

UNDERSTANDING THE RIGHT TO FREEDOM OF ASSOCIATION AT THE WORKPLACE: COMPONENTS AND SCOPE

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SUMMARY

Freedom of association is one of the most important fundamental rights entrenched in a number of legal international and domestic instruments, especially the International Labour Organization (“ILO”) Conventions, national constitutions and labour legislation.

The right to freedom of association can be exercised in different sectors of human activity. It is also critical to the workplace. However, despite its widespread “veneration”, the right to freedom of association remains a contested concept. It does not mean the same thing for employees and employers and defining it remains a challenge even among labour lawyers and analysts. It is against this background that the paper strives to examine the meaning, contents and scope of the right to freedom of association.

1 INTRODUCTION

The right to freedom of association, which is one of the cornerstones of liberal democracy, stems from a basic human need for society, community, and shared purpose in a freely chosen enterprise. It is an essential feature of (liberal or social) democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in a society.¹

As Alex de Tocqueville pointed out, the right to freedom of association is almost inalienable in its nature as the right of personal liberty and no legislator can attack freedom of association without impairing the very foundations of society.”² Freedom of association is in fact indispensable to

¹ *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545. See also Ewing “Freedom of Association and Trade Union Rights ” in Harris and Joseph (eds) *The International Covenant on Civil and Political Rights and the United Kingdom Law* (1995) 465.

² De Tocqueville *Democracy in America Vol 1* (1835) Part II Chapter 4-8. See also Woolman “Freedom of Association” in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman (eds) *Constitutional Law of South Africa* (1996) 22-1; Ewing 239; and Caruso “Alexis de

democratic and accountable government, for it provides the constitutional basis of the right to form and join political parties, to take part in the activities of pressure groups and to meet with others to discuss matters of common concern.³ However, freedom of association is important not only to facilitate effective participation in civil and political society. It is equally important in the field of social and economic activity and is particularly significant as a basis for securing trade union freedom from interference by the employer on the one hand and the government on the other.

At the workplace the right to freedom of association is enshrined in the relevant conventions adopted within the ILO, an agency of the United Nations (UN) responsible for the protection and promotion of workers' rights.⁴ It is also entrenched in domestic legislation enacted by ILO member states who are parties to these conventions.

Accordingly this article first explores the meaning and the contents of the right to freedom of association in the workplace. It further deals with related issues such as the right not to associate and union security arrangements. The paper ends with a brief conclusion.

2 THE CONCEPT OF FREEDOM OF ASSOCIATION AND ITS COMPONENTS

2.1 The concept of freedom of association

Freedom of association like many other legal concepts is a contested concept. There are different views on what the term actually means, what purpose it serves and what legal approach is to be attached to it. Some see freedom of association as a liberal-political right, derived from the libertarian notion that all persons should be entitled to associate or not with other persons of their choice in a totally non-coercive way, subject only to such compelling considerations as national security or public morals.⁵ Others, on the other hand, consider the right to freedom of association as a functional guarantee, which is protected in order to secure a clearly defined social purpose, that is to say, the attainment of some sort of equilibrium of bargaining power between employers and workers.⁶

In Von Prondzynski's words, freedom of association is no more than a useful shorthand expression for a bundle of rights and freedoms relating to membership of associations and does not tell us anything very precise about

Tocqueville Speaks on Associations and the Worldwide Movement Towards Democracy" <http://www.carusogroup.com/ts/ts4.html> accessed 2009-04-02.

³ Ewing 239.

⁴ The most vital ILO Conventions dealing with workers' right to freedom of association are Convention No 87 of 1948 (Freedom of Association and the Protection of the Right to Organize Convention) and Convention No 98 of 1949 (Right to Organize and Collective Bargaining Convention).

⁵ Von Prondzynski *Freedom of Association and Industrial Relations: A Comparative Study* (1987) 225.

⁶ *Ibid.*

what these rights and freedoms are.⁷ It is not a static concept. It is capable of being expressed in different ways by different people.

According to Olivier the right to freedom of association in labour relations can be defined as those legal and moral rights of workers to form unions, to join unions of their choice and to demand that their unions function independently.⁸ This right is determined and influenced by binding international law, government policy and regulations and binding collective agreements.⁹

Kirkland pointed out that freedom of association simply means the right of ordinary people who share common interests to form their own institutions in order to advance those interests and to shelter them against the arbitrary power of the state, the employer or other strongholds of self-interest.¹⁰

The right to freedom to associate confers neither the right nor licence for a course of conduct or for the commission of acts, which in the view of the legislature are inimical to the peace, order, and good government of the country. Thus the freedom of association protects one's membership in any organization that is not involved in criminal activity.¹¹

Bentham wrote that governments were free to recognise "the liberty of public association or the security with which malcontents may communicate their sentiments, concert their plans and practise every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them".¹²

Woolman and De Waal identify two reasons for which the sphere of liberty secured by freedom of association is important. First, they indicate that the sphere of liberty secured by freedom of association enables individuals and groups to pursue or maintain those attachments, which they believe, are constitutive of their being. Such attachments might be intimate, cultural, religious or social. Secondly, it enables individuals and groups to realise a most important instrumental goal: a rich and varied civil society. This rich and varied civil society in turn serves many ends such as facilitating social debate and participatory politics providing a buffer between the individual and the state, sustaining vibrant culture and ensuring economic progress and advancement.¹³

The right to freedom of association has been associated with economic individualism and social policy and was given its early intellectual basis by

⁷ Von Prondzynski 14. See also Budeli "The Protection of Workers' Right to Freedom of Association in International and Regional Human Rights Systems" 2009 42(1) *De Jure* 136 138.

