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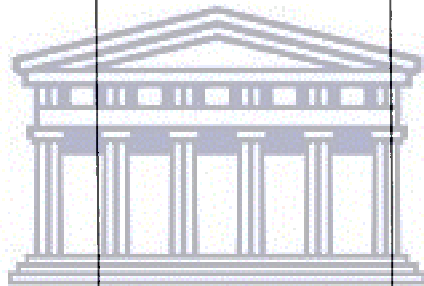

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Freedom of Association and Union Security Arrangements in the Republic of South Africa and the Federal Republic of Germany

by

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UNIVERSITY of the
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presented in partial fulfilment of the requirements for the degree Magister Legum
in the Faculty of Law of the University of Western Cape

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Preface

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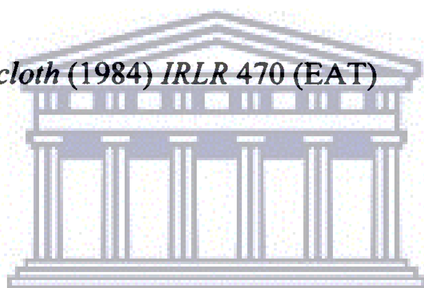

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Abbreviations

A - *Appellate Division*
ABl - *Amtsblatt*
AD - *Appellate Division Reports*
AP - *Arbeitsrechrliche Praxis*
ASE - *Amalgated Society of Engineers*
ASSAL - *Annual Survey of South African Law*
AuR - *Arbeit und Recht*
BayVerfG - *Bayrisches Verfassungsgericht*
BAG - *Bundesarbeitsgericht*
BB - *Betriebsberater*
BCLR - *Butterworth Constitutional Law Reports*
BGBl - *Bundesgesetzblatt*
BVerfG - *Bundesverfassungsgericht*
BVerfGE - *Entscheidung des Bundesverfassungerichts*
BVerwG - *Bundesverwaltungsgericht*
BVerwGE - *Entscheidung des Bundesverwaltungsgerichts*
C - *Cape Provincial Division*
CC - *Constitutional Court*
cf - *confer*
CGB - *Christlicher Gewerkschaftsbund*
CLJ - *Cambridge Law Journal*
DAG - *Deutsche Angestellten Gewerkschaft*
DB - *Der Betrieb*
DGB - *Deutscher Gewerkschaftsbund*
DLR - *Dominion Law Reports*
DR - *De Rebus*
EAT - *Employment Appeal Tribunal*
ECHR - *European Convention on Human Rights, European Court of Human Rights*
EL - *Employment Law*
ELR - *European Law Review*
FDP - *Freie Demokratische Partei*
GG - *Government Gazette*
IC - *Industrial Court*
ICA - *Industrial Conciliation Act*
ILJ - *Industrial Law Journal*
ILJ (UK) - *Industrial Law Journal (United Kingdom)*
ILO - *International Labour Organisation*
ILR - *International Labour Review*
IMS - *Industrial Moulders Society*
IRJ - *Industrial Relations Journal*
IRLR - *Industrial Relations Law Reports*
JuS - *Juristische Schulung*
JZ - *Juristenzeitung*
LRA - *Labour Relations Act*
MWU - *Mine Worker's Union*
NGF - *North German Federation*

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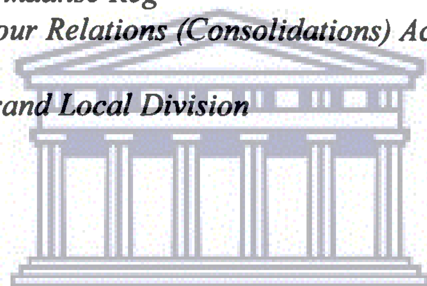
NILQ - *Northern Ireland Legal Quarterly*
NMC - *National Manpower Commission*
NJW - *Neue Juristische Wochenzeitschrift*
ÖTV - *Gewerkschaft für Öffentliche Dienste, Transport und Verkehr*
par - *Paragraph*
RAG - *Reichsarbeitsgreicht*
RdA - *Recht der Arbeit*
RGBl - *Reichsgesetzblatt*
RGZ - *Entscheidungen des Reichgerichts (Zivilsachen)*
SA - *South African Law Reports*
SAHRLLY - *South African Human Rights and Labour Law Yearbook*
SALB - *South African Labour Bulletin*
SAPL - *South African Public Law*
sec - *Section*
SC - *Supreme Court*
SPD - *Sozialdemokratische Partei Deutschlands*
T - *Transvaal Provincial Division*
TPD - *Reports of the Transvaal Provincial Division*
TMA - *Transvaal Miners' Association*
TSAR - *Tydskrif vir die Suid-Afrikaanse Reg*
TULRA - *Trade Union and Labour Relations (Consolidations) Act 1992*
WCA - *Works Constitution Act*
WLD - *Reports of theWitwatersrand Local Division*



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Chapter 1 - Introduction

In the history of labour relations, trade unions have played a major role in protecting the rights of employees and improving their working conditions. They have defended their members against exploitation by employers. They have promoted the establishment of labour legislation, which in some countries is quite comprehensive. They represent the interests of employees in the collective bargaining process. Albertyn describes trade unions as "institutions which advance democracy, co-operation, peaceful resolution of disputes and non-violent negotiation (and which) are intrinsically worth preserving and protecting".[1] It is self-evident that a trade union needs strength to achieve these purposes. However, trade unions are weakened by the fact that it is not only union members who enjoy the benefits of their achievements, since non-members do the same and some employees thus try to avoid the burdens of trade union membership. It is therefore understandable that trade unions attempt to decrease the numbers of these so-called "free riders". Besides the pressure that can be brought to bear by fellow employees in the workplace, union security arrangements, such as the closed shop or the agency shop, represent another traditional method of strengthening trade unions. The free rider problem, however, is only one of many arguments used in the debate by those who support the establishment of closed shops.

The most frequently raised argument *against* the legitimacy of closed shops is the infringement of freedom of association. The point of departure for this study is the fact that,

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due to the interpretation of freedom of association by the German Federal Labour Court and the Constitutional Court, both the closed shop and the agency shop are prohibited in Germany, whereas sec 25 of the South African Labour Relations Act of 1995 provides for agency shops while sec 26 provides for closed shops. Union security arrangements are furthermore permitted by the final Constitution provided that they comply with the limitation clause.[2] These provisions will be examined in detail later.

Freedom of association has only been a constitutional right in South Africa since 1994.[3] However, considering the fact that the constitutionality of the closed shop provision is at least doubtful, it is surprising that the constitutional questions that arise in terms of the closed shop seem to be neglected in South African literature.[4] This study will focus on freedom of association and union security arrangements in South Africa and Germany. One must of course be careful in comparing the legal institutions of two countries since it is necessary to consider their different legal, historical, political and social background. However, certain fundamental principles of both countries seem to be comparable, for example the application of the principle of proportionality, which plays a major role in constitutional scrutiny. Furthermore, it might be helpful to compare the policies of two different societies as a point of departure for future discussions.

The discussion of freedom of association contains two crucial questions: firstly, whether it can be said that freedom of association includes the right not to associate in an association, or, in other words, whether positive freedom of association implies negative freedom of association.

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[1] *Freedom of Association and the Morality of the Closed Shop* (1989) *ILJ* vol. 9 p 981 (986).
[2] Sec 23(6) of the final Constitution.
[3] Sec 17 of the interim Constitution.
[4] An exception is Olivier and Potgieter's article *The right to associate freely and the closed shop* (1994) *TSAR* p 289 and p 443.

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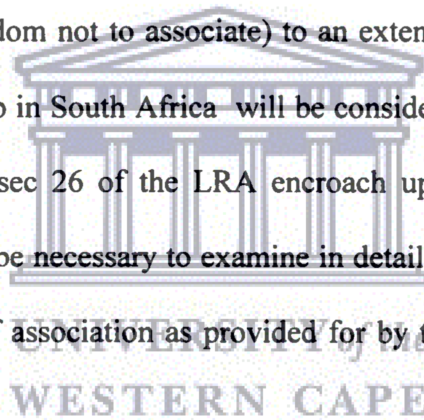
Secondly, if the right exists, it is necessary to determine whether and to what extent it can be limited.

As the application of closed shop varies from country to country, it is first of all necessary to elaborate its general background. This study will attempt to set up a typology according to which union security arrangements can be characterised. Furthermore, the arguments used in the debate about union security arrangements, and about the closed shop in particular, will be examined. In the following chapter the situation regarding union security arrangements in Germany will be discussed with particular attention being paid to the constitutionality of so-called differentiation clauses. It will be shown that the German Basic Law protects freedom of association (including the freedom not to associate) to an extensive degree. In Chapter 4 the development of the closed shop in South Africa will be considered first before turning to the question whether sec 25 and sec 26 of the LRA encroach upon the fundamental right of freedom of association. It will be necessary to examine in detail not only these provisions but also the concept of freedom of association as provided for by the Bill of Rights of the final Constitution.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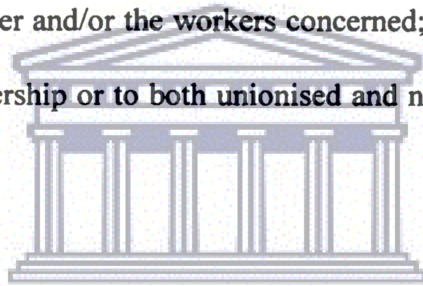
Chapter 2 - The nature and definition of union security arrangements

2.1 The purpose of union security arrangements

Since there is a lot of confusion about the various union security practices, it will be useful firstly to review the origin and the nature of union security in general. Union security arrangements are defined as arrangements "whereby union membership or some of its financial aspects become a condition of employment".[5] According to Cordova and Ozaki, they must contain three common elements: "(1) an organisational purpose, i.e. a clear objective concerning the security and strength of the union as an organisation; (2) an element of compulsion vis-à-vis the employer and/or the workers concerned; and (3) over-all application to either the entire union membership or to both unionised and non-unionised workers in the bargaining unit."[6]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Union security arrangements range from compulsory trade union membership to so-called harmony clauses, where trade union membership is not a condition of employment, but where the employer undertakes to encourage it through certain defined practices.[7] These variations will be described later. What, though, were the reasons for their establishment?

It has already been stated that the free rider problem is not the only motivation for the implementation of union security arrangements. Adopting the pattern laid down by Cordova

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[5] Cordova and Ozaki *Union security arrangements: an international overview* (1980) *International Labour Review* p 19; Erstling *The Right to Organise* (1977) Ch. 5. p 49.
[6] *Ibid.*
[7] Rp. 60/1981 of the South African National Manpower Commission (NMC) Ch. 1 par. 3.11.

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and Ozaki, there are three kinds of problems which provide reasons for union security, namely *organisational, market* and *negotiation* problems.[8]

Firstly, the attempts of trade unions to organise might face not only the indifference of some workers, but the hostile tactics of employers as well.[9] Only strong unions would be able to resist such tactics. Union security reduces the danger of being discriminated against on the grounds of trade union membership. Secondly, in industries where rapid turnover and wide dispersion is common (e.g. construction industry or merchant shipping), trade unions face the difficulty of recruiting members. The same problem arises when certain areas are covered by different unions. Finally, the trade union's role as a party in the collective bargaining process presents two problems: how to put the union in a strong bargaining position, and how to ensure the application of collective agreements to *all* employees.

Union security arrangements and the closed shop in particular are evidently the easiest way to achieve these purposes, as they help increase the membership by compelling all members in the bargaining unit to belong to the union. A large membership is a pre-requisite for a strong bargaining position. Besides this membership function, the union security arrangement fulfils two further functions: it helps to discipline the trade union members, as they are dependent on trade union membership in order to retain their jobs (disciplinary function); also, it helps to control the supply of employees in a particular trade or class of workers (entry control function).[10]

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[8] Cordova and Ozaki *op.cit.* p 19 ff.

[9] Particularly in the United States and in Great Britain. The situation was different in the Scandinavian countries, for example, where employers were more prepared to accept the labour movement.

[10] See Rp. 60/1981 of the NMC Ch. 2 par. 2.3-4; the strongest form of control over the supply of workers is provided for by the pre-entry closed which is not given legal protection in South Africa [*infra* 2(b)(aa)].

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2.2 Definition and concepts of closed shop

The concept of the closed shop has been interpreted differently, according to its various applications, and there is therefore some confusion regarding it, which makes it necessary first of all to determine exactly what is meant by a closed shop. The expression "closed shop" is mostly used as a generic term covering a "variety of practices which contain a common element".[11] This common element refers to some sort of compulsion in regard to trade union membership, which can be exercised in different ways. For this reason, some prefer the term "compulsory trade unionism".[12]

An often cited definition of the "closed shop" derives from McCarthy. He describes it as "a situation in which employees come to realise that a particular job is only to be obtained and retained if they become and remain members of one of a specified number of trade unions."[13] This definition includes closed shops with pre-entry clauses (where the worker has to become and remain a member before obtaining the job), as well as the post-entry closed shop (where membership is not a condition for obtaining the job, but only for retaining it).[14] Other authors prefer to apply the term "closed shop" not only to arrangements, where union membership is condition of employment, but also to so-called agency shops, where instead of union membership the payment of fees is compulsory.[15] Sec 26(1) of the South African Labour Relations Act defines the "closed shop" as a collective agreement, concluded by a representative trade union and an employer or employers' organisation, requiring all employees covered by the agreement to be members of the trade union. This concept is

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[11] Hanson *et al The closed shop* (1982) p 5.
[12] Allan *Power in Trade Unions* (1954) p 56.
[13] McCarthy *The closed shop in Britain* (1964) p 9.
[14] See *infra* par. 2.2.1.

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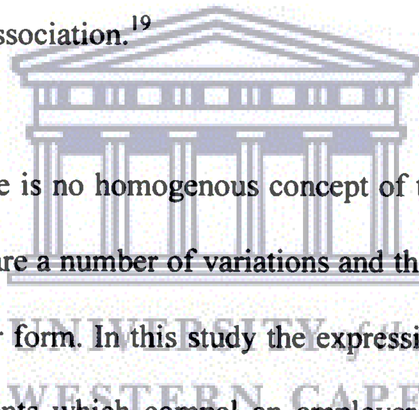
distinguishable from the agency shop agreement, defined in sec 25(1) of the South African LRA as an collective agreement requiring the employer to deduct an agreed agency fee from the wages of its employees who are identified in the agreement and who are not members of the union.[16]

In Germany the closed shop is known as *organisation clause* (*Organisationsklausel*).[17] The so-called *general* organisation clauses refer to the requirement to become a member of *any* trade union, whereas *restricted* organisation clauses postulate membership in the trade union party to the particular agreement.[18] It will be shown later that organisation clauses, i.e. closed shop agreements, are not lawful in Germany, owing to their incompatibility with the non-members' right to freedom of association.[19]



These examples show that there is no homogenous concept of the closed shop. Furthermore, one should consider that there are a number of variations and that some elements of one form can be found to modify another form. In this study the expression "closed shop" is used in a broad sense, i.e. all arrangements which compel an employer not to hire or to dismiss an employee who is not a member of a trade union are considered closed shop arrangements. Of course one should bear in mind that not all of the modifications covered by this definition are to be found either in South Africa or in Germany. However, the phenomenon of the closed shop cannot be isolated from its variations and it is therefore useful to lay down a general pattern. A typology similar to the one used by Cordova and Ozaki could cover five major

[15] Reynders *The Closed Shop in Industrial Agreements* (1982) *IRJ* p 8 (11).
[16] *Infra* par 2.2.1.
[17] Maunz/Dürig *et al Grundgesetz - Kommentar* (1993) vol. 1 Art. 9 par. 231.
[18] See von Münch/Kunig (ed.) *Grundgesetzkommentar* (1992) vol. 1 Art. 9 par. 78.
[19] *Infra* par 3.3.

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areas: forms of closed shop, methods of establishment, conditions of establishment, effect on workers and legal character.[20]

2.2.1 Forms

The closed shop in the narrow sense is also known as *pre-entry closed shop.*[21] It obliges the employer to employ only workers who are members of the particular trade union(s) or, in other words, it is the "agreed practice whereby no one can apply for a job unless he is a member of a particular union".[22] The retention of membership is a condition for continued employment. Although the South African Labour Relations Act of 1956 only made provisions for the post-entry closed shop,[23] the pre-entry closed shop had been a common practice as well.[24] They are not compatible with the South African Constitution of 1996, however, since they are not recognised by the LRA of 1995.[25]

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The less strict form of closed shop is the *post-entry closed shop* or *union shop*. In this case the employer may employ workers, even if they are not members of a particular union. The continued employment depends, however, on admission to the union and the retention of union-membership within a prescribed period. The union shop arrangement is an arrangement where "union-membership is a term of the contract of employment not a condition of its making"[26] (as is the case in regard to the pre-entry closed shop). The employee is obliged to

[20] Cf. Cordova and Ozaki *op.cit.* p. 26; see also the typology developed by McCarthy *op.cit.* pp 27-78 and by Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) pp 240-242.
[21] Also known as unilateral or partial closed shop - see Rp. 60/1981 of the NMC Ch. 1 par. 3.5.
[22] Davies and Freedland *op.cit.* p 240.
[23] Sec 24(1)(x) of the LRA of 1956.
[24] NMC Rp. 60/1981 Ch. 5 par. 4.2.1. Since the LRA of 1956 did not provide for pre-entry closed shop agreements they could only be concluded as non-regulated or non-statutory closed shop agreements. See *infra* par. 4.1.4 (bb)-(cc).
[25] Sec 23 (6) of the Constitution of 1996. See *infra* par 4.5.1 (e).
[26] Davies and Freedland *op.cit.* p 241.

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accept union membership within a certain period (often the company's probationary period). In contrast to the pre-entry closed shop, it is the employer who has control over the pool of people who are eligible for employment. However, continued employment still remains subject to trade union membership, thus creating a powerful position for the trade unions. This form of union security is envisaged by the 1995 Labour Relations Act, since the closed shop agreement is binding only if "there is no provision in the agreement requiring membership of the representative trade union before employment commences".[27]

A variation of the closed shop is the *full closed shop* or *reciprocal closed shop*, where, in addition to the employers' obligation, the trade union members may only work for employers who are parties to the agreement. This form of union security is the strictest one as it restricts both the employer (as regards the choice of employees) and the employees (as regards their choice of employer). It gives the unions a great deal of control over the supply of workers. It is to be found as both post-entry and pre-entry closed shop. The reciprocal closed shop has been provided for by sec 24(1)(x)(ii) of the LRA of 1956. It is not envisaged by the LRA of 1995.[28]

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The Labour Relations Act of 1995 also provides for the establishment of *agency shops*.[29] These are defined in sec 25(1) as collective agreements concluded by a representative trade union and an employer or employers' organisation, requiring the employer to deduct an agreed agency fee from the wages of those employees who are identified in the agreement and who are not members of the trade union. This kind of union security arrangement gives the employee the choice whether to become a member of the union or not. However, he is obliged

[27] Sec 26(3)(c).

[28] Although the LRA does not prohibit such agreements it appears that they would interfere with the employees' freedom of trade, occupation and profession as provided for by sec 22 of the South African Constitution of 1996.

[29] Sec 25.

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to pay to the union a certain sum (which is normally equivalent to the union dues) or, in some variations of this form, to have it paid into a separate account.[30] The obligation to join the union is substituted for by contributing financially. In Germany this payment is known as a "solidarity contribution" (*Solidarbeitrag*).[31] The development of the agency shop results from criticism of the closed shop as being an infringement of freedom of association. However, it will be seen later that this kind of union security also involves its own constitutional problems.[32]

There are a number of other union security arrangements with differing degrees of impact on labour relations. As it would not be helpful to list all of them, this overview will restrict itself to a few examples.[33] It must be understood that only agency shops[34] and closed shops[35] are explicitly provided for by the South African LRA of 1995. Considering that the final Constitution demands that union security arrangements are recognised by national legislation it seems therefore unlikely that practices which do not comply with sec 25 and sec 26 of the LRA (such as the pre-entry closed shop) are lawful in South Africa, at least in so far as they impinge on the non-member constitutional rights.[36] There might occur cases, however, where the union security agreement falls within the ambit of the LRA without being an agency or closed shop agreement. The *maintenance of membership clauses*, for instance, oblige the employee, who is a member of the union concerned, to remain a member for the duration of the agreement.[37] In contrast to sec 26(6) of the LRA of 1995, workers who are not members of the union do not need to become members in order retain their jobs. While such an agreement

[30] Cf. sec 25(3)(c) of the South African LRA of 1995.
[31] Maunz/Dürig *et al op.cit.* vol. 1 Art 9 par. 233.
[32] *Infra* Chapter 5.
[33] For a more comprehensive overview see NMC Rp. 60/1981 Ch. 1 par. 3.
[34] Sec 25.
[35] Sec 26.
[36] See *infra* par. 4.5.1 (e).

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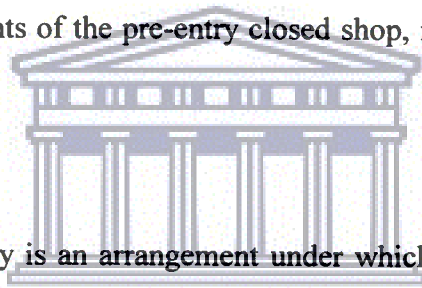
could be concluded in terms of sec 26 of the LRA of 1995, the situation is different as regards the so-called *modified union shop* which is a combination of *union shop* with *maintenance of membership*.[38] This variation compels new workers to become members of the applicable union, but non-members who are already employed at the time the agreement is concluded do not need to become members in order to retain their jobs. Sec 26 (3)(c) of the LRA of 1995 requires, however, that the agreement contains no provision requiring membership of the trade union party to the agreement *before* employment commences. Thus the clause clearly falls outside the ambit of sec 26. The *preference clause* obliges the employer to give first preference to members of the particular trade union(s) when employing workers. Non-members will be employed only after all trade union members have been absorbed.[39] Since this clause also contains elements of the pre-entry closed shop, it is not covered by sec 26 of the LRA of 1995.



A further form of union security is an arrangement under which the employer undertakes to give certain privileges, such as the payment of bonuses and other benefits, to union-members only. In Germany the debate over union security was primarily about these *differentiation clauses* (*Differenzierungsklauseln)*. These clauses are aimed at obliging the employer to differentiate between organised and non organised employees; according to these agreements, the member shall enjoy greater benefits.[40] Differentiation clauses can be seen as the general form of union security practices, since the basic idea is to treat union members and non-members differently. As will be shown later, these clauses are unlawful in Germany, as are the so-called *Tarifausschlußklauseln*. These clauses prohibit the employer from granting certain collective bargaining achievements to the non-member. Like organisation clauses, they occur

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[37] NMC Rp. 60/1981 Ch. 1 par. 3.7.
[38] *Op.cit.* Ch. 1 par. 3.8.
[39] *Op.cit.* Ch. 1 par. 3.9.

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in both general and restricted forms.[41] Although differentiation clauses and clauses which exclude non-members from collective bargaining achievements are less severe forms of union security than the closed shop, they do not fall within the ambit of sec 25 and sec 26. These provisions only allow for either the compulsory payment or compulsory membership as a means of union security arrangements. This does not include supplementary payments to union members or the exclusion from collective bargaining achievements, however. It needs to be stressed again that the Bill of Rights of 1996 requires of union security arrangements to be recognised by national legislation. An union security agreement which is not covered by the LRA is therefore unlikely to survive constitutional attack.[42]

2.2.2 Methods of establishment

The second point concerns the establishment of a closed shop. This can be achieved in one of two possible ways. Firstly, it can be incorporated into a formal agreement.[43] Such an agreement can be the result of industrial action, if the employer is not initially prepared to conclude it.[44] Secondly, the closed shop can come into being by means of an informal arrangement, i.e. by workers simply refusing to work with non-union-members provided that this is tolerated by the employer. This arrangement is not articulated in a formal document.[45]

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[40] von Münch/Kunig (ed.) *op.cit.* Art. 9 par. 78.
[41] *Supra* par. 2.2.
[42] See *infra* par. 4.5.1 (e).
[43] Cf. sec 26(1) of the LRA of 1995.
[44] See Hanson *et al op.cit.* p 7.
[45] This practice has been common in Great Britain [see Kahn-Freund *Labour and the Law* (1977) p 197]. The LRA does not explicitly prohibit informal union security arrangements. If they are to be lawful, however, the safeguards in regard to the closed shop and the agency shop provided for by the LRA could be circumvented. It is doubtful, however, whether this simple fact suffices for the prohibition of informal agreements. The question whether practices on a private level are lawful or not is in the first place a matter of the horizontal application of fundamental rights and of recognition by national legislation. *Infra* par. 4.5.1 (e).

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Finally, it is possible for a closed shop to be established by means of ministerial order, by law or by arbitration award.[46]

2.2.3 Conditions for establishment

Thirdly, one can divide closed shops according to the conditions that must be fulfilled for their establishment. One possible condition could refer for instance to the number of members a union must have in order to be granted closed shop rights. In the so-called *majoritarian system,* only one particular union would enjoy closed shop rights. This union would then be entitled to obtain all the employees within the bargaining unit.[47] In the so-called *all-comers system*, *all* recognised unions become part of the closed shop. A union enjoys recognition if it covers a certain portion of employees within the bargaining unit.[48] Although sec 26(2) of the South African LRA[49] permits a closed shop with two or more unions it appears that it prefers the majoritarian system. For a smaller union it would be necessary to *act jointly* with the dominant union, in order to fall under the definition "representative trade union" in terms of sec 26(1) of the LRA. It is unlikely, however, that the bigger union will be prepared to admit additional competitors to the agreement.[50]

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[46] Cordova and Ozaki *op.cit. p* 27. South African law merely provides for the extension of closed shop agreements by means of ministerial order [cf. sec 48 of the LRA of 1956 and sec 32 of the LRA of 1995]. It is to consider, however, that in regard to the LRA 1995 the binding effect of the extension will be subject to the requirements of sec 26(3), since otherwise these safeguards could be circumvented.

[47] Albertyn *The closed shop and fairness* (1990-91) *EL* vol. 7 p 75.

[48] *Ibid.* See also Albertyn's analysis of the closed shop in regard to this matter in *Closed Shop Agreements and the Principle of Majority Unionism* (1984) 2 *ISA* no 2 p 14.

[49] The provision reads: "For the purposes of this section, 'representative trade union' means a registered trade union, or two or more registered trade unions acting jointly, whose members are a majority of the employees employed-

(a) by an employer in a workplace; or

(b) by the members of an employers' organisation in a sector and area in respect of which the closed shop agreement applies."

[50] *Infra* par. 4.5.1(a).

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Other conditions for establishing a closed shop could, for example, concern a ballot, which must have been held in the workplace, whereby a certain percentage of workers support the establishment of a closed shop. In South Africa it is necessary that two thirds of the employees who vote must do so in favour of the closed shop.[51]

2.2.4 Effect on workers

Closed shops can also be distinguished according to their effect on employees. One can first of all differentiate arrangements which make union-membership compulsory from those involving financial obligations. The first group can in turn be subdivided according to whether it allows the worker to become a member of any union, or expects him to become a member of a specified union.[52] The latter group can be subdivided according to whether the union will benefit directly from the non-member's payment, or if the payment is to be paid into a separate account.[53] In South Africa the deduction is subject to certain requirements. The amount must not, for instance, be used for political purposes.[54] Finally, one may distinguish closed shops from what McCarthy calls *semi-closed shops*, i.e. arrangements which provide for exemption from compulsory membership.[55] Sec 26(7) of the South African LRA provides for exemptions in regard to conscientious objectors and employees already employed at the time the collective agreement takes effect.[56]

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[51] Sec 26(3) of the LRA of 1995.
[52] See Davies and Freedland *op.cit.* p 241.
[53] See for example s 25 (3)(c) of the South African LRA of 1995.
[54] Sec 26(3)(d) of the LRA of 1995. See *infra* 4.5.1(c).
[55] *Op.cit.* p 25.
[56] See *infra* par 4.5.1(b).

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2.2.5 Legal character

One final distinction can be made in regard to the legal character of the closed shop. The closed shop agreement can be concluded in accordance with a statutory provision (statutory closed shop). This provision would either entail a detailed prescription of the preliminary conditions (regulated closed shop), or it would represent a simple allowance for the establishment of a closed shop (non-regulated closed shop).[57] It is also possible for closed shops to be established on a non-statutory basis. These practices are known as *non-statutory closed shops* or *private closed shops.*[58] While the statutory closed shop is subject to the particular statutory regulations, the non-statutory closed shop is merely subject to common law and to the Constitution (if applicable).[59]

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2.3 The debate

The debate about the closed shop has always been both controversial and emotional. It is assumed that this is due to the fact that it is about economic power.[60] There is a variety of arguments both for and against the establishment of closed shop.[61] This is not to say that all of these arguments are related to the issue of the constitutionality of closed shops. It will be seen that the closed shop bears advantages which cannot be denied, but one has to separate the question of whether or not the closed shop represents a desirable policy, from the question of whether or not it is constitutional. The latter question is not to be seen only as a weighing up of advantages against disadvantages. In other words, "the infringement of the right to freedom

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[57] Cf. sec 24(1)(x) and sec 24(1) of the South Africa Labour Relations Act of 1956. Legislation prescribing the closed shop is seen (in particular by the ILO) as an encroachment on the outsider's freedom of association. See *infra* par. 5.3.3 (b).

[58] The non-statutory closed shop has been a common practice in South Africa, especially in the mining industry. See *infra* par. 4.1.4 (b)(cc).

[59] See *infra* par. 4.5.1 (e).

[60] Hanson *et al op.cit.* p 9.

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of association cannot be justified purely because it is perceived that the closed-shop has more advantages than disadvantages".[62] With regard to the arguments used in this debate, some writers draw a distinction between "philosophical" and "pragmatic" arguments. Others use the terms "economic and organisational", "political" and "principled". While the philosophical, political and principled arguments refer to the relationship between individual freedom and public interests, the pragmatic arguments concern the direct or indirect advantages and disadvantages of closed shops. It would not only lead one too far afield to discuss the philosophical significance of individual freedom, it is also much more a matter of justifiability (interpretation of law) than of philosophy, whether public interest prevails over individual rights. It will be shown at a later stage which of these arguments may play a role in regard to the constitutionality of the closed shop.

The most common argument in favour of the closed shop concerns the so-called free-rider. Simply put, "he who benefits should pay", or, more dramatically, "he who does not sow, neither shall he reap".[63] It is obvious, and uncontested by objectors to the closed shop, that the free-rider may be a cause of friction on the shop floor. Therefore, according to Albertyn, the free-rider does not deserve the protection of the law. For him it is a "moral issue ...whether a union can legitimately require the non-member to become a member in terms of a closed shop...".[64] He argues that the closed shop is the only alternative that prevents the free-rider from benefiting from union efforts without the side-effect of the union member losing the benefits himself.[65] The protection of free riders would constitute an abuse of the right of

[61] Cf. Hanson *et al op.cit.* pp [illegible]-10 and von Prondzynski *Freedom of Association and Industrial Relations* (1987) p 120-121.
[62] Olivier and Potgieter *op.cit.* p 465.
[63] Kahn-Freund *op.cit.* p 198.
[64] Albertyn *op.cit.* p 992.
[65] In the case of South Africa, owing to the provision of sec 78 of the LRA 28 of 1956.

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freedom of association. One could object that the free-rider can be prevented from benefiting of union achievements by other means, such as the agency shop, for instance.

Another major argument used in the debate is that the closed shop increases the power of the trade unions as regards collective bargaining. Those who support the establishment of closed shops argue that the employer is naturally in a superior position.[66] Kahn-Freund states that "The case for the closed shop can only be made in terms of the equilibrium of power".[67] It would be necessary to ensure coherence and solidarity among workers during industrial action.[68] As the closed shop is the appropriate means of achieving trade union discipline, it establishes an effective and stable union organisation. It is even submitted that "the alternative to the closed shop in enforcing discipline is violence and intimidation".[69] This does not seem to be a very strong argument, as the examples of other countries show that there are indeed other alternatives.[70] Albertyn also draws analogies to the morality of compulsory military service in the case of war, and to that of taxation.[71] Both would lack effectiveness, if voluntary. Compared to the burdens of military conscription and taxation, union membership would be less dangerous and less costly respectively. The burdens of union membership (such as payment of union dues, attending meetings and abiding by its decisions) could be challenged where applied or enforced unreasonably. One could object that the analogy to taxation and military conscription seems dubious, since taxation is the only means of financing the budget of a country and military conscription is the only means of setting up an army, whereas the closed shop does not represent the only means of promoting collective bargaining. The objective of strengthening the unions in order to improve collective

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[66] McCarthy *op.cit.* p 260.
[67] Kahn-Freund *op.cit.* p 201 f.
[68] Albertyn *op.cit.* p 996.
[69] *Ibid* p 997.
[70] See *infra* Ch. 3 and par 5.3.3 (d)-(f).

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bargaining can also be achieved by means of the agency shop, for instance. Furthermore, trade union membership may be voluntary, whereas taxation and conscription *must* be compulsory. There is no doubt that "the whole society benefits"[72] from collective bargaining. One has, however, to consider the danger of *excessively* powerful unions, as they can impair economic growth (e.g. by demanding unreasonably high wages).[73] Some even argue that the activities of trade unions are not necessarily of a beneficial nature, and can even culminate in the destruction of a firm.[74]

Then there is the view that the practice of the closed shop would protect workers from victimisation and other anti-union activities.[75] It would prevent the employer from making wrongful use of non-members in terms of collective bargaining.[76] Thus it would not be possible for the interests of union members to be undermined. The counter-argument could be that this protection could be achieved with equal satisfaction by legislation. The South African LRA of 1995 provides for a number of safeguards in order to protect the employees and persons seeking employment against discrimination on grounds of union-membership. Sec 5(1) provides that no person may discriminate against an employee for exercising any right conferred by the LRA. Employees and persons seeking employment are furthermore especially protected by sec 5(2). This protection includes, for instance, the prohibition to require an employee or a person seeking employment not to be a member of a trade union or to give up membership of a trade union.[77] Also may no person prejudice someone because of past, present or anticipated membership of a trade union, the participation in forming a trade

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[71] *Op.cit.* p 992.
[72] Albertyn *op.cit.* p 986.
[73] This is a matter of the circumstances of course, and the power of the "opposite" employer would particularly have to be considered.
[74] See Hanson *et al op.cit.* p 12.
[75] Albertyn *The closed shop and fairness* (1991) *EL* p 74.
[76] Albertyn *Freedom of Association and the Morality of the Closed Shop* p 989.

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union or the participation in its lawful activities. Should the discriminating action not be covered by the specific provisions of the Act, the employees are protected by the residual unfair labour practice definition contained in Schedule 7, which provides a "net . . . to catch undesirable practices not catered for in the Act".[78]

Another argument against the closed shop is that it may be a means of discrimination. However, according to sec 26(5)(a) read with sec 95(6) the trade union may not refuse an employee membership or expel an employee on grounds of race or sex. In addition it is necessary that "the reason for the refusal or expulsion is *fair*, including, but not limited to, conduct that undermines the trade union's collective exercise of its rights".[79]

The supporters of the closed shop also submit that the closed shop bears advantages not only for trade unions and their members but for employers as well:[80] it prevents fragmented bargaining, it shields the employer from accusations of discrimination, it binds all the employees to the collective agreement, and it allows the employer to lock out all employees if necessary. It is furthermore submitted that it facilitates management communication with its employees through a single channel. It is said that union leaders enjoy security, enabling them to act in long-term interests, as they do not have to consider competition with other unions and the increase of their membership. Thus the employer faces a "responsible", less militant trade union.

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[77] Sec 5(2)(a).

[78] Grogan *Yours residually - The new unfair labour practice definition* (1996) *EL* p 71.

[79] Sec 26(5)(b). Since this provision is open to different interpretations it is necessary to consider sec 3(b) of the LRA, which provides that the Act must be interpreted in compliance with the Constitution. It follows that the term *fair* needs to be interpreted rather narrowly.

[80] Albertyn *The closed shop and fairness* p 75.

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This dissertation will not attempt to deny all of these arguments, as some of them are certainly true. Also it is not possible to refer to all arguments used in this debate.[81] It is important to note that some arguments have a restricted influence on the justifiability of the closed shop. The two important aspects which need to be considered in this regard refer to the infringement of freedom of association and the improvement of collective bargaining.

