers' Education Manual* (1959) 2.

²²⁷ Sherman B *The State of The Unions* (1986) 13.

²²⁸ Since the end of apartheid in South Africa, for instance, there has been 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.

²²⁹ Maluwa T “International Human Rights Norms and the South African Interim Constitution 1993” (1993-1994) 19 *SAYIL* 22-25.

²³⁰ The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 in Rome and came into force in 1953.

²³¹ In 1998, the European Union adopted an additional Protocol to the European Convention (Protocol No. 11) which came into force on 1 November 1998. This Protocol removes the Commission, creating a full-time Court of Human Rights in the region. The decisions of the Court are legally binding on the parties.

²³² Article 19(1) and (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²³³ For example, in the case of *Lavissee v France* application no 14223/88 at 218-239 the European Commission held that the refusal to register an organisation could in principle constitute an interference of the right to freedom of association.

²³⁴ (1975) 1 EHRR 578.

²³⁵ (1981) JLR 408 (ECHR); (1995) 4 LCD 208 (Young et al).

²³⁶ Young et al *op cit* 210.

²³⁷ *Idem* 209.

²³⁸ *Idem*.

²³⁹ (1996) 22 ECHR 409

²⁴⁰ (1993) 16 EHRR 462.

²⁴¹ Article 5 of the European Social Charter.

²⁴² Article 6(4) of the Charter.

²⁴³ The International Conference of American States approved the establishment of the International Union of American Republics in 1889 to 1890. The Charter of the OAS was signed in Bogota in 1948 and entered into force in 1951.

²⁴⁴ Article 16(2) and (3), which provides 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”.

²⁴⁵ Established in terms of article 33(a) of the American Convention on Human Rights.

²⁴⁶ Established in terms of article 33(b) of the American Convention on Human Rights.

²⁴⁷ Protocol of San Jose, 1988.

²⁴⁸ Articles 6, 7 and 8.

²⁴⁹ Viljoen F “African Commission on Human and Peoples' Rights” in Heyns C (ed) *Human Rights in Africa* (1996) 386.

²⁵⁰ The OAU is composed of 53 independent African states and is the largest regional organisation. 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 in 2001.

²⁵¹ Article 2(1) of the OAU Charter.

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- ²⁵² The African Charter on Human and Peoples' Rights (21 ILM 58 (1082) was adopted on 17 June 1981 in Banjul.
- ²⁵³ 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 and 11 of the African Charter).
- ²⁵⁴ See Preamble and article 60 of the African Charter.
- ²⁵⁵ Articles 60 and 61 of the African Charter.
- ²⁵⁶ Umozurike UO, as quoted by Mugwanya GW *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (2003) 31.
- ²⁵⁷ Articles 21 and 22 of the African Charter.
- ²⁵⁸ See the Preamble to the ICCPR.
- ²⁵⁹ Article 1 of the African Charter.
- ²⁶⁰ For the text of the resolution, see the ICJ Compilation of the Basic Documents October 1991-April 1994 at 40.
- ²⁶¹ The African Commission on Human and Peoples' Rights was inaugurated on 2 November 1987 and its headquarters were located in Banjul, Gambia.
- ²⁶² 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.
- ²⁶³ See for example Communications 25/89, 56/91, and 100/93, also referred to by Mugwanya *op cit* 291.
- ²⁶⁴ *Civil Liberties Organisation in respect of Nigerian Bar Association v Nigeria* 101/93 (1995).
- ²⁶⁵ UN General Assembly Resolution no 40/32 of 29 November 1985 and no 40/146 of 13 December 1985.
- ²⁶⁶ *Civil Liberties Organisation in respect of Nigerian Bar Association v Nigeria* at para 24.
- ²⁶⁷ *Civil Liberties Organisation in respect of Nigerian Bar Association v Nigeria* at para 25.
- ²⁶⁸ 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 25 January 2004.
- ²⁶⁹ Doc. AHG/235 (XXXVIII), Annex I, para 2.
- ²⁷⁰ *Idem* para 5.
- ²⁷¹ Doc. AHG/ Decl.1 (XXXVII).
- ²⁷² Assembly/AU Doc AHG/Decl.1 (1).
- ²⁷³ Doc. AHG/ 235 (XXXVIII).
- ²⁷⁴ *Idem* Annex I.
- ²⁷⁵ *Idem* Annex II (APRM Base Document).
- ²⁷⁶ Doc. AHG/235 (XXXVIII) Annex I.
- ²⁷⁷ *Idem* Annex II.
- ²⁷⁸ 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; Mangu AMB "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.
- ²⁷⁹ Doc. AHG/235 (XXXVIII) Annex I.
- ²⁸⁰ *Idem* para 3.
- ²⁸¹ Adopted at the 2000 AU Summit in Lomé, Togo. It was based on an earlier decision of the 1999 Algiers OAU Summit.
- ²⁸² Doc. AHG/235 (XXXVIII) para 3 (a)-(l).
- ²⁸³ *Idem* para 4.
- ²⁸⁴ Doc. AHG/235 (XXXVIII) *op cit* para 10.
- ²⁸⁵ See, for instance, the UDHR and all conventions relating thereto, including the ICCPR and the ICESCR, which are referred to in the DDPECG of 2002. See Heyns C & Kilander M (eds) *Compendium of Key Human Rights Documents of the African Union* (2006) 294.
- ²⁸⁶ Doc. AHG/235 (XXXVIII) para 28.
- ²⁸⁷ *Idem* Annex II para 1.