⁸ Olivier "Statutory Employment Relations in South Africa" in Slabbert, Prinsloo, Swanepoel and Backer (eds) *Managing Employment Relations in South Africa* (1999) 5-60.

⁹ *Ibid.*

¹⁰ Kirkland "Promoting Democracy: Labor's Enduring Commitment" <http://www.iri.org/common4.asp> accessed 2006-07-02. See also Budeli 2009 42(1) *De Jure* 137.

¹¹ Per Wooding CJ in *Collymore v Attorney General of Trinidad and Tobago* (1970) A.C. 538.

¹² Bentham *Fragments on Governments* (1988) 45.

¹³ Woolman and De Waal "Freedom of Association: The Right to be We" in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and Constitutionalism* (1994) 340.

Adam Smith.¹⁴ He argued for a free market in labour and against anything which “obstruct(s) the free circulation of labour”. He believed that society would best be served by a state of affairs “where things were left to follow their natural course, where there was perfect liberty, and where every man was perfectly free both to choose what occupation he thought proper, and to change it as he thought proper”.¹⁵ Smith believed that the advancement of individual rights and more particularly of individual self-interest was for the good of the society as a whole.

The ILO Committee of Experts provided what can be regarded as the correct approach concerning freedom of association and social policy in 1983. In the Committee’s view, freedom of association should be guaranteed in such a way as to allow trade unions to express their aspirations and to provide an indispensable contribution to economic development and social progress.¹⁶

It is important to bear in mind, therefore, that the reason why freedom of association was given protection in national and international law was not primarily designed to protect individual interests but rather to seek to secure a more equitable distribution of power within the working environment and the society as a whole.¹⁷ But as Lord Wedderburn argues, individuals do of course deserve legal protection in this as in other contexts, so that their conscience, religious beliefs, freedom of expression, bodily integrity and so forth are safeguarded. But such protection can be and ought to be guaranteed under other headings so that freedom of association itself does not need to be turned into an individualistic, anti-collective concept.¹⁸ It would be both unfortunate and strange if the main substance of freedom of association, which was first introduced to allow workers to combine, were now to be seen as the right of individuals to “an isolated existence”.¹⁹

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

In addressing the individual facet of freedom of association, the Supreme Court of Canada in *Lavigne v Ontario*²⁰ recognized that “the essence of freedom of association is the protection of the individual interests in self actualisation and fulfilment that can be realised only through combination with others”. The right to associate concerns an individual as an active

¹⁴ Budeli *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* (Unpublished PhD Thesis, University of Cape Town, 2007) 45.

¹⁵ Smith, quoted by Von Prondzynski 226.

¹⁶ See Von Prondzynski 232.

¹⁷ Budeli (2007) 46.

¹⁸ Wedderburn quoted by Von Prondzynski 232.

¹⁹ Von Prondzynski 233.

²⁰ *Lavigne v Ontario Public Service Employees Union supra* 623.

participant in social activities and it is in a sense a collective right in so far as it can be exercised by a plurality of individuals.

Conversely, the collective dimension entails the liberty or autonomy of the group to act together, to develop its own programmes of action and fulfil its goals.²¹ Freedom of association must therefore be seen as the foundation of the collective bargaining process.²² There must be a legal protection of the freedom of persons to join collective entities before those entities are protected. It would serve little purpose to protect collective bargaining if the parties to that process do not themselves enjoy protection by the law.

Yet again freedom of association gives rise to the establishment of democratically sanctioned institutions such as trade unions, which promote democracy both in the workplace and in the society at large.²³ Madima submits that the right to freedom of association should mean more than just the right to belong to an association with like-minded others.²⁴ According to him, an all-embracing definition of the right of freedom of association remains elusive, or rather; there is a lack of consensus among labour lawyers and other labour commentators on what this concept entails. Free association has been described by so many different people in so many different ways that the field remains open for further debate.²⁵ Madima pointed out that it is difficult to come up with a uniform definition of freedom of association, and definitions differ depending on whether one adopts a literal and narrow or a purposive and broad interpretation of this right.²⁶

Accordingly, freedom of association is the right to associate with others and entails that individuals are entitled to come together and collectively organize in order to defend their common interests. It has sometimes been argued that it must be understood broadly and also negatively to mean the right not to associate or to dissociate.²⁷ However, it is its positive dimension that is generally underscored by the ILO Constitution,²⁸ the ILO Conventions²⁹ and international and domestic Bills of Rights.³⁰

²¹ Ewing 240.