[81] For a survey of arguments and attitudes of employers, trade unions and employees towards the principle of the closed shop see NMC Rp. 60/1981 annexure A par. 5.

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Chapter 3 - The constitutionality of union security arrangements in Germany

Union security arrangements have never played the same role in Germany as they have, for instance, in Great Britain, the USA or South Africa. The closed shop was never an important legal issue. However, attempts were made to introduce differentiation clauses, which oblige the employer to differentiate between union members and non-members.[82] These attempts failed owing mainly to the fact that the clauses were held to be unconstitutional. The most important decision in this regard dates back to 1967. The Federal Labour Court argued that differentiation clauses would violate Article 9(3) of the Basic Law which guarantees freedom of association.[83] Individual liberty represents a high ranking constitutional value and fits employees with an extensive protection against union security arrangements. Basic rights must be regarded as liberty rights which apply primarily as rights defending the citizen against the state. Additionally, it must be borne in mind that Article 1 and Article 2, which respectively protect human dignity and the individual's personality, represent values which stand behind the Basic Law.[84] However, these basic values are only one aspect when it comes to balancing competing rights and it does not follow that the individual always enjoys priority.

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Furthermore, it is owing to the German industrial structure that union security arrangements do not exist. The German labour system is structured as a dual system consisting of collective bargaining on the industrial level and of worker participation on the workplace level, a system which diminishes the influence of the trade unions in the workplace. On the other hand, trade unions embrace whole industries, i.e. they have the bargaining monopoly outside the

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[82] *Supra* par 2.2.1.
[83] BAG (1967) *AP* Art. 9 no 13.
[84] *Infra* par 3.3.4 (c).

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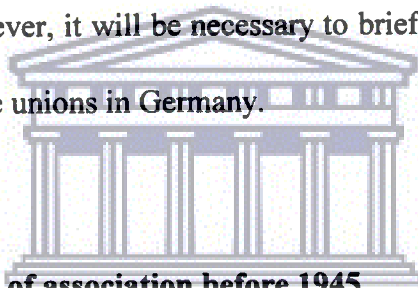
workplace. Thus the need for a strong union within the workplace was not as substantial as in other labour systems.[85]

Nevertheless, in 1960 the Building and Construction Industries unsuccessfully attempted to introduce *Solidarbeiträge* (solidarity contributions) which accord with the agency shop concept. Such attempts were made in view of the fact that the unions suffered a decrease in density during the 1960s. The legal debate during these years culminated in the mentioned ruling of the German Federal Labour Court in 1967, which declared differentiation clauses unlawful.[86] Since these clauses can be seen as the general form of union security arrangements the ruling had important implications. Before establishing the legal question of union security arrangements in Germany, however, it will be necessary to briefly review the development of freedom of association and trade unions in Germany.



3.1 Trade unions and freedom of association before 1945

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The first labour organisations in Germany were the guilds of the middle ages. These were prohibited from dealing with labour relations.[87] With the decline of the guild system, organisations developed which Jacobs calls "infant trade unions", the so-called *Gesellenverbände* (journeymen's federations).[88] These federations, however, were not acknowledged as bargaining agents. They merely provided for mutual help in case of sickness, death or injury, for instance. The authorities were not prepared to allow the association of workers as they feared they might provide a basis for unrest and violence.[89] In Prussia, for

[85] Hanson *et al op.cit.* p 189.
[86] BAG (1967) *AP* Art. 9 no 13.
[87] Art. 39 of the Reich Police Regulation of 1530.
[88] In Hepple (ed.) *The making of Labour Law in Europe* p 196.
[89] The Reich Guild Act of 1731 forbade combinations of workers.

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instance, strikes were punishable by imprisonment for one year.[90] The spread of combinations and the fear of communism lead to combinations being banned within the German League in 1840.[91]

After the uprisings of 1848, it was at first believed that the trade unions would henceforth enjoy the general freedom of association. However, after the revolution failed, German courts reaffirmed the existing bans on combinations.[92] In Prussia, the rights to assemble and to associate were restricted in 1850.[93] In 1854 the North German Confederation banned all association with political, socialist or communist aims. It was only in the 1860s that the tide started turning in Continental Europe.[94]

Freedom of association was explicitly guaranteed for the first time by the Trade Act (*Gewerbeordnung*) of 1869 of the North German Confederation.[95] This freedom, however, was subject to severe restrictions. The Trade Act did not, for instance, make provision for domestic servants, sailors and public servants. In 1878 the so-called Socialist Acts (*Sozialistengesetze)* forbade all socialist trade unions.[96] Moreover, the Trade Act acknowledged negative freedom of association.[97] It contained a civil law provision, which enabled the worker to withdraw his membership without being threatened by civil sanctions.[98]

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[90] Prussian Trade Act of 1845.

[91] Other bans had been enacted in Würtemberg (1836), Saxony (1838), Prussia (1845), Hannover (1847) and Bavaria (1857) [Hepple (ed.) *op.cit.* p 203].

[92] Hepple (ed.) *op.cit.* p 204.

[93] The bans on combinations regulated by the Prussian Trade Act were extended to domestic servants, agricultural workers and miners in 1854 and 1860.

[94] British law already recognised workers' association in 1824 (Combinations Laws Repeal Act). See Hepple (ed.) *op.cit.* p 204.

[95] Sec 152 I of the Reich Trade Act of 21 June 1869.

[96] In fact, this legislation strengthened the socialist labour movement. It was repealed in 1890. Cf. Weiss *Labour law and industrial relations in the Federal Republic of Germany* (1989) par. 39.

[97] It is assumed, however, that this acknowledgement was not made in order to protect the non-members but to protect the state against the unions. See *infra* par 3.3.4 (a).

[98] Sec 152.

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Furthermore, the statute provided for criminal sanctions should an individual be forced to join or remain a member of a trade union.[99] In fact, attempts were made to introduce reciprocal membership clauses.[100] Furthermore, the authorities repressed the unions by arresting their leaders or by prohibiting industrial action.[101]

The early German labour movement was deeply influenced by political ideologies. In 1863 the General German Workers Association was founded with the objective to "promote socialism based on state- subsidised workers' co-operation".[102] The second German Workers Party was founded in 1869 by Bebel and Liebknecht. It merged with the General Workers Association to form the Social Democratic Workers Party based on Marxist socialism. This party is the forerunner of the existing Social Democratic Party (SPD).[103] In 1868 the General Federation of German Trade Unions (*Allgemeiner Deutscher Gewerkschaftsbund ADGB*) was founded, primarily in order to support the Social Democratic Party.[104] The Hirsch and Duncker Union, also founded in 1869, represented one of the unions which accepted the capitalist system. In contrast to the political aims of the other unions, this union tried to promote the workers' interests by negotiating with employers.[105] A third group of ideologically influenced unions were the Christian unions. The membership figures show that the socialist labour movement was by far the most important group.[106] While it originally attempted to overthrow the capitalist system it became more moderate in the 1890s. After the so-called strategy debate participation and democratisation became the new keywords of the socialist labour

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[99] Sec 153 .
[100] In 1906 in the book printing industry [Hanson *op.cit.* p 219].
[101] Cf. e.g. the Prussian Strike Order of 11 April 1886.
[102] Hepple (ed.) *op.cit.* p 319.
[103] Weiss *op.cit.* par. 38.
[104] Hepple (ed.) *op.cit.* p 320.
[105] *Ibid.*
[106] In 1900 the membership was distributed as follows: socialist unions 680 000, liberal unions 90 000, Christian unions 75 000 [source: Weiss *op.cit.* par. 41].

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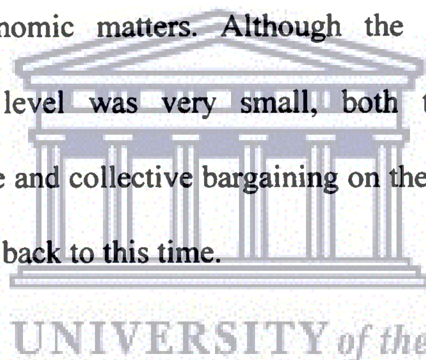
movement.[107] The ideological structure of the German trade unions was abandoned after the Second World War and replaced by an industrial system.[108]

An important feature of the German labour relation concept, introduced by an amendment of the Trade Act of 1891, concerns the workers' co-determination in the workplace. The Act required that before the promulgation of a works rule the employer should hear either all his employees or a voluntary established permanent workers' committee (*ständige Arbeitsausschüsse*). They had already been voluntarily established by the employers in some factories in order to appease the labour movement. In 1845 workers in Prussian factories were, subject to police approval, allowed to establish representative bodies.[109] Workers had a voice in social, personal and economic matters. Although the real effect of the workers' participation on production level was very small, both the dual system of worker representation in the workplace and collective bargaining on the industrial level, and the strict separation of both bodies, date back to this time.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As a result of the First World War and the subsequent political development, including the abandonment of the monarchy and the foundation of the Republic of Weimar, the strength of the unions increased greatly.[110] It must be noted that the trade unions had enormous influence, since the revolutionary workers' councils and soldiers' committees gained power. It is therefore not surprising that in 1918 the trade unions were fully recognised. However, it is also important to note that the November 1918 Revolution did not lead to a socialist system,

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[107] *Ibid.*
[108] *Infra* par 3.2.1.
[109] Sec 183 of the Prussian Trade Regulations of 17 January 1845.
[110] The membership figures of the three major groups were as follows:

ADBG	1914: 2 000 000,	1929: 5 000 000;
Hirsch-Duncker	1914: 283 000,	1929: 169 000
Christian unions	1914: 283 000,	1929: 673 000

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but signalled the foundation of the Weimar Republic which had the important feature of a democratic constitution.[111]

Article 159 of the Weimar Constitution guaranteed to "everyone and to all occupations" the freedom of association to "safeguard and improve working and economic conditions".[112] The wording of Article 9(3) of the Bonn Basic Law derives from this provision. Although the Weimar Constitution did not provide expressly for negative freedom of association any longer, it was a matter of contention whether it would be guaranteed by Article 159.[113] It is submitted, however, that differentiation clauses[114] were a common feature of collective agreements during the Weimar Republic.[115] There were also collective agreements which contained organisation clauses, which required membership in the particular trade union.[116]

The trade union freedom of the Weimar Republic came to an abrupt end in 1933 when the Nazis came into power. They occupied all trade union buildings, arrested the union leaders and confiscated all trade union property. In 1934 freedom of association was abandoned under the Nazi regime and replaced by the Regulation of National Labour Act. The German Labour Front *(Deutsche Arbeitsfront)* replaced employers organisations and trade unions and

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[source: Hepple (ed.) *op.cit.* p 320].

[111] Owing to a lack of strength of the communist movement. The Social Democratic Party remained the strongest party until 1932. See Hepple (ed.) *op.cit.* pp 319-320.

[112] The Article reads: "Freedom of association to maintain and improve economic and working conditions is guaranteed for everyone and for all occupations. All agreements and measures which seek to limit or impede this freedom are unlawful". Beyond this, Art. 130 II provided for freedom of association for state officials *(Beamte)*. Art. 165 explicitly acknowledged the organisation and activities of the associations of trade unions and employers' organisations. Later this fundamental right was not explicitly guaranteed by the Basic Law of 1949, but held to derive from freedom of association (Art. 9(3)).

[113] *Infra* par. 3.3.4 (a).

[114] *Supra* par 2.2.1.

[115] In the coalmining industry in the 1920s for instance. Hueck/Nipperdey *Lehrbuch des Arbeitsrechts*, 6th ed. vol. 2 (1957) p 122.

[116] In some local railway companies, co-operative societies and the German theatrical profession. Hanson *et al op.cit.* p 219.

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embraced the whole working class.[117] Although membership was "voluntary", employees were placed under pressure to join.

3.2 Trade unions and union security after 1945

After the war the Weimar labour system was largely re-installed in West Germany.[118] The Allied Control Council readmitted trade unions in 1946.[119] However, contrary to the Weimar system, where unions were organised according to political, ideological and denominational interests, the post-war structure was founded on the principle of industrial unionism.[120] Trade unions were formed in order to embrace whole industries, i.e. all employees in a particular industry were covered by a single union regardless of their trade and occupation.[121] Different political and ideological interests were amalgamated in one association (so-called principle of amalgamated unions). It was thereby intended to overcome the ideological boundaries which existed in the Weimar Republic, for example as regards the so-called harmony unions (*Harmonieverbände*), which were employer-friendly and undermined other unions.[122] The most important unions are associated in the German Federation of Trade Unions (*Deutscher Gewerkschaftsbund DGB*). At the moment it embraces 16 unions.[123] Each of them covers a different industry. This has an important impact on the unions' engagement in union security since it is very difficult for smaller unions to compete on industrial level. However, there are

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[117] It had, however, no legal power to establish employment conditions. The regulation of employment and working conditions fell under the jurisdiction of the so-called trustees of labour (*Treuhänder der Arbeit*). For a more detailed description of the labour law under the Nazi regime, see Hepple (ed.) *op.cit.* p 293-4.

[118] In the German Democratic Republic, the Free German Trade Union Federation (*Freier Deutscher Gewerkschaftsbund FDGB*) existed as the only trade union.

[119] Directive 31 of 3.6.1946 (ABl. No 8 p 160).

[120] Hanson *et al op.cit.* p 188.

[121] Industry must be interpreted here in a very broad sense. The metal industry, for instance, covers, the automobile industry, the electrical industry, the shipbuilding industry and others.

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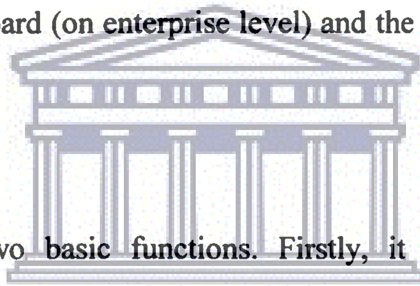
some unions that are not organised according to industrial unionism but according to the system of professional unionism. The most important of these unions is the White-Collar Employees' Union (*Deutsche Angestelltengewerkschaft DAG)* which is open to white-collar workers of all industries.[124] However, compared to the DGB the membership is fairly small.[125] Other examples of professional unionism are the Union of Education and Science (*Gewerkschaft für Erziehung und Wissenschaft GEW*)[126] and (since 1959) the Christian Federation of Trade Unions (CGB).[127]

Another feature of industrial relations in the post-war period which is important in regard to union security is worker co-determination.[128] There are two bodies which ensure worker participation, the supervisory board (on enterprise level) and the works council (on workplace level).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The supervisory board has two basic functions. Firstly, it elects the members of the management board, which represents the shareholders and runs the company. Secondly, it supervises the management board's activities. The supervisory board has an extended right to information in order to fulfil these functions. It should be mentioned that there are three different concepts of supervisory boards. The first concerns the mining and iron and steel

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[122] It must be said that the German post-war unions are naturally closer to the Social Democratic Party (SPD) than to more conservative parties like the Christian Democratic Party (CDU) or Free Democratic Party (FDP).

[123] 9 385 000 members at the end of 1995 [source: Schaub *op.cit.* p 1595].

[124] The reason for this exception was that the allied forces had considerable influence on the creation of post-war unions. The unions in the American sector were organised according to industrial unionism, whereas the DAG was situated in the British sector, thus influenced by the tradition of British unionism.

[125] 520 000 members at the end of 1994 [source: Schaub *op.cit.* p 1595].

[126] 190 000 members in 1990. This union has remained the only professional union within the DGB and thus competes to a certain extent with another DGB-union (Union for Public Service, Transport and Traffic, *Gewerkschaft für öffentliche Dienste, Transport und Verkehr ÖTV*), which had 1 250 000 members in 1990.

[127] 305 000 members at the end of 1994 [source: Schaub *op.cit.* p 1595].

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industries. In these industries, the supervisory boards consist of an equal number of shareholders and worker representatives as well as an independent member.[129] The second model applies to companies outside these industries which have more than 500 employees. This type of supervisory board has less influence, as only one third of its members are employee representatives.[130] The third form covers companies which have more than 2000 employees. Half of its members are employee representatives.[131]

Works councils are to be found in all industries. They are not juristic persons, i.e. only its members can be held liable for their decisions. They must be established in workplaces with at least five employees at the demand of at least three workers. Their main task is to conclude works agreements which affect workers in the same way as collective agreements, i.e. all employees are directly bound by the agreement.[132] These agreements deal with social matters such as working hours or rules on annual vacation.[133] They do not apply, however, in cases where a collective agreement covering the particular matter has been concluded.[134] Beyond the conclusion of works agreements, the works council has a right of co-determination in regard to personal and, to a lesser degree, economic matters.[135] Personal matters primarily include hiring[136] and dismissals[137], but also include personnel planning in the workplace.[138]

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[128] Based on the dual system, which had already been regulated by the 1920 Works Council Law.
[129] Sec 4 of the Act on Workers' Representation in the Mining and Iron and Steel Industries (*Montan-Mitbestimmungsgesetz*) of 1951.
[130] Sec 76(1) of the Works Constitution Act (*Betriebsverfassungsgesetz)* of 1952.
[131] Sec 7(1) of the Act on Workers' Representation of 1976 (*Mitbestimmungsgesetz*).
[132] Sec 77(4) of the Works Constitution Act of 1972 (hereinafter WCA).
[133] Sec 87 of the WCA.
[134] Sec 87(1) of the WCA.
[135] Sec 106 of the WCA.
[136] Sec 99 of the WCA.
[137] Sec 102 and 103 of the WCA.
[138] Sec 95 of the WCA.

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It is important in regard to union security that works councils are formally independent from trade unions. According to the Works Constitution Act, trade unions are formally restricted in their rights as regards the workplace itself. Owing to the employers rights to freedom of association and property the trade unions are only allowed to enter the workplace or participate in matters concerning the workplace if they are authorised by legislation to do so.[139] The exceptions made in this regard concern access to the employers' premises in order to fulfil the duties and powers imposed by the Works Constitution Act and the entitlement to make proposals for the election of a works council.[140] Since the unions are legally barred from other decisions within the workplace, their interest in formal union security arrangements is diminished, especially as regards the fact that the works council's jurisdiction covers all employees. Agreements concluded between the works councils and the employer apply to employees regardless of whether they are union members or not.[141]

Hanson assumes that both the supervisory board (especially in the mining, iron and steel industries) and the works council provide significant influence for the trade unions, because of the position of the so-called labour director, who is a member of the management board and in most cases a unionist.[142] He cannot be elected against the votes of the majority of the employees' representatives on the supervisory board. From this position, he has significant influence on decisions made in the company and on the works council. The unions' influence is even stronger as the density of union members in works councils is naturally high.[143] One can conclude that, owing to the works councils' co-determination rights in the workplace, an

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[139] Cf. BVerfG NJW 1979, 1844 (1845); BAG DB 1979, 1080.
[140] Sec 2(2) and sec 14(5) of the WCA.
[141] Sec 77(4) of the WCA.
[142] Sec 13(1) of the Act on Workers' Representation in the Mining and Iron and Steel Industries (*Montan-Mitbestimmungsgesetz*) of 1951.
[143] According to Streeck, about 80 per cent [*Co-determination and trade unions* (1994) *SALB* vol. 18 no 5 p 93].

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informal pressure can be placed on individual employees to join the union.[144] In this sense the works council can be seen as a tool to implement informal security policies. An interesting statement in this regard is made by Streeck:

> Works Councils are used by unions as an organisation tool. . . . Once this election (of a works council) takes place, unions can begin to put up candidates. Even if at the first election of a works council the majority of the council members are not union members, with the time they often become members, because they find that without the training and advice provided by the unions they cannot perform their function effectively. As a result the most common organisation tactic a German union uses these days is to begin by setting up a works council and everything else follows. The works council members become the union organisers in the plant, the core of the workplace union organisation. . . . The difference between the leadership of the union at the workplace and the works council disappears in practice. . . . The works council . . . is de facto the local union.[145]

Although sec 75(1) of the Works Constitution Act prohibits any discrimination based on membership, trade unions have been suspected of informal union security arrangements. The parliamentary opposition of 1976 (CDU) published documentation accusing unions of abusing their influence in the works councils in order to increase their membership in the plant. This was naturally denied by the trade unions.[146]

Discussion about the introduction of union security arrangements began in the 1960s. Although industrial unionism prevents trade union competition to a great extent and although the number of employees was growing during the 1950s, the density of trade union members was decreasing. In 1960 only 20 000 out of 500 000 new employees in the building industry

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[144] Especially as regards the council's co-determination rights in personal matters such as hiring and dismissal [sec 99 and sec 102 of the Works Constitution Act 1972].

[145] *Op.cit.* pp 93-4.

[146] Hanson *et al op.cit.* p 224.

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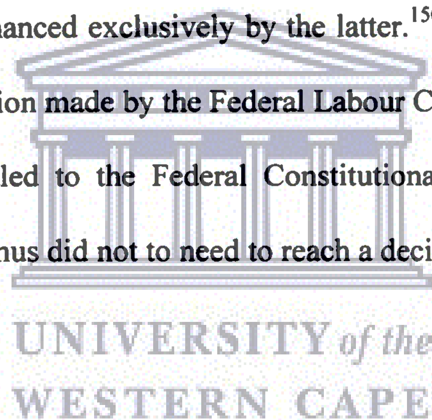
were willing to join a trade union.[147] The situation was similar in other industries. The overall density of DGB unions fell from 31.1 per cent in 1950 to 25.6 per cent in 1970.[148]

This development led to efforts by the unions to introduce differentiation clauses into collective agreements in order to make themselves more attractive to non-members. In 1960 a collective agreement containing an organisation clause was concluded for co-operation societies (*Konsumgenossenschaften*).[149] Later the Building Trade Union tried unsuccessfully to introduce the Swiss model of solidarity contributions (agency shop). The union managed, however, to achieve a higher pension for its members by means of a differentiation clause. The pension was paid by a fund which was jointly administered by the union and the employers' organisation, but financed exclusively by the latter.[150] The clause was abandoned in 1969 after an important decision made by the Federal Labour Court in 1967.[151] The German Trade Union Federation appealed to the Federal Constitutional Court which rejected the appeal on formal grounds and thus did not to need to reach a decision on the issue.



[147] Merker *Einführung eines Solidaritätsbeitrages der Außenseiter* (1960) *DB* p 1127.

[148]

Year	Membership of the DGB	Overall Density (per cent of employees)
1950	5 073 000	31.1
1951	5 543 000	33.1
1955	5 517 000	29.5
1960	5 599 000	27.5
1965	5 658 000	26.0
1970	5 702 000	25.6

Source: Statistisches Bundesamt *Statistische Jahrbücher für die Bundesrepublik Deutschland.* Several reasons can be named for the decline in membership, of which the most reasonable seems to be the success of the unions in achieving good working conditions and the resultant well-being of the workers. It would be the task of a separate study, however, to examine the circumstances more closely.

[149] Hanson *et al op.cit.* p 220.

[150] Similar agreements were concluded in the textile and clothing industry in 1963. Hanson *et al op.cit.* p 220.

[151] BAG (1967) *AP* Art. 9 no. 13. See *infra* par 3.3.

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3.3 Union security arrangements and Article 9(3) of the Basic Law

The decision of the Federal Labour Court was primarily based on the Court's conviction that differentiation clauses violate the non-members freedom of association. The particulars of the case were that a collective agreement was concluded between an employers' association, the plaintiffs, and a trade union, the defendants, containing an agreement about the payment of holiday money. However, the union demanded that their members receive a greater amount than non-members and called a strike when the plaintiffs did not concede to this demand. Afterwards, several of the association's member companies concluded individual agreements containing a clause which met the demands of the union. The plaintiffs applied for a declaration that the strike was illegal and that the agreements were void. They argued against the illegal coercion of the non-members to join, as constituting a violation of freedom of association.[152] In its decision the Federal Labour Court held the same view.[153] However, the ruling has been heavily criticised since its point of departure was that Article 9(3) is the source of this freedom.[154] Although the decision was made in 1967 and its arguments have been upheld in principle by the Federal Labour Court and the Federal Constitutional Court, it is still contested that Article 9(3) embraces both the positive *and* the negative freedom to associate. This matter therefore need to be examined more closely.

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Constitutional scrutiny embraces two phases. In the first phase it must be determined whether the particular fundamental right (or freedom) has been violated. This includes the question of the scope of the basic right, the question of horizontal application and the question of the infringement of the scope. Assuming that the first phase produces a positive result, one has to consider secondly to what extent it is possible to limit the right (or freedom) and thereby

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[152] BAG 20, 175 = *AP* Art. 9 no 13.
[153] For a more detailed analysis of the Court's arguments see *infra* par 3.3.1-4.

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justify the violation.[155] It must be understood that, unlike the South African Bill of Rights, the Basic Law does not contain a general limitation clause nor does Article 9(3) incorporate a special limitation clause. Article 9(3) can therefore only be limited by basic rights of others and other rights of constitutional value.[156] In order to examine whether Article 9(3) contains the freedom not to associate, it is first necessary to examine its general content.

3.3.1 The general content of Article 9(3) of the Basic Law

Freedom of association in terms of Article 9(3) is a special case of general freedom of association in terms of 9(1).[157] That means that Article 9(1)[158] is not applicable if 9(3) comes into operation. Article 9(3) reads

> The right to form associations in order to safeguard and improve working and economic conditions shall be guaranteed to every individual and all occupations and professions.[159]

From its history it becomes clear that freedom of association is primarily a liberty right. It differs from the classical basic rights, however, as it is also an expression of the principle of the social state (*Sozialstaatsprinzip*).[160] It guarantees a system of social self-responsibility and autonomy, which sets the living standards of the employees concerned.[161] Thus the social

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[154] Cf. Gamillschegg *Differenzierung nach der Gewerkschaftzugehörigkeit* (1966).

[155] This approach differs from the one which determines the scope of the right in regard to public policies, i.e. there would be no limitation (the right would thus be interpreted more narrowly), whereas the crucial point of the German concept is mostly to be made in terms of limitation.

[156] *Infra* par. 3.3.4 (b).

[157] von Münch/Kunig (ed.) *op.cit.* vol. 1 Art. 9 par. 54. The use of the term "freedom of association" in this study refers to Art. 9(3) (*Koalitionsfreiheit).*

[158] Article 9(1) reads: "All Germans have the right to form associations, partnerships and corporations".

[159] Cf. von Münch/Kunig (ed.) *op.cit.* vol. 1 Art. 9 par. 76.

[160] Art. 20(1) and 28(1) of the Basic Law.

[161] Although this does not mean that Art. 9(3) represents a so-called *Teilhaberecht,* a right which entails the individual's right to claim titles against the state. See Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 10.

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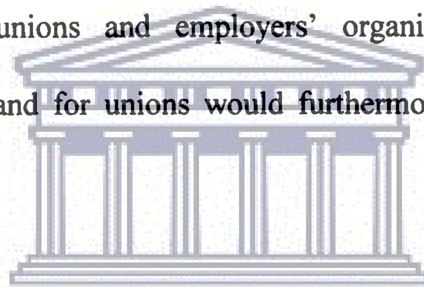
partners (both employers' organisations and trade unions) have important responsibilities within the labour society, as they are trusted with the peaceful regulation of labour relations without interference by the state.[162]

It is important to consider that freedom of association does not refer only to the freedom of the trade union but to that of employers and employers' organisations as well. It has been argued, however, that it would be a "perversion of this constitutional provision to apply it in a similar way to both sides", as Article 9(3) is the result of the workers struggle against exploitation by their employers.[163] This fact certainly needs to be considered when interpreting Article 9(3). However, it should be borne in mind that one feature of labour jurisprudence is the principle of parity as regards both unions and employers' organisations.[164] Having different interpretations for employers and for unions would furthermore contradict the wording of Article 9(3).



It is widely acknowledged that the "right to form associations" implies two different applications (*Doppelgrundrecht*).[165] It not only refers to the individual's right to associate freely (*individual freedom of association*) but also protects the trade unions and employers' organisations, their existence and activities *(collective freedom of association*[166]*)*. Individual freedom of association would be meaningless if the association itself was not protected.

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[162] BVerfGE 18, 18(27).

[163] Weiss *op.cit.* par. 237. For other opinions, which see the employers and their organisations protected to a lesser degree, see Ramm *Koalitionsbegriff und Tariffähigkeit* (1966) *JuS* p. 223, 227; Gamillscheg *Grundrechte im Arbeitsrecht* (1989) p 96.

[164] BVerfGE 18, 18.

[165] BVerfGE 4, 96 (101 f).

[166] See *infra* par. 3.3.4 (b).

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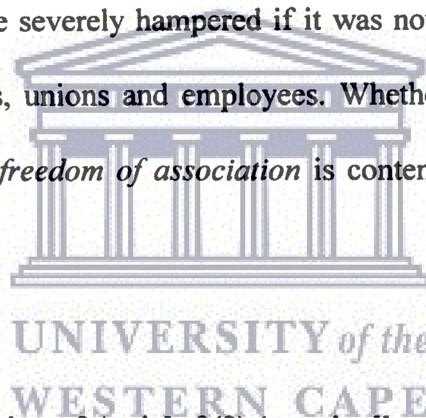
Individual freedom of association means in the first place that the individual has the right to associate with others in an association (trade union or employers' organisation), to join such an association or to remain in such an association, to participate in the protected activities of the union, to change from one union to another and to choose which union to join (*positive freedom of association*).[167] The *negative freedom of association* means the right not to join or to leave an association. Whether this freedom is protected by Article 9(3) is contentious, however, and will be examined later.[168] The bearer of the right to freedom of association is the individual member or the prospective member. It is a so-called *jedermann-Recht*, a right which applies to everybody, not only to Germans. It applies to all professions, i.e. it includes the medical professions, lawyers, civil servants, judges and soldiers.[169] However, the protection of this right would be severely hampered if it was not applicable between private persons, i.e. between employers, unions and employees. Whether Article 9(3) of the Basic Law also protects the *negative freedom of association* is contentious and will be described later.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3.3.2 Direct horizontal application of Article 9(3) (*unmittelbare Drittwirkung*)

Normally, basic rights are defensive rights against the state (vertical application). They are not applicable between private citizens (horizontal application). The situation is different as regards Article 9(3). The social partners have the right to conclude collective agreements. These agreements have the impact of statutory provisions regarding working conditions, i.e. the social partners exercise powers which are normally exercised by the state.[170] Owing to this

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[167] Jarass/Pieroth *Grundgesetz für die Bundesrepublik Deutschland* (1995) Art. 9 par. 25; BVerfGE 19, 303(312); 51, 77(87); 55, 7(21); 64 , 208(213).

[168] *Infra* par 3.3.3-4.

[169] Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 174 ff.

[170] Sec 3(1) read with sec 4(1) of the Collective Agreements Act prescribe that the legal norms contained in the collective agreement regulating the content, the conclusion or the termination of

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collective bargaining autonomy, it is necessary to ensure that Article 9(3) is also applicable horizontally. This is why it is the only provision containing a clause with *unmittelbarer Drittwirkung* (direct horizontal application).[171] The clause reads

> Agreements restricting or intended to hamper the exercise of this right (to form associations to safeguard and improve working and economic conditions) shall be null and void; measures to this end shall be illegal.

The clause applies no matter what kind of agreements and measures are involved and regardless of who concludes the agreement or conducts the measures. This means that not only the bearer of public power is bound by Article 9(3) but so too are the subjects of private law. In terms of the clause, "agreements" are not only contracts in legal terms but also agreements in any form and any relevant legal actions.[172] The clause concerns individual actions or declarations (such as dismissals) as well as collective agreements. It is applicable to every factual and intended restriction of freedom of association. Agreements and private legal transactions which fall within the definition of Article 9(3) are rendered null and void.[173] *Measures* which do not fall within the definition of agreements, i.e. unilateral measures or omissions, are merely illegal. The best known examples for such *measures* are so-called "black lists" which are established by the employers and serve to discriminate against associated employees.[174]

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labour relations apply directly and absolutely to the members of the parties to the collective agreement and the employer who is himself party to the collective agreement.

[171] In contrast to *mittelbarer Drittwirkung* (indirect horizontal application), which means the interpretation of private law in the light of the Basic Law.

[172] Cf. von Münch/Kunig (ed.) *op.cit.* vol. 1 Art. 9 par. 77.

[173] The latter according to sec 134 of the Civil Code. Notwithstanding the provision of sec 139 of the Civil Code, the contract itself remains valid, since otherwise the employee would be in a worse position than would be the case without the protection of Art. 9(3).

[174] Cf. BAG 54, 353.

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3.3.3 Union security clauses and the positive freedom of association

It is, of course, necessary to distinguish between the different forms of union security clauses, as these may encroach upon different basic rights or upon the same rights to a different degree. The strongest form is that of the so-called restricted organisation clauses (*begrenzte Organisationsklauseln*), which compel the employee to be a member of a *particular* trade union. It is acknowledged that these clauses would encroach upon the individuals' positive freedom of association, as this freedom contains the right to choose one's own preferred union.[175]

This does not only follow from the wording "*freedom* of association" but also from the content of the basic right, which is constituted as a liberty right. The Federal Constitutional Court states that, in order to enjoy the benefits of an association in terms of Article 9(3), it is necessary that the association be constituted freely.[176] That means that an association must be defined as a voluntary association. Consequently, the Federal Labour Court has argued that he who is willing to join can decide which of the available associations he wants to join. He has the right to leave one union and join another one. He also has the right to form a new association. These rights are necessary presuppositions for a *freely* constituted association.[177]

According to Hueck positive freedom of association is also encroached on by so-called restricted exclusion clauses *(beschränkte Tarifausschlußklauseln)*.[178] These clauses not only

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[175] Heußner *Die Sicherung der Koalition durch sogenannate Solidaritätsbeiträge der Nichtorganisierten* (1960) *RdA* p 295.

[176] BVerfGE 4, 96(106); 38, 281(303); Cf. Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 196.

[177] BAG (1967) *AP* Art. 9 no. 13 Bl. 350.

[178] Hueck *Tarifauschlußklausel und verwandte Klauseln im Tarifvertragsrecht* (1966) p 38; Cf. also Heußner *op.cit.* p 296.

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allow the employer to differentiate between union members and non-members,[179] but they are furthermore compelled to exclude non-members from benefits which were negotiated by the union for its members. Hueck argues that this differentiation is based on the intention to influence the employee to become a member of the trade union party to the agreement, and that this intention is sufficient for a violation of Article 9(3). As Article 9(3)2 states that agreements that *intend to* hamper the employee's freedom of association (i.e. the freedom to remain a member of or to join a *particular* union) are void, it would not be significant whether the right to choose is in fact restricted. In other words, the mere intention to place pressure on the employee to be a member of a *particular* union would be sufficient to encroach the employee's positive freedom of association.

Some commentators, however, see these clauses as being in conflict not with the positive freedom of association but rather with the negative, as the individual in fact *has* the option of joining the association of his choice.[180] This interpretation can be contested by the argument that it is not always necessary for the violation of a right that its exercise is not factually possible. Here the non-member concerned would suffer the disadvantage of not being able to negotiate conditions, which have already been negotiated for the members of the union. Thus he could be tempted to join the union in order to gain advantages, although this decision would be made against his conviction. Thus his freedom to choose his favoured association would be violated *indirectly*. This, however, must be seen as sufficient for a violation of the

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[179] This differentiation is permitted by sec 3(1) and 4(1) of the Collective Agreement Act. According to these provisions, only the members of the parties to the agreement are bound by the collective agreement.

[180] Gamillschegg *Nochmals: Zur Differenzierung nach der Gewerkschaftszugehörigkeit* (1967) *BB* p 49.

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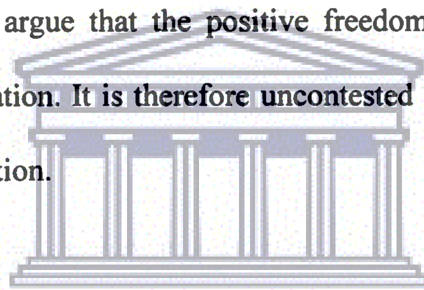
positive freedom of association. The Federal Labour Court held that the mere possibility of such a scenario would be sufficient for a violation of the negative freedom of association.[181]

It becomes apparent that it is difficult to draw an exact borderline between the negative and positive freedom of association. If one defines the positive freedom of association as the *right to join an association* (including the right to choose which association) and the negative freedom of association as the *right not to join or to leave an association*, then clauses which merely compel the non-member to become a member of *any* association do not violate the *positive* freedom of association, as the employee can in fact choose which union to join. Since one cannot derive the right not to join from the right to choose, it would indeed be an overturning of Article 9(3) to argue that the positive freedom of association includes the freedom not to join *any* association. It is therefore uncontested that the latter is protected by the negative freedom of association.