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- ²⁸⁸ Doc. AHG/235 (XXXVIII) para 5.
- ²⁸⁹ *Idem* para 4.
- ²⁹⁰ *Idem* para 3.
- ²⁹¹ *Idem* para 2.
- ²⁹² 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.
- ²⁹³ 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.
- ²⁹⁴ U.N.T.S xvi (hereafter the UN Charter).
- ²⁹⁵ Mugwanya *op cit* 1.
- ²⁹⁶ For example, the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.
- ²⁹⁷ For example, the African Charter on Human and Peoples Rights, the American Convention on Human Rights, and the European Convention on Human Rights.
- ²⁹⁸ Universal Declaration of Human Rights GA Res 217 (111) 1948 adopted by the United Nations General Assembly on 10 December 1948.
- ²⁹⁹ Preamble to the UDHR.
- ³⁰⁰ *Idem*.
- ³⁰¹ Article 20(1) of the UDHR.
- ³⁰² Article 22.
- ³⁰³ Article 23.
- ³⁰⁴ Article 23.4.
- ³⁰⁵ Articles 20(1) and (2).
- ³⁰⁶ United Nations Plenary Meeting, Official Records of Third Session, Part I (1948) 873, Netherlands Delegate. Also quoted by Umozurike UO *The African Charter on Human and Peoples’ Rights* (1997) 11.
- ³⁰⁷ Maluwa *op cit* 24.
- ³⁰⁸ See Waldock CH, quoted by Umozurike *op cit* 11; Dugard J *International Law: A South African Perspective* (2000) 34, 241.
- ³⁰⁹ See *United Nations Action in the Field of Human Rights* (New York 1980) 9. See also Ben-Israel R. *International Labour Standards: The Case of the Freedom to Strike* (1988) 71-72.
- ³¹⁰ See *United Nations Action in the Field of Human Rights op cit* 10.
- ³¹¹ International Covenant on Civil and Political Rights 1966 999 UNTS 171; 6 ILM 368 (1967).
- ³¹² International Covenant on Economic, Social and Cultural Rights UNTS 3 (1967) 6 ILM 360 (1960).
- ³¹³ Articles 21 and 22(1).
- ³¹⁴ Article 22(2).
- ³¹⁵ Article 22(1).
- ³¹⁶ Articles 6, 7 and 8 of the ICESCR.
- ³¹⁷ Article 8 of the ICESCR.
- ³¹⁸ Article 8(d).
- ³¹⁹ Preamble to the ILO Constitution read with Preamble to the Convention No 87 of 1948.
- ³²⁰ This is recognised and given effect to by several instruments adopted by the ILO, including the ILO Constitution, ILO conventions such as Conventions 87 and 97, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the ILO Convention 151 concerning the Protection of the Right to Organize and Procedure for determining Conditions of Employment in Public Service of 1978 and the Declaration of Fundamental Principles and Rights at Work of 1998.
- ³²¹ Betten *op cit* (1994) 1.
- ³²² Article I of the Declaration of Philadelphia of 1944.
- ³²³ Articles I(b) and III(e).
- ³²⁴ Hepple B et al (eds) *Human Rights and Labour Law: Essay for Paul O’ Higgins* (1994) 1-2.
- ³²⁵ Novitz T *International and European Protection of the Right to Strike* (2003) 109.

³²⁶ Swepston *op cit* 169.

³²⁷ See 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 in 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.

³²⁸ Convention No 87 of 1948 "Freedom of Association and the Right to Organise Convention" and Convention No 98 of 1949 "The Right to Organise and Collective Bargaining Convention".

³²⁹ Part I of the convention deals with freedom of association (articles 1 to 10), part II concerns the right to organise (article 11), part III deals with miscellaneous issues (article 12), and part IV contains the final provisions.

³³⁰ Article 2 of Convention No 87 of 1948.

³³¹ International Labour Office *Freedom of Association: An International Survey* (1975) 3.

³³² Article 10 defines an organisation as "any organization of workers or employers for furthering and defending the interests of workers and employers."

³³³ Article 9.

³³⁴ General Survey of the Reports on the Freedom of Association and the Right to Organise Convention No 87 of 1948 and The Right to Organise and Collective Bargaining Convention No 98 of 1949 in 1994. (hereafter called the "General Survey, 1994") paras 48-49.

³³⁵ ILO Report of Experts on the Application of Conventions and Recommendations, Report III (Part IV), International Labour Conference, 48th Session, Geneva, 1964, 130.

³³⁶ Most countries deny the armed services the right to organise, 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 organisations only.

³³⁷ See article 9 of Convention No 87 of 1948 and article 5 of Convention No 98 of 1949.

³³⁸ General Survey, 1994, para 55.

³³⁹ *Idem* paras 66 and 67.