²² Basson, Christianson, Mischke and Strydom *Essential Labour Law* (2002) 26.

²³ Landman "Freedom of Association in South African Labour Law" 1990 *Acta Juridica* 89.

²⁴ Madima "Freedom of Association and the Bill of Rights" in Kalula (ed) *Labour Relations in Southern Africa* (1993) 116.

²⁵ Madima "Freedom of Association and the Concept of Compulsory Trade Union Membership" 1994 3 *TSAR* 545.

²⁶ Madima 1994 3 *TSAR* 546.

²⁷ See Albertyn "Closed Shop, Closed Mind" 1994 10 *Employment Law* 101-102; Madima 1994 3 *TSAR* 546 and 552-554; Fung-Kuen "Compulsory Membership and Freedom Not to Associate: An Interpretation and Application of Article 18 of the Hong Kong Bill of Rights" 1994 1 *HKSLR* 33-45; Blanpain *Trade Union Democracy and Industrial Relations* (1988) 2; Olivier and Potgieter "The Right to Associate Freely and Closed – Shop (continued) 1994 *TSAR* 289; and Weiss "Trade Union Democracy in Germany" in Blanpain (ed) *Trade Union Democracy and Industrial Relations* (1988) 30.

²⁸ Constitution of the ILO which was adopted in 1919. Since that date it has been amended on several occasions. Its principles have been restated in the Declaration of Philadelphia of 1944.

²⁹ Convention No 87 of 1948 (Freedom of Association and the Protection of the Right to Organize Convention) and Convention No 98 of 1949 (Right to Organize and Collective Bargaining Convention).

Hence freedom of association complements and consolidates other individual freedoms and without it, individuals may not express themselves as a group, defend their common interests and contribute positively to the development of their societies, it is essential to liberal democracy and to democratic politics.³¹ Similarly, freedom of association is necessary to create and maintain intimate relationships, which are valuable for their own sake as well as for the pleasure that they offer to the society.

According to Gutmann, by associating with one another, people engage in camaraderie, co-operation, dialogue, deliberation, negotiation, competition, creativity and kinds of self-expression and self-sacrifice that are possible only in association with others.³² Freedom of association is essential as a means of engaging in charity, commerce, industry, education, health care, religious practice, professional life, music, art etc. An organization or association does not in any sense promote the fragmentation of the society, but it works for different ideological, philosophical, social, economic and political tendencies that may exist in a community.³³

Sir Hugh Wooding CJ stated that freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest of the associating group.³⁴ These may be religious, political or philosophical, economic or professional, educational or cultural, sporting or charitable. Associations differ from one another, depending on their size, aims, membership, and nature. There are small and large associations. Some are legal and protected by the law, whereas others are not.

2 2 The components of the right to freedom of association

It is argued that the concept of freedom of association comprises three distinct elements, namely the freedom to organize in terms of which individual workers join together, choose a spokesperson and combine economic resources for the common good; the freedom to choose between good organizations so as to enable the worker to join and work through the organization which she/he believes speaks best for her/his needs and desires; and the freedom not to join trade unions at all, this entails the right of individuals to refuse to participate in collective action and to insist on acting alone.³⁵

Summers observed that these freedoms are not always mutually enforceable in the sense that the exercise of one may at the same time be at the expense of the other. On the other hand, Lord Wedderburn believes that

³⁰ Madima 1994 3 *TSAR* 553.

³¹ Gutmann *Freedom of Association* (1998) 64.

³² *Ibid.*

³³ De la Cruz *The International Labour Organization* (1996) 166.

³⁴ See *Colleymore v Attorney General Trinidad and Tobacco* 1967 12 W.I.R. (S.C.A.) 15; (1970) A.C. 532 547 (PC).

³⁵ Summers "Freedom of Association and Compulsory Union Membership in Sweden and the United States" 1964 *Pennsylvania Law Review* 647.

the concept of freedom of association can be interpreted either purposively or emasculatingly.³⁶ According to him, in the former sense, the term connotes protection of the collective aims of an association, though to what extent this should go remains for argument in a given situation. The latter sense will have none of the above as it sees freedom of association as no more than the right of persons to associate.

Freedom of association is the entitlement of individuals to extend their personal freedom and improve their position by organizing into trade unions and dealing collectively with their employer(s) through their representatives. This right can be translated into a straightforward duty placed upon employers not to interfere by using their powers to dismiss or otherwise deter or penalize trade union membership or activities.³⁷

When demonstrating the main components of the right to freedom of association in the workplace, Sachs remarked:

“The key, absolutely fundamental rights of workers are those rights that enable the working people to fight for and defend their rights. These rights comprise the first group of rights. This group of rights consist of three rights namely, the right to establish and join trade unions; the right to collective bargaining and the right to strike. These are the three pillars of the working people, of their capacity to defend all their other rights.”³⁸

As far as the employees are concerned, the right to freedom of association includes the employees’ right to form or join trade unions of their own choice in order to defend and protect their interests, the right to organize and bargain collectively with the employer and also the right to strike.