In the following section it will be examined whether differentiation clauses violate the negative freedom of association of the non-member. Although these clauses need to be distinguished from solidarity contribution clauses (agency shop) and organisation clauses (closed shop), the latter will be neglected, since only differentiation clauses are still part of the legal discussion in Germany. Furthermore, one can regard differentiation clauses as being the general form of union security arrangements, thus making it possible to apply the arguments of the study to other union security arrangements.[182]

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[181] BAG (1967) *AP* Art. 9 no. 13 Bl. 357.

[182] Differentiation clauses describe practices which treat union members and non-members differently [*supra* par 2.2.1]. This definition, however, also covers agency shop agreements and closed shop agreements. The only difference, which must be taken into account, is the severity of the impact

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3.3.4 Differentiation clauses and negative freedom of association

Negative freedom of association and its legal basis are not undisputed. Very few commentators, however, support the view that the negative freedom of association enjoys no constitutional protection at all.[183] This view deserves no support. There can be no doubt that the wish to reject membership of any association falls within the scope of at least Article 2(1) of the Basic Law. Article 2(1)[184] must be understood as an all-embracing liberty right which protects all acts (and omissions) within the value order of the basic law. It cannot be said that the wish to decline membership does not fall within this protection, as it does not contradict the values provided by the Basic Law.

In fact, the view that the right to disassociate derives from Article 2(1), which guarantees personal freedom, is supported to a greater extent.[185] Article 2(1) must be interpreted very broadly, as it is the main right pertaining to personal freedom. The dispute whether Article 2 or Article 9(3) is the source for the negative freedom of association is not merely of an academic character, as Article 2(1) can be limited more easily than Article 9(3). Also Article 2(1) does not contain a clause providing for its horizontal application.[186] Thus Article 2(1) is preferred by some commentators in order to allow the conclusion of collective agreements containing differentiation clauses.[187] However, Article 2(1) is a so-called *Auffanggrundrecht*, which is only applicable if another basic right does not apply (*Subsidiaritätsgrundsatz*).[188] It is

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on non-members. This will be a matter of balancing the interests. *Infra* par 3.3.4 (d) and par 5.3.4 (bb).

[183] Cf. Gamillscheg *Die Differenzierung nach der Gewerkschaftszugehörigkeit* (1966) p 53 ff; Cf. Biedenkopf *Grenzen der Tarifautonomie* (1964) p 93 ff.

[184] Art. 2(1) of the Basic Law reads: "Everybody has the right to self-fulfilment in so far as they do not violate the rights of others or offend against the constitutional order or morality."

[185] Hueck/Nipperdey *op.cit.* vol. 2/1 par. 10 2 2.

[186] See *supra* par. 3.3.2.

[187] von Münch/Kunig (ed.) *op.cit.* vol. 1 Art. 9 par. 70.

[188] Maunz/Dürig *et al op.cit.* vol. 1 Art. 2(1) par. 6.

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therefore necessary to determine first of all whether the negative freedom of association is covered by Article 9(3).

(a) Negative freedom of association and the scope of Article 9(3)

Freedom of association is not regarded as a classic basic right, since it only developed along with industrialisation during the 19th century. Therefore the Constitutional Court has expressly stated that the interpretation of Article 9(3) has to be made with regard to its history.[189]

It has already been mentioned that the negative freedom of association had been explicitly protected between 1869 and 1918 by sec 152(2) and sec 153 of the Trade Act.[190] Some commentators argue that the repeal of sec 153[191] would indicate the intention of the legislation to abandon the protection of the freedom not to associate. Article 159 of the Weimar Constitution furthermore guarantees the "freedom of association in order to safeguard and improve working and economic conditions". As Article 9(3) of the Basic Law not only has nearly the same wording as Article 159 of the Weimar Constitution, but would also have to be interpreted equally, it would contradict the history of the origin of Article 9(3) to imply a negative freedom of association. It must, however, be considered that the Trade Act of 1869 in the first place did not intend to protect the non-member, but rather the state itself against too powerful unions.[192] This interpretation is supported by the fact that the civil law provision of

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[189] BVerfGE 4, 96(101, 106, 107); 18, 18(27 ff); 19, 303(314); 38, 386(394); 44, 322(347).

[190] Trade Act of the North German Federation of 21 June 1869 (BGBl. of the NGF p 245 ff). Sec 152(2) enabled the worker to withdraw his membership without being threatened by civil sanctions. Sec 153 provided for criminal sanctions should an individual be forced to join or remain a member of a trade union.

[191] By the repeal act of 22 May 1918 (RGBl. 423).

[192] This view is rejected by Heiseke in *Negative Koalitionsfreiheit und tarifliche Schutzklauseln* (1960) *RdA* p 299.

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sec 152 would have been sufficient to protect the individual against the union. It would not have been necessary to provide for criminal sanctions, if it had been intended to achieve the protection of the non-member only.[193] This interpretation is also underlined by the jurisprudence of that time, which held that even the intention to strike could constitute an illegal pressure placed on non-members and thus constitute a criminal offence.[194] Thus the negative freedom of association that existed between 1869 and 1918 was merely a side effect of the legislation. Its removal in 1918 must therefore be seen in a different light, as this was meant to eliminate its suppressive effect on the unions. [195]

As regards the similarity of the provisions of both the Weimar and the Bonn Constitutions, one has to consider that there had been no conformity among the legal writers of the Weimar Republic about the question whether Article 159 of the Weimar Constitution would contain a right to disassociate or not.[196] The courts, too, left this question unanswered.[197] However, it is not surprising that the discussion continued, especially considering the fact that a clause providing for the right to disassociate was removed during the drafting of the Bonn Constitution.

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It has been argued that the removal of this clause would indicate that Article 9(3) was not intended to protect the negative freedom of association. It is indeed interesting that the

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[193] See Diekhoff *Tarifausschlußklausel und Koalitionsfreiheit* (1959) *DB* p 1141.
[194] Cf. Hepple (ed.) *op.cit.* p 213.
[195] This is underlined by the fact that sec 153 of the Trade Act was removed independently from Art. 159 of the Weimar Constitution by a special act on 22 May 1918 (RGBl p 423).
[196] Supporters: Kaskel *Arbeitsrecht* 1st ed p 233; Jacobi *Grundlehren* p 96; Oertmann *Arbeitsvertragsrecht* (1923) p 272; Anschütz *Art. 159 Weimarer Verfassung* par. 4; Stier-Somlo *Reichs- und Landesstaatsrecht I* p 471; Landman-Rohmer *Gewerbeordnung* 8th ed sec 152 par. 4. Objectors: Nipperdey *Grundrechte* vol 3 p 418; Nipperdey *Lehrbuch* 3th ed vol 2 p 501; Kaskel-Dersch 4 ed p 318; Sinzheimer *Grundzüge* p 81; Flatow - Kahn-Freund *Betriebsrätegesetz* par. 66 no 6 par. 4, par. 85 par. 6; Potthoff *Arbeitsrechtspraxis* (1928) p 145.
[197] RGZ 104, 327; 111, 119; RAG 3, 125; 4, 19; 6, 427; 9, 55.

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constitutions of two states (the *Länder* Hesse and Bremen) explicitly provide for a right to dissociate,[198] whereas the Senior Drafting Committee of the Federal Constitution did not adopt this approach. It must be noted, however, that although the representatives of the Committee who were in favour of the trade unions rejected an explicit clause, they did not basically object to a protection of the non-member by Article 9(3).[199] Reading the minutes of the committee, it becomes evident that the clause was removed, since there was disagreement about the exemptions pertaining to the prohibition of compulsory membership, but not in order to abandon the constitutional protection of non-members. The Federal Labour Court argued that this was underlined by the fact that the right not to be compelled into an association had already been acknowledged by Article 20(2)[200] of the United Nations' Declaration of Human Rights before the decisive debates of the Drafting Committee in Germany began on 19 January 1949.[201] At least in terms of its historical development, one can not argue therefore that Article 9(3) would not include the freedom not to associate.

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It has been argued that the positive and negative freedom of association would exclude each other, since Article 9(3) should have been constituted primarily in order to protect the organised workers and their organisations. This purpose would be undermined, if the negative freedom of association was recognised as being protected by Article 9(3), as every measure which lays pressure on employees to join the union would be unconstitutional.[202] Also it would not be "attractive" to balance conflicting interests if they all appeared to be based on

[198] Art. 36(2) of the Hesse Constitution of 1948, and Art. 48 of the Bremen Constitution of 1947.
[199] Dietz in Bettermann, Nipperdey, Scheuner *Die Grundrechte* (1958) 3 p 456; Neumann *Der Schutz der negativen Koaltionsfreiheit* (1989) *RdA* p 244. It is worth noting that only one member of the committee was in favour of removing the right to disassociate.
[200] The provision reads as follows: "No one may be compelled to belong to any association".
[201] BAG (1967) *AP* Art. 9 no. 13 Bl. 351. It must be understood that the UN Declaration of Human Rights only has a limited effect on German constitutional interpretation, since the preferred method of interpretation is based on the values of the Basic Law itself rather than international law.

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the same guarantee, as it would be "tempting to assume that they cannot both be justified".[203] These views must be rejected. It should be considered that a basic right must not be seen as absolute but rather as relative to competing basic rights. This means they can restrict each other. As the essence of a basic right (*absoluter Wesensgehalt)* is protected by Article 19(2), *each* right can, however, only be restricted to a certain extent. Thus the positive aspect of 9(3) could never be eliminated by its negative correlative. With regard to the objection that it is easier to balance interests which are protected by different basic rights, it should be considered that there are several possible configurations where opponents base their claims on the same provision.[204] The process of balancing is not affected by the fact that both parties rely on the same provision.

The negative freedom of association must be seen as necessary for its positive correlative. The two aspects cannot be separated and so merge into each other. Particularly in cases where a new trade union is to be formed, the negative freedom of association and the positive right to form a new association coincide with each other, as Article 9(3) must not be interpreted as protecting existing associations against emerging ones. Although Prondzynski acknowledges that non-membership in these cases can be identified as the "expression of his (the non-member's) positive desire to join another (union)", he doubts the validity of the idea that freedom of association implies the freedom to choose one's union.[205] He argues that it is possible that there may be only *one* union to choose, thus eliminating an effective choice between different unions, leaving instead a choice only between joining or not joining. This choice would, however, not be covered by freedom of association, which has been described by the Commission for Human Rights as "a freedom to choose between existing unions -

[202] Foedisch *Organisationszwang* (1955) *RdA* p 93; Hueck/Nipperdey *op.cit.* p 114 ff.
[203] von Prondzynski *op.cit.* p 217.
[204] For example as regards the conflict of personal freedom (Art. 2(1)) of two persons.

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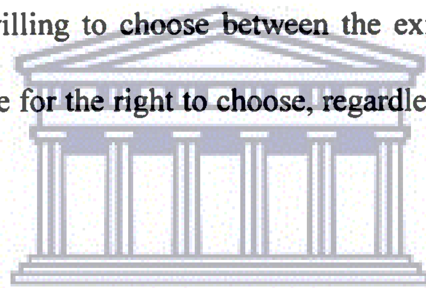
unless, that is, the worker who does not desire to be a member of the only existing association is prepared and able to form his own alternative one".[206] Other cases might occur, where a choice between different unions is available but where the union the worker wants to join is unwilling to accept him. Prondzynski concludes that the only approach in such cases would be to argue that "a choice is protected even where it cannot in practice be put into effect".[207] Prondzynski implicitly acknowledges, however, that the right to choose exists in cases where the choice is available and the worker is willing to choose. Consequently, the bone of contention is not the existence of the right to choose but rather its application under certain circumstances. Considering the circumstances of every case, however, bears difficulties, because it is hardly possible and leads to legal insecurity in determining whether every single worker is either willing or unwilling to choose between the existing unions. It is therefore necessary that legislation provide for the right to choose, regardless of the individual worker's attitude.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The Federal Labour Court also argued that a "freedom" to form (or join) an association, by definition presupposes the freedom to stay away from *any* association.[208] This interpretation is also doubted by Prondzynski. In spite of his abovementioned objections, he accepts the view that the freedom to associate "is something which persons may exercise or not exercise as they wish".[209] He rejects the conclusion, however, that the "freedom not to join unions . . . may be treated as a *right* not to join unions, leading to correlative duties (. . .) on others not to interfere with such a right."[210] He distinguishes between a *right* not to associate and a *freedom* not to associate, of which the latter would not impose a *duty* on third parties (i.e. the

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[205] von Prondzynski *op.cit.* p 200.
[206] *Op.cit.* p 207.
[207] *Ibid.*
[208] BAG (1967) *AP* Art. 9 no. 13 Bl. 351.
[209] *Op.cit.*

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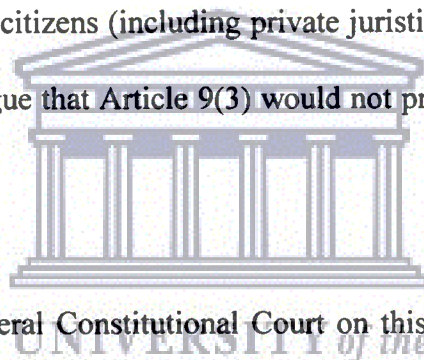
association). Hence, as there is no duty, there could be no breach of such.[211] This view is unsound, in so far as Prondzynski does not distinguish between a duty which arises from the right of another subject and the duty not to interfere with the protected legal interests of others. Freedom must be understood as the (defensive) right that nobody interferes with this sphere, whereas a right in the narrow sense means that one has an (active) right against someone. In the first case, the third party has a duty not to interfere with the freedom, in the second case he is obliged to (actively) fulfil a duty as a correlative to a right. The argument that "the legal freedom not to join is observed by the law once there is no *legal compulsion* to join unions"[212] should also be rejected because Article 9(3) applies not only against the state but also horizontally. This means that not only is the state bound not to interfere with this freedom but so too are private citizens (including private juristic persons). From this point of view, one can therefore not argue that Article 9(3) would not protect the non-member against union security arrangements.[213]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Finally, the rulings of the Federal Constitutional Court on this issue need to be considered. The Court only acknowledged in 1979 that the negative freedom of association derives from Article 9(3).[214] The Court stated that "elements of the guarantee (of Article 9(3)) include the freedom to form or join an association, the freedom to withdraw from and stay away from an association and the association as such." It furthermore stated that the infringement of the negative freedom of association presupposes that coercion or pressure is laid on the non-

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210 *Op.cit.*
211 *Op.cit.* p 209, 213.
212 *Op.cit.* p 209.
213 In regard to the decision of the Federal Labour Court, von Prondzynski also objected that there would not be an indication that the non-members in fact objected to joining, and therefore no right had necessarily been violated and thus no duty breached [*op.cit.* p 214]. Indeed, it is possible to renounce a basic right, and the worker would indeed have the possibility to dispose of his freedom not to associate thereby. However, for such a renunciation an appropriate declaration would be necessary. Cf. von Münch/Kunig (ed.) *op.cit.* introduction to Art. 1-19 par. 62 f.

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associated. This pressure must not be allowed to encroach on the freedom to decide in a perceptible way. In a later decision, the Court stated that the pressure must not be "considerable".[215] These definitions are not very satisfactory, as they lack any precise definition of what pressure is admissible or not. Gamillschegg, who acknowledges the existence of the negative freedom of association in principle, objects, beyond that, that the assertion that the negative freedom of association is the mirror-image of the positive is not plausible, notwithstanding the "stony unflinchingness of the highest courts".[216]

The Court also acknowledged that the plurality of associations (*Koalitionspluralismus)* is, at least in legal terms, protected by Article 9(3).[217] In fact, however, single-unionism (*Einheitsgewerkschaft)* is a common feature of German labour structure. Indeed, the Constitution does not prescribe this principle, but Article 9(3) of the Basic Law guarantees freedom of association also to emerging unions.[218] Prondzynski argues that this single-unionism would only have implications for industrial-relations practice, but "little bearing" on the legal position of non-members.[219] This is questionable, as collective freedom presupposes that the individual can exercise his individual freedom.

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Also noteworthy are the rulings in regard to corporations set up under statute by the state. The Court ruled that constitutional limitation of compulsory membership in such corporations

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[214] BVerfG *NJW* (1979) 708 f.
[215] BVerfGE 55, 7 (22).
[216] *Differenzierung nach der Gewerkschaftszugehörigkeit im Vorruhestand* p 556 f. This statement has been criticised in a responding article by Neumann, who refers to the decision of the Federal Labour Court in 1967, in which the Court gave a very detailed analysis why the negative freedom of association derives from Art. 9(3) [*op.cit.* p 244].
[217] Cf. BVerfGE 18, (18) 33; 19, (303) 321.
[218] Cf. Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 253. See also Gamillschegg who calls single-unionism "factual union oneness with legal union multiplicity" [in *Differenzierung nach der Gewerkschaftszugehörigkeit im Vorruhestand* (1988) *BB* vol. 8 p 556].
[219] *Op.cit.* p 208.

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does not follow from Article 9 but only from Article 2(1). The Court argued that such corporations cannot be seen as associations in terms of Article 9(1), since they are not private associations which are voluntary established but institutions which are set up by statutory order.[220] It found that the compulsion is constitutional if the corporation fulfils "legitimate public obligations".[221] In this sense, compulsory membership has been seen as constitutional in, for instance, industry and trade chambers[222], lawyers' chambers[223], doctors' chambers[224], workers' chambers[225], pharmacists' chambers[226] and students' medical insurance[227]. Compulsory membership in such institutions is not an infringement of an individual's basic right but only a legal means to entrust a certain group with a public obligation.[228] Article 2(1) protects the concerned citizen against incorporation only if the purpose of the corporation is disproportional, and in particular does not pursue a constitutional aim.[229] Hence, the citizen enjoys the freedom not to associate only in regard to private associations. [230] Of interest is the decision concerning the compulsory membership in employees' chambers. The court ruled that these bodies are not in competition with trade unions, as they do not negotiate on behalf of their members with employers' organisations over terms and conditions of employment. However, compulsory public-law corporations violate the basic right of freedom of association of a trade union, if they impair the protected functions of the trade unions.[231] This

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[220] BVerfGE 85, 360 (370).
[221] BVerfGE 10, 89 (102 ff).
[222] BVerfGE 15, 235 ff.
[223] Bavarian Constitutional Court Verwaltungs Rechtsprechung 7, 385 ff.
[224] BVerwGE 39, 100 ff.
[225] BVerfGE 38, 281 ff.
[226] BVerwG *NJW* 62, 1311 ff.
[227] BVerwGE 32, 208 ff.
[228] von Münch/Kunig (ed.) *op.cit.* vol. 1 Art. 9 par. 17.
[229] Bender, Maihofer, Vogel (ed.) *Handbuch des Verfassungsrechts* (1994) par. 18 68.
[230] Although the constitutionality of these institutions is not contested, it is objected by Maunz/Dürig *et al* that not Art. 2(1) but Art. 9(1) is the legal basis for their limitation [*op.cit.* vol. 1 Art. 9 par. 90].
[231] BVerfGE 38, 301 ff. Such a conflict, however, will seldom arise, as both unions and public law corporations normally pursue different aims.

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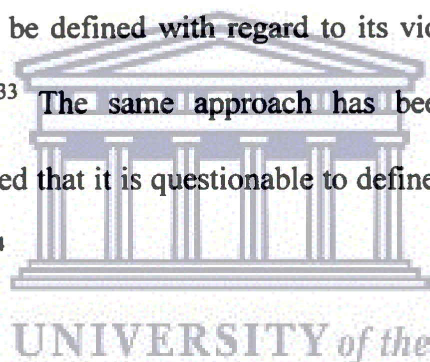
would be the case, for instance, if the public-law corporation intends to conclude collective agreements with an employer.

Departing from the conclusion that Article 9(3) contains the freedom not to associate, it is now clear that Article 2(1), owing to its subsidiarity, does not apply. However, it is now necessary to determine *to what extent* Article 9(3) protects this freedom. According to Steinberg, it is not possible to apply a concrete rule to determine the scope of freedom of association, since it is necessary to see the pressure in the light of its end, i.e. to balance the respective legal interests.[232] Although it is also necessary to conduct this balance of course, it is at first obligatory to determine the scope of the negative freedom of association, since the scope of a basic right must not be defined with regard to its violation, because "a violation cannot constitute its object".[233] The same approach has been adapted by the Federal Constitutional Court, which stated that it is questionable to define the range of a basic right in consideration of its limitation.[234]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The scope of a basic right must be determined by way of interpretation. Decisive in this regard is the intention of the lawgiver regarding the wording and the meaning of the basic right.[235] The wording is not very helpful in this regard, as only the title of Article 9 indicates the intention to protect the negative freedom of association.[236] The point must be made in terms of the fact that the non-member effectively suffers a disadvantage in cases where a differentiation clause applies. It cannot be a matter of the intensity of this disadvantage whether he enjoys protection or not. The property of a citizen, for instance, is protected

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[232] Steinberg *Koalitionsfreiheit und tarifliche Differenzierungsklauseln* (1975) *RdA* p 103.
[233] Stern *Das Staatsrecht der Bundesrepublik Deutschland* 3/2 par. 77(3) 1 a.
[234] BVerfGE 32, 54 (72).
[235] von Münch/Kunig (ed.) *op.cit.* vol. 1 introduction to Art. 1-19 par. 50.
[236] Vereinigungs- und Koalitions*freiheit*.

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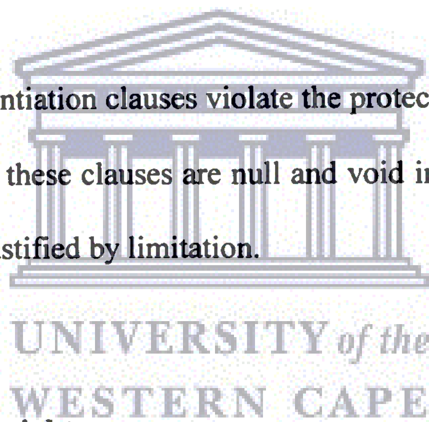
regardless of its value. This does not exclude restrictions, even expropriation, if the presuppositions of Article 14(3) of the Basic Law are fulfilled.[237] However, as the Federal Constitutional Court has applied the principle that basic rights must "unfold their maximum efficiency", a rather broad scope needs to be applied.[238] Thus it is necessary to regard all those differentiation clauses which impose disadvantages on the non-member as a violation of Article 9(3). As Article 9(3) applies horizontally[239], it can be concluded that the scope of the negative freedom of association is violated by the conclusion of differentiation clauses which, for instance, guarantee holiday money to union members only, regardless of the amount. An example of measures which do not disadvantage the non-member is the contribution of advertisements.[240]

It can be concluded that differentiation clauses violate the protected scope of Article 9(3).[241] It does not follow, however, that these clauses are null and void in terms of Article 9(3), as the violation of the scope can be justified by limitation.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(b) Collision with other basic rights

In spite of the fact that Article 9(3) itself is not fitted with a limitation clause, it is not, like every basic right, guaranteed without limitation. Some commentators argue for the application of the limitation clause of Article 9(2), as Article 9(3) is a special case of Article 9(1), to

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[237] Article 14(3) provides that "Expropriation shall only be permissible in the public interest. It may only be ordered by pursuant to a law which determines the nature and extent of compensation. Compensation shall reflect a fair balance between the public interest and the interest of those affected. In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts".

[238] BVerfGE 32, 54 (71).

[239] *Supra* par. 3.3.2.

[240] Cf. BVerfG (1996) *JZ* vol. 12 p 627 ff.

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which the clause of Article 9(2) normally applies.[242] According to the wording of Article 9(2), an association "whose aims or activities contravene criminal law or are directed against the constitutional order . . . shall be banned". Since this wording does not cover a single employee who rejects membership, i.e. to the exercise of the right to disassociate, it is not necessary to decide whether 9(2) is applicable or not. Like all basic rights, Article 9(3) must be seen in the context of the value order of the Basic Law. This means, however, that it can be limited by other basic rights.[243] This has been confirmed by the Federal Constitutional Court, which has stated that although Article 9(3) is guaranteed without limitation clause, not every limitation is excluded. The Court stated that it can be limited by the "basic rights of others and other rights with constitutional value".[244]

The conflict of the basic rights of *different* bearers of basic rights is called *Grundrechtskollision* (collision of basic rights). The colliding rights limit each other if one right comes into play at the expense of another. It needs to be emphasised again that the scope of the right is not restricted thereby, since the limitation merely *justifies* the violation of the protected scope. The Basic Law itself does not provide for an explicit regulation regarding the collision of basic rights. The limitation clause of Article 2(1) mentions the "rights of others" as the limitation for personal freedom. According to the majority of legal writers, however, the clause cannot be applied to basic rights other than Article 2(1) itself.[245] However, the Basic Law offers the constitutional principles and guidelines of interpretation which apply to the

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[241] Accordingly, it is clear that more severe forms of union security arrangements such as solidarity contributions (agency shop) and organisation clauses (closed shop) also encroach on the scope of freedom of association.
[242] Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 337.
[243] Cf. BVerfGE 84, 212 (228); Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 353 ff.
[244] BVerfGE 84, 212 (228).
[245] Stern *Das Staatsrecht der Bundesrepublik Deutschland* 3/2 (1994) p 635.

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collision of basic rights. These principles are the "uniformity of the Constitution", the principle of proportionality and the method of balancing of legal interests.[246]

The individual's negative freedom of association could above all be limited by the trade union's collective right to freedom of association. Thus it needs to established first of all whether differentiation clauses are protected by Article 9(3).

It is acknowledged by the majority of legal writers that, besides the individual right of freedom of association, the association itself also enjoys the protection of its existence and its activities. This interpretation does not derive expressly from the wording of Article 9(3). The basic rights are also basically constituted in order to protect the individual, not a juristic person.[247] However, Article 9(3) represents an exemption, as the existence and the activities of an association are necessary presuppositions for the exercise of the individual right. The freedom which is enjoyed by the individual is a "collective freedom" (*status collectivus).*[248] In regard to this typology of the individual right, the recognition of the collective element of Article 9(3) is a necessary consequence. The collective right to associate was already recognised by the Weimar Constitution.[249] The Basic Law cannot be interpreted differently, especially in view of the fact that it contains the principle of the social state.[250]

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[246] *Ibid.*
[247] Cf. Art. 1(1) and Art. 19(3).
[248] Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 22.
[249] Art. 165(1).
[250] Whether the collective freedom of association derives from Art. 9(3) alone, or from Art. 9(3) in connection with Art. 19(3), is a matter of contention. *Scholz* argues that Art. 9(3) primarily protects the individual freedom of association. Consequently, the collective freedom of association needs to be measured according to the interpretation of the individual freedom of association [in Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 240].

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First of all the *existence* of the association is protected, i.e. all activities which are necessary for the maintenance and the protection of the association .[251] This includes the choice of the organisation's form, its autonomy in terms of the statute, its propaganda for encouraging membership and the expulsion of members who violate its aims.[252]

Besides the guarantee of existence, Article 9(3) protects the *activities* of the association, but only in so far as they pursue the ends that are specified by Article 9(3), i.e. the safeguard and improvement of working and economic conditions (*spezifisch koalitionsmässige Betätigung)*.[253] This includes the *Tarifautonomie* (autonomy as regards the conclusion of collective agreements). This autonomy is aimed at outweighing the inferior position of the employee.[254] The conclusion of collective agreements which contain differentiation clauses could fall within the protection of the collective agreement autonomy.

It needs to be stressed, however, that the scope of Article 9(3) has been a matter of contention. The Federal Constitutional Court developed the *Kernbereichslehre* (doctrine of the "nuclear sphere"). The point of departure for this doctrine is the conviction that the guarantee of the association's freedom of activity is not guaranteed without limitation. The limitation itself may not violate the nuclear sphere of Article 9(3), unless the violation is committed in order to protect other legal interests. The doctrine has been interpreted differently. It has been applied by the Federal Labour Court in order to restrict the scope of Article 9(3) to activities which were absolutely indispensable. However, the Federal Constitutional Court dismissed this interpretation. It stated that the doctrine must not be seen as restricting the scope of

[251] BVerGE 28, 295 (304);50, 290 (373); 57, 220 (246).
[252] Jarass/Pieroth *op.cit.* Art. 9 par. 8.
[253] BVerfGE 50, 290 (367).
[254] BVerfGE 84,212 (229).

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Article 9(3), but as describing a limitation of the limitation (*Schranken-Schranke*) of this right. In a recent decision, the Court redefined the "doctrine of the nuclear sphere", stating that the

> point of departure of the formula is the confession that the freedom of activity of the associations is not guaranteed without limitation but can be elaborated by the legislative (cf. BVerfGE 28, 295, 306; 57, 220, 245 f). Using the formula of the nuclear sphere the Court describes the limit for this elaboration; it is infringed if the limiting regulation is not imperative in regard to the protection of other legal interests (cf. BVerfGE 57, 220, 246).[255]

According to the Court, the scope of freedom of association embraces all activities which are "specific for an association". Whether this activity is absolutely indispensable (and therefore belongs to the nuclear sphere of the organisational activity) is a matter of limitation rather than scope. Thus it follows that the clauses in question fall within the scope of the collective freedom of association if they are specific for an association.

The social partners are trusted with the public mandate to regulate the economic and working conditions autonomously. The protection would lack efficiency if the necessary pre-requisites were not protected as well. This includes the maintenance and strengthening of the membership, as only a strong association will have the necessary power for negotiation. This has been confirmed by the Federal Constitutional Court. It stated that the protected activities include the rights to advertise and to spread propaganda.[256] By gaining new members, the associations secure their continuing existence, thereby creating the basis to perform the public mandate imposed by Article 9(3). Their strength in terms of collective bargaining depends on the number of members. Thus differentiation clauses fall within the scope of Article 9(3), as

[255] BVerfG *JZ* (1996) vol. 12 p 628.

[256] BVerfGE 28, 295 (304); 57, 220 (245). The decision of 1995, concerning the union's right to distribute propaganda in the workplace, does not constitute a change of the opinion of the court, as

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they are aimed at maintaining or increasing this number and are therefore "specific for an association". This leads to a collision between the *collective* freedom of association of the corporation and the negative freedom of association of the non-member.

It is questionable furthermore whether the freedom not to associate also collides with the positive *individual* freedom of association of the associated member. In fact, the Federal Constitutional Court stated that the propaganda created by the individual member is a *protected activity* in terms of Article 9(3). The member who seeks to strengthen his own association makes use of his basic right of freedom of association.[257] It is evident that the attempt to conclude collective agreements which contain union security clauses must be regarded as an attempt to strengthen the association and, as such protected by Article 9(3). Thus, the scope of individual freedom of association is violated if the conclusion of the particular agreement is prevented (by the prohibition to conclude differentiation clauses) or even hampered. It must be understood that only the members who participate in the conclusion of the particular agreement can claim this violation. However, the collision between the negative freedom of association of the non-members and the individual freedom of association of the particular members has little bearing on the result of the balancing of the interests and can therefore be neglected. In case the collective freedom prevails, the member will also enjoy protection, and the question of conflict with non-members' rights will not arise. If the negative freedom of association prevails, however, the conclusion of agreements which contain differentiation clauses would constitute a violation of the negative freedom of association and therefore be void. As the collective exercise of concluding collective agreements would therefore not enjoy constitutional protection, it is consequently not possible

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it did not deal with the material issue but merely with the reasoning of the pre-instance [*JZ* (1996) p 627].

[257] Cf. BVerfGE 28, 295 (304); BVerfGE *JZ* (1996) vol. 12 p 628.

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that the participation in negotiating such agreements would do so, since the Federal Constitutional Court stated that the member has the right to participate only in those activities which are constitutionally protected.[258]

(c) Balancing the rights

In a case of conflict between constitutional values, it is necessary to balance both rights. If this is not possible, the decision as to which of the basic rights take precedence must be made in regard to the circumstances of the case. This principle was developed by the Federal Constitutional Court in the important *Lüth* decision.[259] The Court later added the "principle of the most sparing adjustment" (*Prinzip des schonendsten Ausgleichs)* of colliding constitutional interests.[260]

Although it is obligatory to balance the rights in regard to the particular circumstances, it has been attempted to develop abstract rules. Much support was found for the "principle of practical concordance" developed by Hesse.[261] This principle means that

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> constitutionally protected legal interests must be related to each other so that both gain reality. Where collisions arise, one must not balance the interests hastily or even abstractly in order to realise one of them at the expense of the other. The principle of the uniformity of the Constitution rather demands an optimisation of the interests; *each* interest must be limited in order to achieve an optimal efficiency for both. Thus the limitation must be proportional and must not go further than necessary for the concordance of the legal interests. However, the principle does not give advice in regard to what *is* proportional in the particular case . . . .[262]

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[258] BVerfGE 119, 303 (312 f).
[259] BVerfGE 35, 202 (225).
[260] BVerfGE 39, 1 (43) - this case concerned the constitutionality of the termination of pregnancy.
[261] Hesse *Grundzüge des Verfassungsrechts* (1993) 72, 317.

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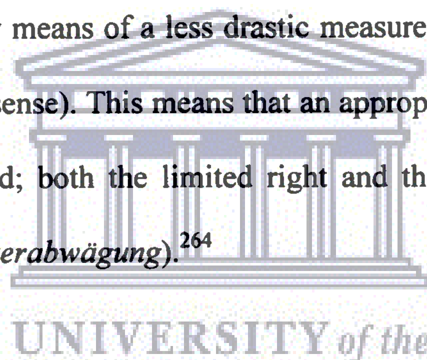
As the Basic Law does not provide an explicit regulation in this regard, the Federal Constitutional Court has developed the *proportionality principle*, which is inferred from the constitutional state principle (Article 20(3) of the Basic Law). There needs to be a distinction, however, between the principle of practical concordance and the principle of proportionality. The first always means a proportionate co-ordination of legal interests, whereas the latter does not always mean a concordant application. Practical concordance concerns the optimisation of the efficiency of basic rights, whereas proportionality must be seen as the limit of any encroachment. [263] It contains three elements; the limitation of a right must be *suitable* to its achievement. This is the case if the measure can lead to a promotion of the purposed objective. The second element is that the limitation must be *necessary*, i.e. the objective may not be attained as effectively by means of a less drastic measure. Finally, the limitation must be *proportional* (in the narrow sense). This means that an appropriate relationship has to exist between the means and the end; both the limited right and the public interest have to be weighed against each other (*Güterabwägung*).[264]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There can be little doubt that differentiation clauses are *suitable* for increasing the density of organised employees. This is evident for the closed shop, but even the weakest form of differentiation clauses, which merely deny negotiated benefits for non-associated employees, are suitable. Although it is uncertain to what extent these clauses would increase the membership (as this would be a matter dependent on the particular circumstances), it is sufficient that the clause could theoretically serve this purpose. The means do not necessarily

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[262] Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 72.
[263] Cf. Stern *op.cit.* 3/2 par. 84 (4) par. 7.
[264] BVerfGE 30, 292 (315 f).

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need to be the most suitable.[265] Furthermore, it is not necessary that there be a factual success in terms of the purpose in the particular case.[266]

One might doubt the *necessity* of certain differentiation clauses, however. In order to fulfil this requirement, the objective may not be attained as effectively by means of a less drastic measure. It is evident that a differentiation clause is a less drastic measure than either a closed shop agreement or a "restricted exclusion clause". However, the less drastic means are also less efficient, as the closed shop secures a 100 per cent density, whereas an agency shop might represent merely the most effective motivation to join the union(s), and differentiation clauses an even less effective motivation. The Federal Constitutional Court ruled that there must be "no doubt" that a less drastic measure could be applied.[267] Consequently, it needs to be certain that the measures are of the same efficiency. Since this is not the case, one cannot say that any form of differentiation clause is unnecessary in terms of proportionality.