³⁴⁰ International Labour Office *Freedom of Association: An international Survey* (1975) 37.

³⁴¹ *Idem* 3.

³⁴² 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.

³⁴³ Article 3, which deals with collective rights of the organisations themselves.

³⁴⁴ Article 8 has two parts. First, in exercising the rights provided for in the convention, workers and employers and their respective organisations, like other persons or organised 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.

³⁴⁵ Article 5.

³⁴⁶ Articles 1 and 11.

³⁴⁷ Article 22.3 of the ICCPR (Freedom of Association) read with article 8.3 of the ICESCR (trade union rights).

³⁴⁸ Report of the Committee of Experts on the Application of Conventions and Recommendations 1959 Report III (Part IV) 109.

³⁴⁹ General Survey, 1994, paras 102-103.

³⁵⁰ Article 1.1 of the convention.

³⁵¹ Article 1.2.

³⁵² Article 2.1.

³⁵³ Article 3.

³⁵⁴ Novitz *op cit* 185.

³⁵⁵ 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, par 27.

³⁵⁶ 1983 Report of the Committee of Experts, para 2000.

³⁵⁷ General Survey, 1994, para 179.

³⁵⁸ 1983 Report of the Committee of Experts, para 205.

³⁵⁹ Provided in article 3 of Convention No 87 of 1948.

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- ³⁶⁰ General Survey, 1973, para 107.
- ³⁶¹ 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.
- ³⁶² These may include the giving of strike notice, the holding of ballots, the recourse to compulsory conciliation, and arbitration.
- ³⁶³ General Survey, 1994, paras 170-172.
- ³⁶⁴ Creighton *op cit* 19-20. See also Novitz *op cit* 110.
- ³⁶⁵ Morris G *Law at the Workplace: Union Members* (1980) 11.
- ³⁶⁶ 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 recognised the ILO’s “solemn” obligation to further “the effective recognition of the right of collective bargaining” These constitutional principles are not dependent on ratification of standards. Instead they are applicable to all member states of the ILO.
- ³⁶⁷ (1998) 37 ILM 1237.
- ³⁶⁸ Article 2(a) of the 1998 Declaration of Fundamental Principles and Rights at Work.
- ³⁶⁹ Those instruments are Conventions No 87 and No 98, the Forced Labour Convention No 29 (1930), the Abolition of Forced Labour Convention No 105 (1957), the Equal Remuneration Convention No 100 (1951), the Discrimination Convention No 111 (1958), and the Minimum Wage Convention No 138 (1970).
- ³⁷⁰ Basson A *et al Essential labour law* (2002) 3.
- ³⁷¹ 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.”
- ³⁷² At <http://www.constitutionalcourt.org.za> (accessed on 28 February 2006).
- ³⁷³ 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.
- ³⁷⁴ Chapter III of the interim Constitution.
- ³⁷⁵ Section 27 of the interim Constitution.
- ³⁷⁶ Van Jaarsveld & Van Eck *op cit* 258; Basson *et al op cit* 10.
- ³⁷⁷ See Fouche M (ed) *A Practical Guide to Labour Law* (1998) 211.
- ³⁷⁸ *Government Gazette* 1692, 10 February 1995.
- ³⁷⁹ It was passed by Parliament as Act 66 of 1995 in October 1995 and it came into operation on 11 November 1996.
- ³⁸⁰ 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.
- ³⁸¹ Sections 4 to 8 of the LRA.
- ³⁸² Section 10.
- ³⁸³ Sections 12 to 16 of the LRA.
- ³⁸⁴ The parts of this Act which relate to individual labour law are largely a codification of the body of jurisprudence which had been developed 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 Courts.
- ³⁸⁵ Section 64 of the LRA.
- ³⁸⁶ De Waal *et al op cit* 5.
- ³⁸⁷ Section 72(1) of the interim Constitution.
- ³⁸⁸ *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).
- ³⁸⁹ The judgment of the Constitutional Court of South Africa on the certification of the new constitution is dated 6 September 1996 and reported in *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).

³⁹⁰ 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); 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); 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.

³⁹¹ Act 75 of 1997.

³⁹² Act 97 of 1997.

³⁹³ Act 9 of 1999.

³⁹⁴ Act 55 of 1999.

³⁹⁵ See Finnemore & Van Rensburg *op cit* 46.

³⁹⁶ Composed of the ANC, COSATU and the SACP.

³⁹⁷ Louw I “Labour Federation threaten to Strike over the Anti-terror Bill” *Sowetan* Friday, 27 February, 2004.

³⁹⁸ The Bill identifies 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.

³⁹⁹ Louw I. “Labour Federation threaten to Strike over the Anti-terror Bill” *Sowetan* Friday 27 February 2004.

⁴⁰⁰ These included the Group Areas Act 41 of 1950, the Reservation of Separate Amenities Act 49 of 1953, the Prohibition of Mixed Marriages Act 55 of 1949, the Immorality Act 23 of 1957, the Suppression of Communism Act 44 of 1950 and the Affected Organisations Act 31 of 1974. All these Acts were intended to further racial discrimination in South Africa.

⁴⁰¹ Luckhardt & Wall *op cit* 36.

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