2.2.1 *The right to form and join trade unions*

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

“A legal scheme aimed at protecting employees’ and their unions’ right to bargain collectively with the employer and to embark upon strike action would be meaningless if the underlying right to first belong to that union was not safeguarded. Conversely, freedom of association would remain ineffective if the right to bargain collectively and to strike were not well recognized.”³⁹

³⁶ Wedderburn “Freedom of Association and the Philosophies of Labour Law” 1989 18 *ILJ* (UK) 16.

³⁷ Anderman *Labour Law: Management Decisions and Workers Rights* (2000) 306.

³⁸ Sachs “The Bill of Rights and Worker Rights: An ANC Perspective” in Patel (ed) *Workers’ Rights: From Apartheid to Democracy – What Role for Organized Labour?* (1994) 47.

³⁹ Olivier 5-61.

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

“No country need association more to prevent either despotism of parties or the arbitrary role of the prince than those with a democratic social state...In countries where such associations do not exist, if private people did not artificially and temporarily create something like them, I see no other dike to hold back tyranny of whatever sort, and a great nation might with impurity be oppressed by some tiny faction or by a single man.”⁴⁰

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

The right to join an association does not provide that one has the right to join any association. It is generally open to a private association or union to exclude persons for whatever reasons it considers proper.⁴¹ Applicants must comply with the union’s constitution. But even if they do so, membership is not an automatic right. A trade union, being a legal persona, can itself decide whom to admit and whom not to admit as a member.

The Irish Supreme Court in *Tierney v Amalgamated Society of Woodworkers*,⁴² rejected the contention that the defendant, a craft union, could be forced to accept the plaintiff, an allegedly under-qualified carpenter as a member. The court held that freedom of association entailed that the defendant, as a voluntary organization, had the right to accept and reject potential members.⁴³

Similarly, the European Commission on Human Rights pointed out in *Cheall v UK*⁴⁴ that the right to form and join trade unions as protected by Art. 11 of the European Convention on Human Rights “involves, for example, the right of trade unions to draw up their own rules, to administer their own affairs and to establish and join trade union federations.”⁴⁵ The Commission further indicated that the right of an employee to join a trade union “for the protection of his interest”, does not give a worker the right to join a trade union of his choice, irrespective of the rules of the union.⁴⁶

Thus freedom of association means that the group must have the right to its own membership and also that the group must have the right to regulate its own procedures for government and administration.⁴⁷ Hence, by joining a union, a member enters into a contract, the terms of which are set out in the union’s rules or constitution. A member’s right thus depends on the rules of the union. If a member fails to abide by the rules of a union, that a member

⁴⁰ De Tocqueville *Democracy in America* (1994) 192.

⁴¹ The rules relating to the admission and expulsion of a member by a trade union are usually stipulated in the trade union’s constitution or rule book.

⁴² (1959) I.R. 254.

⁴³ *Tierney v Amalgamated Society of Woodworkers supra* 256.

⁴⁴ *Cheall v UK* (1986) 8 EHRR 74. See also *Ewing* 470.

⁴⁵ *Cheall v UK supra* par 4.

⁴⁶ *Cheall v UK supra* par 6.

⁴⁷ *Ewing* 254.

would be in breach of contract of membership and may be expelled from the union.⁴⁸

By virtue of trade union membership employees acquire a right to participate in trade union activities at an “appropriate time”. The right to take part in trade union activities protects employees against dismissal and discriminatory action short of dismissal for participating in union activities. These legal protections extend to a basic range of organizational activities, including those of a small group of employees attempting to organize in order to have representation rights and possibly recognition by the employer as well as the activities of recognised unions.⁴⁹ Firstly, any dismissal of an employee for taking part in activities of a trade union at an “appropriate time” is a serious violation of employees’ fundamental rights as entrenched in international and regional human rights instruments as well as the domestic legislation of many countries.

Secondly, an employee has a right as an individual not to be penalized for, or deterred or prevented from trade union activities by action short of dismissal taken against him or her by his or her employer. This protection is available as long as the activity concerned is connected with the more institutional aspect of trade union organization activities. This protection is intended to discourage employers from penalizing employees for participating in their association’s activities.

The right not to be dismissed or penalized for participation in trade union activities, unlike the right of trade union membership, is restricted by the requirement that the activities must take place at an “appropriate time”. This requirement balances the interests of management with the protection of the employee.⁵⁰

In *Post Office v Union of Post Office*,⁵¹ the House of Lords pointed out that employees may take part in trade union activities on the employer’s premises using the facilities normally available provided that it does not cause excessive expense or inconvenience to the employer or fellow workers.

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

The Court in *Beal v Beecham Group Ltd*,⁵² held that union representatives could be given paid time off to attend a national trade union advisory meeting to co-ordinate the next pay claim, since duties related to industrial relations were not limited to the immediate process of collective bargaining

⁴⁸ Riddal *The Law of Industrial Relations* (1981) 278.

⁴⁹ Anderman 320.

⁵⁰ Anderman 321.

⁵¹ (1974) 1 All ER 229.