Finally, the violation of the negative freedom of association must be *proportional* (in the narrow sense). In this regard, it is necessary to relate positive and negative freedom of association in terms of Article 9(3). The historical origins of Article 9(3) can be traced back to the conflict during the early industrial era between employers and exploited workers. In this light, it is evident that Article 9(3) primarily protects the trade union members, i.e. the positive freedom of association, especially since the negative freedom of association would have enjoyed protection by Article 2(1). However, this does not mean that the positive freedom of association always prevails in a case of conflict with its negative correlative, as the negative

[265] BVerfGE 16, 147 (181); 19, 119 (126); 57, 139 (159).
[266] BVerfGE 67, 157 (175).
[267] BVerfGE 17, 232 (244).

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content is an essential part of the positive. The protection of the former must not negate the latter.

Scholz submits that the positive freedom of association does not deserve to prevail, as the failure to acknowledge the negative freedom of association would invalidate Article 9(3) as a liberty right.[268] Basic rights have indeed to be seen in the first place as liberty rights. Articles 1(1) and 2(1) of the Basic Law provide the liberty principle as an all-embracing value. Personal freedom (Article 2(1)) must be seen as essential content of the dignity of man (Article(1(1)). All basic rights need to be interpreted in this light. Their primary function is to defend the citizen against encroachments of the state, thus creating a protected sphere of liberty. This means that basically any form of coercion is in conflict with this principle. Therefore, it is relatively uncontested that coercion or massive pressure used to force the non-member into an association would disregard his negative freedom of association; restricted organisation clauses as the strongest form of coercion would clearly negate the description "liberty right". These clauses, which infringe upon the right to choose are furthermore in conflict with Article 19(2), as this right belongs to the essential content of Article 9(3).[269] It remains open to question whether less intrusive measures can be justified in order to promote collective interests or not.

The Federal Labour Court has stated that the intensity of pressure is not of importance but only the *social adequacy*.[270] The Court ruled that differentiation clauses would "heavily violate the legal feeling", regardless of their intensity and thus be socially inadequate.[271] The

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[268] In Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 226.

[269] Even *Gamillschegg* confesses that the non-member must be protected against any coercion to join a trade union [in *Nochmals: Die Differenzierung nach der Gewerkschaftzugehörigkeit* p 47].

[270] BAG (1967) *AP* Art. 9 no. 13.

[271] *Ibid.*

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court also argued that a distinction cannot be made between non-members who merely reject membership of a particular union and those who reject membership of *any* union. There are different possible reasons which could lead to such rejection. Firstly, the individual could be willing to join an association in general, but rejects the existing ones in regard to their ideology or policies, for instance. Secondly, it is possible that the individual concerned is simply not willing to join any union in general because he is indifferent or lacks solidarity towards the members of the association, or because he is not prepared to contribute financially, although he enjoys the benefits which are negotiated by the association. The Federal Labour Court argued that it would lead to legal uncertainty if one distinguished between these two groups.[272] It also would constitute a violation of the intimate sphere of the individual, since it would be unreasonable to expect him to confess that he wants to act as a "parasite" and would therefore endanger his personal freedom.[273]

The criterion of social inadequacy has been criticised more recently by Gamillschegg, who argues that it would be sufficient to speak of "weighty" pressure.[274] He wants to concede soft pressure, which does not constitute genuine coercion but can be seen as a "soft incitement".[275] Others argue that one can expect the non-member to accept small sacrifices in order to defend his beliefs. The individual would be part of society charged with numerous duties.[276] Steinberg states that without the trade unions, the "existence of the individual would be nearly impossible".[277] Although these arguments have a certain value, it should be considered that it is not defensible that someone must be prepared to make sacrifices only because he enjoys

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[272] BAG (1967) *AP* Art. 9 no. 13 Bl. 357; see also Hueck *Tarifausschlußklausel und verwandte Klauseln im Tarifvertragsrecht* (1966) p 46.
[273] BAG (1967) *AP* Art. 9 no 13.
[274] Gamillschegg *Differenzierung nach der Gewerkschaftzugehörigkeit beim Vorruhestand* p 556.
[275] Gammilschegg *Differenzierung nach der Gewerkschaftszugehörigkeit* p 61.
[276] See Steinberg *op.cit.* p 105; cf. also BVerfGE 33, 1(10).
[277] *Op.cit.*

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advantages from the collective, especially if it concerns his constitutionally protected liberty. The Constitution grants to everybody the decision to what extent he wants to engage in society, or whether he wishes to engage at all. However, there are cases in which the individual is forced to accept that his sphere of liberty is limited (by the rights of others), or even forced to contribute actively to collective purposes (taxes, conscription) if this is justified by a constitutional aim of exceptional value.[278] Individual freedom certainly cannot prevail if the social order provided by the values of the Basic Law is endangered.

Departing from the assumption that collective bargaining is a constitutional aim of exceptional value, it is then necessary to establish whether it justifies the conclusion of collective agreements containing differentiation clauses. Dietlein argues that collective bargaining depends on the ability of the association to provide advantages for its members.[279] He assumes that the trade union lacks this ability if non-members receive the same salaries and social benefits as their associated colleges. He concludes that this development does not conform with the constitutional aim of an autonomous collective bargaining system, as the Basic Law's point of departure is "free and strong associations which are socially open".[280] In fact, a union needs strength in order to be able to function as a workers' agent in collective bargaining. Also, the "parity of the associations" has to be seen to be protected by Article 9(3) by the Federal Constitutional Court, which has stated that employer's organisations and trade unions must be treated equally, since only then is a fair adjustment of interests possible.[281] However, this refers in the first place merely to *legal* equality. A right of "material equality" exists only where the factual equality is intruded upon in a way that contradicts the principle

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[278] See Art. 20(1), 104a, 105; Art. 12a, 115a-l.
[279] *Op.cit.* p 204.
[280] Dietlein *Zum verfassungsmäßigen Verhältnis der positiven zur negativen Koalitionsfreiheit* (1970) *AuR* p 204, although this statement can be used as a counterargument in regard to the feature "free" association, which means voluntary associations [BVerfGE 4, 96 (106); 38, 281 (303)].

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of the social state.[282] This is in keeping only with suspicious inequalities, since the state is barred from interfering in regard to slight inequalities, owing to its duty to remain a neutral party in regard to collective bargaining. Thus it would be necessary to determine whether the association's ability of performing their mandate (to safeguard and improve working and economic conditions[283]) is in fact hampered by a decreasing membership. Until today, however, in spite of a declining membership[284], there is no sign that the trade unions' ability of being a social partner is endangered. *If* that were the case, the weighing of the individual and collective interests would appear in a different light.

In the light of the importance of individual liberty provided by the Basic Law, one can conclude that, unless the union's ability of being a bargaining agent is in fact not endangered, the union's interest in differentiation clauses must be considered less important than the interest of the non-member in his freedom to decide whether or not he wants to join an association. The freedom is not impaired in cases where pressure is not perceptible. However, it is not possible to apply an abstract rule. It needs to be stressed again that it is necessary to have an appropriate regard for the circumstances of the concrete case. This includes firstly the situation of the trade union that wants to conclude the differentiation clauses and its ability to perform the bargaining mandate. Secondly, the situation of the competing union(s) needs to be considered, and finally the situation of the non-member, i.e. the level of pressure to join the association needs to be taken into account. Only then is a concrete balancing of interests possible.

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[281] BVerfGE 18, 18.
[282] Maunz/Dürig *et al op.cit.* vol. 1 Art. 9 par. 292.
[283] Article 9(3) of the Basic Law.
[284] The membership of the DGB, for instance, fell from 9 770 000 at the end of 1994 to 9 385 000 by the end of 1995 and about 9 000 000 at the end of 1996 [source: *Statistische Jahrbücher der Bundesrepublik Deutschland*].

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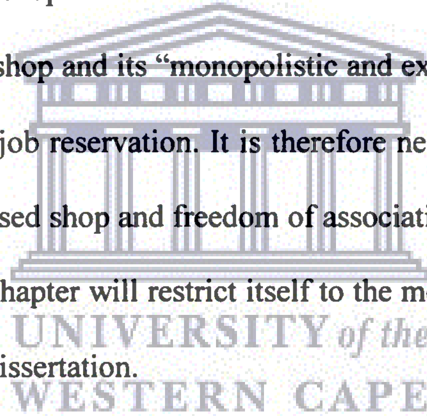
Chapter 4 - The development of freedom of association and union security arrangements in South Africa

Freedom of association has only been a fundamental right in South Africa since the interim Constitution came into effect in 1994.[285] Although it has been protected statutorily since 1956 (it is important to note that African workers were excluded from this protection), this fact illustrates why the question of the incompatibility of closed shop and freedom of association did not play a major role in South African literature. In most articles the authors were more concerned about the implementation of necessary safeguards against abuses, than with a possible conflict of the closed shop with freedom of association. This is an understandable approach, regarding the closed shop and its "monopolistic and exclusionary potentials"[286] as a means of racial separation and job reservation. It is therefore necessary for this study to deal with the development of the closed shop and freedom of association in South Africa. It should be stressed, however, that this chapter will restrict itself to the most essential aspects, in order not to extend the scope of this dissertation.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4.1 The closed shop: from craft security to racial separation

4.1.1 The origins of the closed shop

The closed shop in South Africa developed together with the first unions, in the industrial areas at Kimberly and the Witwatersrand, but was also found in the coastal centres. [287] The first demands for closed shops were made by unions representing artisans. Many of the skilled

[285] Sec 17 of the interim Constitution of 1993.

[286] Lever *Historical and contemporary aspects of the closed shop in South Africa* (1986) *IRJ* 4 p 4.

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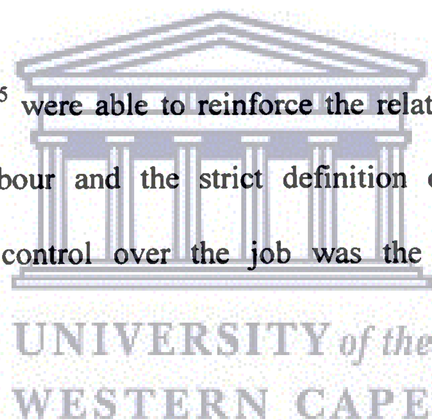
workers represented by these unions came from Britain and Australia[288], where trade unionism and closed shop practices had been a feature of labour relations since the end of the 18th century.[289] In the beginning the closed shop was mainly a means to protect crafts and to fix a minimum standard of skill.[290] However, it is necessary to consider that the point of departure for the implementation of closed shops was different as regards the artisans' and craft unions[291] and as regards the mining unions[292]. Craft unions claimed that they served "for trade protection purposes only", whereas mining unions were primarily concerned with the protection of their members against competition with African workers.[293] It will be shown briefly, however, that the effect in both these industries was the same, namely that the closed shop became a means of job reservation.[294]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The artisan and craft unions[295] were able to reinforce the relative scarcity of their skills by controlling the supply of labour and the strict definition of a skilled worker.[296] One mechanism for establishing control over the job was the apprenticeship system. The

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[287] The forerunners of the South African trade unions were organisations established in the printing industry. The earliest dates back to 1838. The first black union, however, was founded only in 1917. See *The Complete Wiehahn Report* (1982) p xxi and Baskin *Striking Back* (1991) p 7.

[288] Katz *A trade union aristocracy* (1976) pp 1-9 Appendices A and B.

[289] National Manpower Commission (NMC) Rp. 60/1981 Ch. 2 par. 3.1.

[290] Report of the *Industrial Legislation Commission of Inquiry* 1951 (Rp. 62/1951) par. 830.

[291] Such as the Iron Moulders' Society (IMS) and the Amalgated Society of Engineers (ASE).

[292] The first permanent mining union, the Transvaal Miners' Association (TMA), was only founded in 1902. It became the Mine Workers' Union (MWU) in 1913.

[293] IMS Executive minutes 25.9.26 of 1869 as cited in Lewis *op.cit.* p 19.

[294] The South Africa National Manpower Commission defined job reservation as relating "to the allocation of specific tasks or trades or types of work to workers of a given race. It may be statutory . . . or it may be based on the customs, uses or preferences . . ." [Rp. 60/1981 Ch. 1 par. 4.4.2].

[295] According to Lewis, craft unionism is defined as being founded on the principle of *unilateral control* and based on exclusive membership. It is the union itself which determines the rules of trade. Craft unionism is especially found in trades which traditionally entail the principle of apprenticeship, such as moulding, engineering, masonry, carpentry and printing [*Industrialisation and trade union organisation* (1984) pp 18-19].

[296] Katz *op.cit.* p 5.

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Apprenticeship Act of 1922[297] had the effect of "excluding the vast majority of non white youths" by setting standards which could mostly only be fulfilled by white applicants.[298] On the one hand, the black population lacked the necessary educational facilities, while, on the other, black labour was not represented in the Apprenticeship Committees, which consisted of employers' representatives and registered trade union representatives. Thus the Act had the practical effect of excluding the majority of Africans, although it did not directly discriminate against them. It was for this reason that there was no pressing need for an artificial protection represented by the closed shop. However, the apprenticeship system only applied in certain industries.[299] It was not "watertight, (and thus) the closed shop remained a necessary adjunct - or equal partner - in the battery of protectionist measures".[300]

It is owing to industrialisation that the direct labour of the craftsman was increasingly supplemented by mass production and cheap labour. The closed shop was therefore an additional means of achieving unilateral control over the supply of skilled labour.[301] Owing to the employers' intention not to renounce black labour, however, the introduction of the closed shop into the sphere of artisans' and crafts unions was a slow process. The first closed shop which was applied nationwide was included in an agreement concluded in the steel and engineering industry in 1944.[302]

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[297] Act No.26 of 1922.

[298] Jones *Labour Legislation in South Africa* (1980) p 21.

[299] The Act applied only to certain industries: bootmaking, building, clothing, carriage building, electrical engineering, food, furniture, leather working, mechanical engineering and printing.

[300] *Op.cit.* p 6.

[301] Lewis *op.cit.* p 23.

[302] *GG* 23 June 1944.

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Skilled Coloured and Asian workers, however, were admitted to some craft unions.[303] This was owing to the employers' demand for cheap labour and the fact that the craft unions could afford to be more pragmatic in terms of race. They were militant in resisting deskilling, however, so that workers who lacked the necessary means achieving these skills did not have the option of joining the union and were thus excluded from gaining jobs.

The situation in the mining industry was different. As long as the industry operated at a profit, it could afford to ignore cheap (black) labour for skilled occupations.[304] After the Anglo-Boer War (1899-1902), the situation changed when, for the first time, African workers were introduced to skilled labour positions in order to minimise costs. The traditional skilled miner became supervisor, while his tasks were fragmented and performed by Africans at a much lower rate of pay.[305] The labour shortage caused by the war led to an additional importation of foreign workers.[306] This development, coupled with the fall in the gold price, led to the phenomenon of "poor white workers", who increasingly organised themselves into strong bargaining units.[307] They demanded protection from any competition with black labour.[308] It was owing to the absence of the apprenticeship system, that the skilled white mineworker needed to be protected by state measures against competition with African workers. The closed shop must be seen, however, as merely one of a number of different means of implementing a colour bar in order to achieve job reservation. Another example in this regard

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[303] *Op.cit.* p 20.
[304] White workers had won trade union and other political rights during the 1890s and were supported by government policies. The employers were thus forced to give priority to white work seekers.
[305] Lewis *op.cit.* p 13.
[306] Jones *op.cit.* p 1.
[307] Lewis *op.cit.* pp 13-14.
[308] Coetzee *Industrial Relations in South Africa* (1976) p 179.

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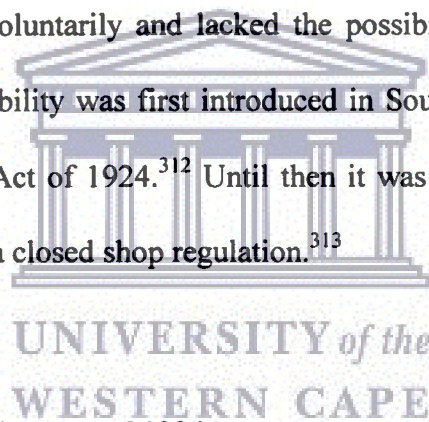
is the legal reservation of the job of blasting for white workers in 1893. Although the law was amended in 1896, it was assumed that only whites would be given blasting certificates.[309]

In the period before 1924, closed shop agreements could only be concluded on an informal basis, because the negotiations between employers and trade unions were held privately, as industrial councils were not yet statutorily provided for.[310] The first industrial councils, however, had already been installed in 1919 and 1921 in the printing industry, which contained a closed shop provision: "No employer may engage an employee being a journeyman unless such employee is a member of the S.A.T.U.".[311] The agreement was concluded between printing employers and journeymen unionists, and operated nationwide. However, it was established voluntarily and lacked the possibility of extending the closed shop to non-parties. This possibility was first introduced in South African labour legislation by the Industrial Conciliation Act of 1924.[312] Until then it was entirely a matter of strength whether a union could enforce a closed shop regulation.[313]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4.1.2 The Industrial Conciliation Act of 1924

The Industrial Conciliation Act 11 of 1924 provided for the first time for the voluntary establishment of industrial councils.[314] These councils were centralised bodies, used by employers and employees as a vehicle for negotiating all matters of mutual interest.[315] The

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[309] Lewis *op.cit.* p 17.
[310] See *infra* par 4.1.2.
[311] As cited in Lever *op.cit.* p 6: "Wages Agreement", authorised by the National Industrial Council of the Printing and Newspaper Industry of South Africa, November 1921.
[312] Sec 9(1).
[313] There were, however, some closed shop agreements which were voluntarily concluded between union and employer.
[314] Sec 2.
[315] E.g. wage levels, working conditions, hours of work, bonuses, incentive and productivity shemes, annual leave, etc.

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agreements concluded in these councils were given force of law upon their publication in the *Government Gazette*.[316] The establishment of industrial councils represented a major change in industrial relations, as industrial agreements applied to all members of the participating associations and could even be extended to non-parties.[317] In addition, the Act provided for conciliation boards. These were temporary bodies which dealt only with conflicts which had already arisen, in order to bargain collectively and settle disputes.[318] The agreements of these bodies could also, like industrial council agreements, be extended to non-parties.[319]

An important feature of the 1924 Industrial Conciliation Act was that it led to a "dualistic system of labour organisation consisting of registered white and coloured unions on the one hand and unregistered black unions, without industrial council negotiations, on the other hand".[320] Pass-bearing (at that time only male) African workers were excluded from the definition of "employee".[321] Since only employees could belong to, and participate in, a registered trade union, Africans were effectively excluded from being members of any registered and recognised trade union.[322] As only these unions were allowed to be parties to industrial council agreements, African workers were excluded from concluding closed shop agreements within the scope of an industrial council, although black trade unions were not prohibited statutorily.

[316] Sec 9(1). The agreements concluded in industrial councils can be seen as a form of "domestic" or subordinate legislation, i.e. they may bind not only the parties to the agreement, but non-parties (both employees and employers) as well. See *SA Association of Municipal Employees v Pretoria City Council* 1948 (1) *SA* (T).
[317] Sec 9(1).
[318] Sec 4.
[319] Sec 9.
[320] Du Toit *South African Trade Unions* p 33.
[321] Sec 24.
[322] Sec 14(2).

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The Act contained no explicit provision for closed shop agreements, and during the 1930s the closed shop was indeed challenged on this issue. In *Rex v Daleski*[323] the defendant was charged with paying less than the minimum wage to four of his employees. The defendant argued that the agreement contained a closed shop provision, which would be covered by the Industrial Conciliation Act. The court shared this view. It held that the provision was not *ultra vires* as being in restraint of trade.[324] Closed shop agreements were regarded as a matter of mutual concern and thus covered by the objects of the Industrial Conciliation Act of 1924.[325]

The industrial council agreements to a growing extent began to contain closed shop provisions.[326] By 1928, some 31 industrial agreements had been gazetted in terms of the 1924 Industrial Conciliation Act, of which 11 contained closed shop clauses. These agreements were mostly only of regional scope and did not include the leading craft unions.[327] In 1937, 22 out of 35 industrial council agreements contained closed shop provisions, growing to 51 out of 88 in 1951[328]. It was acknowledged by the Industrial Legislation Commission in 1935 that closed shop provisions "are designed to improve the organisation of both employers and employees which is one of the objects set out in the registered constitution of almost every industrial council".[329]

The Industrial Conciliation Act was eventually repealed by Act No 36 of 1937. The new Act, however, made no explicit provision for closed shops. The closed shop became a "political as

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[323] 1933 TPD 47.
[324] 51.
[325] *Ibid.* Sec 2(1) of the ICA of 1924 provided that "any employer or employers' organisation may agree with a registered trade union to establish an industrial council in order to consider and regulate matters of mutual interest and to prevent and settle disputes between them".
[326] The first industrial council agreement, concluded according to the 1924 Industrial Conciliation Act, was in the printing and newspaper industry (*GG* 9 March 1925).
[327] Lever *op.cit.* p 7.
[328] *Industrial Legislation Commission of Inquiry* 1951 Rp. 62/1951, p 119.

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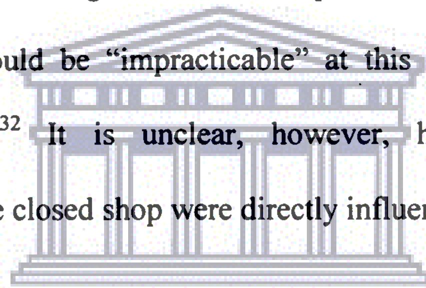
well as industrial bone of contention"[330], and there were objections against the fact that the legislation did not provide for any safeguards against abuse.

4.1.3 The Botha Commission

In 1948 the government changed and in the same year appointed the Botha Commission to revise *inter alia* the Industrial Conciliation Act. The Commission dealt *inter alia* with the closed shop and its desirability.[331] It should be borne in mind that the new government was under pressure from the white population, which demanded to be protected against competition with African workers. Interestingly, a senior official of the Department of Labour informed the Commission that although the closed shop was in conflict with the principle of freedom of association, it would be "impracticable" at this stage to prohibit agreements containing such provisions.[332] It is unclear, however, how far the Commission's recommendations regarding the closed shop were directly influenced by government policies.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The Commission came to two major conclusions: firstly to retain the closed shop practice, and, secondly, to make it subject to certain safeguards. In regard to the first aspect, the Commission found that public interest should prevail over the disadvantages. It expressly mentioned the guarantee of a certain degree of skill, promotion of collective negotiations and the securing of equal wages.[333] As regards the second aspect, the commission stated that the closed shop should be "subject to the introduction of certain safeguards designed to prevent

[329] Report 37 of 1935 par. 424.
[330] Lever *op.cit.* 7.
[331] The report was based on the statements of witnesses representing both unions and employers. It experienced that "an overwhelming preponderance of evidence . . . was in favour of the retention of closed shop clauses" - Report of the *Industrial Legislation Commission of Inquiry* UG 62/1951 par. 842.
[332] Par. 817.
[333] Par. 844.

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abuse".[334] These safeguards refer *inter alia* to exemptions for employees who are unreasonably expelled from the union or who have conscientious objections against union membership.[335] In addition it called for the prohibition of closed shop where mixed trade unions were concerned, as "closed shop provisions (could) compel Europeans and non-Europeans to associate in one union".[336]

It is interesting to note that the Commission also dealt with the conflict of closed shop agreements with freedom of association. The report cited, for example, the South African Federated Chamber of Industries, which stated that "freedom of association should include at the same time its corollary, viz. the freedom not to associate".[337] The report also referred to the United Nations Declaration of Human Rights of 1948 which recognised that nobody may compelled to be a member of an organisation.[338] However, the attitude of the commission becomes clear as regards its assumption that

> witnesses who advocate the right of freedom of association (or rather the negative aspect, i.e. the freedom not to belong to an organisation), as a reason why they were opposed to the closed-shop principle, included those who were not prepared to accept the obligations associated with trade-union membership but were, nevertheless, prepared to enjoy the benefits resulting from joint action . . .[339]

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[334] Par. 847.
[335] Par. 850.
[336] Par. 848. It is worth noting in this regard, that "the Government was accused of doing nothing to prevent the forcing of workers into mixed unions against their will by means of the closed shop, because it was dependent on the votes of the workers, especially those of the Coloured workers" [Du Toit, M.A. *op.cit.* (1976) p 104].
[337] Par. 815.
[338] Clause 2 of Art 20.
[339] Par. 825.

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Although the Commission's recommendations were ignored to an important degree, they influenced the policies of the new legislation with regard to the closed shop.[340]

4.1.4 The Industrial Conciliation Act No 28 of 1956

The Industrial Conciliation Act of 1956 brought about extensive amendments and additions to the Act of 1937. This is also true in terms of the closed shop practice in South Africa. It is worth noting that, although some important amendments were made, the statute remained in force until it was replaced by the 1995 Labour Relations Act. It will not be helpful to analyse the Industrial Conciliation Act of 1956 in detail, but there are some features which need to be shown.

Like the Industrial Conciliation Act of 1924, the new Act applied only to white, coloured and Asian workers, whereas African workers still fell outside the definition of "employee".[341] African workers were thus categorically excluded from the statutory trade union system. Their (un-recognised) unions were unable to establish a statutory closed shop as they could not be party to an industrial agreement, since only registered unions were admitted to industrial councils and conciliation boards.[342] The exclusion had the further consequence that the number of African workers (in any industry in which there were closed shop agreements) could not to be taken into account in terms of the representativeness of the trade unions.[343] It was possible, however, for an industrial agreement to be declared binding for African

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[340] See du Toit *et al op.cit.* p 5-6.

[341] Sec 1(1)(xi) provided as follows: " 'employee' means any person (other than a native) . . . ." It was not until 1979 that blacks who were South Africa citizens, were covered by the definition 'employee'. Foreign blacks were included only in 1981.

[342] Sec 18(1).

[343] Rp. 60/1981 of the NMC p 13.

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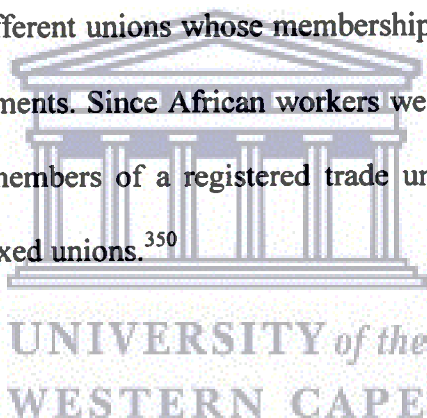
workers.[344] The exclusion of African employees from the whole bargaining concept was not only characterised by the fact that black unions could not register, but that African workers were prohibited from striking and from instigating or inciting others to take part in strikes.[345]

The Act also prohibited the foundation of mixed unions (unions that were confined to white, Asian and coloured employees).[346] Where a trade union already had members of two or more different races, the Act provided that the workers of each particular race should be in separate branches and hold separate meetings.[347] In addition, only white unionists were allowed to hold executive office.[348] It is evident that this legislation implemented a statutory form of job reservation, as it only supported closed shops that were open to a particular race. [349] This would only not be the case if different unions whose membership was open to different races were party to closed shop agreements. Since African workers were not "employees" in terms of the Act, and could not be members of a registered trade union anyway, they were not affected by the prohibition of mixed unions.[350]



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(a) The statutory protection of freedom of association

It is important to note that the Act made two provisions for the statutory protection of freedom of association (of employees). Sec 78(1) forbade an employer to require an employee not to be

[344] Sec 48 (1)-(3).
[345] Sec 18 the 1953 Black Labour Relations Act (Native Labour Act No 48 of 1953).
[346] Sec 4(6). Exemptions were granted to a considerable extent, however, as the employer demanded an appropriate supply of labour. An important example in this regard is the 'permit system' of the engineering industry. In 1969, for instance, at least 13 per cent of production moulders were Africans who were given exemptions, a number which rose to 33 percent in 1971.
[347] Sec 8(3)(a)(aa)-(bb).
[348] Sec 8(3)(a)(cc).
[349] Another important provision in terms of job reservation represented sec 77, which enabled the Minister of Manpower to make a determination to the effect that work of any specified class could be reserved, either partially or wholly, for workers of a particular class.

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or become a member of a union or similar association.[351] Employment contracts which contain such requirements (*yellow dog contracts)* were void. There are different opinions on how to interpret this provision. In his study, le Roux discusses two possible interpretations, of which the first includes not only the right to freedom of association, but also the freedom to dissociate.[352] This interpretation of sec 78(1) is based on the assumption that the word *not* qualifies only *be*. According to the second interpretation, the employer is prevented from requiring an employee not to be or not to become a member of a trade union. Point of departure for this interpretation is the assumption that the word *not* qualifies *become* as well as *be*.[353] Others support this interpretation, as sec 78(1) contains no express reference to a right not to join a union.[354] In a case which dealt with non-statutory closed shop, the Appellate Division did not even consider sec 78(1).[355] It is furthermore submitted that the statutory protection of the freedom to dissociate contradicts one of the basic aims of the Act, i.e. the promotion of collective bargaining.[356] It is clear, however, that this discussion would only be relevant in regard to non-statutory closed shops, as sec 24(1) expressly provides for statutory closed shops and would be meaningless if sec 78 was applicable to them as well.

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The second provision in terms of freedom of association, is sec 66(1)(c), which protected employees from *victimisation*, i.e. from being dismissed or otherwise discriminated against for

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[350] It is interesting to note, that, although the Botha Commission also objected to "associating Europeans and non-Europeans in the same union", it did not recommend the prohibition of mixed unions, but merely the prohibition of closed shop agreements by those unions. Cf. par. 848-849.

[351] Sec 78(1) of the Industrial Conciliation Act of 1956 reads as follows: "No employer shall require of any employee whether by a term or condition of employment or otherwise that that employee shall not be or become a member of a trade union, or other similar association of employees and such term or condition in any contract of employment, entered into before or after the commencement of this Act, shall be void."

[352] Le Roux *The Closed Shop - Agreements entered into outside the scope of the Industrial Conciliation Act 28 of 1956* (1981) *MB* p 64. This view is supported by Du Toit *et al op.cit.* p 70.

[353] This interpretation is supported by the wording of the Afrikaans text of the Act.

[354] Rycroft & Jordaan *A guide to South Africa labour law* (1992) p 131.

[355] *Amalgamated Clothing & Textile Workers Union v Veldspun Ltd* 1994 *SALR* (1) 162 (A).

[356] Rycroft & Jordaan *op.cit.* p 130.

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belonging to a union or participating in its (lawful) activities (including its foundation).[357] This means victimisation must relate to past, present or intended membership of a trade union. In terms of a closed shop, this provision might only become significant thereby, if a dismissal was not based on *failing to be a member* of the particular union (which is a party to the agreement) but based instead on *being* a member of the union which is not party to the closed shop agreement.[358] The courts found that victimisation in terms of sec 66(1)(c) must constitute the *effective cause* of the dismissal, irrespective of other reasons.[359] The Industrial Court held that sec 66(1)(c) is contravened, where an employee is victimised by reason of the fact that he was a member of *any* union, *or* where he was victimised because he was a member of a *particular* trade union.[360]

(b) The closed shop

In terms of the establishment of closed shop, the Act represented a major change, as it provided expressly for the inclusion of closed shop provisions in agreements of industrial councils or conciliation boards.[361] Sec 24(1)(x) specified the requirements for the so-called

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[357] Sec 66(1)(c) provides as follows:

"(1) Any employer who . . . dismisses any employee employed by him or reduces the rate of his remuneration or alters the terms and conditions of employment to terms or conditions less favourable to him or alters his position relatively to other employees employed by him to disadvantage, by reason of the fact, or because he suspects or believes, whether or not the suspicion or belief is justified or correct, that

- that employee belongs or has belonged to any trade union or any other similar association of employees or takes or has taken part outside working hours or, with the consent of the employer, within working hours, in the formation of or in the lawful activities of any such trade unions or association shall be guilty of an offence".

[358] If the dismissal is based on the fact that the employee refuses to join the union, it does not contravene sec 66(1), as the motive for the dismissal is then not that the employee belonged to a union, but that he refused to belong to a union. See Le Roux *The Closed Shop - Agreements entered into outside the scope of the Industrial Conciliation Act 18 of 1956.*

[359] *R v Bassa* 1944 NPD 239; *R v Wilson* 1948(1) SA 1170 (T); *NUFW v Champ Food Manufacturing Group* (1988) 9 *ILJ* 469 (IC) 479I-J.

[360] *Mazibuko v Mooi River Textiles Ltd* (1989) 10 *ILJ* 875 (IC).

[361] The function of industrial councils compares to the one described *supra* in terms of the 1924 ICA. Sec 23 of the ICA of 1956 stated that they are "to endeavour by the negotiation of agreements or

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regulated statutory closed shop.[362] Furthermore, it was possible to conclude closed shops in terms of sec 24(1). These agreements were called *non-regulated statutory closed shop* agreements, since sec 24(1) did not contain any specifications in regard to closed shops.[363] Finally, it will be necessary to consider *non-statutory closed shops*, which were not negotiated within the terms of the Industrial Conciliation Act.[364]

(aa) The regulated statutory closed shop

Sec 24(1)(x) of the Industrial Conciliation Act provided that an industrial council agreement may contain the

> prohibition of the employment by an employer who is a party to the agreement or who is a member of an employers' organisation which is a party to the agreement, of employees or employees of a particular class, who, while being eligible for membership of a trade union which is a party to the agreement, are not members of such union . . .

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Sec 24 (1)(x) did not apply to the employment of African workers as they were not *employees* in terms of the Act. They were thus unable to install a regulated closed shop. The situation was different as regards Asian and Coloured, workers who fell within the definition of *employees*. Owing to their race, however, they were often barred from union membership. Since they were thus not "eligible for membership", the employer was free to employ these

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otherwise to prevent disputes from arising, and to settle disputes that have arisen or may arise . . . and (to) take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest to employers or employers' organizations and employees or trade unions". They consisted of an equal number of representatives of employers and employees. The Act also provided for conciliation boards (sec 35, sec 36, sec 37). The agreements of industrial councils and conciliation boards must, according to sec 48 (1), be declared binding and published in the Government Gazette by the Minister of Manpower to bind non-members of the union employed by the employer. An agreement reached at an industrial council or a conciliation board which is not promulgated is not enforceable.

362 *Infra* par. (aa).

363 *Infra* par. (bb).

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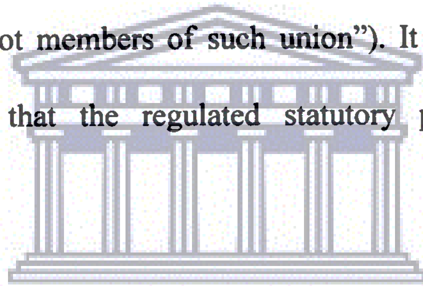
workers. The phrase "employees of a particular class" could refer to any classification of employees which was deemed advisable (such as according to skills). Any differentiation based on sex, race or colour was prohibited, however.[365] Thus it was not possible to exclude workers from the factory or industry concerned by means of regulated statutory closed shop agreements, if such exclusion was based on racial grounds.[366] It will be shown later that the closed shop in general nevertheless remained a possible means of job reservation, thus making it difficult to regard the provisions of sec 24(1)(x) as *safeguards*.

In regard to these safeguards, it is worth mentioning that sec 24(1)(x) allowed for the conclusion of *post-entry* and *pre-entry* closed shops ("the prohibition of employment of employees . . . who . . . *are* not members of such union"). It was only in 1981, after the amendment of sec 24(1)(x), that the regulated statutory pre-entry closed shop was prohibited.[367]



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Sec 24(1)(x) did not only provide for the prohibition of employers employing non-union-members. It furthermore allowed for the

> prohibition of the acceptance by members of such trade union or by members of a particular class of such members of employment with an employer who is neither a party to such agreement nor a member of an employers' organization which is a party to such agreement.

Both the employer and the employee could thus be compelled to enter into a contract of employment only with parties to the agreement, or with members of associations which were parties to the agreement, respectively. This form of closed shop is known as *reciprocal closed*

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364 *Infra* par. (cc).
365 Sec 24(2). The reference to differentiation based on 'sex' was only introduced in 1981.
366 Le Roux *The closed shop and the Industrial Conciliation Act* (1980) *MB* p 69.

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shop. In contrast to the USA and Britain, the reciprocal closed shop has been a common practice in South Africa since at least the 1940s.[368]

The statutory closed shop regime envisaged by the Industrial Conciliation Act of 1956 was, following the recommendations of the Botha Commission, subject to further safeguards aimed at preventing or lessening iniquities:

- It was the normal rule that any agreement which was binding for members of a trade union or employers' organisation remained binding for such members even when they ceased to be members.[369] The Act provided for an exemption in regard to statutory closed shop agreements.[370]

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- Exemption from any provisions of an agreement, including closed shop provisions, could be granted.[371]

- Any person who had been refused membership or had been expelled from a union or employers' organisation, could apply to the Minister of Manpower for a "direction" that the closed shop would not apply in respect to such a person.[372] The employee who faced dismissal enjoyed a 30 day period of grace from the time of his expulsion.[373]

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[367] *Infra* par. 4.2.3.

[368] Cf. Rp. 60/1981 of the NMC p 17. The first national agreement containing a reciprocal closed shop provision was concluded in 1944 in the engineering industry.

[369] Sec 50(1).

[370] Sec 50(1)(a).

[371] Sec 51(1)-(9) and (11). See, for example, *MWA-SA v Die Morester en Noord-Transvaler* (1991) 12 *ILJ* 802 (LAC), a case in which the application for exemption failed.

[372] Sec 51(10) and (11). There is no protection available if the employee voluntarily resigns from the union. See Marius Olivier *Freedom of Association and closed shop agreements* (1994) *DR* p 353.

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- A closed shop agreement did not become binding, unless it covered the majority of the employees.[374] The Minister of Manpower must have been satisfied that more than half the employees in those occupations to which the closed shop provision applied, who were members in good standing of the trade union concerned, were employed by employers who were parties to the agreement or who were members of an employers' organisation which was a party to the agreement. This applied similarly to arbitration awards which contained any provision such as was referred to in sec 24(1)(x).[375]

- The contravention of a closed shop provision constituted a criminal offence.[376]

(bb) The non-regulated statutory closed shop

One could argue that the fact that the Act provided for safeguards to protect workers from iniquities shows that all closed shop agreements are subject to these qualifications. Otherwise, the purpose of these safeguards might not be achieved. However, the fact that the Act did not specifically provide for closed shops which differ from the one described in sec 24(1)(x), for instance by not being reciprocal, did not necessarily mean that other forms of closed shop were prohibited.[377] Indeed, the so-called *non-regulated statutory closed shop* has been a common practice in South Africa, although it is not subject to the same legal protection as that of regulated statutory closed shop. It is based on sec 24(1), which states that

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[373] Sec 51(10).
[374] Sec 48(8).
[375] Sec 49(1).
[376] Sec 53. See, for example, *MWA-SA v Die Morester en Noord-Transvaler* (1991) 12 *ILJ* 802 (LAC); *SACWU and others v Storm Plastics (Pty) Ltd* (1993) 14 *ILJ* 367 (LAC).
[377] See le Roux *The closed shop and the Industrial Conciliation Act* p 72.

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> any matter affecting or connected with the remuneration or other terms or conditions of employment of all employees or of the members of any class or classes of employees . . . or . . . any matter whatsoever of mutual interest to employers and employees

may be included in an industrial agreement. This phrase was broadly interpreted by the courts as covering non-regulated closed shops as well.[378] Thus it was possible to elude the statutory safeguards provided for the regulated statutory closed shop, specifically those that relate to sec 24(1)(x), e.g. those concerning representativeness during the initial negotiation of the agreement (sec 48(8)) and exemptions (sec 51(1)). Since non-regulated closed shop provisions are published in industrial agreements some safeguards apply, however, for example that the provisions must be renegotiated when the agreement expires.[379] Le Roux submits examples of closed shop provisions which show that, depending on the wording of the agreement, the non-regulated closed shop can basically be used to exclude workers on racial grounds.[380] For instance, there is a clause found in some agreements, which is similar to the wording of sec 24(1)(x). In contrast to this provision, though, the reference to the eligibility of union membership is omitted.[381] Thus workers who are "employees" in terms of the Act but who are, due to the agreement, not "eligible" for trade union membership, are excluded and thus discriminated against on grounds of race. Another similar example is a closed shop agreement in the engineering industry which was concluded between certain employers' organisations and trade unions in the Iron, Steel, Engineering and Metallurgical Industry in 1968, where the

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[378] *Rand Tyres and Accessories (Pty) Ltd and Appel v The Industrial Council for the Motor Industry (Transvaal), Minister of Labour, and Minister for Justice* 1941 TPD 108 115.

[379] See Rp. 42/1986 of the National Manpower Commission Ch. 4 par. 2.4.

[380] Le Roux *The closed shop and the Industrial Conciliation Act* p 73.

[381] The example cited by le Roux refers to an agreement of the Industrial Council for the Canvas Goods Industry, Witwatersrand and Pretoria, which provided that "No member of the SA Canvas and Ropeworkers Union shall accept employment with any employer who is not a member of the Transvaal Canvas Goods Manufacturers' Association and no member of the Transvaal Canvas Goods Manufacturers' Association shall give employment to any employee who is not a member of the SA Canvas and Ropeworkers Union" [R 2261 *GG* 1978 11 17].

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unions enforced a clause which excluded African workers from higher paid work categories.[382] Clause 1(1) of Part 3 reads as follows:

> No employee may be taken into service to do work . . . unless he is acceptable as a member of any of the trade unions which are parties to the agreement.

The clause differs from sec 24(1)(x) of the ICA, since it refers to the eligibility of the employee and not his membership of a trade union. Hence it could not be concluded in terms of sec 24(1)(x). This clause was even extended by the Minister of Labour to include non-party employers and non-party African workers. The validity of the agreement was upheld by the Appellate Division, although it clearly represented a means of job reservation.[383]

(cc) The common-law or non-statutory closed shop

Besides the two types of closed shops described above, the practice of closed shops which fall outside the scope of the Industrial Conciliation Act of 1956 is also to be found in South Africa, especially in the mining industry.[384] Agreements containing this type of closed shop are not negotiated within industrial councils or conciliation boards. They are purely contractual relationships, and are thus also called *private closed shops*.[385] They can be included in unpublished agreements[386] or practised as a condition of employment based purely

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[382] Published in the *GG* of 19th April 1968 as an annexure to Goverment Notice 2046.
[383] *SEC v Universal Iron and Steel Foundries (Pty) Ltd en andere* (1971) *SA* 4 p 355.
[384] See the examples of such an agreement between the *Gold Producers' Committee of the Chamber of Mines* and the three *Associations of Mining Officials* of 1969 in Rp. 60/1981 of the National Manpower Commission Ch. II par. 5.2. It is important to note that the closed shop in the mining industry is *unilateral,* i.e. the union members were free to enter into employment with any employer, including one who is not party to the agreement (Rp. 42/1986 of the National Manpower Commission Ch. 3 par. 2.1.3.2.1).
[385] Lever *op.cit.* p 11.
[386] Sec 31 of the Industrial Conciliation Act of 1956.

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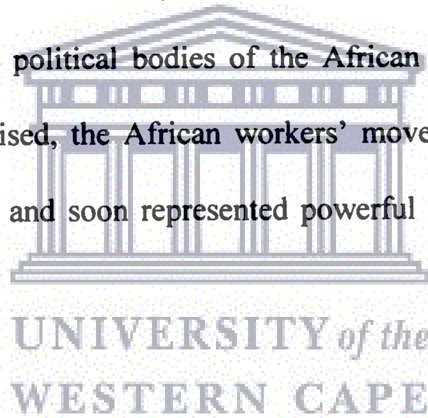
on tradition or on an understanding between employer and union.[387] Clearly, the safeguards provided for statutory closed shops do not apply, and neither of course do the safeguards provided for the regulated statutory closed shop.[388] In *Matthews and others v Young*[389] and *R v Daleski*[390] the courts held that the non-statutory closed shop was not invalid in terms of the common law.[391] Some authors, however, argue that the non-statutory closed shop would contradict sec 78(1) of the Industrial Conciliation Act of 1956, as this provision contains the freedom to dissociate.[392]

4.2 The closed shop in the post Wiehahn era

A change of the racially exclusive labour system was in sight after the outbreak of strikes in the early 1970s. Although the political bodies of the African population were banned and black trade unions not recognised, the African workers' movement was greatly increasing. Unrecognised unions emerged and soon represented powerful bodies against both state and employers.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Black resistance,[393] coupled with increasing pressure from the international community and economic development, forced the Government to change its labour policies, as it became

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[387] van Zyl *The closed shop: development in South Africa* (1982) *SAJLR* vol. 6 no 2 p 14.
[388] *Supra* par. (bb).
[389] 1922 AD 492.
[390] 1933 TPD 47. At the time of both decisions, though, there were no statutory closed shops, as the Industrial Conciliation Act of 1924 made no provision for them.
[391] It must be borne in mind that these decisions were made before 1956, and thus omit considerations regarding the public policies of the Industrial Conciliation Act. See *Veldspun (Pty) Ltd v Amalgamated Clothing & Textile Workers Union of South Africa & another* (1992) 12 *ILJ* 41 (E).
[392] Grogan *Collective Labour Law* (1993) p 8. See *supra* par. 4.1.4 (a).
[393] After a series of strikes by African workers, the government was prepared to amend the Black Labour Relations Regulation Act in 1975, to improve the conciliation system between black employees and their employers. However, the Amendment Act was heavily criticised. One reason was that its effect was to strengthen the works committees and thus weaken black trade unions. Moreover, it was objected that the Amendment Act allowed only limited rights compared to the

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evident that skilled labour was a presupposition of economic stability.[394] With the decreased influx of skilled immigrants, African workers were increasingly needed to fill the gap.[395] In 1977, the Wiehahn Commission was entrusted with making recommendations regarding a new labour legislation.

4.2.1 Deracialisation

It was not until 1979 that African workers were included in the system of collective bargaining, as they were no longer excluded from being "employees" in terms of the Industrial Conciliation Act.[396] This amendment had *inter alia* the consequence that African workers had to be taken into account, in terms of the representativeness of trade unions.

However, it was only in 1981 that all references to race were removed from South African labour legislation.[397] Henceforth, every worker (excluding those in agriculture and domestic service) could join a trade union of his choice, subject to the trade union's constitution. Furthermore, the prohibition of mixed unions, introduced in 1956, was removed. Henceforth, unions that were open to workers of different races could be founded again, and the former requirement that one race dominate the administration of a mixed union was abandoned.[398]

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1956 LRA, which applied to other population groups. Cf. ILO's Report of the Fact Finding Commission on Freedom of Association in South Africa of 1992 p 33.

[394] See Thompson *Strategy and Opportunism: Trade Unions as Agents for Change in South Africa* (1992) in *9th World Congress of the International Industrial Relations Association: Theme 4* p 119.

[395] See Ch. 1 par. 1.2 of the Wiehahn Report (Report of the *Commission of Inquiry into Labour Legislation*, Part 1, Rp. 47/1979).

[396] Sec 1(c) of the Industrial Conciliation Amendment Act 94 of 1979. It was only in 1981, however, that the definition of 'employee' was also extended to 'foreign' African workers.

[397] Act 57 of 1981. This statute simultaneously changed the Act's name to "Labour Relations Act".

[398] In the case of already registered unions, however, the Act maintained the restriction on the election of office-bearers to white employees.

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4.2.2 Dissent about the closed shop

As regards the recommendations made by the Commission in terms of closed shop arrangements, it stated that the

> closed shop practice is so firmly entrenched in South Africa that it cannot be abolished. Any attempt to do so at this particular point in the history of the trade union movement in South Africa would not only arouse opposition but would be viewed with a great deal of suspicion and distrust.[399]

It recommended, however, that the status quo be maintained "subject to constant surveillance by the National Manpower Commission to prevent abuses".[400] The recommendation was made subject to the admission of African workers to industrial councils. It was based on the assumption that the removal of the closed shop practice would be averred by the black unions because "they were being denied a privilege on the basis of past events over which they had no control".[401] However, it is interesting to note that the Commission experienced "a much greater degree of absolute rejection of the closed shop practice"[402], whereas the Botha Commission had discovered that both employers and employees were "to an overwhelming extent"[403] in favour of the retention of closed shop clauses in industrial agreements.

In a minority statement, some members of the Commission dissented from the recommendations made by the majority. They were of the opinion that it "is unacceptable that it should be recommended on the one hand that work reservation be abolished and on the

[399] Par. 3.101.2.
[400] Par. 3.101.5.
[401] *Ibid.*
[402] Par. 3.99.
[403] *Op.cit.* par. 842.

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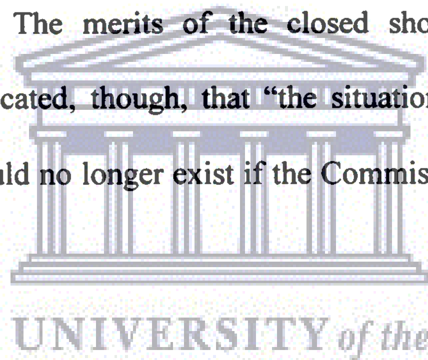
other that its commonest forms should be perpetuated and statutorily sanctioned."[404] They indicated that a "prohibition on closed shop agreements in a situation of union plurality is a self-evident necessity if extreme inter-union and union-employer tensions - with the danger of industrial unrest on lines - are to be avoided".[405] Indeed, it was arguable that it was inconsequent to long for union plurality on the one hand, and the maintenance of closed shops on the other, as the closed shop is a feature of a majoritarian system (at least as regards closed shops where only a single union is party to the closed shop agreement). Thus, there is a contrast between union plurality and the closed shop practice. It was furthermore held that the closed shop would stand in direct contradiction of fundamental principles, such as minimal state intervention in private relationships and freedom of association ("with its corollary of the freedom not to associate"[406]). The merits of the closed shop practice were, however, acknowledged. It was also indicated, though, that "the situation in which the closed shop could in the past be applied would no longer exist if the Commission's recommendations . . . were to put into practice".[407]



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In its White Paper on Part 1 of the Wiehahn Report, the Government considered the minority recommendation to be the more logical one.[408] It was stated that

> untenable threats to labour peace within individual enterprises and in entire industries, with an undertone of racial conflict, are foreseen should it be possible to conclude agreements of this nature with one or more trade unions in a situation of racially based trade union plurality.

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[404] Par. 3.103.1.
[405] Par. 3.103.3.
[406] Par. 3.103.6.
[407] Par. 3.103.7.
[408] *White Paper on Part 1 of the Report of the Commission of Inquiry into Labour Legislation* [Rp. 47/1979] p 18.

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Nevertheless, it held that the closed shop should not be generally prohibited at that stage, while further advice thereon was awaited from the newly established National Manpower Commission.[409] In the meantime, the closed shop practice became suspended and no further agreements of this nature were permitted, but existing agreements were, depending on the wishes of the parties concerned, permitted to remain in force.[410]

4.2.3 The National Manpower Commission Reports of 1981 and 1986

The government advised the National Manpower Commission[411] to offer guidance with regard to either the complete prohibition or control of the closed shop practice in South Africa. The Commission concluded in its first report on the closed shop that

> although there are strong philosophical and practical objections to the closed shop it is a long established practice in South Africa the retention of which will on balance probably have more advantages than disadvantages in the maintenance of industrial peace and the promotion of sound and stable industrial relations. . . . it is a way of recognising that trade unions need some sort of security arrangements . . . because of the role they play in the . . . promotion of sound and stable industrial relations.[412]

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Consequently, the majority of the Commission's members recommended that the suspension of and prohibition on further closed shop agreements be lifted. However, the Commission was aware of the fact that there was a need for additional safeguards. The most important guidelines given by the Commission read as follows:[413]

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[409] *Ibid.*
[410] *Ibid.*
[411] The establishment of this Commission had been recommended by the Wiehahn Commission, in order to submit recommendations to the Minister on all labour matters including labour policy, and to submit recommendations on matters, of administrative routine referred to it by the Minister. Cf. Ch. 2 par. 2.18 of the Wiehahn Report.
[412] Rp. 60/1981 Ch. V par. 4.1.
[413] *Op.cit.* par. 4.2.

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- Only post-entry closed shop should be declared legal.[414]

- One should aim at concluding closed shop agreements only within the ambit of the Industrial Conciliation Act of 1956. Alternatively, non-statutory closed shops should be subject to the same safeguards as their statutory counterparts.[415]

- The legal conclusion of a closed shop agreement should be subject to the support of the majority of the affected employees (indicated in a secret ballot).

- There should be a possibility of periodical re-negotiating of closed shop agreements.

- There should be a statutory prohibition of job reservation or discrimination, whether explicit or implicit, entailed in an closed shop agreement.

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- There should be the possibility of exemption for any person who objects to joining a trade union on the grounds of "deep personal conviction".

- It is desirable that all agreements on conditions of employment should come within the framework of South Africa's labour legislation.

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[414] The National Manpower Commission established that 88 per cent of the closed shop agreements published contained pre-entry clauses [par.4.2.1].

[415] The National Manpower Commission, however, was not prepared to make recommendations on the matter in this report, as it implies far-reaching consequences in regard to freedom of contract for instance. This matter was dealt with in the second report of 1985 [*op.cit.* par. 4.2.2].

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In 1981, sec 24(1)(x) was amended.[416] Henceforth it provided for post-entry closed shops (non-regulated statutory closed shops and non-statutory closed shops, however, were not subject to the safeguards of sec 24(1)(x) and could still be established as pre-entry closed shops). The employee or employer respectively must become a trade union member within 90 days.[417] Furthermore, periodical renegotiating became necessary, since the closed shop agreement would remain in force only for a specific period of time.[418] However, the amendment did not follow all the recommendations made by the Commission.

Some of these recommendations were dealt with in depth by the Commission in 1985: it examined *inter alia* whether or not it would be desirable that non-statutory closed shop agreements should also be subject to the safeguards of the Labour Relations Act. The Commission came to the conclusion that in this regard there are "in principle . . . no real reasons why the safeguards applicable to closed shop arrangements under sec 24(1)(x) of the LRA should not be extended to closed shop arrangements outside the ambit of the LRA as well".[419] However, even between 1988 and 1991, when the right not to join a union was

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[416] Henceforth a closed shop agreement was defined as "the prohibition of the
(i) continued employment by an employer who is a party to the agreement, or who is a member of an employers' organisation which is a party to the agreement, of employees or employees of a particular class, who, while being eligible for membership of a trade union which is a party to the agreement, are not members of such union at the date of coming into operation of such prohibition and do not become members within a period of 90 days from the date of entering into operation of such prohibition or from the date of entering into employment where the entering into employment takes place after the date of coming into operation of the prohibition; and
(ii) continued service of members of such trade union or of a particular class of such members with an employer who at the date of coming into operation of such prohibition is neither a party to such agreement nor a member of an employers' organisation which is a party to such agreement and who does not within a period of 90 days after the date of coming into operation of such prohibition or after the date of employment, where the employment takes place after the date of coming into operation of the prohibition, become a party to such agreement or a member of an employers' organisation which is a party to such agreement".

[417] This rule could also be applied to employees already employed at the commencement of the agreement.

[418] Sec 24(1)(x) and 48 of the 1956 LRA.

[419] Rp. 42/1986 Ch. 4 par. 6.1.

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acknowledged, the courts were not prepared to abandon the non-statutory closed shop practice.[420]

Another issue concerned the necessity for a secret ballot purporting to establish whether the closed shop is appreciated by the majority of employees. The majority of the Commission's members found that a ballot would "ensure that the norms of reasonableness and fairness and the principle of freedom of association continue to be upheld".[421] However, only since the enactment of the new LRA of 1995, is a secret ballot provided for statutorily.[422]

4.2.4 The closed shop and the unfair labour practice definition

In regard to the closed shop practice it is also necessary to consider the newly established concept of *unfair labour practice*.[423] This provided *inter alia* protection against infringements of freedom of association. Whether a labour practice was "unfair" or not, was left to the courts' interpretation.[424] It represented a flexible concept, as "fairness" had to be determined with reference to the circumstances of the particular case.[425] If the court found that a particular practice would fall within the ambit of the unfair labour practice definition, it would have to remedy that situation with an appropriate order.[426]

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[420] See *infra* par. 4.2.4.

[421] *Op.cit.* Ch. 5 par. 4.1(b).

[422] Sec 26(3)(a) and (b) of the 1995 Labour Relations Act.

[423] The definition of 'unfair labour practice' was amended in 1980 (Act No 95), in 1988 (Act No 83) and in 1991 (Act No 9). The Act of 1979 left the definition of 'unfair labour practice' to the industrial court.

[424] Following the recommendation of the Wiehahn Commission, the *industrial courts* were established, in order to solve disputes and thus prevent industrial action. In fact, they are not regarded as courts of law, but as quasi judicial administrative tribunals whose rulings can be reviewed by the Supreme Court. The industrial court is also intended to regulate and set objective guidelines for the unfair labour practice concept. See Poolman *Equity, the Court and Labour Relations* (1988) p 3.

[425] See *SADWU v The Diamond Cutter's Association of South Africa*(1982) 3 *ILJ* 87 (IC) at 101F. Cf. also Brassey *et al* p 226.

[426] Rycroft and Jordaan *op.cit.* p 156.

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The first important case dealing with the question whether a closed shop agreement constitutes an unfair labour practice was *Mynwerkersunie v O'Okiep Copper Co Ltd en'n Ander*.[427] The facts of the case were that the MWU, the applicant, had lost its representativeness in the workplace and the concomitant benefits of a closed shop agreement, after many of its members had been dismissed for striking. The company then extended its closed shop agreement with the AEU. The MWU alleged that this constituted an unfair labour practice, on the grounds that the closed shop was unfairly prejudicial to its interests and denied employees the right to decide which union they preferred to join. The Court held, however, that closed shop agreements are an accepted practice in South African industrial relations. According to the judgement, closed shops were not *per se* an illegitimate incursion into freedom of association or unfairly prejudicial to the employees they govern, since any union was subject to the same policy, namely that of being representative.

In *Black Allied Workers Union and Others v Initial Laundries (Pty) Ltd and Another*, the Industrial Court had to decide whether the *dismissal* of several employees (and not the closed shop agreements in themselves) for refusing to remain member of a union in terms of a closed shop agreement, constituted an unfair labour practice. The employees concerned had voluntarily resigned from a union which was a party to this agreement (which was a non-regulated closed shop agreement, because the 90 day period in terms of sec 24(1)(x) did not apply). The Court argued that

> In view of the criminal sanctions attached by s 53 to a failure to comply with the provisions of the main agreement first respondent had no option but to terminate the other applicants' employment once they had resigned from the Laundry Union and had made it clear that they

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> had no intention of rejoining that union. To have acted otherwise would have rendered first respondent liable to the penal sanctions provided for by s 53. The termination of the other applicants' employment can therefore not be regarded as an unfair labour practice as contemplated by s 46(9).[428]

A closed shop agreement was held to constitute an unfair labour practice, for instance, in *Chamber of Mines v Mineworkers Union*, where a closed shop favoured members of one race group against fair competition from those of another.[429] In *National Automobile and Allied Workers Union (NAAWU) v ADE(Pty) Ltd*, the Court decided that unfair labour practice could also include the abovementioned victimisation in terms of sec 66(1).[430]

In 1988 a new unfair labour practice definition was introduced. Prior to this amendment, the only statutory protection of freedom of association was provided for by sec 66(1) and sec 78.[431] Henceforth, subsection (j) of the definition expressly included the right *not* to associate, by recognising that "subject to the provisions of this Act, the direct or indirect interference with the right of employees to associate or not to associate . . ." would constitute an unfair labour practice.[432] In *Mazibuko v Mooi River Textiles Ltd*, for instance, the court held that a non-statutory closed shop would, according to the new definition, constitute an unfair labour practice, as it would interfere with the employee's right not to associate.[433] The courts, however, were not prepared to regard the non-statutory closed shop as an unfair labour

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427 (1983) 4 *ILJ* 140 (IC).
428 (1988) 9 *ILJ* 272 (IC) at 282G-I.
429 (1989) 10 *ILJ* 133 (IC).
430 (1990) 11 *ILJ* 342 (IC). See also *UAMAWU v Fodens SA* (1983) 4 *ILJ* 212 (IC); *Black Allied Shop Offices and Distributive Trade Workers Union v Homegas* (1986) 7 *ILJ* 411 (IC).
431 *Supra* par. 4.1.4 (a).
432 Du Toit *et al* argued that this would "undermine the positive element" of freedom of association - *op.cit.* p 64.
433 (1989) 10 *ILJ* 875 (IC).

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practice *per se*, although the right not to associate was explicitly recognised by par (j) of the unfair labour practice definition.[434]

In 1991 however, the Act was amended again, after years of sustained protest.[435] Henceforth there was no express reference to a right not to associate. The provision was open-ended and it would therefore be left to the courts to determine whether a closed shop could constitute an unfair labour practice. An important case in this regard is *ACTWUSA v Veldspun (pty) Ltd*,[436] which dealt with a non-statutory closed shop (agency shop), where it was *inter alia* questioned whether it would constitute an unfair labour practice. The Appellate Division argued that the deletion of par (j) of sec 1 would restore the pre-1988 position. Owing to the fact that, during this time, the closed shop was not contra public policy, the court concluded the same to be the case after the amendment of 1991.[437] The judgement was criticised as it did not refer to sec 1(4), which stated that the fact that specifically unfair labour practices had been part of the repealed 1988-definition did not necessarily mean that they should now be regarded as excluded from the definition.[438] It was furthermore objected that there were numerous safeguards against possible unfair labour consequences of statutory closed shops, constituting an indirect but strong indication that the legislation disapproved of other non-statutory

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[434] See *Mbobo v Randfontain Estate Gold Mining Co* 1992 *ILJ* 1485 (IC). In this judgement, it was argued that par. (a)-(o) of the unfair labour practice definition would not per definition represent an unfair labour practice. The court would have to determine whether the particular practice was unfair or not. This interpretation is at least doubtful as regards the wording of the introductory part of the definition 'and shall *include* the following . . .' (italics added). Cf. *Veldspun (Pty) Ltd v Amalgamated Clothing & Textile Workers Union of South Africa & Another* (1992) 12 *ILJ* 41 (E) 65D-67B.

[435] Labour Relations Amendment Act No 9 of 1991. It is estimated, for instance, that 3 million workers took part in a stay-away in September 1988, organised in joint protest against the apartheid legislation. See Report of the FFC p 39. For the development of the 1991 amendment, see also Albertyn *Freedom of Association* (1991) *SAHRLLY* p 312.

[436] (1994) 1 SA 162 (A).

[437] 175H.

[438] Olivier and Potgieter *op.cit.* p 463.

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arrangements.[439] Although the courts were not prepared to abandon the non-statutory closed shop practice they subjected it to democratic controls over its creation and application as an "absolute precondition",[440] a demand that had already been made by Albertyn in 1989.[441] He states that

> the debate on the closed shop has focused too much on the simple question: should the closed shop be permitted or not? That question should be replaced . . . by the far more fertile and interesting question: what should the legislature provide as the democratic controls upon the operation of the closed shop?[442]

The most important of these controls refer to the necessity to ensure that a significant majority of the workers must be in favour of the establishment of the closed shop and its continuation. This should be determined by way of a ballot which is conducted before the commencement of the closed shop agreement and once a year or once every two years after the commencement.[443] He suggests that the workers should be entitled to trigger a ballot on the continuation of the closed shop. Furthermore, he demands that the conditions of membership of the union are reasonable, not oppressive and open to judicial review. The closed shop union must have a duty to admit as members every worker falling within the bargaining unit, irrespective of the worker's race. The workers should also be free to join another trade union

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[439] *Ibid.* See also the statement made by Erasmus in a concurring judgement in *Veldspun (pty) Ltd v ACTWUSA*: "The fact that the Act permits the imposition of a statutory closed shop only in strictly controlled circumstances and then carefully limits its effect on employees affected thereby, is in my view an indirect but strong indication that the legislation disapproves of other, non-statutory, arrangements" [(1992) *ILJ* 41 (E) 65B-C].

[440] *Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town* (1994) 15 *ILJ* 348 (IC) at 356H. The industrial court stated, however, that an interference with the worker's right of freedom of association may be considered only if "depending on the circumstances . . . the advantages and more particularly the dire and compulsive need for such system outweighs the oblique and *perhaps* slight interference with the worker's 'right not to associate' (This however will by no means be easily presumed)" [at 356E-F].

[441] *Freedom of Association and the Morality of the Closed Shop* (1989) *ILJ* 981.

[442] *Ibid* p 999.

[443] *Ibid.*

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of his choice in addition to the closed shop union. Finally, the union should not be affiliated to a political party in order to protect the political rights of the employees. This could be ensured by the establishment of a separate political fund out of which the union finances its political activities. The members who object to the political activities of the union would be obliged to contribute only to the general fund of the union.[444]

Albertyn's article was comprehensively considered in *Cape Town Municipal Professional Staff Association v Municipality of the City of Cape Town.*[445] The court found that the democratic controls (and the requirement of a ballot in particular) were necessary to "rid the closed-shop provisions . . . of their inherent unfairness . . . in impinging upon an employee's right to freedom of association".[446] The court made an important statement as regards the question of when a closed shop constitutes an unfair labour practice. The court argued that it cannot be contended that a closed-shop arrangement *per se* must necessarily constitute an unfair labour practice. Examples for admissible union security agreements refer to the protection of skilled workers and (under certain circumstances) the conclusion of an agency shop agreement.[447] However, the court also stated that "the sight of a 'forced rider' certainly fills us with misgiving".[448] Therefore it held that it is

> absolute necessary that all such democratic controls that are relevant and possible be scrupulously imposed and observed. This as we see is an absolute precondition. In the end we submit that the ultimate test for fairness will be that the stringent standards and precepts of a truly democratic society relating to the principles of personal and individual freedom, will have to be adequately accommodated.[449]

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[444] *Op.cit.* p 1002.
[445] (1994) 15 *ILJ* 348 (IC).
[446] 357B-C.
[447] 356C-F.
[448] 356F.
[449] 356G-H.

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It can be assumed that Albertyn's article and this judgement have had an important impact on the making of the LRA of 1995, since sec 25 and sec 26 of this statute are indeed fitted with the democratic controls demanded by Albertyn and the court.[450]

It is interesting to note that, although the 1988 unfair labour practice definition of the Labour Relations Act was amended, the unfair labour practice definition of the public service legislation and regulations explicitly recognised the freedom not to associate.[451] The 1995 Labour Relations Act, however, repealed the public service legislation.[452]

4.5 The 1995 Labour Relations Act

In 1994 the new government approved the appointment of a Legal Task Team which, assisted by the ILO, produced a draft Bill for a comprehensive new labour relations legislation.[453] This Bill was published in February 1995.[454] In September 1995, after certain amendments had been made, parliament passed the Act. The new Act brings about important changes to the previous legislation. These changes were made with regard to various reasons, of which a complete analysis would be the task of a separate study.[455] The statute was not only aimed at removing the injustices of the old system, but also at raising South African labour law to

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[450] *Infra* par 4.5.

[451] Sec 4(1), (6) and (7) of the Public Service Labour Relations Act 1994, promulgated by Proclamation No 105 of 1994; sec 5(1)(a) of the Education Labour Relations Act 146 of 1993; r 3(1) of the South African Police Labour Regulation 1995, published in terms of the South African Police Services Rationalization Proclamation 5 of 1995. In fact, according to Olivier and Potgieter, there have been no closed shop agreements in the public service (*op.cit.* p 454).

[452] Sec 213 in connection with Schedule 6 of the LRA of 1995.

[453] For a more detailed description of the process, see the Explanatory Memorandum of the Labour Relations Bill of 1995. See also du Toit *et al op.cit.* pp 17-26.

[454] *GG* 10 February 1996.

[455] For a comprehensive overview of the features of and changes to the new LRA, see du Toit *et al op.cit.* pp 32-38; Thompson and Benjamin *South African Labour Law* part AA1.

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international standards, bringing about new national policies,[456] and all of course in accordance with the Constitution. The conciliation machinery and procedures have undergone substantial changes. The establishment of a new independent dispute resolution body,[457] for instance, was made with the joint purpose of increasing the numbers of disputes settled and of avoiding industrial action.[458]

Of considerable importance in regard to union security is the establishment of workplace forums and thereby a dual system of bargaining on both the industrial level and on the workplace level. It does not seem, however, that the unions' influence on the workplace level (and thereby their interest in union security arrangements) is significantly diminished, as the workplace forums do not have the same power as German works councils.[459] In addition, it is noteworthy that the South African labour system is not based on industrial unionism as it is the case in Germany[460], although the Act favours bargaining on the industrial level.[461] This means that South African unions are essentially interested in being representative within the workplace, as this is (also) a level where decisions are made.[462]

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In Chapter II, the Act gives expression to various aspects of freedom of association, including the individual freedom of association of both employees and employers.[463] The Act states that every employee has the right "to participate in forming a trade union or federation of trade

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[456] In this regard, it is important to mention the RDP, which includes the achievement of high productivity, improved efficiency, equity and social justice, the inclusion of all sectors under the LRA and the establishment of collective bargaining at national, industrial and workplace levels [par. 3 of the Explanatory Memorandum of the LRA].

[457] Commission for Conciliation, Mediation and Arbitration (CCMA).

[458] Par. 12 of the Explanatory Memorandum of the LRA.

[459] See *supra* par. 3.

[460] See *supra* par. 3.

[461] Thompson and Benjamin *op.cit.* AA 1-2.

[462] The unions' interest in being representative is intensified by the fact that only a representative trade union may apply for the establishment of a workplace forum [sec 80(2) of the LRA].

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unions and to join a trade union subject to its constitution".[464] It furthermore protects participation in trade union activities.[465] Sec 5 expressly protects the rights conferred by the Act.[466] Furthermore, it prohibits discrimination on the grounds of exercising any right conferred by the Act.[467] It outlaws "yellow dog contracts".[468] It prohibits prejudice on the grounds of union membership[469] or on the grounds of non-fulfilment of unlawful requirements.[470] The right of the employee to dissociate, however, is not mentioned. This is not surprising, of course, as the Act provides for closed shops.[471]

The Act also provides for the protection of the collective aspect of freedom of association, that is the rights of trade unions and employers' organisations.[472] This embraces their right to determine their own constitutions and rules, the protection of their activities and the protection of federations of unions or employers' organisations.[473]

The implementation of closed shop has been controversial. The draft of the Labour Relations Bill of February 1995 made no provision for closed shop agreements (but only for agency shop agreements), owing to the drafters' belief that they would be held unconstitutional.[474]

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463 Sec 4 and sec 6.
464 Sec 4(1).
465 Sec 4(2).
466 Sec 5(2)(b) and 5(3).
467 Sec 5(1).
468 Sec 5(2)(a).
469 Sec 5(2)(c)(i) to (iii).
470 Sec 5(2)(c)(iv).
471 One could question, however, whether the right to join a trade union embraces the right to choose the particular union, a right that could be limited by a closed shop agreement. According to sec 5(4), however, it is possible to contradict or to limit the provisions of sec 4, if this is permitted by the Act. The question of a contradiction of sec 4 and sec 26 is therefore irrelevant.
472 Sec 8.
473 *Ibid.*
474 Landman *The closed shop born again* (1995) *CLL* vol. 5 no 2 p 11.