⁵² (1982) ICR 460.

but extended to preparatory and explanatory work by officials. However, in the case of *Luce v Bexley*,⁵³ the Employment Appeals Tribunal (hereinafter “EAT”) stressed that in order for the employees to be protected against dismissal for participating in trade union activities, the activity should be linked to the employment relationship.

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

2.2.2 The right to organize and bargain collectively

The right of worker to organize does not exist in a vacuum. Workers organize for the purpose of giving a unified voice to their need for just and favourable terms and conditions of employment when they have freely decided that collective representation is preferable.

Collective bargaining assumes freedom for workers to organize in independent trade unions to bargain independently and effectively with the employer. The freedom to combine in autonomous associations is essential to individual workers to alleviate their subordination.⁵⁴ Union representatives acting on behalf of employees are able to secure better terms and conditions of employment than individuals negotiating on their own behalf.

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

Thus collective bargaining is the most common form of workers’ participation in the workplace as it provides workers, through their trade unions, with greater leverage and equality of negotiating power in the bargaining process with employers. The word “collective” refers to the fact that employees join together in trade unions to enhance their power in bargaining with employers over wages, working conditions and any other matters of mutual interest between them.⁵⁵ It is a means by which the fundamental right of association moves into the real and enduring life of workers and employers. As such, the right to bargain collectively is a “real” implementation in the economic and social setting of the “ideal” civil and political right of association.

Collective bargaining deals with all aspects of the employment relationship.⁵⁶ The process frequently includes negotiation on matters such

⁵³ (1990) IRLR 422 EAT.

⁵⁴ Wedderburn *The Worker and the Law* (1986) 7.

⁵⁵ Finnemore and Van Rensburg *Contemporary Labour Relations* (2002) 223; and Steenkamp *et al* “The Right to Bargain Collectively” 2004 25 *ILJ* 943 944.

⁵⁶ Collective bargaining may take place with a number of employers at a “sectoral” level, or with a single employer or related employers at a company level.

as the day-to-day work rules and procedural issues important to workers and the functioning of a trade union in its relationship with the employer.⁵⁷ It is through this system of collective representation that workers can obtain influence over their employers and become involved in decisions that have a bearing on their experience of work. In the same way it is through the negotiation and administration of written agreements with management that a union becomes an effective instrument of workers' representation in industry.

On the primary objectives of trade unions engaging in collective bargaining Davies and Freedland observe:

"By engaging in collective bargaining with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secured."⁵⁸

Nevertheless, the right to collective bargaining is more than an exercise of the pure right of association by workers, since it involves another party, the employer. It is important for a trade union to be recognized by an employer as a bargaining agent for its employees.⁵⁹ Thus recognition of a trade union as a bargaining agent of employees in any given undertaking is the prelude to collective bargaining.⁶⁰

There is little point in workers belonging to a trade union unless that union has power to negotiate and act on their behalf. Collective bargaining is the basic reason for the existence of a trade union, but it can only take place if the employer recognizes a union for this purpose.⁶¹ Accordingly collective bargaining is undermined where unions are unable to organize effectively, such as where trade union members and officials are discouraged or formally penalized for participating in trade union affairs.⁶²

Similarly collective bargaining cannot be effective if a union is a "house union" controlled by the employer or if its members have no right to refuse to work on the terms offered by the employer. Thus, in order for collective bargaining to be viable, trade unions must be independent from any direct or indirect control by the employer or the States.

As already pointed out, collective bargaining is a continuous process. Its merits are that it enables parties with differing outlooks and compulsions to

⁵⁷ Barrow *Industrial Relations Law* (1997) 152.

⁵⁸ Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 69.

⁵⁹ By recognizing a trade union as a representative of employees and bargaining with it in "good faith", management loses some of its authority. Consequently a set of rules and procedures which are jointly adopted by a union and management, replaces unilateral action by management. However, recognition is not compulsory. An employer has discretion to recognize a union or not.

⁶⁰ Okpaluba "Recognition as Collective Employee Representative in Swazi Labour Law" 1998 19 *ILJ* 1329 1331. See also *Colleymore v AG Trinidad and Tobago* (1969) 2 All ER 1207 1212.

⁶¹ Pitt *Employment Law* (1992) 224.

⁶² Barrow 143.

reach agreement on a variety of issues to which the market mechanism fails to supply satisfactory solutions. It is a flexible instrument resting on voluntary acceptance and backed by the threat of economic force.⁶³ Thus, where individual contracts of employment allow little scope for employees to influence the conditions under which they work, collective action appears to present a solution. In this manner workers are able to co-ordinate their demands and strategies and this may be done by organizing industrial actions.

2.2.3 *The right to strike*

The right to strike is fundamental to sound industrial relations. The capacity of a trade union to bring workers out on strike is in the final instance the only reason why a manager is compelled to seek genuine agreement with organized labour. Without the right to strike, trade unions become pathetic, powerless bodies and the rule of management is absolute.⁶⁴ A strike consists of the simultaneous and co-ordinated withdrawal of labour by workers for the purpose of remedying a grievance between workers and an employer in respect of matters of mutual interest.