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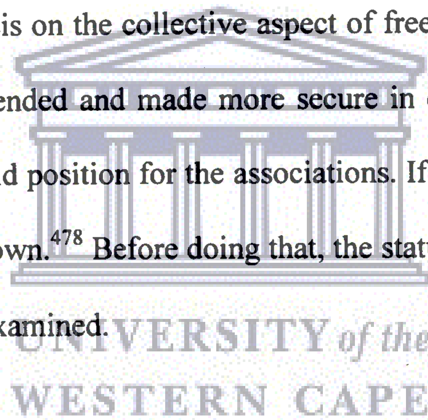
The Act, however, which was passed by Parliament in September 1995, provided, as a result of union protests, for agency shop agreements *and* closed shop agreements.[475]

Both provisions entail safeguards which try to meet the objections made against the former versions of closed shops in South Africa. Thus sec 25 and sec 26[476] can be seen as a further development of the closed shop practice of the previous labour system. Furthermore, the drafters had to deal with the fact that the Act would be subject to the Bill of Rights and to freedom of association in particular.[477]

Regarding these provisions (sec 4, sec 5, sec 8 and sec 25 and 26) as a whole, it becomes clear that the Act places the emphasis on the collective aspect of freedom of association. Although the individual's rights are extended and made more secure in comparison with the previous statute, the Act manifests a bold position for the associations. If this is in compliance with the Constitution, it needs to be shown.[478] Before doing that, the statutory provisions for the closed and agency shops need to be examined.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4.5.1 The closed shop

(a) Preliminary conditions

As a general rule, the closed shop agreement may be concluded between a representative trade union and an employer or an employers' organisation.[479] A *representative trade union,* according to the statute, means one or more registered trade union acting jointly, whose

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[475] Sec 25 and sec 26.
[476] Henceforth, all provisions are provisions of the 1995 Labour Relations Act, if not stated otherwise.
[477] Sec 17 of the interim Constitution and sec 18 of the final Constitution.
[478] *Infra* par. 5.
[479] Sec 26(1).

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members are a majority of the employees[480] either in a particular workplace[481] or (if not a single employer but an employers' organisation is party to the agreement) in a sector and area.[482] From these provisions it becomes clear that the statute favours the majoritarian system, at least in regard to the closed shop. For a trade union whose members are not the majority of the employees, it is only possible to be a party to the closed shop agreement if it *acts jointly* with at least one other union to gain the necessary majority.[483] This will probably only be the case when both unions are minority unions, because a majority union would not be prepared to renounce undivided sovereignty.

A closed shop agreement is concluded as a collective agreement in terms of sec 23.[484] That means that, apart from the procedure concerning dispute resolution, the legal effects of collective agreements apply.[485] This includes the regulation concerning the parties bound by the agreement, the duration of the agreement, and the legal effect of the agreement on any contract of employment between an employee and employer who are both bound by the agreement.[486] *Collective agreements* are defined in sec 213 of the LRA as "written agreement(s) concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, on the other hand - (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations".

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[480] Sec 26(2).

[481] Sec 26(2)(a). *Workplace* is defined by sec 213 of the LRA as "the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation".

[482] Sec 26(2)(b).

[483] The Act gives no guidance as regards the determination of the term *acting jointly*. Alternatively, *acting jointly* could mean that the unions concerned must have the same policies in general or merely have the common wish to establish a closed shop.

[484] Cf. sec 26(1).

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Agreements concluded between a representative trade and an employer or an employers' organisation are only binding if a ballot is held in the workplace or area and sector concerned[487] and if two thirds of the employees who voted have voted in favour of the agreement.[488] This requirement has often been a major demand of those in favour of the closed shop.[489] It is clearly meant to soften the impact on the individual's freedom of association. However, the fact that only the employees who actually vote are taken into account may lead to the consequence that a closed shop can be established even though only a minority of all employees employed in the workplace have voted in favour of the closed shop.[490]

A registered trade union which is not party to the agreement, and which wants to participate in an existing agreement, may notify the parties to the agreement of its intention if it represents a "significant interest in, or a substantial number of, the employees covered by the closed shop agreement".[491] The employer is then obliged to convene a meeting of the parties and the registered trade union within 30 days of the notice. If the parties to a closed shop agreement do not admit the registered trade union as a party, the trade union may refer the dispute in writing to the Commission for Conciliation Mediation and Arbitration (CCMA).[492]

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485 Cf. sec 26(6) and (7).
486 Sec 23.
487 Sec 26(3)(a).
488 Sec 26(3)(b).
489 See Albertyn *The Morality of the Closed Shop* p 999.
490 If, for example, only 30 employees vote in every 100, and 20 of these votes are in favour of the closed shop, the requirement of sec 26(3)(b) would be fulfilled.
491 Sec 26(10).
492 Sec 26(11).

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The statute provides only for post-entry closed shops,[493] whereby the union does not have a direct influence on the supply of labour. The union, however, can basically trigger the dismissal of an employee, by means of expulsion or non-admission. According to sec 26(6)(a), it is not unfair to dismiss an employee who refuses to join a trade union party to a closed shop agreement. It is also not unfair to dismiss an employee who is refused membership of, or expelled from, a trade union party to a closed shop agreement, if the refusal or expulsion is in accordance with the trade union's constitution, and if the reason for the refusal or expulsion is fair.[494] In this regard, it is important to consider sec 95(6), which provides that the trade union's constitution must not include provisions that discriminate, either directly or indirectly, against any person on the grounds of race or sex.[495] This provision seeks to balance the rights of the collective (the closed shop union) and those of the individual. However, the constitutional question arises as to whether this provision infringes the trade union's right to freedom of association or not.[496]

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A dismissal is considered to be fair if it is based on the fact that the employee's conduct "undermines the trade union's collective exercise of its rights".[497] It is of course necessary for a trade union to enforce discipline among its members. However, the provision is problematic as it leaves quite a broad space open to interpretation. One could object that it could be used to eliminate that criticism which is needed to prevent abuses and to elaborate healthy union

[493] Sec 26(3)(c).

[494] Sec 26(6) read with sec 26 (5). According to sec 26(9), the normal unfair dismissal procedures apply in these cases, if the Labour Courts decide that the dismissal is unfair, except that any order of compensation must be made against the trade union and not against the employer.

[495] The previous Act did not prohibit the differentiation made by the union's constitution. However, at least as regards the statutory regulated closed shop, employees who are not eligible are excluded from the closed shop provision. See *supra* par. 4.1.4 (c)(aa).

[496] According to the German courts, freedom of association includes the right to set up a constitution without interference by the state [Cf. BAG (1967) *AP* art 9 no 13]. See also *Garment Workers Union v Keraan* 1961 (1) SA 744 (C); *Spilkin, Newfield & Co of SA(Pty) Ltd v Master Builders &*

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policies. It would in that case be necessary to restrict the application of this provision to cases where the essential interest of the trade union is endangered by the behaviour of the employee concerned. In doing this, the employee's constitutional rights (such as freedom of opinion and freedom of expression) have to be taken into consideration.

(b) Exemptions

The statute also provides for exemptions. Contrary to the previous legislation, though, this possibility is limited to two groups. Firstly, employees who are already employed at the time that the closed shop agreement comes into force may not be dismissed for refusing to join a trade union party to the agreement.[498] However, the employee concerned may be required to pay an agreed agency fee.[499]

The second group concerns conscientious objectors. An employee may not be dismissed for refusing to join a trade union party to the agreement on the grounds of conscientious objection.[500] Conscientious objectors, however, may also be required to pay an agreed agency fee.[501] It will be the task of future jurisdiction to define the term "conscientious objector". This issue will be treated later in terms of the impact of the closed shop and agency shop respectively on the constitutional rights of the non-member.[502]

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Allied Trades Association, Witwatersrand 1934 WLD 160; *Smit v Building Workers Industrial Union* 1939 TPD 127.

[497] Sec 26(5)(b).

[498] Sec 26(7)(a). This is an improvement for the situation of the individual employees already employed at the commencement of the Act, because sec 24(1)(x) of the previous legislation allowed the prohibition of *continued employment*.

[499] Sec 26(8).

[500] Sec 26(7)(b).

[501] Sec 26(8). The conscientious objector may, according to sec 25(4)(b) (which applies), request the employer to pay the amount deducted from that employee's wages into a fund administered by the Department of Labour.

[502] *Infra* par. 5.5.2 (b)(bb).

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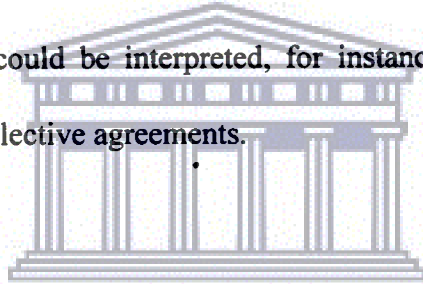
(c) Safeguards against conflict with political rights of the employee

It will be examined later that the closed shop potentially is in conflict with the employees' political rights.[503] The LRA provides safeguards in order to reduce the impact of the closed shop on these rights. No part of the amount deducted may be paid to a political party as an affiliation fee, contributed in cash or kind to either a political party or to a person standing for election to any political office, or used for any expenditure that does not *advance or protect the socio-economic interests* of employees.[504] The provision appears problematic, as this term can be interpreted broadly. The definition of this term must be made, however, in consideration of the employees' fundamental right to make political choices freely. In view of this, *socio-economic interests* could be interpreted, for instance, as concerning only those matters that are dealt with in collective agreements.



(d) Termination of a closed shop agreement

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There are different options as to how to terminate a closed shop agreement. Firstly, the agreement itself may be limited to a certain period, though, according to Landman, this is unlikely to be the case.[505] Secondly, the parties to the agreement may effect the termination by means of a separate agreement. Finally, there is the possibility (explicitly provided for by the statute) that the termination be triggered by the employees. If one third of the employees covered by the agreement sign a petition calling for the termination of the agreement, and three years have elapsed since the date on which the agreement commenced, or on which the last ballot was conducted, a ballot of the employees covered by the closed shop agreement

[503] *Infra* par. 5.5.2 (b)(bb).
[504] Sec 26(3)(d).
[505] *Op.cit.* p 15-16.

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must be conducted.[506] The agreement "will terminate" if the majority of the employees who vote are in favour of the termination.[507] The ballot must be conducted in accordance with the guidelines published by the CCMA. It has already been discussed that the requirement of establishing whether or not the employees covered by the closed shop agreement are in favour of the closed shop has been seen as a necessary precondition in order to reconcile the closed shop and freedom of association. Whether or not this objective has been achieved will be examined later.[508]

(e) Validity of non-statutory and non-regulated closed shop agreements

A major concern of the objectors to the recent closed shop practice has been the establishment of non-statutory[509] and non-regulated[510] closed shops which elude the safeguards of the Act. In fact, there is no provision to be found in the LRA which prohibits the conclusion of such agreements. Landman argues that non-statutory closed shop would have been immune to constitutional attack under the interim Constitution due to its non-horizontal effect.[511] He bases his view on a Canadian decision in which a non-statutory closed shop was held a

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[506] Sec 26(15).

[507] Sec 26(16). It is assumed by Landman that the agreement is terminated as soon as the result of the ballot is established [*op.cit.* p 16].

[508] *Infra* Ch. 5.

[509] An example for a non-statutory closed shop is a closed shop which is not concluded as a collective agreement in terms of sec 213 of the LRA but practised as a condition of employment purely on tradition or on an understanding between employer and union. It must be considered that a statutory closed shop in terms of sec 26 can also be concluded outside the jurisdiction of a bargaining council [cf. sec 213], thus a closed shop agreement must not automatically be defined as a non-statutory closed shop agreement if it is not concluded within a bargaining council.

[510] According to sec 213 collective agreements in terms of the LRA of 1995 may concern "terms and conditions of employment or any other matter of mutual interest". This definition is indeed very similar to sec 24(1) of the previous statute, which has been the basis for non-regulated statutory closed shops. An example for a non-regulated statutory closed shop in terms of the new LRA is an agreement, concluded as a collective agreement, which does not fall within the definition of closed shop agreements in terms of sec 26(1), e.g. an agreement requiring the employees not to become a member of the union that is party to the agreement but of *any* trade union.

[511] Landman *op.cit.* p 17.

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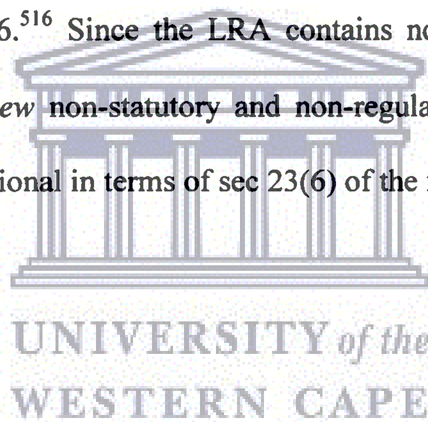
consensual, private act which is beyond the reach of the Charter.[512] Although the interim Constitution might not have applied *directly*, it would have nevertheless affected non-statutory closed shops. One should keep in mind that the state has delegated quasi-lawgiving powers to the social partners, thereby creating the need for the protection of the individual in the private sphere. Thus, the courts are bound to give regard to the Bill of Rights when it comes to interpreting the common law. This means that the Constitution would have gained *indirect* application.[513] The final Constitution, however, not only explicitly provides for the possibility of horizontal application[514] but also demands that union security arrangements are recognised by national legislation.[515] Thus, outside the scope of sec 26 only *existing* non-statutory closed shops are admissible provided that they comply with the requirements for a closed shop in terms of sec 26.[516] Since the LRA contains no provision which explicitly allows for the conclusion of *new* non-statutory and non-regulated closed shop agreements such agreements are unconstitutional in terms of sec 23(6) of the final Constitution.[517]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[512] See *Bhindi and London v BC Projectionists, Local* 348 (1985) 20 *DLR* (4T) 386 (SC).

[513] See Cockrell *Horizontal Application of the Bill of Rights* (1995) p 23.

[514] Sec 8(2) states that a provision of the Bill of Rights "binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right". There can be little doubt that the social partners are bound by this provision and thus have to give regard to the Bill of Rights when concluding collective agreements.

[515] Sec 8(2) and 23(6).

[516] Item 13(5) of Schedule 7 provides that "An existing non-statutory agency shop or closed shop agreement is not binding unless the agreement complies with the provisions of sections 25 or 26 of this Act respectively. This provision becomes effective only 180 days after the commencement of the Act".

[517] The definition of sec 213 cannot be seen as a sufficient recognition of non-regulated union security arrangements since it does not explicitly mention such arrangements. It should also be considered that sec 23(6) of the final Constitution states that legislation may recognise union security arrangements *contained in collective agreements*. Thus, the Constitution prohibits the recognition of union security arrangements which are not contained in such an agreement. The recognition of private closed shops merely based on an understanding between union and employer, for instance, would be unconstitutional.

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(f) Validity of statutory closed shop agreements concluded in terms of sec 24(1)(x) of the 1956 LRA

According to item 12(3) of Schedule 7, statutory closed shop agreements concluded in terms of the 1956 LRA that were in force immediately before the commencement of the 1995 LRA are deemed to be closed shop agreements concluded in compliance with sec 26 of the 1995 LRA. The provision concerning the expenditure of the membership fee, and a provision concerning an annual audit to establish the compliance of the union with sec 26, only become applicable at the commencement of the next financial year of the trade union party to the agreement.[518] The date of commencement of the closed shop agreement shall be deemed the commencement date of the 1995 LRA.[519]

4.5.2 The agency shop

(a) Preliminary conditions and safeguards

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Agency shop agreements are defined in terms of the 1995 LRA as agreements "requiring the employer to deduct an agreed agency fee from the wages of those of its employees who are identified in the agreement and who are not members of the trade union".[520]

As regards the parties to the agreement, the same rules apply as in the case of a closed shop agreement, except that an agency shop may not be concluded with a *non* representative union.[521]

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[518] Item 12(3)(a) of Schedule 7 of the LRA.
[519] Item 12(3)(b) of Schedule 7 of the LRA.
[520] Sec 25(1).
[521] Rudd raises the question whether collective agreements concluded by agency shop parties will apply only to union members or to non-members as well [*Guide to the 1995 Labour Relations Act: Part 1* (1996) p 396]. As far as workplaces and not sectors and areas are concerned, this question is answered by sec 23, which provides that collective agreements bind employees who are not

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In contrast to the closed shop, no ballot is necessary for the conclusion of a binding agency shop agreement. It is sufficient that the unions are representative in terms of sec 25(1). This is because of the limited impact of an agency shop on the constitutional rights of the employee.[522]

An agency shop agreement is only binding if

- the employees who are not members of the representative trade union are not compelled to become members of that trade union,

- the agency fee is equal to or less than the subscription payable by the members of the representative union,[523] and

- the amount deducted is paid into a separate account administered by the representative trade union.[524] The expenditure of the agency fee is furthermore subject to the same restrictions as the closed shop.[525]

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members of the registered union, if that union (or unions) have as their members the majority of employees in the workplace. For the definition of *representative* trade union see *supra* par 4.5.1(a).

[522] Cf. du Toit *et al op.cit.* p 74. See also *infra* par. 5.

[523] If there is more than one union party to the agreement, the highest amount of the subscriptions of these unions is applicable (sec 25(3)(b)(iii)).

[524] Sec 25 (3)(c). According to sec 25(5), the provisions of sec 98 and 100(b) and (c) apply to this account, i.e. the union concerned must meet the "standards of generally accepted accounting practice" and provide the Registrar with copies of the auditor's report, financial statements and further information, if requested.

[525] Sec 25 (3)(d). Cf. *supra* par. 4.5.1(a).

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The employer may deduct the agency fee from the wages of an employee without the employee's authorisation.[526]

The Act also provides for exemption in cases of conscientious objection. The conscientious objector may request the employer to pay the amount into a fund administered by the Department of Labour.[527]

(b) Termination

Like the closed shop agreement, the agency shop agreement can be terminated either by an appropriate clause in the agreement itself or by a separate agreement. Beyond this, it is only the employer (or employers' organisation), and not the employees, who can trigger the termination of the agreement (in contrast to a closed shop agreement).[528]

(c) Non-statutory and non-regulated agency shop agreements

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Existing non-statutory agency shop agreements will not be binding unless they comply with the requirements of sec 25 (within 180 days of the commencement of the 1995 LRA).[529] The situation as regards the conclusion of new non-statutory and non-regulated agency shops is the same than in regard to closed shops.[530] Such agreements are unconstitutional in terms of sec 23(6) of the final Constitution, since they are not recognised by national legislation.

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[526] Sec 25(4)(a).

[527] Sec 25(4)(b). *Supra* par. 4.5.1(b).

[528] If the employer or the employers' organisation alleges that a trade union is no longer representative in terms of sec 25(1), written notice *must* be given to the union(sec). The union(sec) have 90 days to prove their representativeness, otherwise the employer *must* give the union(sec) and the employees 30 days' notice, after which the agreement will be terminated (sec 25(8)-(9)).

[529] Item 13(5) of Schedule 7.

[530] *Supra* par. 4.5.1 (e).

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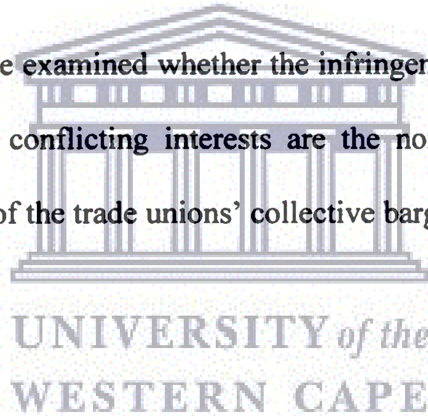
Chapter 5 - The conflict of sec 25 and sec 26 of the 1995 LRA with freedom of association in terms of the final South African Constitution

This chapter will address the conflict of sec 25 and 26 of the LRA respectively with freedom of association in terms of the final Constitution.[531] Firstly, it will be helpful to consider the certification process of the final Constitution in regard to the provisions concerning union security arrangements. Secondly, the approach to constitutional interpretation in South African Constitutional law will be viewed before turning to the question of the constitutionality of sec 25 and sec 26 of the LRA. This brings us to the question of the content and scope of freedom of association and whether or not this freedom is infringed by sec 25 and sec 26 of the LRA. It will be examined whether the infringement is justified by balancing the interests concerned. These conflicting interests are the non-member's freedom not to associate and the improvement of the trade unions' collective bargaining ability.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5.1 Certification process

Although the interim Constitution, which came into effect on 27 April 1994, provided for the constitutional right of freedom of association, the impact on the validity of closed shops was restricted owing to sec 33(5) of the interim Constitution which reads as follows:

[531] Sec 18 of the final Constitution. Although the individual worker is only directly affected by a particular collective agreement, it is nevertheless necessary to concentrate on sec 25 and sec 26 in the first place, as these provisions provide the legal basis for the agreements. The state cannot free itself from the obligation to give proper regard to the Constitution, simply by delegating powers to private persons or institutions. It is therefore irrelevant whether the infringement is made by the law or on the basis of the law.

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> The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.

Since statutory union security arrangements fall under this definition, they were insulated from constitutional challenge.[532]

The interim Constitution provided in its preamble that "representatives of all the people of SA should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles".[533] Pursuant to this mandate the Constitutional Assembly adopted a new constitutional text in May 1996 and transmitted it to the Constitutional Court for certification.[534] The Court had to decide whether it complied with the Constitutional Principles laid down in the interim Constitution.[535] Important in the context of this study are the Court's findings regarding sec 241(1) and sec 23 of the draft.

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Sec 241(1) of the draft provided that the provisions of the LRA shall, despite the provisions of the Constitution, remain valid until they are amended or repealed. The Constitutional Court argued, however, that in consideration of the Constitution Principles contained in the interim Constitution, it would be "plain that statutory provisions must be subject to the supremacy of

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[532] In *George v Western Cape Education Department & another* (1995) 16 *ILJ* 1543 (IC), the industrial court held that sec 33(5) would *only* insulate those provisions of labour laws from rights in Chapter 3 that conflict with sec 27 of the interim Constitution. According to sec 27, "workers shall have the right to form and join trade unions". Assuming that a closed shop infringes this right, sec 24(1)(x) of the 1956 LRA is insulated.

[533] These principles are contained in shedule 4 of the interim Constitution, which is incoporated by a refernce under sec 71(1)(a) of the interim Constitution.

[534] The mechanism for the drafting of the new Constitution is contained in sec 68 to 74 of the interim Constitution.

[535] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) (4) SA 744 (CC). For an evaluation of this judgement in the labour context see Jordaan *The new Constitution and Labour Law* (1996) *LLCR* vol. 6 no. 1 p 1.

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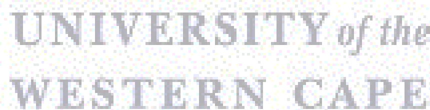
the Constitution unless they are made part of the Constitution itself." Since the LRA is not made part of the Constitution, the Court found that sec 241(1) is not in compliance with the CPs.[536]

The draft of the 1996 Constitution also provided for the explicit insulation of union security arrangements from constitutional review. Sec 23(5) of the final Constitution as adopted by the Constitutional Assembly on 8 May 1996 provided that

> The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements.[537]

The Court only objected to the fact, however, that sec 23 failed to recognise the right of individual employers to engage in collective bargaining. It did not comment on sec 23(5), although this provision would have prevented union security arrangements from being subject to the limitation clause (sec 36).[538]



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In consideration of the non-compliance of some provisions of the draft with the Constitutional Principles contained in schedule 4 to the interim Constitution the Court did not certify the text. On 11 October 1996 the Constitutional Assembly passed an amended text, which addressed the grounds for non-certification, but also effected other changes to the draft.

Although the Constitutional Court did not comment on sec 23(5), the insulation clause contained this provision has been removed. Instead, sec 23(6) of the final version authorises

[536] Ch.4 par. D of the judgement.
[537] The inclusion of this provision had been proposed by the African National Congress (ANC).
[538] Ch.3 par. D of the judgement.

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the legislative recognition of union security arrangements provided that it complies with the limitation clause. The provision reads:

> National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

The new draft was transmitted to the Constitutional Court again for certification. The Court found, however, that there "is no longer any sustainable ground for objection to the constitutional provisions relating to labour relations".[539] The Court only referred to the question whether sec 23(5) unlawfully diminishes the power of the provinces because it gives to the national legislature only the right to recognise union security arrangements. It found, however, that "as far as the provinces are concerned, 'labour' was not an area in respect of which they had legislative competence at all . . . (sec) 23(5) and (6) do not therefore diminish anything which the provinces enjoyed before in the IC (interim Constitution)".[540]

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The Court found that the Constitution complied with the Constitutional Principles and therefore certified the new draft of the final Constitution. On 3 February 1997 the new basic law came into effect.

5.2 Approach to constitutional interpretation

The scope of the right or freedom needs to be determined by interpretation. Even though the language of the text of the Constitution must not be ignored, the awareness must be stressed,

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[539] *Certification of the amended text of the Constitution of the Republic of South Africa* Case 37/1996 delivered on 4 December 1996 at par. 15 (The case has not been published at the time of the writing of this study).

[540] Par. 200 of the judgement.

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however, "of the fallacy of supposing that general language must have a single 'objective' meaning".[541] One possible approach of interpretation refers to the original intention of the drafters of the Constitution. The original interpretation must be applied carefully, however, since it places too much emphasis on the intention of the lawgiver. The interpretation of the constitutional provisions consequently becomes less flexible, since the lawgiver cannot foresee the changing realities.[542]

The preferable method of interpretation is value-based.[543] This means that the single provisions of the Bill of Rights must be seen in context. For example, not only the right or freedom in question must be considered, but also the other rights and the values behind them. The approach "recognises the value-laden nature of constitutional review and argues that the proper approach to interpretation requires the courts to excavate and give expression to the values which underpin particular constitutional guarantees."[544] In regard to the values that underlie the Bill of Rights, it is important to note that the main purpose of the Bill of Rights is to protect the individual against incursions by the state.[545] Chaskalson *et al* describe this objective as follows: "If the role of the legislature is to give expression to the majority will, the role of the courts, at least in constitutional matters, is to protect individual rights which may be countermajotarian in nature".[546]

The value-based approach is supported by the interpretation clause of the final Constitution. Sec 39(1) of the clause provides that

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[541] *S v Zuma* 1995 (2) SA 642 (CC) par. 17. Cf. Chaskalson *et al op.cit.* Ch. 11 pp 27-30.
[542] Cf. Chaskalson *et al op.cit.* Ch. 11 pp 17-20.
[543] Cf. *Matinkinca v Council of State, Ciskei* 1994 (1) BCLR 17 (Ck) at 34C, in which the court stated that a value statement has to be made in order to establish the content of a fundamental right.
[544] Chaskalson *et al op.cit.*Ch. 11 p 23.
[545] Since the final Constitution also applies horizontally (sec 8(2)), it also protects against incoursions by private persons.
[546] *Op.cit.* Ch. 11 p 23.

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When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must *promote the values that underlies an open and democratic society based on human dignity, equality and freedom*

(b) must consider international law

(c) may consider foreign law.[547]

Allied to the value-based interpretation is the so-called purposive interpretation, which was developed by the Canadian Courts. In *S v Zuma*,[548] the South African Constitutional Court relied a Canadian case in which it was stated that

> the proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and the purpose of other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question . . .[549]

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According to Chaskalson *et al*, purposive interpretation demands, firstly, that proper weight is given to the South African background, i.e. historical, political, social and legal peculiarities are taken into consideration.[550] Secondly, it is necessary to assure that the meaning and scope of constitutional guarantees is not exhausted by the existing common-law protection of

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[547] Italics added.
[548] 1995 (2) SA 642 (CC) at 15.
[549] *R v Big M Drug Mart Ltd* (1985) 18 *DLR* (4th) 321 at p 359-360.

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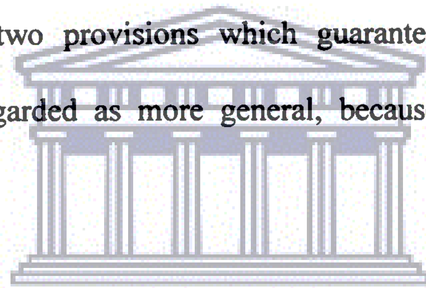
individual rights.[551] This requirement is also provided for by sec 39(3) of the final Constitution which recognises the existence of this protection of the common-law.[552] Finally, it is important to distinguish between purposive and generous approaches of interpretation, since "in some instances a generous or liberal interpretation may overshoot the purpose of the right".[553] In other cases, however, "a purposive approach will result in a generous interpretation".[554]

5.3 Content and scope of sec 18 and sec 23 of the final Constitution

5.3.1 The relation between sec 18 and sec 23

The Bill of Rights contains two provisions which guarantee the right to freedom of association. Sec 18 can be regarded as more general, because it comprises all kinds of associations. It reads:



> Everyone has the right to freedom of association.

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Sec 23 contains a more specific guarantee of freedom of association in the labour context. It reads as follows:

> (1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right -
>
> (a) to form and join a trade union;

---

[550] Chaskalson *et al op.cit.* Ch. 11 p 25.

[551] *Ibid* pp 26-27.

[552] Sec 39(3) reads: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".

[553] Chaskalson *et al op.cit.* Ch. 11 p 27.

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(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right -

(a) to form and join an employers' organisation

(b) to participate in the activities and programmes of an employers' organisation.

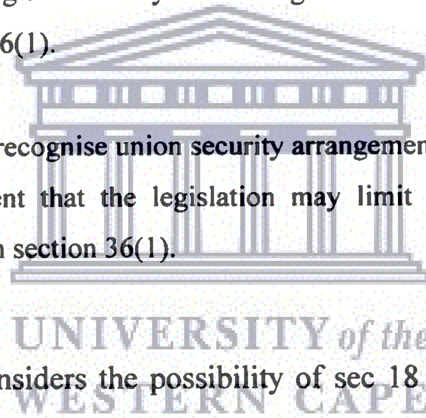
(4) Every trade union and every employers' organisation has the right -

(a) to determine its own administration, programmes and activities

(b) to organise

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).



(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

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The introduction of sec 23 considers the possibility of sec 18 being interpreted narrowly in South Africa, thereby excluding the rights to bargain collectively and to strike from freedom of association.[555] The elements of freedom of association in the broader sense have been split up and are now individually provided for by sec 23. Consequently, there is less room for speculating whether freedom of association in the South African context has to be interpreted as broad or narrow. The problem as to whether sec 23 also protects the right to strike is resolved definitely by subsection (2)(c). The employer's right to lock out is not provided for

[554] *Ibid.*

[555] These and other rights have been interpreted by the German Courts as being covered by Article 9(3) of the Basic Law. *Supra* 3.3.4 (b).

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by the 1996 Constitution. The LRA guarantees, however, his "recourse to lock out".[556] Sec 23 of the final Constitution also removed any doubts about the question whether the association itself (as opposed to its members) can rely on the so-called *collective* freedom of association, because it distinctively provides the associations with collective rights, such as the right to form and join a federation.[557]

The question arises whether sec 18 also applies to trade unions and employers' organisations or if its application is excluded by the more specific provision of sec 23. Assuming the association acts within the scope of sec 18 but not within the scope of sec 23, i.e. politically, it would probably violate the right to equality to withhold the union from the protection of the general freedom of association.[558] Furthermore, there are no indications that it was intended to restrict the protection of employees and employers to sec 23. The relations between Article 9(3) and Article 9(1) of the German Basic Law prove to be instructive. Cases where two or more constitutional provisions apply to the particular conduct of one bearer of a basic right are described in German Law as *Grundrechtskonkurrenz* (concurrence of basic rights).[559] However, the principles of the concurrence of basic rights do not apply if one of the provisions is *lex specialis*, i.e. if one ousts the other (*unechte Grundrechtskonkurrenz* - non-genuine concurrence of basic rights). In Germany, the majority of legal writers do not contest that the employees' and employers' right of freedom of association derives from Article 9(3) of the Basic Law (*Koalitionsfreiheit*) which can be regarded as *lex specialis* of 9(1), which in

[556] Sec 64 of the LRA.

[557] Sec 23(2)(3) and sec 23(4). These provisions, however, cannot be seen as isolated, as the right to strike, for instance, must also be guaranteed for the trade union as an organisation.

[558] du Toit *et al op.cit.* p 72 n 52.

[559] The concurrence of basic rights must be distinguished from the collision of basic rights, that is in cases where two different basic rights of *different* bearers are in conflict with each other. Cf. von Münch/Kunig (ed.) *op.cit.*, introduction of Art. 1-20 par. 41.

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turn allows for the general freedom of association (*allgemeine Vereingungsfreiheit*).[560] This means that the application of Article 9(1) is excluded as long as Article 9(3) is applicable.[561] This interpretation, however, is subject to the presumption that the association acts within the protected area of Article 9(3), the improvement of working and economic conditions.[562] Beyond this "public obligation", such as in the case of political statements, the trade union does not act as a privileged association. Instead it is protected only by the general freedom of association, provided by Article 9(1).[563] It is important to note, however, that according to the Federal Constitutional Court, the values of the ousted basic right have to be considered when interpreting the prevailing right.[564]

It is disputable, however, whether the special provision does necessarily oust the more general one. It is necessary to acknowledge the legal effect of the provisions concerned and to consider the purpose of the special provision, i.e. to replace, to modify or to supplement the general norm.[565] Only in cases where the legal effects of both provisions exclude each other is there no doubt that the special norm applies. Otherwise it would not be applicable at all. The legal effects of the limitation of sec 18 and sec 23 coincide, however, since both provisions

[560] *Supra* par. 3.3.1.

[561] However, the general freedom of association can have a twofold impact on union security arrangements. Firstly, it could constitute a right of the trade union, which could then be balanced against the rights of non-members. The exercise of the general freedom of association implies the possibility of political coercion, however. It will be shown later that this coercion is regarded unconstitutional not only in Germany, but also in the United States and in Canada. Since political coercion is not compatible with an "open and democratic society based on equity and freedom", justifying union security arrangements with the political interests of the trade union would also contradict the South African Constitution. The second implication appears to be of greater significance. It refers to the fact that not only the social partners enjoy protection from the general freedom of association but so too do non-members. It is submitted by du Toit *et al* that it would be possible that a closed shop agreements impairs the political freedom of association of the outsider, since trade unions are entitled to engage in political activity [*op.cit.* pp 71-2].

[562] The Federal Constitutional Court stated that the "freedom of coalitions differs from the general freedom of association by the inclusion of a particular purpose of association into the constitutional protection" [BVerfGE 84, 212 (224)].

[563] von Münch/Kunig (ed.) *op.cit. vol. 1* Art. 9 par. 54.

[564] BVerfGE 13, 290(298 ff.); 65, 104 (112).

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are subject to the limitation clause. Assuming that neither provision has more weight than the other, it would make no difference whether sec 18 or sec 23(2)(a) applies. Considering, that sec 23 is obliged to prevent a narrow interpretation of sec 18, sec 23 must be regarded as merely a supplement of sec 18. Accordingly, sec 23 does not suppress the application of sec 18.

Apparently, South African legal writers are also in favour of a simultaneous application of sec 18 and 23(2)(a) of the final Constitution, although most of their statements refer to the interim Constitution. This conclusion can be drawn, because the provisions concerned are very similar.[566] Supporters of the general freedom of association not applying to trade unions do not seem to exist.[567] In regard to freedom of association in the labour context most authors refer to both provisions.[568]

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[565] Larenz *Methodenlehre in der Rechtswissenschaft* (1991) pp 267-8.

[566] Sec 17 of the interim Constution reads: "Every person shall have the right to freedom of association". Sec 27(2) reads: "Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations".

[567] The only comment which has been found concerning this matter is made by du Toit *et al*. They state that it is "arguable that s 27 of the interim Constitution is the formulation of the right to freedom of association in the labour context and that s 17 therefore does not apply". They hold the view, however, that this interpretaion does not seem the most likely one, since it might be in conflict with the guarantee of the right to equality (sec 8 of the interim Constitution) [*op.cit.* p 72 n 52].

[568] Cf. Jordaan *The new Constitution and Labour Law* (1994) *LLCR* vol. 4 no. 1 p 4; Chaskalson *et al op.cit.* Ch. 30 n 2. In regard to the negative freedom of association some commentators refer to the general freedom of association only [Landman *The closed shop born again* (1995) *CLL* vol. 5 no. 2 p 16.] This interpretation does not seem to be the most likely one, however, since the negative content of freedom of association has been seen as being an essential part of the positive freedom of association. It would contradict this interpretation to separate the sources of the positive and the negative content of freedom of association. Furthermore, it is to consider that the final Constitution regulates the authorisation to conclude union security arrangements in the context of sec 23 and not in the context of sec 18. Accordingly, it is to conclude that the drafters saw sec 23 as protecting the right not to associate.

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5.3.2 Negative freedom of association

Since sec 23(2)(a) is more special compared to sec 18 it is necessary to examine this provision in the first place.[569] Considering the literal wording of sec 23(2)(a), it is evident that this provision primarily guarantees the *positive* right of freedom of association for the individual. Only the right to form and the right to join are protected. However, this guarantee would be meaningless if this protection did not entail the right to remain in the association or the right to take part in its (lawful) activities, e.g. holding elections. Thus, the content of the freedom cannot be defined considering only the wording. It must be understood, however, that the wording of the Constitution must be the chief guideline for such an interpretation. A fundamental right must not be interpreted contrary to its wording. One would not contradict the wording of sec 23, however, if the interpretation entailed the right to choose or the right not to associate. Especially in regard to sec 18, one could argue that the right to join means the *freedom* to join.

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Regarding the development of constitutional provisions concerning labour relations, it appears that the drafters hold the view that freedom of association also guarantees the freedom not to associate. They found it necessary to protect union security arrangements from constitutional attack.[570] Sec 23(6) of the final Constitution also supports this view, since it states that union security arrangements must comply with the limitation clause. This presumes, however, that they constitute a violation of the freedom not to associate. Furthermore, there are no indications that it was intended to restrict the protection provided for by sec 18, which explicitly guarantees the "freedom of association".

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[569]If one assumes that sec 23(2)(a) protects the right not to associate, this right is necessarily protected by the more general provision of sec 18.

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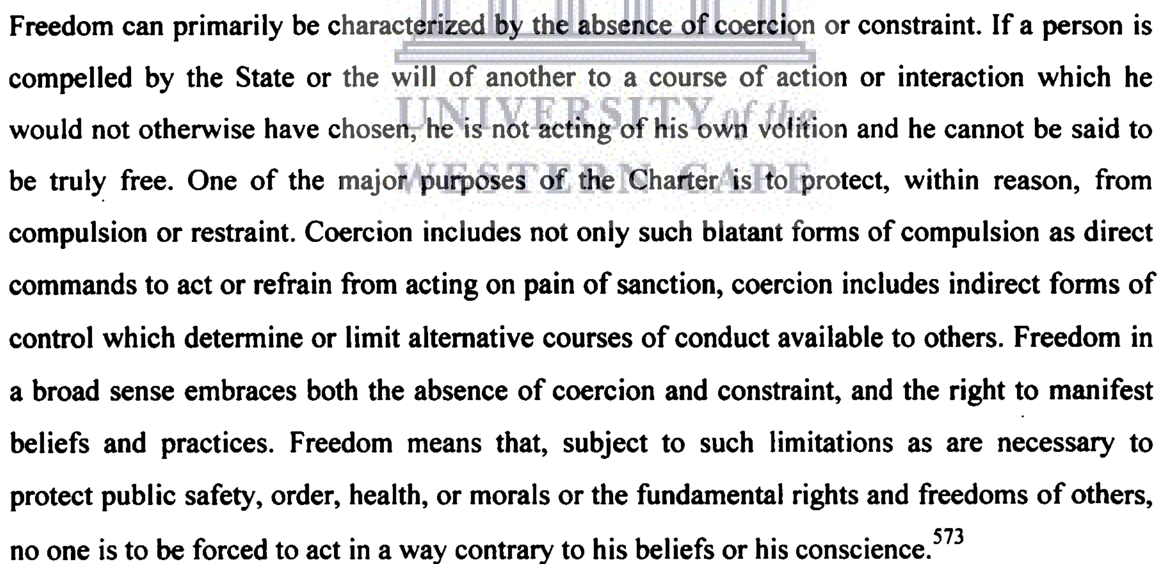
As mentioned above, however, it is not only the wording and the drafters intent, which must be taken into consideration but particularly the value-based nature of the right or freedom concerned. Sec 39(1)(a) of the 1996 Constitution states that one "shall promote the values which underlie an open and democratic society based on *freedom* and equality"[571] in interpreting the provisions of the Bill of Rights. Emphasis must be placed on the word freedom, since a Bill of Rights must protect "certain spheres of personhood against incursion by the majority".[572] Therefore, it would be in contradiction with this provision if the members of society were subject to coercion, and their individual freedom was encroached upon without being justified by the protection of other constitutional interests.

In this regard it is helpful to consider a judgement of the Canadian Constitutional Court, in which it was stated that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> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or interaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[573]

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[570] *Supra* par. 5.1.
[571] Italics added.
[572] Chaskalson *et al op.cit.* Ch. 11 p 23.
[573] *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SC) p 354.

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In evaluation of this statement, one can conclude that coercion to join an association would be contrary to both the values underlying a society based on freedom and to the character of freedom of association itself, which necessarily includes the right to choose.[574] The right to choose is seen as an essential part of the individual's positive freedom of association by both German[575] and Canadian courts.[576] However, it has not always been clear that freedom of choice implies both negative *and* positive freedom of association. In terms of the closed shop, most writers refer only to the negative freedom of association and not to a possible infringement of the positive freedom of association. Of course, these arguments might be considered doubtful, as they refer to definitions rather than content. As the arguments in the debate, however, are often of a theoretic and academic nature, it is necessary to draw an exact distinction. If an employee wants to join a particular union but is hampered by a closed shop agreement, because the union concerned is not a party of this agreement, the positive freedom of association of the employee is infringed. The same agreement encroaches on his negative freedom of association, assuming its existence, since he is forced to join an association against his will. This case scenario presumes the existence of at least two trade unions. Indeed it has been argued that freedom of choice only applies to cases where the employee actually has a choice and wants to make use of it. However, the supporters of this view do not deny that the individual should have the option of choosing if he so wishes. If there are at least two associations he should have a choice.[577] Under these circumstances, however, they implicitly acknowledge the existence of the freedom not to associate.

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[574] The right to choose could be infringed by sec 26 of the LRA of 1995, as it basically allows the establishment of one-union closed shops. See *supra* par 4.5.1.

[575] BAG *AP* Art. 9 no. 13.

[576] *Lavigne v OPSEU* p 627.

[577] *Supra* par. 3.3.4 (a).

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Another argument in favour of the acknowledgement of negative freedom of association is the necessity to interpret this right in the light of other fundamental rights.[578] Chaskalson et al state that freedom of expression, political rights, and freedom of assembly bolster political association freedom. Privacy, dignity and equality rights support intimate associational freedom. Language, cultural, educational and religious rights, as well as the principle of self-determination, all buttress the freedom of cultural association. Economic activity and property rights provide additional protection for the freedom to form economic associations. Important, in respect to the right not to associate, are thus sec 15 (freedom of religion, belief and opinion), sec 16 (freedom of expression) and sec 19 (political rights) of the final Constitution. The right to freedom of association entails these rights to a certain degree, since the individual must be free to exercise his beliefs and opinions within the association. However, being free to do so, also means being entitled not to do so. Otherwise freedom would not exist.

Regarding the value-based interpretation of sec 23(2)(a) of the final Constitution, it has been shown that there are strong arguments for the acknowledgement of the freedom not to associate. However, according to sec 39(1)(b) of the Constitution it is also necessary to regard public international law. Furthermore, sec 39(1)(c) allows to consider foreign national law.

5.3.3 The protection of the freedom not to associate in international law and in foreign law[579]

(a) Declaration of Human Rights of 1948

Article 20(2) of the Universal Declaration of Human Rights of 1948 states that

[578] *Young James and Webster v U.K* (1981) *IRLR* vol. 10 p 408 (ECHR) par. 93.

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> No one may be compelled to belong to any association.

This is, of course, a strong statement in favour of the interests of the non-members. It is interesting that the introduction of this provision was very contentious among the member states of the United Nations and was objected to especially by the United Kingdom, Australia and New Zealand.[580] It must be kept in mind, however, that the Declaration is a resolution of the General Assembly of the UN and not a convention subject to the ratification and accession requirements for treaties.[581]

(b) ILO Convention No. 87 of 1948

Article 2 of Convention No.87 of the International Labour Organisation concerning Freedom of Association and the Protection of the Right to Organise states that workers have the right

> to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing.

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The Convention does not expressly refer to a right not to associate. It has moreover been submitted that, although the article expressly refers to the principle of free choice, it was *not* intended to express support either for the idea of trade union monopoly or for that of trade union pluralism.[582]

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[579] For the interpretation of freedom of association in Germany see *supra* par. 3.3.
[580] Eide (ed.) *The Universal Declaration of Human Rights* (1992) p 287 f.
[581] *Op.cit.* p 6.
[582] ILO *Freedom of Association: A workers educational manual* (1987) p 37.

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Although it has also been acknowledged that the principle of free choice "must be regarded as one of the foundations of freedom of association",[583] it has been stipulated that a distinction should be drawn between *voluntarily* concluded union security agreements and agreements which are not "based on clauses freely agreed upon between workers' unions and employers . . . (but are) imposed on the workers by the law itself".[584] The same approach is adopted as regards the contrast between union monopoly and union diversity, as there would be "a fundamental difference between a situation in which a trade union monopoly is instituted and maintained by law, and one in which in actual practice the workers or their trade unions join together voluntarily to form a single organisation that has not resulted from legislative provisions enacted for the purpose".[585] Thus it seems that the approach has been adopted that legislation is held to conform with the Convention as long as it does not institute union security on a compulsory basis, i.e. without a ballot being held among workers.

According to Olivier and Potgieter, however, the Convention must nevertheless be interpreted as supporting the right not to associate. This would be supported by the intention that trade union diversity should remain possible, if the workers so choose. Furthermore, it would be envisaged to encourage unions to form strong organisations voluntarily, rather than to enforce this by way of legislation..[586] Restrictions on the right of employers and workers to organise freely would be limited in order not to hamper the establishment of associations. These restrictions apply to the setting of a minimum number of members, for instance, or to the distinction between the most representative trade unions and other trade unions.[587] The authors conclude from these adopted policies that, although the emphasis would be placed on

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[583] *Op.cit.* p 35.
[584] *Op.cit.* p 40.
[585] *Op.cit.* p 37.
[586] *Op.cit.* pp 302-3. See also ILO Committee of Experts as quoted in Campbell and Bowyer *Trade Unions and the Individual* (1980) pp 78-79.

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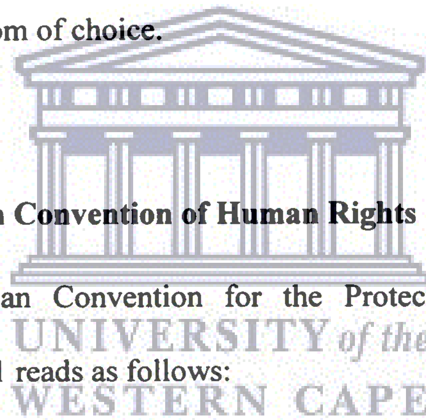
the positive freedom of association, the negative freedom of association is "at least partly - and implicitly" recognised.[588] However, the fact cannot be disregarded that the Committee of Experts on the Application of Conventions and Recommendations took a clear stand as regards union security arrangements. Its report stated that it is left

> to the practice and regulations of each State to decide whether it is appropriate to guarantee the right of the workers not to join an occupational organisation, or, on the other hand, to authorise and, where necessary, to regulate the use of union security clauses in practice.[589]

As this appears to be the official approach of the ILO, there is not much room left for interpretation. The same applies to the wording of Article 2 of Convention 87, however, which expressly protects freedom of choice.



(c) Article 11 of the European Convention of Human Rights

Article 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1951 reads as follows:

> 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.[590]

Here again, there is no explicit reference to the right not to associate.[591] However, probably the most frequently cited ruling of a court in regard to the legitimacy of closed shop is based

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[587] *Ibid.*
[588] *Ibid.*
[589] ILO: Committee of Experts on the Application of Conventions and Recommendations 1959 Report III (Part IV) 109.
[590] Subsection (2) concerns the justification of restrictions on this right. This aspect will be addressed during the second stage of inquiry.

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on this provision. In *Young, James and Webster v U.K.*, an union membership agreement which was concluded between British Rail and three railway unions in 1970 was revived in 1975, after the repeal of the Industrial Relations Act.[592] According to the applicants' terms of employment, their contracts were "subject to such terms and conditions of employment as may be settled from time to time . . . (with) any trade unions or other organisations".[593] Subsequently, the applicants were informed that they had to join two of the three available trade unions in order to retain their job. The applicants refused to do so, two of them on ideological grounds, and the third (Mr James) because he claimed the unions were not looking after his interests to his satisfaction. The applicants were dismissed. In their application to the Commission on Human Rights, they claimed a violation of their right to freedom of association as guaranteed by Article 11 of the Convention.[594] In its decision, the court decided that compulsion to join would not constitute a violation of Article 11 *per se*. Although the majority of the court acknowledged that "the situation facing the applicants clearly runs counter to the concept of freedom of association in its negative sense", it was not thought necessary to decide whether Article 11(1) would guarantee the negative freedom of association.[595] The judgement reads:

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[591] The Annexure to the European Social Charter of 1961, however, clearly states that the provision concerning freedom of association "shall not be interpreted as prohibiting or authorising any union security clause or practice". Olivier and Potgieter assume that this statement shows that the right not to associate does indeed fall within the ambit of the Charter and of Article 5 in particular [*op.cit.* p 303].

[592] European Court of Human Rights (1981) *IRLR* vol. 10 p 408. See the comments on the case in Forde *The "Closed Shop" Case* (1982) *ILJ* (UK) p 1; Andrews *The Closed Shop case* (1981) *ELR* p 412.

[593] As cited in Forde *op.cit.* p 1.

[594] Although they also claimed the violation of their rights to freedom of thought and conscience (Article 9), freedom of expression (Article 10) and to an effective remedy (Article 13), the court did not consider a violation of these rights, as it saw it as sufficient to base its decision on a violation of Article 11.

[595] Six of the judges involved, however, state their view that the negative aspect of freedom of association is 'necessarily complementary to, a correlative of and inseparable from its positive aspect. Protection of freedom of association would be incomplete if it extended to no more than its positive aspect. It is one and the same right that is involved' [par. 122 of the judgement]. For these judges, the mere obligation to give reasons for refusing to join a trade union constituted a

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> Assuming that Article 11 does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention. However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion . . . In the court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11. For this reason alone, there has been an interference with that freedom as regards each of the three applicants.[596]

The court did not decide whether closed shop agreements in general are contrary to Article 11.[597] However, the majority found that the (positive) freedom of association would be encroached upon in cases where the compulsion exceeds a tolerable limit. The second part of the judgement was that the particular closed shop agreement concerned did encroach upon the applicants freedom of choice.

> Another fact of this case concerns the restriction of the applicants' choice as regards the trade unions which they could join of their own volition. An individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value.[598]

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violation of freedom of association. Three of the judges (who, interestingly, all came from Scandinavian countries with trade union structures similar to that of Great Britain) objected to this view, however, stating that there was no logical link between the two aspects. Interestingly, only these three judges out of twenty-one dissented from the finding of the court. The dissension was based *inter alia* on the grounds that an express right not to associate, which was provided for by earlier drafts of Convention 87, was omitted from the final text [at par. 134]. The majority, however, found that as a result of this omission , it "does not follow that the negative aspect of a person's freedom of association falls completely outside the ambit of Article 11 and that each and every compulsion to join a particular trade union is compatible with the intention of that provision" [par. 81]. The arguments are thus similar to the ones used in terms of the drafting process of the German Basic Law [*supra* par. 3.3.4 (a)].

[596] Par. 85-87.

[597] This approach deserves support. It is owing to the diversity of closed shop practices that it is not possible to determine whether a closed shop agreement is in general unlawful. Such an agreement might, for instance, provide for exemptions or include all unions which are representative at the workplace, while a "hard" closed shop might exclude certain (minority) unions and does not provide for exemptions.

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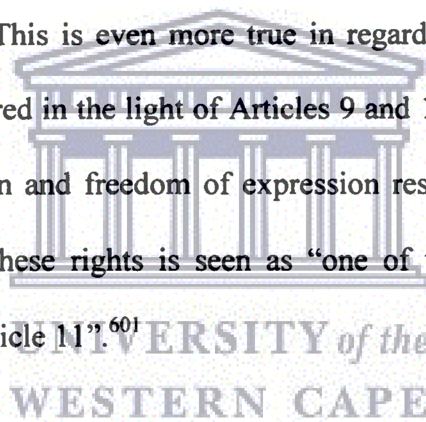
The important implication of this statement is that a closed shop already impinges upon the positive freedom of association, if the employees do not have the possibility of choosing between the existing unions. This interpretation has been criticised on the grounds that it would be necessary that the applicants be prepared to choose between the existing unions *and* that there is a factual choice, i.e. there must exist at least two representative unions of which one is not a party to the closed shop agreement.[599] However, as has already been stated, it is implicitly acknowledged that, in circumstances where the employee *could* and *wishes* to choose between those unions but is barred from doing so, his freedom of choice is impinged.[600] Thus, one must conclude that any legislation which allows for closed shop agreements that hamper the employee's freedom of choice, does encroach upon the ambit of Article 11 of the Convention. This is even more true in regard to the Court's opinion that Article 11 must also be considered in the light of Articles 9 and 10, which protect freedom of thought, conscience and religion and freedom of expression respectively. The protection of personal opinion afforded by these rights is seen as "one of the purposes of freedom of association as guaranteed by Article 11".[601]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(d) USA

The US Constitution is remarkable for its omission of express collective rights. The Constitution does not regulate labour relations. It is the individual who enjoys highest priority. In the notorious case *Lochner v New York*, for instance, the Supreme Court struck down state

[598] Par. 88.
[599] Cf. von Prondzynski *Freedom of Association and the Closed Shop: The European Perspective* (1982) *CLJ* p 262-3; Forde *op.cit.* p 8-10. In its submission, the British Government denied that the applicants' freedom of choice in *Young et al* would not have been impinged upon since they would in fact have had the option of joining unions other than the closed shop unions [Forde *op.cit.* p 9].
[600] *Supra* par. 3.3.4 (a).
[601] 91-93.

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law limiting the working hours of bakers on the grounds that it interfered with the liberty to sell one's labour.[602] This individualistic approach must be taken into consideration in regard to US constitutional law. An important case regarding to the right to disassociate, though concerning public sector legislation, is *Abood v Detroit Board of Education.*[603] This case concerned an agency shop arrangement authorised by Michigan state law and concluded between a local government employer and a union representing local government employees. Each employee represented by the union, including the non-members, was required, as a condition of employment, to pay to the union a service fee equal in amount to union dues. The applicants, all teachers, claimed that their rights under the first and fourteenth amendments were thereby violated. These amendments were held to protect the right to associate and the right not to associate.[604] The Supreme Court decided that the encroachment upon the applicant's rights was justified by the state's interest in avoiding and minimising industrial conflicts and in gaining stability in order to be able to negotiate a single contract with a common bargaining representative. The court relied on two decisions (*Railway Employees' Dept v Hanson*[605] and *Machinists v Street*[606]) in stating that

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> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. . . . But the judgement clearly made in Hanson and Street is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the

[602] 198 US 45 (1905).
[603] 431 US 209 (1977). The court stated, however, that 'the union security issue in the public sector . . . is fundamentally the same issue . . . as in the private sector' [at 231].
[604] As this right is not explicitly provided for, it had to be gleaned from freedom of expression. See 431 US 233 (1977).
[605] 351 US 225 (1955).
[606] 367 US 740 (1960).

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> group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy".[607]

However, in so far as the deducted dues were used for other than collective bargaining purposes, such as for political activities or for ideological activities, the encroachment is not justified.

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's belief should be shaped rather than coerced by the State.[608]

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Besides the constitutional protection they are given, both the right to associate and the right not to associate are protected at a statutory level. Sec 7 of the National Labor Relations Act protects both the employees' right to bargain collectively through "representatives of their own choosing" and the right to "refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organisation as a condition of employment . . .". As a result, the conclusion of closed shop agreements is generally authorised. However, pre-entry closed shop has been prohibited since 1947.[609] Thus, only so-called union shops are statutorily recognised. In practice, however, the union shop is no more than a "watered down agency shop"[610], as, according to sec 8(a)(3) of the National Labor Relations Act, non-membership does not justify the employee is being discriminated against.

[607] 431 US 222 (1977).
[608] 431 US 234-5 (1977).
[609] By the Taft-Hartley Amendments to the National Labor Relations Act of 1947.

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(e) Canada

The situation is comparable as regards Canadian legislation. Neither the Canadian Bill of Rights nor the Canadian Charter of Rights and Freedoms contains express labour rights but, sec 2(d), on the other hand, protects general freedom of association. Closed shops and agency shops (based on the so-called "Rand Formula") are allowed, although this provision also applies to labour associations. It is important to take into consideration the fact that labour relations are based on the principle of exclusive representation. A union which is supported by the majority of the employees in a bargaining unit acquires the exclusive right to bargain for all employees in the bargaining unit. The employer is prohibited from negotiating with another trade union unless with the consent of the majority union.[611] However, the consequence that the individuals freedom of choice might be infringed thereby is derived not from the assumption that this freedom is not protected, but from the limitation of this freedom being justified. Important in this regard is the case of *Lavigne v Ontario Public Service Employees' Union,*[612] which has similar implications to the US Supreme Court decision *Abood v Detroit Board of Education.*[613] The applicant, Lavigne, a teacher at a provincial College, objected to a provision of a collective agreement, which compelled him to pay union dues, although he was not a member of the union. The agreement was concluded between the union and the Ontario Council of Regents. Lavigne objected to the use of the dues, which included financial contributions to a political party, disarmament campaigns and pro-choice abortion groups. He claimed a violation of his rights to freedom of association and expression, guaranteed respectively by sec 2(d) and (b) of the Canadian Charter. The Supreme Court decided firstly that the conclusion of the agreement constituted "government action", which was found necessary for the application of the Charter. It found furthermore that freedom of

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[610] Olivier and Potgieter *op.cit.* p 452.
[611] Olivier and Potgieter *op.cit.* pp 460-1.

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association, as provided for by sec 2(d) of the Charter, included freedom from being compelled to associate. It was stated that

> Forced association will stifle the individual's potential for self-fulfilment and realization as surely as voluntary association will develop it. Moreover, society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice. Instead it can expect that such groups and organizations will, overall, have a negative effect on the development of the larger community. One need only think of the history of social stagnation in Eastern Europe and of the role played in its development and preservation by officially established "free" trade unions, peace movements and cultural organizations to appreciate the destructive effect forced association can have upon the body politic. Recognition of the freedom of the individual to refrain from association is a necessary counterpart of meaningful association in keeping with democratic ideals.[614]

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The court decided that the compulsory payment of union dues constituted a violation of the negative freedom of association. The majority found that the payment of dues should be considered an associative act included within the meaning of sec 2(d), as the "mandatory contribution of union dues under an agency shop provision is an essential component of the union's right to 'maintain' the association under sec 2(d) of the Charter".[615] The court found further that the compulsory payment would encroach upon the negative freedom of association of the appellant, as he would be forced "to contribute to causes, ideological or otherwise, that are beyond the immediate concerns of the bargaining unit".[616] However, with regard to the services the union renders the appellant within the collective bargaining context, the court also stated that "few would think he should not be required to pay for the services . . . the union is

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[612] (1991) 81 *DLR* (4th) 545 (SC).
[613] 431 US 209 (1977).
[614] 624.
[615] 627-8.
[616] 635. However, during the last stage of inquiry the court found that the encroachment would be justified, as it is necessary for the common good. See *infra* 5.4.2 (bb).

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simply viewed as a reasonable vehicle by which the necessary interconnectedness of Lavigne and his fellow workers is expressed".[617] The court distinguished between contributions made towards the costs of collective bargaining and those made towards matters other than collective bargaining. Hence, one can conclude that an agency shop which provides for appropriate safeguards does not violate the ambit of the negative freedom of association, as provided for by Canadian legislation.

(f) Great Britain

Freedom of association and freedom of non-association are statutorily protected in Great Britain. Sec 137(1) of the Trade Union and Labour Relations (Consolidations) Act of 1992 states that

> it is unlawful to refuse a person employment-
> (a) because he is, or is not, a member of a trade union, or
> (b) because he is unwilling to accept a requirement -
> (i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union,
> or
> (ii) to make payments or suffer deductions in the event of his not being a member of a trade union.

Furthermore, it is automatically unfair if the reason for such refusal (or, if more than one, the principal reason) was that the employee "was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member."[618]

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[617] 632.
[618] Sec 152(1)(c) of the Trade Union and Labour Relations (Consolidations) Act of 1992 (hereinafter TULRA 1992).

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The employee is also protected against actions short of dismissal taken against him as an individual by his employer either for the purpose of compelling him to join any trade union or a particular trade union, or for the purpose of enforcing a requirement (whether or not imposed either by his contract of employment or in writing) that, in the event of his not being a member of any trade union, he must make one or more payments.[619]

In addition to the above protections, the non-member is also protected by the very high levels of compensation either for unfair dismissal or for cases of refusal of employment.[620] He may also apply for reinstatement, re-engagement in another position or suspension on full pay.[621] It must be noted, however, that these rights apply to the same extent in cases of discrimination on the grounds of union membership.

The protection of the non-member is also provided as regards job-seeking, as "it is unlawful for an employment agency to refuse a person any of its services because he is, or is not, a member of a trade union".[622] This also applies to post-entry closed shops, as it is also unlawful to refuse a person any of its services because he is "unwilling to accept a requirement to take steps to become or cease to be, or to remain or not to become, a member of a trade union."[623]

Yet another indirect method of union security, the requirement of union membership in contract for goods or services, is also outlawed. "A term or condition of a contract for the

[619] Sec 146(1)(c) and (3) of the TULRA 1992.
[620] Sec 149, 155-158 of the TULRA 1992.
[621] Sec 161-166 of the TULRA 1992.
[622] Sec 138(1)(a) of the TULRA 1992.
[623] Sec 138(1)(b) of the TULRA 1992.

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supply of goods or services is void in so far as it purports to require that the whole, or some part, of the work done for the purposes of the contract is done only by persons who are, or are not, members of trade unions or of a particular trade union."[624]

The non-member had not enjoyed this far reaching protection prior to this, to a great extent owing to the long-standing tradition of the closed shop in British industrial relations. In 1968, the so-called Donovan Commission stated that the right to associate did not necessarily entail the right to disassociate, since the latter was "designed to frustrate the development of collective bargaining, which it is public policy to promote".[625] The Trade Union and Labour Relations Act of 1974[626] gave an unprecedented degree of support to closed shop agreements. According to Hepple and Fredman, the right not to belong to a union was acknowledged between 1974 and 1976 only with regard to non-independent unions and conscientious objectors.[627] Until the end of the 1970s, the closed shop was well established, with "little legal protection for individual employees".[628] After 1979, however, previous government policies changed radically, as the Conservative Government saw trade unions as "obstacles to the operation of market forces and efficient practices" and as threats to individual freedom of choice.[629] This development was reinforced by the judgement in *Young, James and Webster*.[630]

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Thus, although closed shops and agency shops are not banned, the individual enjoys extensive protection against its compulsory elements, which effectively means that all forms of closed

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[624] Sec 144 of the TULRA 1992.
[625] *Royal Commission on Trade Unions and Employers' Associations* (Cmnd. 3623, 1968), par. 599.
[626] As amended by the Trade Union and Labour Relations Amendment Act of 1976.
[627] *Labour Law and Industrial Relations in Great Britain* (1992) 2nd at 383.
[628] Smith and Wood *Industrial Law* p 472.
[629] Upex (ed.) *Sweet & Maxwell's Encyclopaedia of Employment Law* vol. 2 (1992) 1.8002; Hepple and Fredman *op.cit.* 384.

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shop and agency shop are unenforceable.[631] Indeed, it is evident from the regulations discussed above that the British approach is an individualistic one.[632] According to Morris, "the right not to join a union is seen as the corollary of the right to join and the qualifications for claiming action short of dismissal on this ground, and the remedies available, are identical to those available for the infringement of the rights to join".[633] Smith and Wood submit that "whether or not the right to dissociate is properly seen as the logical opposite of the right to associate, both rights are accorded equal respect."[634]

5.3.4 Evaluation for the ambit of the freedom not to associate in South Africa

Although the approaches of the countries discussed above regarding non-member rights are technically different from one another, they have one important aspect in common: The protection against obligation to be a member of an association. The ILO Convention No.87 acknowledges workers' rights to join associations of their own choosing.[635] The European Convention of Human Rights protects the freedom of choice.[636] In the USA, the agency shop has an impact on the individual rights of the First Amendments.[637] The Canadian Charter protects the right not to be compelled to make contributions that serve purposes other than collective bargaining. British law provides the non-member with extensive protection against discrimination. The possibility that this protection is limited in some countries, under to the

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[630] *Supra* par. (c).

[631] However, various forms of closed shop are to be found in Great Britain [Hepple and Fredman *op.cit.* par. 386]. The number of employees covered by closed shop arrangements fell from an estimated 3.5 million in 1984 to a mere 0.5 million by the beginning of the 1990s [source: Smith and Wood *op.cit.* p 470].

[632] It has been submitted, however, that the motivation behind the legislation was to diminish trade union's power rather than to protect the individual. See Upex (ed.) *op.cit.* 1.8002.

[633] Upex (ed.) *op.cit.* 1.8009.

[634] *Op.cit.* p 474.

[635] Article 2 of the Convention.

[636] *Supra* par. 5.3.3 (c).

[637] *Supra* par. 5.3.3 (d).

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assumption that the limitation is justified by its advantages for the "common good" (i.e. for collective bargaining) will be discussed below. However, it needs to be stressed again, that this question need not concern this stage of inquiry. It in turn is concerned with the question whether the scope of sec 23(2)(a) and sec 18 includes freedom from compelled association or not.

Although, the provisions, making comparative jurisprudence mandatory, bring "public international human rights law into the very centre of human rights adjudication in South Africa",[638] it is important to recognise that comparative jurisprudence bears the danger of over-simplification. One must not only take the social, political and historical circumstances of a country into consideration, but also its legal circumstances, i.e. the formal approach to constitutional scrutiny. The British statutory approach, for instance, can not simply be transferred to the South African two-stage-inquiry in the constitutional context. However, conclusions can be drawn from the fact that Great Britain has adopted an individualistic approach, even though, the closed shop is not legally banned. In the United States, on the other hand, freedom of association has had to be gleaned from freedom of expression. Consequently, only forced contributions to ideological causes are open to constitutional challenge, which means a narrow interpretation applies. It must be kept in mind, however, that unlike the South African Constitution the United States Constitution does not have a limitation clause.[639]

The ILO approach is also rather narrow, as it distinguishes between statutorily imposed union security and union security which is "freely agreed upon by workers".[640] It is problematic,

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[638] Chaskalson *et al op.cit.* Ch. 11 p 7.
[639] See *Abood v Detroit Board of Education* 431 US 209 (1977).
[640] *Supra* par. 5.3.3 (b).

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however, to justify the encroachment of minority rights with the argument that the encroachment has been accepted by the majority. This problem will be examined more extensively further on.[641]

In comparing the technique of constitutional interpretation, more similarities can be seen in regard to the Canadian and the German constitutions, since in each of these countries a similar two-stage-inquiry applies. The fact that a limitation of the fundamental right is possible, can be viewed as an argument for a "broader reading of the guaranteed rights and freedoms because they can by that provision be shaped by the reasonable limits to any right or freedom that must exist in a free and democratic society".[642] According to the judgement in *Lavigne*, however, the ambit of the freedom not to associate does not include payments for collective bargaining purposes. This is contradictory to the situation in Germany, where the negative freedom of association has been interpreted more broadly. Considering the method of initially applying a broader scope and then limiting it, allows for more flexibility, since all interests can be taken into consideration and weighed against each other. This aspect supports a broad interpretation of the ambit, and places emphasis on the weighing of interests. The German Federal Constitutional Court has stated, however, that the scope of a fundamental right should be defined without considering its limitation.[643] The expansive approach is also rejected by Chaskalson *et al*, since a narrow (or value-based) approach would diminish judicial review of legislative or executive action. This *inter alia* would have the advantage of only serious violations making it through to the second stage of inquiry.[644] The notional or expansive approach would furthermore allow for the *prima facie* protection of activities which do not

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[641] *Infra* par. 5.5.2 (b)(bb).
[642] *Lavigne v OPSEU* (1991) 81 *DLR* (4th) 545 at 634; see also *R v Big M Drug Mart Ltd* (1985) 18 *DLR* (4th) 321.
[643] BVerfGE 32, 54 (72).
[644] *Op.cit.* Ch. 12 p 12.

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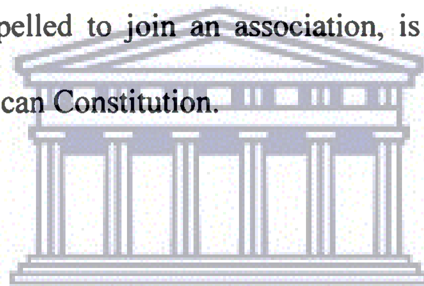
deserve that protection. In *Makwanyane,* however, the Constitutional Court stated that "our Constitution . . . calls for a two-step approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter 3 and limitations have to be justified through the application of s 33".[645] Adopting this view, there can be little doubt, that the negative freedom of association falls within the ambit of sec 23(2)(a) and thus also within the ambit of sec 18.

In consideration of the value-based interpretation of sec 18 and sec 23 of the South African Constitution, and abiding the fact, that the negative freedom of association enjoys protection in international public law, as well as in national law of foreign states, it must be concluded that the right, not to be compelled to join an association, is protected by sec 18 and sec 23(2)(a) of the final South African Constitution.



5.4 Infringement

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It is now necessary to determine as to what extent sec 25 and sec 26 of the LRA infringe the right to freedom of association provided by sec 18 and sec 23(2)(a) of the final Constitution. Regarding sec 26 of the LRA it is obvious that it infringes the right not to associate. The closed shop represents the most severe form of coercion and totally negates the right not to be compelled to join an association. It is certainly indisputable that employees falling under a closed shop agreement are not free to join. The consequence of not joining the association and the possible loss of livelihood, cannot be seen as an acceptable sacrifice for exercising fundamental rights.

[645] 707D-E.

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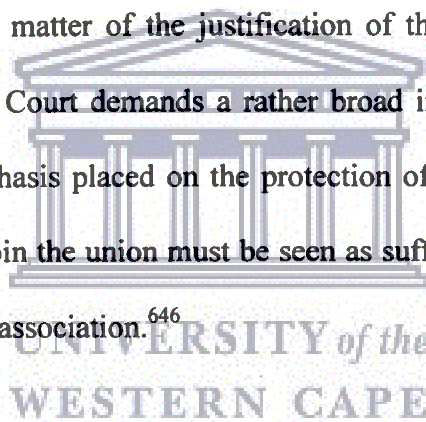
More difficult is the question of infringement which is effected by sec 25 of the LRA. The employee falling under an agency shop agreement is indeed not compelled to join the association. However, it is arguable that the compulsion to pay union dues is an *indirect* compulsion to join the association. It is evident that not only the direct compulsion to join an association constitutes an infringement of the negative freedom of association. It is necessary to determine the borderline between pressure infringing the right not to join and pressure, which is too soft to infringe the negative freedom of association. In regard to the effect of compulsory payments, it is likely that some employees feel indirectly compelled to join the union, since otherwise they would lose the advantages connected to union membership. The fact that there are indeed advantages does not affect the fact that the employees' mental freedom is impaired. This is a matter of the justification of the infringement. Taking into account that the Constitutional Court demands a rather broad interpretation of fundamental rights and considering the emphasis placed on the protection of the individual, the pressure placed on the non-member to join the union must be seen as sufficient for an infringement of the employees' freedom of non-association.[646]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It can be concluded that sec 25 and sec 26 of the LRA infringe the non-members' right to negative freedom of association in terms of sec 18 and sec 23(2)(a) of the final Constitution. That does not necessarily mean, however, the provisions are unconstitutional, since they could be justified, according to sec 7(3) and sec 36 of the final Constitution.[647]

[646] Cf. *S v Makwanyane* (1995) *BCLR* (6) 665 (CC) 707D-E.
[647] Cf. Chaskalson *et al op.cit.* Ch. 12 p 12.