The strike is integral to the system of collective bargaining.⁶⁵ The right to bargain collectively is compromised without the right to strike. Thus, without the right to strike, there cannot be genuine collective bargaining and collective bargaining will be nothing else but collective begging.⁶⁶

Writing in 1967 Grunfeld remarked:

“If one set of human beings is placed in a position of unchecked industrial authority over another set, to expect the former to keep the interests of the latter constantly in mind and, for example to increase the latter’s earnings as soon as the surplus income is available ... is to place on human nature a strain it was never designed to bear.”⁶⁷

Human nature has not changed since 1967. Accordingly, strikes and other forms of industrial action are essential parts of the collective bargaining process. They are the final stage if a negotiation agreement cannot be reached.⁶⁸

Although the two ILO Conventions on freedom of association⁶⁹ do not expressly refer to the right to strike, the ILO Committee on Freedom of Association (CFA) has interpreted the two conventions on freedom of association as implying the right to strike.⁷⁰ According to the Committee of

⁶³ Lester *Labor and Industrial Relations: A General Analysis* (1953) 151.

⁶⁴ Patel *Workers’ Rights: From Apartheid to Democracy – What Role for Organized Labour* (1994) 22.

⁶⁵ Myburgh “100 Years of Strike Law” 2004 25 *ILJ* 962 966.

⁶⁶ Blanpain *Labour Law, Human Rights and Social Justice* (2001) 190.

⁶⁷ Grunfeld quoted by Pitt 251.

⁶⁸ Pitt 251.

⁶⁹ The ILO Convention No 87 (Freedom of association and protection of the right to organise) of 1948 and Convention No 98 (Right to organise and collective bargaining) of 1949.

⁷⁰ General Survey, 1994 par 179.

Experts, a general prohibition of the right to strike constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members,⁷¹ and of the right of members to organize⁷² their activities.⁷³ It is also considered to be inconsistent with the obligation to accord proper respect to the principles of freedom of association as resulting from their adherence to the ILO Constitution. The ILO has maintained that the right to strike is an essential element of the right to freedom of association, but recognizes that strikes may be restricted by law where public safety is concerned, as long as adequate alternatives such as mediation, conciliation and arbitration provide a solution for workers who are affected.

Any domestic law of a member state which prohibits in general or restricts in particular the right to strike must comply with the two ILO Conventions on freedom of association.⁷⁴ The supervisory body has accepted that governments may legitimately impose certain pre-conditions on the right to strike.⁷⁵ However, all pre-conditions on the right to strike must be reasonable and must not be such as to place substantial limitation on the means or action open to trade union organizations.⁷⁶

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

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

“By presenting the concept of freedom of association in a three-dimensional manner as set forth below, the complementing rights principle tends to the conclusion that denial of the freedom to strike is a great affront to justice. The organised and collective power of the workers within the framework of trade unions by itself is not sufficient in order to balance the labour relations system, and therefore it must be supplemented by two complementary freedoms. The first of these two freedoms is the freedom of collective bargaining. It is only by collective bargaining that the workers can make use of their combined power, which stems from the fact that they are organized within a trade union in order to improve their working conditions ... but that, too, is insufficient. The freedom to associate and to bargain collectively must be supplemented by an additional freedom, which is the freedom of strike. Hence, freedom to strike is a complementary freedom of the freedom of association since both are meant to help in achieving a common goal which is to place the employer-employee relationship on an equal basis.”⁷⁷

In general the view seems to have developed that the right to strike is

⁷¹ 1983 Report of the Committee of Experts, par 205.

⁷² Provided in Article 3 of Convention No 87 of 1948.

⁷³ General Survey 1973 par 107.

⁷⁴ Birk “Derogations and Restrictions on the Right to Strike Under International Law” in Blanpain (ed) *Labour Law, Human Rights and Social Justice* (2001) 99.

⁷⁵ These may include the giving of strike notice, the holding of ballots, the recourse to compulsory conciliation and arbitration.

⁷⁶ General Survey 1994 pars 170-172.

⁷⁷ Ben-Israel *International Labour Standards: the Case of the Freedom to Strike* (1987) 93.

implicit when constitutions and laws guarantee the right to freedom of association and collective bargaining.

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

3 ISSUES RELATED TO FREEDOM OF ASSOCIATION BUT LESS EXPLORED

3 1 Freedom of association and the right not to associate

The right not to associate aims at protecting the individual against being grouped together with other individuals with whom he or she does not agree or for the purposes which he or she does not approve. Unlike the positive right to freedom of association, the negative right to choose not to join a trade union is not explicitly dealt with by legislation. There are different views on this. Some scholars feel that “any freedom” worth the name must involve the freedom to refuse to do something, along with the freedom to do it.⁷⁸ Others differ and are of the view that it does not.⁷⁹

Rautenbach defines freedom of association as including both the positive right to associate and the negative right not to associate. According to him, freedom of association means that adult people have the right to associate with or dissociate from, whom they choose.⁸⁰ They may join a trade union if they so wish or they may not.