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5.5 Justifiable limitations

If a law infringes the exercise of a fundamental right, the analysis must move to the question whether this interference is justified.[648] One must consider that, in terms of union security arrangements, not only the public interest in collective bargaining is concerned, but also the trade union's right to freedom of association. In the German context, the problem has been discussed as a collision of basic rights.[649] It is questionable whether this principle applies in South Africa, since the South African Constitution, in contrast to the German Basic Law, entails a general limitation clause. Since the limitation clause only concerns limitation "by law", it does not apply to limitation by the rights of others. It should be considered, however, that a society depends on the fact that everybody exercises his rights only within the boundaries set by the fundamental rights of others (for instance one's right to human dignity might limit another's right to freedom of expression). Furthermore, sec 7(3) of the final Constitution clearly specifies that fundamental rights are not only subject to the limitation clause but also to other limitations contained "elsewhere in the Bill". Hence, one must conclude that fundamental rights can have a limiting effect on each other.

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It must be considered, however, that the limitation by the fundamental rights of others and the limitation clause do not operate in isolation from one another, i.e. the limitation by the rights of others must be seen to be related to the limitation provided for by the limitation clause. Sec 36(1) of the final Constitution reads as follows:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

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[648] See *Matinkinca v Council of State, Ciskei* 1994 (4) South Africa 472 (Ck), 1994 (1) BCLR 17 (Ck) at 34E.

[649] *Supra* par. 3.3.4 (b).

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(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

5.5.1 Law of general application

The limitation must be accomplished through law of general application. This clause accords with Article 19(1) of the German Basic Law, which provides that a law which restricts a basic right "shall apply generally and not merely to one case". There can be little doubt that sec 25 and sec 26 of the LRA pass this test, as the LRA is not designed as a *bill of attainder*, i.e. it is not constituted to "pick out specific named individuals or easily ascertainable members of a group for punishment without judicial trial."[650]

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It is questionable, however, whether the authorisation of the conclusion of collective agreements containing union security arrangements, stated in sec 25 and sec 26 of the LRA, complies with the requirement of fundamental rights being limited only *by law* of general application. It appears that the encroachment of fundamental rights by non-legislative action (or, in other words, the discretion of lawgiving power) is unconstitutional. One can assume the necessity of the lawgiver to be authorised by the Constitution to allow for such delegated infringements. Otherwise, the state could elude its responsibility of obeying the Bill of Rights by means of the delegation of legislative powers.[651] The interim Constitution lacks such an

[650] Chaskalson *et al op.cit.* Ch. 12 at 18.

[651] Cf. Article 80(1) of the German Basic Law, which permits that executive organs may be empowered by law to issue statutory orders. These organs are furthermore empowered to sub-delegate statutory orders. The legal nature of collective agreements is, however, something of a bone of contention in Germany. It is not contested that the Basic Law recognises the conclusion of collective agreements. See Stern *op.cit.* vol. 3/1 p 1275 ff.

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explicit provision. It is accepted, however, that the lawgiver may authorise the executive[652] to limit fundamental rights, as it is "almost impossible to conceive of a legislature sufficiently prescient to be able to enact legislation that would be detailed enough to provide a rule for every situation".[653]

Regarding the 1996 Constitution, there is less room for speculation since it explicitly contains a specific clause which authorises national legislation to recognise union security arrangements contained in collective agreements, to the extent that the legislation complies with the limitation clause.[654] This clause would be superfluous if it was not aimed at this authorisation, since legislation is subjected to the limitation clause anyway. Furthermore it must be considered that the Constitution provides for collective bargaining (which includes the necessity to conclude collective agreements).[655] One must assume, that the conclusion of collective agreements encroaching upon fundamental rights is acknowledged by the Constitution, in so far, as the violation complies with the limitation clause. The view of the Federal Constitutional Court, in regard to declarations of general application of collective agreements (*Allgemeinverbindlichkeitserklärungen)* extending the operation of the collective agreements to non-members, is noteworthy. The Court found that such competence derives from Article 9(3) of the Basic Law, which constitutes an autonomous system of collective bargaining. Owing to this provision, the state has withdrawn its jurisdiction to regulate.[656] It is arguable that a similar interpretation applies to South Africa, since both the interim Constitution and the 1996 Constitution provide for the right to bargain collectively and autonomously.

[652] It is hereby assumed, that the social partners can be regarded as "executive organs", because they fulfil a public task, which has been delegated to them by the Constitution.
[653] Baxter cited in Rautenbach *op.cit.* p 87.
[654] Sec 23(6) of the 1996 Constitution.
[655] Sec 23(5) of the final Constitution.

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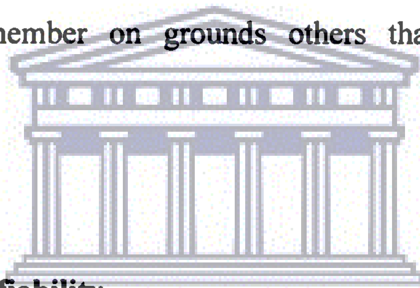
Having established that the lawgiver may confer a discretion to limit rights, "then the question naturally follows: how many particulars should the authorising act contain when a discretion is conferred?"[657] Article 80(1) of the German Basic Law postulates that the delegation of legislative power should specify the *content*, the *purpose* and the *scope* of the authorisation.[658] The lawgiver is required to make all material decisions. In cases where the encroachment is more severe and more sensitive, the authorising statute must be more specific than in cases where the violation is less intensive.[659] Though some terms of sec 25 and sec 26 of the LRA might be interpreted differently, it appears that these provisions pass this test.[660] Sec 26 of the LRA also makes clear, for instance, what consequences the non-member faces, should he refuse to become a union member on grounds others than conscientious objections (dismissal).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5.5.2 Reasonableness and justifiability

In order to pass constitutional muster, the limitations of rights must, according to sec 36(1) of the final Constitution, primarily be *reasonable* and *justifiable* in an open and democratic society based on equality and freedom and human dignity.[661] In South African legal literature,

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[656] BVerfGE 34, 307.

[657] Rautenbach *op.cit.* p 88; cf. BVerfGE 8, 274 (325 ff).

[658] It needs to be stressed, however, that Article 80(1) only enables certain executive bodies (Federal and States Governments, Federal Ministries) to issue statutory orders. The Constitution does not allow for the direct discretion of power to others than these institutions (e.g. such as the social partners). Since the problem of requirements of the necessary content of the authorisation is the same, however, it might be helpful to have regard to the guidelines developed by the Federal Constitutional Court.

[659] BVerfGE 33, 125 (161 ff); 76, 171 (184 ff).

[660] It will be discussed later that the terms *conscientious objection* and *socio-economic interests* are open to different interpretations. However, departing from the view that the authorisation must contain only the basic decisions, it is assumed that this fact does not constitute a problem in the law-of-general-application test.

[661] The interim Constitution singled out certain rights, the limitation of which in addition to being reasonable must also be *necessary*, in so far as such rights relate to free and fair political activity.

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one will find a number of different approaches to the interpretation of these terms.[662] These approaches all agree, however, that "a particular relationship has to exist between the factual limitation imposed and a public or community interest which may be protected and promoted by the state".[663] It is also acknowledged that the South African limitation clause owes a debt to Canadian and German constitutional law.[664] It is therefore necessary to have a special regard for those systems, which core of scrutiny is the proportionality principle. This principle also applies in South Africa.[665]

(a) The relation of the limitation and its purpose

The most important Canadian case regarding the limitation of fundamental rights is *R v Oakes*.[666] According to the judgement, a limitation must first of all be of sufficient importance to warrant overriding a constitutionally protected right or freedom, i.e. the government objective must relate to concerns which are "pressing and substantial in a free and democratic society".[667] This test is also conducted in German law. However, it is normally found as part of the third stage of the proportionality test, in regard to the question, whether the

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These rights include freedom of association as provided for by sec 17 of the interim Constitution [sec 33(1)(b)]. O'Regan, concurring in *S v Makwanyane* (1995) *BCLR* (6) 665 (CC) at 708E-G, states that it is "clear . . . that section 33 (of the interim Constitution) introduces different levels of scrutiny for laws which cause an infringement of rights. The requirement of reasonableness and justifiability which attaches to some of the section 33 rights clearly envisages a less stringent constitutional standard than does the requirement of necessity. In both cases the enquiry concerns proportionality."

[662] Cf., for instance, Rautenbach *op.cit.* Ch. 6 and Chaskalson *et al op.cit.* Ch. 12.

[663] Rautenbach *op.cit.* p 93.

[664] The Technical Committee on Fundamental Rights during the Transition declared in its eleventh report that it "relied on the Limitation Clause in Section 1 of the Canadian Charter as its point of departure" [par 14]. Section 1 of the Canadian Charter makes fundamental rights subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[665] Rautenbach *op.cit.* p 98-99; Chaskalson *et al op.cit.* Ch. 12 at 23 ff.

[666] 26 *DLR* (4th) 200.

[667] 227. It is important to consider that the state is empowered to determine such objectives. The objectives must, however, be compatible with the constitution.

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infringement is proportional in the narrow sense (i.e. whether the state objective prevails over the individual right). The difference, however, is only of technical nature.[668]

Following the Canadian model, it is first of all necessary to determine whether the closed shop and the agency shop relate to the pressing and substantial concerns of a free and democratic society. Closed shop and agency shop are aimed at improving the ability of trade unions to bargain collectively. Collective bargaining is a matter of public interest, especially since the South African Constitution explicitly protects the right of collective bargaining.[669] Furthermore, trade unions do not deny that they have an additional financial interest in concluding closed shop agreements. However, this interest in gaining contributions from all employees who benefit from negotiations is not guaranteed by the Constitution. Nevertheless, it cannot be relevant to the constitutionality of a limitation if, in addition to public objectives, it serves other (private) interests. This view has also been adopted by the Federal Labour Court.[670] There can be no doubt that the improvement of collective bargaining represents a legitimate state objective. This derives both from the constitutional protection of this right and from the structure of South African industrial relations. Trade unions fulfil the important task of being the agent of employees and constructing the social basis of their well-being. As this matter has already been discussed in the German context, no further mention will be made thereof.

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[668] Cf. von Münch/Kunig (ed.) *op.cit. vol. 1* introduction par. 55, who, as the judges in *Oakes*, examines in the first of four stages whether the infringement is designed to serve the interests of society.

[669] Sec 27(3) of the interim Constitution [sec 23(5) of the 1996 Constitution].

[670] BAG (1967) *AP* Article 9 no 13.

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(b) Proportionality

The core of the balancing process is the application of a proportionality test. In *Oakes*, the Canadian Supreme Court states that the "means chosen must be reasonable and demonstrably justified. This involves a form of proportionality test".[671] This three-stage proportionality test is applied similarly in Germany.[672]

(aa) Suitability and necessity

The first requirement of this test is for the closed shop or agency shop to be a *suitable* means for improving the collective bargaining process.[673] The requirement is fulfilled in regard to closed shop agreements, as it is by means of these agreements that trade unions become strong and predictable negotiation partners. This leads to more effective negotiation and a decrease in industrial action. Both are desirable objectives for a society which has an industrial relations concept based on collective bargaining. Difficulties arise in regard to the agency shop, however, as it merely compels the employees to pay a fee equivalent to the membership fees. The non-members are not forced to join the union. This leads to the question whether the agency shop is suited for improving the collective bargaining process or not. According to the German Federal Constitutional Court, however, it is not essential for the suitability of a limitation that the desirable aim actually be achieved. It is sufficient that the limitation be capable of assisting in attaining the objective.[674] As regards the agency shop, one cannot deny that this practice leads to an increase in union membership. Since the employees have to pay

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[671] 227. See also *R v Big M Drug Mart Ltd. DLR* 352 (S.C.R.) p 366.
[672] *Supra* par. 3.3.4 (c).
[673] The Canadian approach in regard to this stage of inquiry is to establish whether the limitation and its purpose are rationally connected [Cf. *R v Oakes* at 228-229]. This requirement is objected to by some South African commentators. Cf. Chaskalson *et al op.cit.* Ch. 12 par. 23 n 2; de Ville *Interpretation of the general limitation clause in the chapter of fundamental rights* (1994) *SAPL* pp 302-304.
[674] Cf. BVerfGE 67, 157(175).

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an equivalent amount of union dues anyway, it is likely that some of them will join the union in order to gain the advantages of membership (strike money, for instance). Hence, the collective bargaining capacity improvement of the trade union cannot be ignored, making the agency shop a suitable means of improving the collective bargaining process.

Secondly, the limitation should infringe upon the fundamental right as little as possible or, in other words, the infringement must be *necessary*.[675] This means the objective of improving the collective bargaining process should not be attainable with the same degree of success by means of a less drastic measure than the closed shop and the agency shop. Although the agency shop doubtless is a less drastic measure than the closed shop, the latter nevertheless passes this test. It has already been stated that the less drastic measure must at least have the same efficiency as the more drastic one. In other words, the intensity of the infringement must be seen in relation to its effectiveness. Considering this there can be more than one *necessary* means of serving the state objective. As Chaskalson *et al* point out, the state must, furthermore, have the freedom to "achieve its substantial and pressing goals".[676] It must have the freedom to choose between different possible ends, or to apply more than one of them. In other words, the legislature must have an assessment prerogative (*Beurteilungsspielraum*).[677] The Supreme Court of the United States also acknowledges that "the important contribution of the union shop to the system of labour relations" reflects such a legislative assessment prerogative.[678] Only if it is *certain* that a less drastic but equally effective measure can be used, will the limitation not be necessary.[679] Consequently, the closed shop is necessary to achieve the objective, as there is no equally effective means available of improving the trade

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[675] BVerfGE 7, 377(405); 17, 232(244).
[676] *Op.cit.* Ch. 12 p 24.
[677] Benda, Maihofer, Vogel (ed.) *Handbuch des Verfassungsrechts* (1994) par. 5 68.
[678] 431 US 222.

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unions' collective bargaining strength and thus the collective bargaining process as a whole. If one accepts the closed shop as being necessary, one accepts the same in respect to the agency shop. Evidently, this is a less drastic means than the closed shop. It concludes that closed shop and agency shop impair non-members' fundamental rights *as little as is reasonably possible*.[680]

(bb) Balancing the interests

The final requirement and focal point of the proportionality test concerns the question, whether the limitation is *proportional in the narrow sense* or not. This stage of inquiry demands a closer examination of both the individual freedom not to associate and the state objective. Both interests must be put into perspective, and it must be established whether the benefits achieved by the restriction justify the hardship caused through it. The 1996 Constitution gives guidance to the following factors all of which have to be taken into account: the nature of the (limited) right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means of achieving the purpose.

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It must be understood that the simple listing of advantages and disadvantages is of little value in regard to constitutional scrutiny. The limitation of fundamental rights can only be made in terms of the limitations provided by the Constitution itself. Thus, there is a selection of interests which may be considered in terms of constitutional scrutiny. The arguments only

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[679] See examples in which the Federal Constitutional Court held that a limitation did not comply with the requirement of *necessity*, in Stern *op.cit.* 3/2 p 780.

[680] In *Oakes*, the majority required the measure to infringe "as little as possible" on the right in question [at p 227]. As de Ville points out, however this interpretation leaves "little room for even a narrow margin of appreciation" [*op.cit.* p 304]. As has been stated, however, it is necessary that the legislative has an assessment prerogative.

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gain weight if they have constitutional value. In practice this means, the moral argument, that the free-rider deserves no protection and should be prepared to accept the disadvantages connected to the defence of his freedom, has no impact on the question of the constitutionality of union security arrangements.[681]

It is argued by Albertyn that the existence of "democratic controls" allows for the violation of individual rights.[682] It is, however, a simplification to stress that the situation regarding union security arrangements is totally different when the decision is made by "the workers" (and not imposed by legislation).[683] The argument does not give proper value to the fact that it is because of the protection of minority rights that union security arrangements are in crossfire. A closed shop which is created by law has the same impact on the non-member as a closed shop which is supported by the majority of the employees. For the non-member who objects to union membership, the closed shop agreement is anything but *freely* agreed upon. Since minorities have particular need of constitutional protection, it would be in contradiction with the purpose of fundamental rights to disadvantage them simply because the majority enjoys advantages. It is therefore irrelevant for the constitutionality of the closed shop, whether 90 per cent of the employees are in favour of its establishment or merely 10 per cent. Only constitutional values and legal interests can justify a violation of fundamental rights. The support of the majority is *per se* not sufficient for such a justification. Prondzynski states that "the ballot procedures and their required majorities are not a mechanism, as might be claimed, for balancing conflicting interests, since they represent merely a rule-of thumb calculation

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[681] Cf. Albertyn *Freedom of association and the morality of the closed shop* p 995.
[682] *Op.cit.* pp 984-5.
[683] ILO *Freedom of association - a workers educational manual* p 37.

rather than a consideration of conflicting arguments".[684] Noteworthy is also the statement of the Constitutional Court in a judgement on the constitutionality of the capital punishment:

> Public opinion may have some relevance to the inquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold it provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjucation. The protection of rights could then be left to Parliament, which has a mandate from the public . . . By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities . . .[685]

Of greater merit, in terms of supporting the view that union security arrangements might comply with the 1996 Constitution, is the fact that sec 23(6) of the Constitution explicitly states that national legislation may recognise union security arrangements. However, the recognition must comply with the requirements of the limitation clause. Hence, apart from the authorisation to delegate powers which may infringe upon constitutional rights, sec 23(6) appears *prima facie* to have little significance. However, it is arguable that sec 23(6) also has an impact on the balancing of interests in terms of the limitation of fundamental rights, in so far as it implies that union security clauses are generally not in contradiction with the value order of the Constitution. This, however, automatically places more weight on the side of union interests. Nonetheless, the particular legislation must comply with the limitation clause. Hence, not all union security arrangements necessarily prevail over individual interests.

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As sec 26 of the LRA entails coercion to an extensive degree, the public interest must consequently be of overriding value, in particular since the political beliefs of the employee

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[684] *Op.cit.* p 220.
[685] *S v Makwnyane & another* (1995) *BCLR* (6) 665 (CC) at par. 88.

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may be involved. Freedom of association also relates to free and fair political activity. This is made evident by sec 33(1)(b) of the interim Constitution, which states, the limitation of freedom of association, in terms of sec 17 of the interim Constitution, must be reasonable and *necessary*, in so far as it relates to free and fair political activity.[686] Since a trade union is entitled to engage in political activity, union security arrangements could impair the political freedom of association of the compelled individual.[687] Such impairment could be based on compulsory financial contributions or on compulsory membership. Trade unions naturally are engaged in political activity. The political statements of an association have more weight if the association can rely on a large membership. Thus, the member is indirectly forced to support the political policies of the association. However, it is necessary to consider the safeguards provided of the LRA in order to diminish the impact on the political rights of the employees. According to sec 26(7)(b) of the LRA, an employee "may not be dismissed for refusing to join a trade union party to the agreement on grounds of conscientious objection". This provision may have different meanings. Does this refer to the refusal to join trade unions in general or the refusal to join a specific trade union? Does it concern only religious objections, or political or other objections that are related to the beliefs of the objector as well? The answer must be given with consideration for sec 3 of the LRA. According to this provision, the Act must be interpreted in compliance with the Constitution. Thus, one has to apply a rather broad interpretation, including not only religious beliefs but also political beliefs, which are also protected by the Constitution.[688] It should also be irrelevant whether the employee objects to being a member of any union or a particular one. Only a broad interpretation can guarantee that the purpose of the provision, namely the protection of the

[686] Sec 33(1)(b) of the interim Constitution.
[687] To exclude employees from this freedom would "be in conflict with the guarantee of the right of equality contained in s 8 of the interim Constitution", as they would enjoy only an "attenuated right to freedom of association". Cf. du Toit *et al op.cit.* p 72 n 52.
[688] Sec 21 of the interim Constitution [sec 19 of the 1996 Constitution].

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individual's rights, is not eluded. This does not mean, however, that the objection should not be reasonable, i.e. based on essential personal convictions.

Landman cites a definition of Australian federal legislation that might serve as a possible guideline for South African courts. The provision defines "conscientious beliefs" as *any*

> beliefs, whether the grounds for beliefs are or are not of a religious character and whether the beliefs are or are not part of the doctrine of any religion.[689]

An even wider regulation can be found in British legislation, which states that the dismissal of an employee shall not be fair if it is based on an union membership agreement, and if the

> employee genuinely objects on ground of conscience or *other deeply-held personal conviction* to being a member of any trade union whatsoever or of a particular trade union (my emphasis).[690]

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In a case concerning this definition, the Employment Appeal Tribunal decided that, with regard to the wording of the provision, *deeply-held personal convictions* do not impute moral consideration and could not be said to be based upon conscience.[691] The employee concerned did not object to union membership in principle, but simply refused to be a member of a particular union, since he felt that his interests were not represented satisfactorily. The Tribunal held that this belief could amount to a deeply-held personal conviction. It has been suggested that this interpretation makes union membership a personal decision for each

[689] Sec 144A(2) of the Australian Conciliation and Arbitration Amendment Act 3 of 1977.
[690] Sec 58(4) of the British Employment Protection (Consolidation) Act of 1978.
[691] *Home Delivery Service v Shackcloth* (1984) *IRLR* 470.

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employee, "the direct antithesis of the concept of the closed shop".[692] Of course, one has to distinguish between conscientious objections, in terms of the South African LRA, and deeply-held personal convictions, in terms of the British law. One can hardly say that the belief that one is not satisfactorily represented by a union amounts to a conscientious objection. With regard to political objections to membership however, the employee may not be discriminated against.

Furthermore, it is difficult to determine whether conscientious objections are genuine or not. Albertyn suggests that a "conscientious objection would need to be subjected to an enquiry and scrutiny to establish its conscientiousness, viz. that the belief giving cause for the objection has been consistently held over a period of time, it is compatible with the conduct of the objector in other aspects of his/her life, it is informed in the sense of being coherent and considered, etc." This approach leads to problems, however. It will not only be difficult to determine whether the non-member objects on grounds which are genuine in terms of "conscientious objections" . Furthermore, it is incompatible with the Constitution to protect certain beliefs subject to the duration of the existence of these beliefs. Also, it is hardly possible to imagine, how one can determine whether beliefs are compatible with the conduct of the objector in other aspects of the employee's life without violating the constitutional right to privacy.[693] It is therefore necessary, according to sec 3 of the LRA, to apply a broad interpretation in regard to conscientiousness, i.e. the simple declaration of the worker concerned must be sufficient (subject to the reasons being based on conscientious grounds). Thus, one must apply conscientiousness not only to political beliefs but also to religious and other beliefs that are reasonable in justifying the objection.

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[692] Bradney *An end to the closed shop? Conscientious objection to trade unions membership* (1986) *NILQ* p 174.
[693] Sec 14 of the final Constitution.

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Conscientious objectors may also be required to pay an agreed agency fee, i.e. the provision for the agency shop applies.[694] An agency shop demands financial contribution equivalent to or less than the membership fee. The Act, however, also contains safeguards regarding financial contributions made by the objector. If the employee objects to the amount paid towards the union(s) party to the agreement on grounds of conscientious reasons, he may request his employer to pay the amount deducted from his wages into a fund administered by the Department of Labour.[695] No part of the amount deducted may be paid to a political party as an affiliation fee, contributed in cash or kind to either a political party or to a person standing for election to any political office, or used for any expenditure that does not advance or protect the *socio-economic interests* of employees.[696] This term allows also for different interpretations. The money might be used indirectly for political purposes, which may simultaneously be connected with socio-economic interests. According to sec 3 of the LRA, however, *socio-economic interests* must be interpreted in compliance with the Constitution, i.e. protecting the employee's political freedom in terms of sec 18 read with sec 19 of the final Constitution. Although it is difficult to separate political purposes and collective bargaining purposes, it is necessary to draw a distinction between them. If, contrary to the wishes of the objector, the amount deducted is used directly or indirectly for political purposes, the employee's political freedom is impaired. Although collective bargaining is evidently the cornerstone of industrial relations, it is definitely not influential enough to satisfy a violation of political freedom. In terms of the final Constitution, the closed shop would be unlawful,

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[694] Sec 26(8). The conscientious objector may, according to s 25(4)(b) (which applies), request the employer to pay the amount deducted from that employee's wages into a fund administered by the Department of Labour.

[695] Sec 25(4)(b), 26(8) of the LRA.

[696] Sec 26(3)(d).

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even though no strict test is provided for regarding political activity.[697] Political freedom is one of the highest valued benefits of a democracy. Considering the political power of South African trade unions, the protection of this freedom is even more important. This view is clearly supported by the preamble of the Constitution and the statements made in sec 7(1), sec 36(1) and sec 39(1) of the 1996 Constitution. In order to remain in compliance with the Constitution, the term *socio-economic interest* has to be interpreted narrowly. The financial contribution may only be used (directly or indirectly) for purposes of collective bargaining interest. This approach has also been adopted in Canada and the USA, where obligatory contributions may only be made towards purposes "related to the concerns of the applicant's bargaining unit, or to the union's function as the exclusive bargaining representative"[698] and not contributed "to political candidates and to express political views unrelated to its duties as exclusive bargaining representative".[699]

Having established that the terms *conscientious objections* and *socio-economic interests* read with sec 3 of the LRA comply with the Constitution, the question whether the closed shop, as provided for by sec 26 of the LRA, prevails over non-members' freedom remains unanswered.

The supporters of the closed shop argue that it would be justified by its effect of improving industrial relations. Indeed, the South African Constitution envisages a structure in the centre of which stands collective bargaining. It is in the interest of the public that collective bargaining is conducted in a peaceful manner and that industrial action is minimised as far as possible. Strong trade unions are regarded as reliable negotiation partners. The supporters of union security often rely on Kahn-Freund, who states that the "case for the closed shop can

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[697] Cf. Sec 33(1)(b) of the interim Constitution.
[698] *Lavigne v OPSEU* (1991) 81 *DLR* 545 (SC) at 635.
[699] *Abood v Detroit Board of Education* 431 US 209 at 234.

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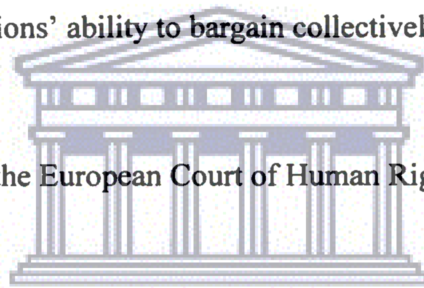
only be made in terms of the need for an equilibrium of power".[700] In judgement over the certification of the 1996 Constitution, the Constitutional Court stated that "collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers".[701] Although it cannot be denied that employers have a superior position compared to unions, it is necessary, however, to take the considerable power of trade unions into account. Furthermore, it is doubtful that the union's interest in concluding closed shop agreements is of such an overwhelming value that it overrides individual liberty. Supporters of the closed shop say that it is the most effective way to serve collective bargaining. However, it is also most severe in regard to individual rights. It is, therefore, a prerequisite for the justification of sec 26 of the LRA that there are no other means of securing the trade unions' ability to bargain collectively. This is not the case.



In *Young, James and Webster* the European Court of Human Rights suggested

> that the railway unions would in no way have been prevented from striving for the protection of their members' interests through the operation of the agreement with British Rail even if the legislation had not made it permissible to compel non-union employees having objections like the applicants to join a specified union.[702]

The merit of this statement lies in its acknowledgement of the necessity to consider less severe means of achieving the legislative aim than the closed shop. The alternative of having less drastic measures, has already been discussed as being a matter of necessity, where the intensity of a measure must be considered in relation to its effectiveness, thus allowing the closed shop to overcome this hurdle. The situation is different in terms of proportionality in

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[700] *Op.cit.* p 201 f.
[701] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996) (4) SA 744 (CC) 795F.

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the narrow sense. Here, it is not only the intensity and effectiveness that have to be considered, but also the restricted right. Taking these three factors into account, one should consider whether there are less drastic measures that are sufficient to promote collective bargaining (and if it is necessary to apply such measures at all).[703]

One possible alternative is suggested by the LRA itself, is the agency shop.[704] The effectiveness of the agency shop cannot be doubted, since the contributions made by the employees are used to advance the *socio-economic* interests of the workers. It is also argued that collective bargaining is improved by strong unions. It is plain that agency shop agreements improve the position of the trade union party to the agreement. The side-effects of an agency shop agreement are, however, far less intense compared to those caused by the closed shop. One must assume that the agency fee is equal to the applicable union subscriptions. Hence, the employee has a choice of paying the agency fee, without gaining the advantages of trade union membership (of support in case of strike, lock-out or illness, for instance), or joining the union and thereby enjoying these advantages and at the same time supporting its cause financially and quantitatively. However, since the worker cannot be compelled to become a member of the union, he is not forced to support its policies directly. The problem is whether the pressure applied by the agency shop to join the union is too strong to be outweighed by collective interests. Some writers argue that the employee should be prepared to pay the amount equivalent to the union dues in order to uphold his freedom not to join the union.[705] The counter-argument is that one cannot demand that an individual "buy" his or her freedom, regardless of how low the price is. Regarding the balancing of the interests

[702] 108.

[703] This aspect, however, is a question of the *necessity* of the measure. It has been stated above that the lawgiver has an assessment prerogative in this regard. *Supra* par (aa).

[704] Sec 25 of the LRA.

[705] Cf. *supra* par. 3.3.4 (d).

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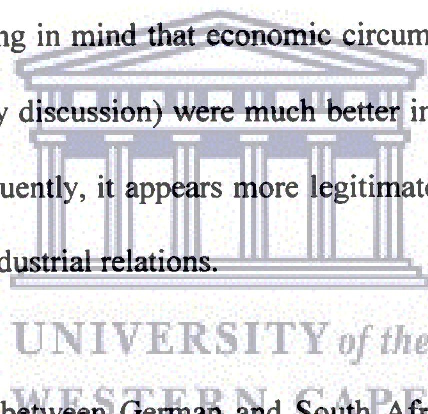
concerned, the arguments are the same as in the German context and need not be repeated here. It has been said that perceptible pressure to join an association does not comply with the German understanding of freedom of association.

The question now is, whether the value of individual liberty and collective interest should be balanced differently in South Africa. Although the Bill of Rights primarily envisages individual protection, one must consider that the collective (and the trade unions in particular) played an important role during the political transition. In contrast, individual freedom has always been the centrepiece of German constitutional development. The experiences of the third Reich have especially increased the sensitivity towards encroachments on this freedom. Furthermore, it is worth keeping in mind that economic circumstances during the 1960s (the beginning of the union security discussion) were much better in Germany then, than they are in South Africa today. Consequently, it appears more legitimate to encroach upon individual freedom in order to stabilise industrial relations.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Another important difference between German and South African constitutional law is the feature of comparative jurisprudence. Although the limitation clause does not contain a specific reference to foreign law, it is necessary to interpret the term "open and democratic society based on human dignity".[706] Thus, the fact that the agency shop is seen as constitutional in the United States and in Canada has an important impact on South African jurisprudence, since it shows that the agency shop is justifiable in a democracy. This applies even more so, regarding the similarity of the Canadian and South African limitation clauses.

[706] Cf. sec 33 of the interim Constitution and sec 36 of the 1996 Constitution.

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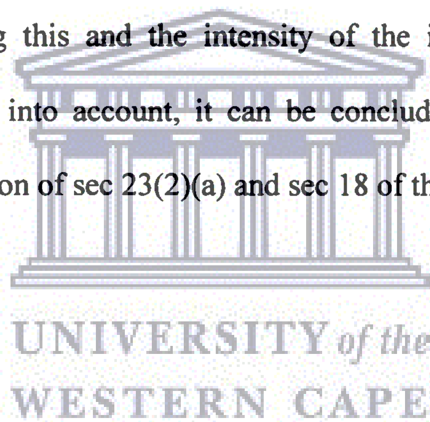
In *Lavigne*, the majority in the Supreme Court of Canada held that, although there had been an infringement of Lavigne's right to associate, it was justified under the limitation clause.[707]

It is therefore concluded that the infringement of the freedom not to associate, which is effected by sec 25 of the LRA is justified by the constitutional objective to enable the trade unions to bargain collectively. Therefore, the agency shop, as provided for by sec 25 of the 1995 LRA, must be seen in compliance with the fundamental right of freedom of association.

Since the effectiveness of the agency shop in regard to the improvement of collective bargaining cannot be denied, one must consequently regard the agency shop as an alternative to sec 26 of the LRA. Taking this and the intensity of the infringement of freedom of association effected by sec 26 into account, it can be concluded that sec 26 of the LRA constitutes an unjustified violation of sec 23(2)(a) and sec 18 of the final Constitution.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[707] (1991) 81 *DLR* (4th) 545 (SC).

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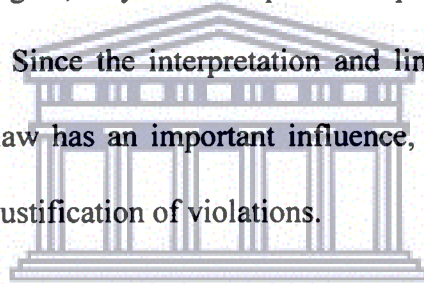
Chapter 6 - Conclusion

It has been shown, from a German point of view, that the constitutionality of union security arrangements is difficult to acknowledge. Although the German trade unions still face the problem of a decreasing membership, the union security arrangements discussion has not been revived. The situation is unlikely to change considering the clear statements made by the German courts and the importance of individual liberty which is expressed by the German Basic Law. The possibilities of interpretation are restricted, and one must accept the fact that the German and South African Constitutions have different backgrounds and, though similarities exist to a certain degree, they are not equal. This particularly concerns the method of comparative jurisprudence. Since the interpretation and limitation of fundamental rights cannot be separated, foreign law has an important influence, not only on the first stage of inquiry but also regarding the justification of violations.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Furthermore, one must certainly acknowledge that the differences of both economic realities in either countries influence the constitutional discussion. Increasing the living standards of workers will be a vital task of South African social partners. Nonetheless, regarding union security arrangements, one must consider the danger of overshooting the purpose and, thereby, jeopardising economic prosperity. However, this aspect is beyond the scope of this study and could not be examined here. Only the legal aspects of the conflict of union security arrangements with freedom of association have been discussed and, from that point of view, the closed shop runs counter to the South African final Constitution. Should the Constitutional Court hold a different view, however, and uphold the agency shop *and* the closed shop, much will depend on how the trade unions use the power provided for by the

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LRA. Time will tell whether union security arrangements will contribute to industrial peace and thus to the improvement of the living conditions of the South African workforce.

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Summary

The study focuses on the conflict of union security arrangements with freedom of association in South Africa and in Germany. In 1996 the new South African Labour Relations Act came into force. The statute provides for the possibility to conclude closed shop and agency shop agreements. Such agreements are unlawful in Germany, because they infringe the employee's constitutional right to freedom of association, which has been seen as entailing the right not to associate. Since the South African Constitution (the interim Constitution as well as the final Constitution) also provides for the right to associate freely, the question arises whether the concerned provisions of the South African Labour Relations Act are constitutional or not.

At first the study elaborates the nature and definition of union security arrangements and closed shops in particular. The different concepts of closed shop agreements are examined and the arguments of both objectors and supporters of the closed shop practice are discussed.

The following chapter concerns the constitutionality of union security arrangements in Germany, including the development of trade unions and freedom of association. It is shown that only a slight pressure to join an association, such as the contribution of advertising material, is seen as a justifiable limitation of freedom of association. According to German jurisprudence, the right to negative freedom of association prohibits any different treatment of trade union members and non-members.

Subsequently, the development of the associational freedom and union security arrangements in South Africa is surveyed, including a closer examination of the legislation concerned with closed shop arrangements. Then, the study turns to the question whether sec 25 and sec 26 of the South African LRA of 1995 encroach upon the fundamental right to freedom of association in terms of the final Constitution or not. The certification process of the Constitution and the approach to constitutional interpretation in South Africa are discussed before elaborating the content and scope of sec 18 and sec 23 of the final Constitution. According to sec 39 (1) of the final Constitution, regard is given to the protection of the freedom not to associate in international law and in foreign law. The study comes to the conclusion that both the agency shop and the closed shop as provided for by the LRA infringe

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the ambit of the freedom not to associate. However, the agency shop is considered to be a justified limitation of this freedom in terms of the limitation clause, since it improves the collective bargaining capacity of the trade unions.

Sec 26 of the LRA, which permits the conclusion of closed shop agreements, is seen as unconstitutional, since the negative freedom of association of the individual overrides the right of the trade union to bargain collectively. Although the importance of the latter must not be underestimated, the agency shop is considered as a sufficient means of achieving the objective of strong trade unions.

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