According to Albertyn, freedom of association means that one can choose whether one wants to join an association or not to join any association. In a just society which recognizes human rights, one should not be compelled to associate with either those whom one does not want to meet, or to involve oneself in matters which are not of one’s interest or concern.⁸¹

In Justice Budd’s view, “If it is the ‘liberty’ that is guaranteed in freedom of association, that means that the citizen is ‘free’ to form and join such

⁷⁸ See Anderman 307; and Leader *Freedom of Association* (1992) 30-32.

⁷⁹ See Leader 12. According to him, there are two ways in which we might understand the notion of “freedom of association” and the freedom not to associate. The first indicates that one is both free to associate and free to refuse to associate, whereas the other entails that one is free to associate while not necessarily being free to do so. Leader referred to what Hart called “unilateral” and “bilateral” liberty. To be free to do something in a bilateral sense indicates that one is neither under a duty to do something nor under a duty not to do something. On the other hand, to be free to do something in a unilateral sense indicates that one is at liberty to do something, that is, one is under no obligation not to do it. One may be at the same time under an obligation to do it.

⁸⁰ Rautenbach *Set the Workers Free: Why Deregulation will Solve South Africa’s Labour Problems* (1993) 28.

⁸¹ Albertyn “Freedom of Association and the Morality of Closed Shop” 1989 10 *ILJ* 981 985.

associations and unions, and if he is free to do so, that obviously does not mean that he must form and join those associations, but that he may if he so wishes.”⁸²

Hayek also condemns compulsory union membership arrangements not only as undermining individual freedom but also as a means of reinforcing trade union power by coercive means. According to him, “closed shop” agreements should be treated as contracts in restraint of trade and should be denied the protection of the law.⁸³

As for Leader, the right to freedom of association is, in its strongest form, a bilateral liberty, indicating that one is neither under an obligation to associate nor not to associate, and this is coupled with an immunity from any imposition of any contrary duty as well as by a claim right against other forms of interference either by the state, private groups or individual. In its weakest form, the right to freedom of association is a unilateral liberty, indicating that one is, at the moment the right exists, under no obligation not to associate.⁸⁴ The right to freedom of association is best understood as an independent and not a derivative right. It should therefore not be limited to the protection of other specific interests which are the subjects of separate constitutional rights, but should range as widely as do the liberties enjoyed by all subjects extending from the most important things to the most trivial. It is a right which should normally be thought to contain both the negative as well as the positive right to freedom of association.⁸⁵ The crucial questions are not whether the right to dissociate exists but rather what weight it should have *vis-à-vis* other rights.

On the other hand, Kahn-Freund argues that it is “bad logic” to conclude from the positive to the negative freedom. The fact that a given Constitution guarantees the positive freedom of organization does not mean that it guarantees the negative freedom of organization.⁸⁶

Leader finds support in McCarthy’s view that “the inevitable restrictions on personal liberty produced by the closed shop ... seem to be the price which must be paid if the unions are to be allowed the freedom they require in order to pursue their objectives in the most effective way”.⁸⁷

The two ILO Conventions 87 and 98 are silent on whether the right of workers to form and join organizations of their own choosing include the right not to form and join those organizations. But according to the ILO it is essential that all workers and employers enjoy the right and the freedom to establish and join organizations that they consider will best further their occupational interests.

However, when interpreting Convention No 87, the ILO Committee on Freedom of Association held that though the convention did not explicitly

⁸² See *Educational Company of Ireland v Fitzpatrick* 1961 IR 345.

⁸³ Hayek *The Constitution of Liberty* (1960) 264-267.

⁸⁴ Leader 15.

⁸⁵ *Ibid.*

⁸⁶ Kahn-Freund quoted by Leader 15.

⁸⁷ Leader 36.

refer to the right to dissociate, the general right to dissociate is included in the right to associate.⁸⁸ This means that the employees are free not to form and join such organizations.

Concisely freedom of association contains in general both the positive right to form and join associations and the negative right not to join those associations. Accordingly the state or the employer cannot at any time legitimately impose such duty. Thus the freedom to join a trade union implies another freedom, the freedom not to join any trade union.

While the positive workers' right to form and join associations of their own choice is explicitly dealt with and elaborated, and the right of individual workers to choose not to join a trade union has had to be implied from the general right to freedom of association, what is the position regarding union security arrangements?

3 2 Freedom of association and trade union security arrangements

There is no firm definition of union security clauses or arrangements. However, "union security arrangement" is viewed as a generic term for a collective agreement between an employer or employers' organization and a trade union or trade unions, in terms of which union membership or alternatively, payment of trade union subscriptions is a condition of employment for all employees.⁸⁹ Union security arrangements therefore require compulsory union membership⁹⁰ or alternatively, compulsory payment of union subscription.⁹¹

Those who support union security arrangements argue that union security arrangements are necessary to avoid the so called "free riders".⁹² Furthermore, there is a view that union security arrangements encourage "responsible" unionism.⁹³ It is argued that it gives union organizers a sense of security and enables them to devote themselves to the long-term interest of the members instead of collecting subscriptions and trying to persuade reluctant employees to join. For some the main justification for union security arrangements is that they add to the power of the unions during collective bargaining and this creates a more effective counterbalance to the naturally superior economic power of the corporate employer. It does this by preventing the defection of members during wage bargaining which may lead to strike action.

On the other hand, those who consider that the unions already possess

⁸⁸ Report of the Committee of Experts on the Application of Conventions and Recommendations 1959 Report III (Part IV) 109.

⁸⁹ Barker and Hothouse *South African Labour Glossary* (1996) 160; and Davis, Cheadle and Hayson *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 217.

⁹⁰ Generally known as the closed-shop agreement.

⁹¹ Referred to as the agency-shop agreement.

⁹² "Free riders" are employees who benefit from the efforts of a trade union as a bargaining agent without contributing to it.

⁹³ Haggard *Compulsory Unionism, the NLRB and the Courts* (1977) 13.

monopoly status and excessive power at the workplace see union security arrangements, more particularly the closed shop, as a main cause of undesirable state of affairs at the workplace. The main arguments against union security arrangements being: firstly, that closed-shop agreements give more power to the unions since the union controls the pool of applicants for the post; secondly, in case of an agency-shop arrangement, workers who are members of minority unions end up paying double subscriptions, that is, one for their union and one for the representative union, and lastly, that union security arrangements, more particularly closed-shop arrangements, infringe workers' right not to be a member of a trade union or the freedom not to associate.

It is unfortunate that the two ILO Conventions on freedom of association and collective bargaining did not make any express reference to the notion of trade union security arrangement. The ILO Committee also left it to the practice and regulation of each state to authorize and where necessary to regulate the use of union security clauses in practice.⁹⁴ This was also expressed by the ILO Committee in the Venezuela case.⁹⁵

In this case the ILO Committee had to pronounce on whether the deduction of an agency fee from the wages of educators without their permission in terms of a collective agreement between the Ministry of Education and seven federations of the teaching profession was unjust and contrary to the provisions of the Constitution of Venezuela.⁹⁶ The Committee pointed out that problems related to union security clauses should be resolved at national level and in conformity with national practice and the industrial relations system in each country. The Committee considered that both situations where union security clauses were authorized and those where they were prohibited could be held to be in conformity with ILO principles and standards on freedom of association.⁹⁷

According to the ILO Committee union security arrangements are compatible with the ILO Conventions on freedom of association, provided that they are the results of free negotiations between workers' organizations and employers. Thus, as long as union security arrangements are the result of a collective agreement between workers' organizations and employers, the international body would not interfere with them, provided that the law of a particular country does not go as far as generally imposing them and making union membership compulsory. However, when trade union security clauses are imposed by the law itself then the right to join an organization of own choosing is compromised and those provisions will be incompatible with the ILO Convention.⁹⁸ Accordingly ILO member states are at liberty to

⁹⁴ See ILC, 32nd Session 1949: Records of proceedings 468. See also ILC, 81st Session 1994, par 100; ILC, 32nd Session, 1949 Record of Proceedings, 468; ILC, 81st Session 1994, par 205; and also the 2006 Digest par 365.

⁹⁵ Case 1611.

⁹⁶ Provisions concerning the protection and safeguard from seizure of wages to oblige a worker, without his or her permission or against his or her will, to make a financial contribution to a union of which he is not a member.

⁹⁷ See Committee on Freedom of Association Report No. 284 par 339.

⁹⁸ ILC, 81st Session 1994, par 103.

include or not to include in their constitutions and labour legislation provisions regulating trade union security arrangements.

4 CONCLUSION

Workers' right to freedom of association is essential to the issue of social justice, human rights and democracy and must be promoted as such. At the workplace, this right is a conjunction of many other rights without which it may not flourish. It entitles both employees to form and join associations of their own choice, to organize and bargain collective and also to strike in order to champion their interests.

Although most labour legislation does not expressly refer to freedom not to associate, freedom of association also entails the freedom not to associate. However, this connotation raises another dimension regarding the freedom not to associate and the concept of trade union security arrangements.

On the conflict between freedom not to associate and trade union security arrangements, as Albertyn pointed out, union security arrangements should be understood in terms of collective bargaining system, a process which ensures the autonomous regulation of the relationship between employees and employers.⁹⁹

It must be noted that in case of union security arrangement, what are at issue are the circumstances, if any, under which individual rights and interests should be subordinated to that of the group in order to achieve a so-called common good. Undoubtedly, as already pointed out, union security arrangements are an important support for the institution and support of an orderly functioning collective bargaining. In the labour context freedom of association operates within the collective bargaining process, and where it conflicts with the collective bargaining process, freedom of association should be limited in favour of this process.¹⁰⁰ Otherwise it will not serve to promote effective collective bargaining at the workplace. It is just inopportune that the practice of these arrangements sometimes results in a restriction of individual liberty, and it sometimes has disadvantageous economic effects.

⁹⁹ Albertyn 1989 10 *ILJ* 981.

¹⁰⁰ Albertyn 1989 10 *ILJ* 1150.